

Australasian Parliamentary Review

**JOURNAL OF THE AUSTRALASIAN STUDY
OF PARLIAMENT GROUP**

Editors

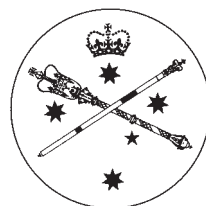
Jennifer Aldred

Colleen Lewis

**The role of the Speaker in
minority government**

**Opposition in parliamentary
democracies**

**Should upper houses
have ministers?**



Australasian Parliamentary Review

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Apology – APR Volume 28, No. 2, Spring 2013

The article '*Oversight as it intersects with Parliament*' was co-authored by Roger Macknay and Julie Flack. Attribution to Ms Flack did not appear on the Table of Contents and was not clearly stated on the title page – p56. The Editor sincerely regrets this omission.

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From Your Editor

Jennifer Aldred

Welcome to the Autumn 2014 Australasian Parliamentary Review, the first to be a collaboration with my co-Editor, Professor Colleen Lewis. Articles in this issue reflect the changing nature of our Westminster style government in the 21st century and consider the adaptive capacity of those who operate within and alongside our parliaments.

As is well known, when the result of the 2010 federal election in Australia was confirmed, it produced the first hung parliament for 40 years. In his article, David Elder, reminds us that the role of the Speaker is a significant one in Westminster parliaments but – in a minority parliament – more so. David examines specifically the experience of the Speakership during the 43rd minority parliament (September 2010 to August 2013) in the Australian House of Representatives. His perspective during this period is particularly insightful as he was Deputy Clerk of the House. In January 2014 he became Clerk.

In his article ‘Opposition in parliamentary democracies: a framework for comparison’, Professor Bruce Stone leads us to an understanding of the nature and importance of institutional opposition, with particular reference to parliamentary democracies. Considered within – and building on – the work of political theorist, Robert Dahl, a framework for comparative analysis is developed comprising six factors: concentration, competition, goals, institutionalisation, size, and alternation. Bruce argues that these identify differences between oppositions which have major systemic consequences. The Australian case is of particular interest. While Australia has inherited Westminster understandings and practices regarding parliamentary opposition, these are a less perfect fit with the Australian political system than is often assumed. The framework described is applied briefly to Australia or selected Australian jurisdictions to make this point and to illustrate particular features of Australian opposition, as well as differences within Australia.

Continuing our theme from the last issue of APR, matters of oversight are addressed in three articles. In his work, Professor John McMillan, Australian Information Commissioner, argues in a compelling and elegant way that, if Australia were to develop a new constitution at this point of time, principles such as privacy protection, freedom of information and integrity in government would be included. Further, that the doctrine of the separation of powers no longer provides an accurate picture of how scrutiny and accountability of government actions occurs. The article also looks at how technology has changed the way citizens relate to their governments bringing the need for not just different practices of

government but for different theories of government. For an elaboration of this last point, readers might also like <http://www.oaic.gov.au/news-and-events/speeches/the-impact-of-technology-on-the-administrative-justice-system>.

Journalist and writer Brian Toohey favours a greater level of accountability at the Commonwealth level to reduce the risk of corruption and misconduct. Given that Commonwealth decision-making involves, amongst other public policy determinations, major procurement, contractual and investment choices, he argues the need for independent oversight, is as great – if not greater – than that at the state level.

The parliament's role in addressing corruption and maladministration is examined by Monash University academics Ken Coghill, Ross Donohue and Colleen Lewis. The proposition is put that parliamentary oversight is fundamental to the Westminster tradition. That scrutiny by our parliamentarians – through their various roles and functions – brings accountability to the legal, political and administrative actions of government. Yet analysis of research finds that MPs' personal and working knowledge of their oversight responsibilities may not match the expectations of our model of parliamentary democracy, particularly in our changed and changing society. Recommendations are made on how, through enhanced induction programs and professional development, MP's can undertake their oversight role in a more considered and effective way.

The New South Wales parliament is the backdrop for two articles. Gareth Griffith considers the part played by the inaugural (or maiden or first) speech in the life of an MP and in the conduct of the parliament, noting that – while marked by convention – they reflect the political and social culture of the time. The other by John Young examines responsible government in a bicameral parliament and asks if upper houses should have ministers. At issue is the principle of ministerial responsibility and to which chamber does a minister account for the conduct of the executive. This within the knowledge that, for the most part, no distinction is generally made in the mind of the public as to which chamber the minister belongs.

Readers are reminded that responsible government and representative democracy are the themes of the 2014 conference of the Australasian Study of Parliament Group to be held in Sydney in October. For more information see <http://www.aspg.org.au/events>

The legislative initiatives of two Australian state parliaments – South Australia and Tasmania – to legalise voluntary euthanasia are the subject of the article by Alison Plumb. The two parliaments are shown to account for the large part of activity since the overturning by the federal parliament of the Northern Territory *Rights of the Terminally Ill Act* in 1997. The status of bills is reviewed and the activities of relevant interest groups and professional organisations are examined to identify the likelihood of reform in the near future. The article also sheds light onto the influence of the medical profession in Australian politics in relation to a contemporary 'morality politics' issue.

Dr June Verrier and Dr David Clune provide their usual excellent snapshots of recently published books and I welcome, as a first time contributor to the APR, Dr Tony Brown of the University of Technology, Sydney who has reviewed the Marion Maddox book 'Taking God To School'.

Acknowledgement also and always to Dr Robyn Smith of the NT Assembly for the round-up of events in our parliaments *From the Tables* for the latter part of 2013. A valuable record of events and research resource.

May 2014

Articles

The role of the Speaker in minority government – the case of the Australian House of Representatives 2010–2013

David Elder

David Elder is Clerk, Australian House of Representatives

INTRODUCTION

The role of the Speaker is a significant one in Westminster parliaments.¹ In a minority parliament, it can be even more significant to the operation of the House.² This article examines the experience of the Speakership in the 43rd minority Parliament in the Australian House of Representatives.

Between 2010 and 2013 there was a minority government in Australia with no single party or party grouping able to command a majority on the floor of the House. The result of the August 2010 election, which gave rise to a hung parliament, is illustrated in Figure 1 below.

Figure 1: Numbers – August 2010

| | |
|------------------------|----|
| Australian Labor Party | 72 |
| Liberal/National Party | 72 |
| Others | 6* |

* Bandt (Greens), Crook (WA Nat), Katter (Ind), Oakeshott (Ind), Wilkie (Ind), Windsor (Ind)

The Australian Labor Party, led by Julia Gillard, was able to form government with written agreements with the Australian Greens (Mr Adam Bandt) and three independent members (Mr Rob Oakeshott, Mr Andrew Wilkie, Mr Tony Windsor). These agreements guaranteed the government supply and support in non-confidence motions in return for various undertakings from the government. In addition, the government committed to a program of parliamentary reform. On all other matters, there was no commitment on the part of the non-aligned members to vote with the government. Once the various agreements

1 Hon Margaret Wilson, former Speaker of the New Zealand House of Representatives, notes the significance of the role of Speaker in Westminster constitutional arrangements, but also that it has not been the subject of great analysis. M Wilson, ‘The role of the Speaker: perceptions and realities’, *Public Law*, July 2010, pp 565–582, at p 565.

2 A colourful account of the minority government in New South Wales in the early 1910s, including the significance of the role of the Speaker can be found in A Twomey, ‘How to succeed in a hung parliament’, *Quadrant*, November 2010, pp 36–40.

had been concluded that enabled the Gillard government to be formed and the non-aligned members had indicated which party or party groupings they would support, the numbers of the respective parties are illustrated in Figure 2. These were the numbers prior to the election of a Speaker, who, under the Australian Constitution, has a casting vote only when the numbers in a division are equal (section 40). Thus, with the election of a Speaker, the total voting numbers would reduce to 149 with a consequent effect on the balance of numbers between the two sides as the Speaker’s deliberative vote would be lost from the party or party groupings from which he or she was drawn.

The Speakership has, arguably, evolved in a particular way in the Australian context, especially in the House of Representatives

Figure 2: Numbers – September 2010 (prior to first meeting of the House)

| | |
|--|------|
| Australian Labor Party | 72 |
| + Bandt (Greens), Oakeshott (Ind), Wilkie (Ind), Windsor (Ind) | = 76 |
| Liberal/National Party | 72 |
| + Crook (WA Nat), Katter (Ind) | = 74 |

THE ROLE OF THE SPEAKER

As noted by May in *Parliamentary Practice*, ‘The Speaker ... is the representative of the House itself in its powers, proceedings and dignity’.³ However, the Speakership has, arguably, evolved in a particular way in the Australian context, especially in the House of Representatives, as articulated by former Speaker Neil Andrew:

... the essence of the Australian speakership is impartiality which is the formal expression of the Aussie ‘fair go’ and that there is an important distinction between impartiality as Australian Speakers seek that goal and the structural independence model which has evolved in the United Kingdom ... impartiality is the defining characteristic of the speakership in Australia.⁴

The Agreement for Parliamentary Reform, which was part of the process of the formation of government, recognised the important role the Speaker would play in the forthcoming minority parliament. Indeed, the following references from the Agreement indicate the central position the Speakership was expected to take:

For the improvements to work ... there will need to be a recognition by all ... to allow a Speaker (in particular) to rule with a firm hand as debate tests the boundaries of the standing orders.⁵

3 May, *Parliamentary Practice*, 24th edn, p 59.
4 Hon Neil Andrew, *The Australian Federal Speakership – the first hundred years and some future directions*, Paper for presentation to a Conference on Constitutional and Parliamentary Reform, University of Adelaide, 17–18 August 2002, p 1.
5 *Agreement for a better Parliament: Parliamentary reform*, p 1.

The Speaker will be independent of government.⁶

The Speaker will rigorously enforce the standing orders on his or her own motion.⁷

It is interesting that these references reflected some of that tension in the model of Speakership that former Speaker Andrew referred to between the 'impartial' and the 'independent' Speaker. This tension would also play out in the way the role of Speaker was performed over the course of the 43rd Parliament. In the case of the hung parliament in the Australian House of Representatives, there were two reasons why the Speakership would be central:

- the closeness of the numbers meant that the loss of a deliberative vote by having a member take up the office of Speaker was going to be significant; and
- the Speaker would play a key role, even more important than that usually played by a Speaker, in how minority government would function as the reforms were, in part, built around an independent and assertive approach being taken by the Speaker.

ISSUES BEFORE THE HOUSE SAT

The Speakership had become embroiled in controversy before the House had met over particular provisions of the Agreement for Parliamentary Reform as follows:

If the Speaker is drawn from a political party then the Deputy Speaker will be drawn from an alternate political party and both the Speaker and Deputy Speaker will:

- abstain from attending their respective party rooms; and
- when in the Chair, be paired for all divisions.

If the Speaker is non-aligned, then the same pairing arrangements will apply [emphasis added].⁸

The purpose of these provisions was to neutralise the voting implications of a member taking the Speakership by 'pairing' the Speaker with the Deputy Speaker from an opposing political grouping in any division in the House. Questions were raised about the constitutionality of this provision. Section 40 of the Constitution provides:

Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

The government sought an opinion from the Solicitor-General on the constitutionality of any pairing arrangement involving the Speaker.⁹ The Solicitor-General concluded that there was not any necessary constitutional impediment to a pairing arrangement between the

⁶ *Ibid*, p 2.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ In the matter of the Office of the Speaker of the House of Representatives, Opinion, Stephen Gageler, Solicitor-General, SG No. 37 of 2010.

Speaker and another member from an opposing political party if the arrangement had a fixed operation irrespective of any particular vote, with two provisos:

1. The arrangement could not give the Speaker a deliberative vote and could not deprive the Speaker of a casting vote.
2. Adherence to the arrangement by the other member could only be voluntary.¹⁰

In explaining his conclusion the Solicitor-General noted:

Although not inappropriately described as ‘pairing’, the arrangement, in substance and effect, would involve nothing more than the other member choosing not to exercise that member’s constitutional entitlement to cast a deliberative vote and to maintain that choice without regard to the question for determination.¹¹

The Coalition Opposition parties sought an opinion on the same matter from its Shadow Attorney-General, Senator George Brandis SC. Senator Brandis concluded in his advice:

In my opinion, pairing arrangements cannot be extended to the Speaker. Pairing arrangements contemplate that a vote (commonly described as a ‘deliberative vote’, although that term is not included in section 40) *could* have been cast and, indeed, but for the existence of the pairing arrangement, would have been cast. However, section 40 provides, in terms which do not admit of ambiguity, that the Speaker may not vote on the question before the Chair, unless the numbers are equal, in which event he has a casting vote.¹²

As the Opposition, relying on the legal advice from Senator Brandis, did not agree to pair the Speaker, no ‘pairing’ arrangement was put in place involving the Speaker during the course of the Parliament. But the debate around this issue was a significant pointer towards the importance of the vote that could have been exercised by the person chosen as Speaker. Upon their election, this person’s vote was not available to their own party grouping.

THE ELECTION OF THE SPEAKER

Before the House met for the first sitting there was considerable speculation in the media about Opposition or independent members being nominated by the government for the Speakership to overcome the problem of the loss of a vote. However, when the House convened for its first sitting on 28 September 2010, Mr Harry Jenkins, a member of the government and the Speaker in the previous Parliament, was nominated by the government and was elected unopposed as Speaker. The government nominated an Opposition member, Mr Peter Slipper, for the position of Deputy Speaker. In the ballot for the Deputy Speakership, Mr Slipper prevailed over the Opposition’s nominee, Mr Bruce Scott. The previous evening, when there was speculation that he could be the government’s

¹⁰ *Ibid*, pp 1–2.

¹¹ *Ibid*, p 19.

¹² George Brandis SC, Opinion, re: Section 40 of the Commonwealth Constitution, Ex parte Oakeshott, 20 September 2010, p 3.

nominee for Deputy Speaker, Mr Slipper issued a statement that he would not support the government in guaranteeing supply or confidence motions, nor would he enter into any pairing arrangement with the Speaker.¹³ The election of Mr Jenkins as Speaker, with no pairing arrangements in place, left the numbers at the start of the 43rd Parliament as shown below in Figure 3. The government had the slimmest of a majority.

Figure 3: Numbers – September 2010 (after election of Speaker Jenkins)*

| | |
|---|------|
| Australian Labor Party | 72 |
| + <i>Bandt (Greens), Oakeshott (Ind), Wilkie (Ind), Windsor (Ind)</i> | 76 |
| Less Speaker Jenkins | = 75 |
| Liberal/National Party | 72 |
| + <i>Crook (WA Nat), Katter (Ind)</i> | = 74 |

* It is worth noting that if the 'pairing arrangement' of the Speaker and Deputy Speaker referred to earlier had been agreed, the numbers would have been Australian Labor Party (plus non-aligned supporters) 75 and Liberal National Party (plus non-aligned supporters) 73 as neither the Speaker nor the Deputy Speaker would have voted in divisions.

SPEAKER JENKINS

Speaker Jenkins indicated, in acknowledging his election as Speaker, the significant role that parliamentary reform could play in the minority Parliament:

The whole House – each of the 150 members – has an opportunity presented by a minority government in this 43rd Parliament of getting effective, positive changes to the way in which this place operates. But I would hope that we do that in a way that enables those changes to be sustainable – that those changes would continue under differing circumstances of numbers within the chamber.¹⁴

Mr Jenkins indicated early in his Speakership that he would permit one supplementary question to be asked each Question Time as provided for in the Agreement for a better Parliament.¹⁵ In addition, Mr Jenkins sought during Question Time to take a firm approach to adherence to the standing orders, particularly direct relevance of Ministers in responding to questions.¹⁶ Mr Jenkins also absented himself from attendance at party meetings in accordance with the Agreement. The circumstances of minority government created particular challenges for the Speaker. On two occasions Speaker Jenkins made important statements in relation to legislation that was considered to have breached constitutional provisions or principles relating to the financial initiative of the House of Representatives and of executive government. For the purposes of this article, the details of these two cases will not be

13 Statement by Peter Slipper MP regarding the Deputy Speakership, 27 September 2010.

14 House of Representatives Debates, 28 September 2010, p 11.

15 House of Representatives Debates, 20 October 2010, p 859.

16 One of the changes made to the standing orders as a result of the 'Agreement for a better Parliament' was to tighten the requirement that answers be 'relevant' to the question to answers being 'directly relevant' to the question.

canvassed as they are well covered in a paper prepared by the House of Representatives Clerk's Office on 'The Law Making Powers of the Houses – Three aspects of the Financial Initiative'.¹⁷ The significant issue was that the Speaker intervened to place a limit on the ability of private members to pursue matters of considerable interest to them and sought the support of the House for his position. In the context of minority government, this was a testing situation and left the Speaker's position with some vulnerability. In the event, the House supported the Speaker on both these matters. The vulnerability of the Speaker's position in minority government also was exposed in relation to the maintenance of order in the House. One of the more dramatic moments in Speaker Jenkins' speakership arose when a member was 'named' for disorderly behaviour.¹⁸ In accordance with the standing orders, the Leader of the House moved a motion to suspend the member from the House. This motion was defeated in the subsequent division. Speaker Jenkins advised the House that 'After Question Time, I will be taking time to consider my position'. The Leader of the Opposition immediately moved a motion of confidence in Mr Jenkins' Speakership and this motion was seconded by the Prime Minister and carried on the voices.¹⁹ In supporting Speaker Jenkins, Mr Abbott in particular noted that Mr Jenkins had performed his duties 'with commendable impartiality and with considerable forbearance'.²⁰ Mr Jenkins remained in office.

On another dramatic day in the 43rd Parliament, the final sitting day in 2011, Speaker Jenkins took the Chair as usual at the commencement of proceedings and announced to the House that he would be resigning as Speaker that day.²¹ Both the Prime Minister and the Leader of the Opposition referred to the exemplary service that Mr Jenkins had performed as Speaker. In particular there was reference again to Mr Jenkins embodying that impartial model of Speakership which Speaker Andrew had referred to. The Prime Minister stated:

On all occasions Harry Jenkins, as Speaker of this House, has carried out his duty with honour, with dignity, with a strict non-partisan approach which brought him credit from all sides of the Parliament.²²

The Leader of the Opposition stated:

[Mr Jenkins] has been in my judgment one of the very best Speakers to grace the chair of this Parliament. Certainly he is the equal of the best of Speakers that I have served under in my 18 years in this Chamber.²³

17 The most recent version of this paper is available on the Parliament House website at http://www.aph.gov.au/About_Parliament/House_of_Representatives/Research_and_Education/Procedural_publications.

18 The process of naming a member is effectively an appeal from the Speaker to the House for support in maintaining order. A member whose conduct in the chamber is disorderly can be 'named' by the Speaker. A motion is then moved to suspend the member from the House. The Speaker would be expecting the support of the House for this motion as a demonstration of confidence in the Speaker's authority to maintain order.

19 See House of Representatives Debates, 31 May 2011, pp 5283–86 for the details of this incident.

20 House of Representatives Debates, 31 May 2011, p 5284.

21 House of Representatives Debates, 24 November 2011, p 13741.

22 House of Representatives Debates, 24 November 2011, p 13790.

23 House of Representatives Debates, 24 November 2011, p 13791.

Later that day the election took place for a new Speaker. The government nominated the Deputy Speaker, the Hon Peter Slipper MP, a member of the Opposition Liberal Party. The Opposition claimed that the nomination by the government of a non-government member was unprecedented and contrary to Westminster tradition.²⁴ Mr Christopher Pyne, the Manager of Opposition Business, sought to nominate a number of government members for the position, but each of them declined to accept the nomination, leaving Mr Slipper to be elected unopposed.²⁵ Ms Anna Burke, from the Labor Party was elected as Deputy Speaker.²⁶ The significance of the election of Mr Slipper as Speaker for the balance of numbers in the House is illustrated in Figure 4. The government had improved its margin from one to three votes.²⁷

Figure 4: Numbers – November 2011

| | |
|---|------|
| Australian Labor Party | 72 |
| + <i>Bandt (Greens), Oakeshott (Ind), Wilkie (Ind), Windsor (Ind)</i> | = 76 |
| Liberal/National Party | 73* |
| + <i>Katter (Ind)</i> | = 74 |
| Less Speaker Slipper | = 73 |

* Note that Mr Crook in the meantime had formally joined with the Nationals

SPEAKER SLIPPER

Speaker Slipper made his intentions about his speakership clear from the outset and expressed them in terms of taking an ‘independent’ approach. In his remarks on his election as Speaker he stated:

I do intend to be an independent Speaker in the Westminster tradition and I hope that this is establishing a principle which will be followed by Speakers in other parliaments.²⁸

Speaker Slipper advised the House that he would be relinquishing his party membership and would be an independent member of the House.²⁹ As he would be an independent member, the issue of him attending party meetings did not arise. Speaker Slipper thus set about doing the unusual in the Australian context of endeavouring to be an ‘independent’ Speaker. On the first sitting day back in 2012, Speaker Slipper indicated his intentions

24 See the remarks of the Manager of Opposition Business, Hon Christopher Pyne MP, House of Representatives Debates, 24 November 2011, p 13784.

25 House of Representatives Debates, 24 November 2011, pp 13784–90.

26 House of Representatives Debates, 24 November 2011, p 13790.

27 Some of the media commentary at the time was to the effect that this was a ‘strategic victory’ for the government; that it afforded ‘another level of protection’; and that it made it ‘considerably safer’ for the government. See Chris Johnson, ‘Slipper sinks Abbott’s hopes’, *Canberra Times*, 25 November 2011, p 1; Mark Kenny, ‘Key vote ripped from Abbott’, *Adelaide Advertiser*, 25 November 2011, p 9, and Michelle Grattan, ‘PM’s bait and switch for power’, *Age*, 25 November 2011, p 15.

28 House of Representatives Debates, 24 November 2011, p 13797.

29 *Ibid.*

about a number of matters that asserted his desire to pursue an independent approach.³⁰ In relation to Question Time he had made proposals to further reduce the time limits for questions and answers. With the support of the House the time limits were reduced from 45 seconds to 30 seconds for questions and from four minutes to three minutes for answers. He also proposed to increase significantly the number of supplementary questions that he would permit under the discretion available to the Speaker within the standing orders. The maximum number of supplementary questions permitted each day rose from one to up to five, with shorter time limits for both supplementary questions and answers. Speaker Slipper also said that he wished to maintain order in the chamber and so advised members that it was not his intention to warn members before directing them to leave the chamber for one hour under standing order 94A. Although members usually would be warned before being named, this would not always be the case. Finally Speaker Slipper indicated he would abide by the principles set out in *House of Representatives Practice* in his use of the casting vote (see below for further discussion of the casting vote). He also announced that he would introduce a Speaker's procession once a week which would take in a route that could be viewed from some of the public areas of the building.³¹ This attracted considerable media attention at the time. Speaker Slipper's early actions in implementing the stricter regime he promised as Speaker attracted favourable comment from the media:

It was only day two and dangerously early to rush to judgment, but no one looking on could help but notice that order has replaced chaos in Federal Parliament.

And while it is obviously unwise to make too much of it yet, a fair portion of the credit for this should go to the new Speaker, Peter Slipper.³²

By the end of his first period of sittings as Speaker, much media reporting on Mr Slipper's performance continued to be favourable. One commentator noted:

After five weeks of his [Mr Slipper's] stewardship, the result is a markedly different Parliament.

Shorter questions, shorter answers, a much more tightly policed relevance rule have ensured that ministers stay closer to the subject asked. Question Time has become a more controlled event.³³

And another commentator:

If Slipper continues as the disciplinarian he has been thus far, it is possible, just possible, that Question Time could once again become a forum where oppositions seek information and governments sometimes provide it. And that would be a very good thing ...³⁴

30 House of Representatives Debates, 7 February 2012, pp 12–13 and pp 112–113.

31 House of Representatives Debates, 8 February 2012, p 195.

32 Geoff Kitney, 'Libs sloppy as Slipper fits into role', *Australian Financial Review*, 9 February 2012, p 5.

33 Mark Kenny, 'Lion tamer Slipper brings some order to political circus', *Adelaide Advertiser*, 24 March 2012, p 48.

34 Lenore Taylor, 'Taking a Slipper to the mob at Question Time', *Sydney Morning Herald*, 24 March 2012, p 17.

However, the Speakership in the 43rd Parliament was about to be rocked by dramatic allegations against Mr Slipper. On 21 April 2012, while Mr Slipper was overseas leading a parliamentary delegation, the *Daily Telegraph* published an article which indicated Mr Slipper would face allegations of sexual harassment in relation to one of his staff and allegations of misuse of taxi vouchers.³⁵ On the following day, Mr Slipper issued a statement saying that allegations had been made against him, which he denied. The allegations were both of a criminal and a civil nature. The statement indicated Mr Slipper believed it appropriate to stand aside as Speaker while the criminal allegation was resolved. In the meantime, the statement indicated, the Deputy Speaker, Ms Anna Burke, would act as Speaker during this period.³⁶ The statement appeared to be invoking the provisions of section 36 of the Constitution which provide that 'Before or during the absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.' Standing order 18(a) provides that 'If the Speaker is absent the Deputy Speaker shall be the Acting Speaker.' Thus the House, in electing a Deputy Speaker (Ms Burke), had made provision for a person to perform the duties of the Speaker in the absence of that person. In a further statement on 29 April 2012,³⁷ Speaker Slipper indicated that the criminal allegation against him 'has been shown to be a fabrication and there is no longer any reason to step aside [as Speaker]'. Nevertheless, he said that to uphold the dignity of the Parliament when the House resumed its sittings on 8 May he would make a short statement and then invite the Deputy Speaker to take the Chair as Deputy Speaker. This is what occurred when the House resumed at 2.00 pm on Tuesday, 8 May.³⁸

The significance of Mr Slipper's statement was that he was invoking provisions in the standing orders that state that the Deputy Speaker will take the Chair of the House whenever asked to do so by the Speaker and that the Second Deputy Speaker and other members of the Speaker's Panel will do likewise when asked by the Speaker (standing orders 16(b) and (c) and 17(b)). Under these provisions of the standing orders the Deputy Speaker and other Panel members perform duties of the Chair. The Speaker, Mr Slipper, continued to perform all the other responsibilities of the Speaker which arose under constitutional, statutory and standing order provisions, but he no longer took a role in chairing the House. On the day of Mr Slipper's statement to the House, the Manager of Opposition Business, Mr Christopher Pyne MP, sought to suspend standing orders to move a motion that would have seen the previous Speaker, Mr Jenkins, appointed to perform the duties of the Speaker whenever Speaker Slipper was absent from the House.³⁹ This was endeavouring also to invoke the provisions of section 36 of the Constitution that the House 'may choose a member to perform [the Speaker's] duties in his absence'. The motion to suspend standing orders did not receive the absolute majority required by the standing orders to enable the substantive motion to be moved.⁴⁰ This situation, with Speaker Slipper not taking the Chair in the House but continuing to perform all other duties of the

35 Steve Lewis, 'Slipper shock – Speaker hit with sexual harassment claim', *Daily Telegraph*, 21 April 2012, p 1.

36 Statement by Hon Peter Slipper MP, Office of the Speaker, 23 April 2012.

37 Statement by Speaker, Speaker's Office, 29 April 2012.

38 House of Representatives Debates, 8 May 2012, p 4127.

39 House of Representatives Debates, 8 May 2012, p 4134.

40 *Ibid*, p 4141.

Speaker, and Ms Burke, as Deputy Speaker, taking the Chair for key times of the day such as Question Time, continued for a number of months. This was a difficult situation for all involved, not least for Ms Burke who had to perform the key role in the Chair, but without having the authority of the Speakership. As noted below, she was recognised to have performed very well during this time.

In the meantime, the legal matters in which the Speaker was involved proceeded without reaching any conclusion. However, in early October 2012 as part of the court case involving the allegations of sexual harassment of a former staff member, a large number of text messages sent by Mr Slipper were released and a number of these messages were of a sexual nature.⁴¹ When the House resumed on 9 October 2012, the Leader of the Opposition moved, by leave, a motion under section 35 of the Constitution to remove Speaker Slipper from office immediately.⁴² The motion was debated, but was defeated by 70 votes to 69. Nevertheless, later that evening Mr Slipper advised the House that he would be tendering his resignation to the Governor-General later that day.⁴³ Mr Slipper referred to his endeavours to achieve changes in the operation of the House including in relation to Question Time and to introduce greater civility into the House. Mr Slipper's period as an 'independent' Speaker had thus come to an end. Later that evening, the Deputy Speaker, Ms Anna Burke, was elected unopposed as Speaker.⁴⁴ This returned the numbers in the House to where they had been when the Parliament commenced.

SPEAKER BURKE

Speaker Burke continued to preside over the House until its dissolution on 5 August 2013. In taking the Chair, Speaker Burke said that she looked forward to serving the House well and with distinction, noting that members serve the Parliament and the people and should uphold the dignity of the House.⁴⁵ In commending Ms Burke on her election, particular recognition was paid to the role she had played as Deputy Speaker in deputising in the Chair for Speaker Slipper.⁴⁶ Speaker Burke reverted to the 'impartial' model of Speakership articulated by Speaker Andrew. Like her predecessors, she did not attend party meetings. While Ms Burke did not seek to introduce any particular further changes, she worked within the significant changes which had already been made in the Parliament. For example, she continued with Speaker Slipper's practice of allowing up to five supplementary questions a day. Further she sought, as she had said in her remarks in taking the Chair, to uphold the dignity of the House and to take the opportunity to also remind members of their role in upholding the dignity of the House. Ms Burke, as both Speaker and Deputy Speaker,

41 See for example Pamela Williams, 'Text barrage reveals Slipper's secrets', *Australian Financial Review*, 9 October 2012, p 11.

42 House of Representatives Debates, 9 October 2012, pp 11574–11601. Section 35 of the Constitution provides in part '[The Speaker] may be removed from office by a vote of the House ...'.

43 House of Representatives Debates, 9 October 2013, pp 11644–47.

44 House of Representatives Debates, 9 October 2013, pp 11660–61.

45 House of Representatives Debates, 9 October 2013, p 11663.

46 See House of Representatives Debates, 9 October 2013, pp 11663–65.

exercised the casting vote ten times, equal to the highest number of casting votes ever exercised by an individual Speaker of the House. On all occasions in which the casting vote was exercised by Speaker Burke, she did so in accordance with Westminster practice. As noted below, the way in which the casting vote was exercised in the 43rd Parliament was an important demonstration of the independent position adopted by the Chair. Ms Burke enhanced her reputation for impartiality in the way in which she exercised the casting vote.

EXERCISE OF CASTING VOTE

One of the difficult responsibilities that can be placed on Speakers (and Deputy Speakers occupying the Chair for a Speaker) is to exercise the casting vote under section 40 of the Constitution when a vote in the House is tied. The casting vote has only been exercised on 36 occasions since Federation, and 15 of those occasions (42 per cent) were in the 43rd Parliament. The exercise of the casting vote in the 43rd Parliament had considerable potential to raise controversy as there would be tight votes on matters of significance and the partisan exercise of the casting vote would have aroused concern. All three Speakers, and Deputy Speaker Burke when she occupied the Chair for divisions during those periods when Speaker Slipper did not undertake duties in the Chair, adhered strictly to the principles outlined in *House of Representatives Practice* and directly reflecting principles which have emerged from the decisions of successive Speakers in the United Kingdom House of Commons. These principles are:

- the Speaker should always vote for further discussion, when this is possible;
- where no further discussion is possible, decisions should not be taken except by a majority; and
- a casting vote on an amendment to a bill should leave the bill in its existing form.⁴⁷

As May notes, the purpose of adhering to these principles and giving a reason on each occasion for how the vote had been exercised is 'to avoid any imputation upon his [the Speaker's] impartiality'.⁴⁸ The use of the casting vote during the 43rd Parliament, by strict adherence to the principles referred to earlier, enhanced perceptions that Speakers had adopted an impartial and independent stance, in accord with the sentiments expressed in the Agreement for Parliamentary Reform. It is notable that, although House of Representatives Practice had long set out the key principles, before the 43rd Parliament they had not always been followed. The consistency of the exercise of the casting vote during the 43rd Parliament was thus important in strengthening practice on this critical matter.

⁴⁷ *House of Representatives Practice*, 6th edn, Canberra, 2012, p 183 after Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, LexisNexis, 2011, p 420.

⁴⁸ May, *op cit*, p 420.

CHAIRING OF SELECTION COMMITTEE AND APPROPRIATIONS AND ADMINISTRATION COMMITTEE

There were two important additional responsibilities for Speakers in the 43rd Parliament which resulted from the Agreement for Parliamentary Reform. The Speaker was given the role of chairing two new and significant committees – the Selection Committee and the Appropriations and Administration Committee. A Selection Committee⁴⁹ was re-established to determine a range of matters primarily in relation to private members' business. The main responsibilities of the committee, chaired by the Speaker, were to:

- select and arrange the timetable for matters of private members' business for debate in the House;
- recommend items of private members' business to be voted on; and
- select bills to be referred to committees for an advisory report.⁵⁰

The Selection Committee was central to the operation of a number of the procedural changes in the 43rd Parliament, particularly relating to private members' business, and thus placed the Speaker, as Chair of the Committee, at the centre of

these developments. In delivering a paper to the Regional Presiding Officers and Clerks Conference in Canberra in July 2013, Speaker Burke, while noting the experience of the operation of the Selection Committee had been 'mixed',⁵¹ stated:

The greater emphasis on private members' business has provided greater opportunity for backbenchers to raise issues of concern in their electorates, review legislation, and initiate their own legislative concerns.⁵²

The Appropriations and Administration Committee was a new committee established in the 43rd Parliament as a result of the Agreement for Parliamentary Reform. As stated in the Agreement, and reflected in the standing orders establishing the committee, its primary role was to consider the estimates for the Department of the House of Representatives and, through the Speaker, convey these to the Minister for Finance and Deregulation for inclusion in the relevant appropriation bills.⁵³ On this core point, the committee reported that:

... the committee considers it has played a positive and responsible role in discharging its responsibilities under the standing orders, and in particular, in assessing the funding

The Speakership emerged from the 43rd Parliament with the philosophy of impartiality intact

49 A Selection Committee (chaired by the Deputy Speaker) had operated from 1988 to 2007, to be replaced by a Whips Committee from 2007–2010.

50 Standing order 222.

51 Anna Burke MP, 'The organisation of private members' business: the role of the Selection Committee', Paper presented to the Regional Presiding Officers and Clerks Conference, Canberra, July 2013, pp 2.

52 *Ibid*, p 7.

53 Agreement for Parliamentary Reform, *op cit*, p 8 and standing order 222A.

requirements of the Department of the House of Representatives and bring those requirements to the attention of government.⁵⁴

In relation to each of these committees, the three Speakers who occupied the Office in the 43rd Parliament played an important leadership role in assisting the committees to meet the expectations which the Agreement for Parliamentary Reform had made of them. As with the exercise of the casting vote, the chairing of these committees enhanced the overall perception of the Speakership.

CONCLUSION

As can be seen, the place and role of the Speaker was central in the 43rd Parliament. The closeness of the numbers made it inevitable that the position of the Speaker would attract considerable interest and be the subject of some controversy. The fact that there were three Speakers in the course of the Parliament, the most in any parliament, is a commentary on the turbulence which surrounded the role of Speaker. The range of matters that arose involving the Speaker during the course of the Parliament brought into consideration all the provisions of the Constitution and the standing orders which relate to the Speaker. Careful thought had to be given to a number of issues and there was considerable interest from the media and the public in matters to do with the Speaker and the detail of how the constitutional and standing order provisions worked. In a parliament in which the role of the Speaker in controlling the House and exercising those judgments so crucial to the effective functioning of the House was even more significant than usual, the Speakership was central. Each of the Speakers who held office in the 43rd Parliament sought to perform the role of Speaker in the impartial manner consistent with the traditions of the Office in the Australian context, in accordance with the model articulated by Speaker Andrew. In a number of significant ways, whether the approach to matters concerning the financial initiative, the exercise of the casting vote, the approach to Question Time or the chairing of the Selection Committee and the Appropriations and Administration Committee, the three Speakers endeavoured to assert an impartial approach in a difficult and contentious climate under considerable scrutiny in the House and the wider community. This also reflected, in this difficult context, Speaker Andrew's point that the underlying philosophy of this approach to the Speakership was inherently Australian in that it embodied the notion of a 'fair go'. However, one cannot deny the significant controversy that surrounded the Speakership at various times, and that there had been a danger that the Speakership itself could have been damaged, perhaps even permanently damaged, by some of this controversy. Nevertheless the Speakership emerged at the conclusion of the 43rd Parliament with the underlying philosophy of that impartiality of the Australian Speakership intact. Perhaps, in addition, the experiment of an 'independent' model of Speakership was one that may be considered to have been less successful.

54 House of Representatives Standing Committee on Appropriations and Administration, *Annual Report 2012-13*, Canberra, June 2013, p 5.

Opposition in parliamentary democracies: a framework for comparison

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INTRODUCTION

The right to oppose government is a fundamental feature of liberal democracy. That right is manifested in a variety of ways and forums, including the ability to sue government in the courts, the holding of free elections, and the privilege of unrestricted speech within legislatures. Especially in systems of parliamentary government, however, opposition is not merely a set of entitlements but a tangible institution and set of institutionalized relationships. Moreover, as with other governmental institutions, opposition differs in form between and within nations. In the study of institutions comparison is the engine of knowledge creation.

The aim of this article is thus to assist understanding of opposition by setting out, and making a case for, an analytical framework which might be used to compare opposition across jurisdictions. As Kaiser (2008, 20) has observed '[d]espite a promising start with Robert Dahl's 'Patterns of Opposition', comparative research on parliamentary opposition is still in its infancy.' Since it is widely acknowledged that Dahl provides a relevant starting point for the contemporary study of opposition, the article begins with an analysis of Dahl's pioneering contribution. The article shares Dahl's interest in relating characteristics of opposition to the wider political system, but it is less ambitious than Dahl in restricting the focus, for the most part, to legislatures in parliamentary systems of government. The Australian case is of particular interest in the article. While Australia has inherited Westminster understandings about parliamentary opposition, these are a less perfect fit with the Australian political system than is often assumed.² The framework developed is selectively applied to Australian jurisdictions to illustrate distinctive features of Australian opposition, as well as differences within Australia.

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- 1 The author thanks Nicholas Barry and the journal's two anonymous referees for their helpful comments.
 - 2 Kaiser (2008, 22–23) notes that all of the Westminster democracies have departed from the classic Westminster assumptions about opposition.

ROBERT DAHL REVISITED

Dahl (1966) identified six 'ways' in which oppositions may differ. Three of these appear to be primary influences: (i) the organizational cohesion, or 'concentration', of the opponents

Dahl's key factors were shown to be useful in distinguishing opposition in Australia...[H]owever, all of these features of opposition in Australia are primarily, if not exclusively, a product of Australia's strong upper houses, with lower house government-opposition dynamics conforming more closely to the Westminster conception

of government; (ii) the 'competitiveness' of the opposition; and (iii) the goals of the opposition. The other differences he identified – (iv) the site of the encounter between opposition and government; (v) the distinctiveness or identifiability of the opposition; and (vi) the strategies of the opposition – seem to be heavily dependent on the first two factors.

Dahl's first two factors are arguably the most important in his analysis. The first factor, concentration, encompasses several elements: (i) the internal cohesion, or discipline, of parliamentary political parties; (ii) the extent to which parliamentary representation is concentrated

into two or fragmented among several political parties or, in Rae's (1968) terms, the 'fractionalization' of the parliamentary party system; and (iii) the extent to which constitutional arrangements (especially, bicameral-unicameral legislature, federal-unitary government, presidential-parliamentary government) separate or consolidate governmental power. The second factor, competitiveness, which Dahl admits is not completely independent of the first, refers to the extent to which parties compete rather than cooperate in electoral politics and in government. In Dahl's account, the most important aspect seems to be the extent to which parties monopolize, rather than share, power in the legislature. So this factor could alternatively be described as the extent of power sharing. The two factors are dimensional and can be used together to differentiate forms of opposition and associated forms of regime – as in the examples given in Figure 1. In the top right-hand quadrant in Figure 1 is located the Westminster conception of opposition. In the Westminster model, there are two major parties, both highly unified, one of which is normally in control of a majority in the lower house of parliament. This majority confers a monopoly of power because at Westminster, especially prior to recent House of Lords reforms and devolution, the House of Lords by law and convention has a limited role in legislation and government is unitary rather than federal. In this context, opposition has two notable characteristics: it is concentrated in a single, disciplined party; and it has no power (Johnson 1997). The 'ins' and the 'outs' are strongly differentiated, with the opposition very much an *alternative* government, or government-in-waiting, powerless but aspiring to monopolize power following the next general election.

In the other quadrants, opposition is more diffuse or less distinct, because it either lacks a single focal point or it is less differentiated from government, in the latter case especially because it contributes to a greater or lesser extent to the shaping of legislation. The bottom right-hand quadrant points up an ambiguity in the description of competitiveness above. Two parties may compete for executive power yet share legislative power, as in

the US where ‘divided government’ in recent decades has meant that a president of one partisan stripe is frequently forced to bargain over legislation with a congressional majority controlled by the other party. Along with divided government, the growing cohesion of parties in the US over recent decades has made opposition more identifiable and power sharing possibly a more visible, and certainly a more acrimonious, feature of the system of government (see Owens & Loomis 2006, 276–80). While it is legislative not executive power which is shared in the US, it is possible, if unlikely except in very unusual circumstances, for parties in a predominantly two-party system to share executive as well as legislative power, as was the case in the UK during the two world wars. Opposition under these circumstances is either negligible or almost indistinguishable from government.

Figure 5: Examples of Democratic Regimes Differentiated by Concentration of Opposition and Extent of Power Sharing among Parties

| | | Concentration of Opposition | |
|-------------------------|------|---|--|
| | | Low | High |
| Extent of Power sharing | Low | Strong Presidentialism with a Fragmented Party System (e.g. mid 20th C Chile) | Westminster Model (e.g. postwar UK or NZ) |
| | High | European Consensus Democracy (e.g. Switzerland) | Government of National Unity (e.g. wartime UK); Divided Government in US Presidentialism |

Something similar is true for certain cases in the bottom left-hand quadrant. For instance, in the Grand Coalition following the 2013 election in Germany, the coalition parties comprised around 80 per cent of the representatives in the Bundestag, and in Switzerland governing coalitions regularly encompass parties representing a similar proportion of the National Council. In these multi-party systems, such outcomes are the product of normal politics, unlike the grand coalitions produced by crises in the UK. This quadrant also includes cases of minority government in multi-party systems, such as those which have occurred frequently in Denmark, Sweden, Norway, Italy, Portugal and Finland and which have resulted in opposition parties having a substantial impact on government policy (Gallagher, Laver & Mair 2006, 388–91). Lastly, the top left-hand quadrant represents a situation where, as in the Westminster model, the executive monopolizes governmental power and the opposition is powerless but, unlike Westminster, the opposition is too fragmented to present itself as an alternative government, or to provide support for an alternative government. The example given is Chile in the middle decades of the 20th century where presidential control of cabinet and over the legislative process was strong and partisanship was fragmented and dominated by local allegiances (see Shugart and Carey 1992, 155–56, 179–83).

A number of other characteristics identified by Dahl are a product of the two factors, concentration and competitiveness, discussed so far. The distinctiveness or identifiability of the opposition, Dahl’s fifth difference, is clearly affected by both factors. The more power is

dispersed in the ways described above, the less clearly delineated and capable of coordinated action will be the opposition. The less power is shared, or the more competitive the parties, the more sharply defined will be the government-opposition divide. Dahl's fourth difference, the site of the encounter between opposition and government, is similarly derivative. Where parliamentary majorities are all-powerful and highly stable and where elections typically create single-party majorities, the primary 'site' or focus of politics will tend to be the electorate rather than the legislature. In Dahl's words, in these circumstances, the legislature is not 'a site for genuine encounters so much as it is a forum from which to influence the next election' (1966, 339). Ironically, it is in just such circumstances, as in the Westminster model, that parliamentary opposition is likely to be a prominent feature of the political system. On the other hand, where elections are less decisive and parliamentary majorities are formed from multiple parties and may shift in their composition over time – and where, as consequence, governing and oppositional roles may be less starkly differentiated – more attention will be paid to strategies and negotiation within the legislature. The dispersion of power between multiple legislative chambers also has the potential to direct attention to the legislature, making it a primary political site. For completeness, it is worth noting, as Dahl does, that where power is shared between the national legislature and other entities in the political system – as in presidential, or federal, or corporatist systems – other forums and relationships will also tend to become important sites of political contest.

The strategies of the opposition, Dahl's sixth difference, refer to the means employed to affect the conduct of government. Dahl sketches a range of strategies which may be described in terms of their aims: to win exclusive control of executive government; to be part of a coalition government (that is, to adopt a strategy of executive brokerage); to seek influence through forums outside national or regional legislatures, such as corporatist arrangements for interest intermediation; to cope with a crisis by cooperating with actors who would normally be rivals (e.g. to enter a government of national unity); and to disrupt governmental institutions as part of a revolutionary strategy (perhaps more relevant to developed democracies in the days of strong European communist parties but also somewhat applicable to recent protest movements in Europe in the wake of the Global Financial Crisis). To these may be added a strategy less clearly identified by Dahl, that of legislative brokerage, whereby a party seeks to use its position in the legislature to influence policy without having a share of executive power. This is, of course, a standard strategy in US legislatures but is also relevant elsewhere. It describes the dominant strategy of the Australian Democrats, the Greens and other small players in Australian parliaments in recent decades. Choice of strategy, again, is clearly shaped by Dahl's factors of concentration and competitiveness, especially the former. Where legislative parties are large and few in number and there are no external incentives to share power, they will tend to adopt a strategy of exclusive control. In a multiparty system where legislative strength is fairly evenly dispersed, strategies of executive and legislative brokerage will come to the fore. Legislative brokerage without executive brokerage will often be the result of a party lacking what Sartori (1976, 122–23) has called 'coalition potential', a quality which may reflect its relative size but also the compatibility of its goals with those of other parties. Constitutional factors are also an important influence on choice of strategy. In a presidential system, the option of executive brokerage will not be open to parties in the legislature, whereas it will be a primary strategy for many parties in systems of parliamentary government.

The other of Dahl's factors referred to at the outset is the goals of opposition. Dahl (341) identifies four sorts of change that oppositions might seek to bring about (or resist): changes in the personnel of government; changes in specific policies; changes in the political system; and changes in the socioeconomic structure. Oppositions will have a different character depending on the particular mixture of these generic motives that animate them. Especially significant for Dahl is the distinction between those focused on changing social and political structures and those focused on policy and personnel alone. However, Dahl noted that a number of socialist parties, the main radical element in post-war liberal democracies, had relinquished their interest in structural opposition and come to focus mainly on the first two areas. This shift is even more apparent nearly half a century on from Dahl's vantage point and would seem to have greatly reduced the importance of structural goals in differentiating oppositions in advanced democracies. However, goals have an intimate connection with strategies, as noted above, and in this way may help create important differences between oppositions.

AN ANALYTICAL FRAMEWORK

What follows is a suggested six-factor framework for the comparative study of opposition. The focus is restricted to systems of parliamentary government in advanced, or mature, democracies. Further, attention is directed at the primary factors differentiating oppositions, keeping in mind that there are important secondary factors of the types dealt with above which are effects of the former. The six factors are explained below and their importance discussed and illustrated with observations on Australian oppositions. The three primary factors identified above in Dahl's analysis are dealt with first. The **concentration** (Dahl), or 'cohesion' (Blondel 1997), of opposition determines whether opposition will be associated with a single parliamentary group or dispersed among a number of groups and individuals. The drivers of concentration are as identified by Dahl. However, in developed parliamentary regimes, party discipline is uniformly strong and hence unlikely to be a major cause of differences between jurisdictions. The degree of fragmentation or fractionalization of the parliamentary party system is likely to be much more important in producing differences in the concentration of opposition. Whether a parliament is bicameral or unicameral, and the strength of bicameralism where it is present, will also be important given the variability of parliamentary systems in this regard. Finally, parliamentary federations also diffuse opposition across levels of government, a feature which needs to be taken into account in international comparisons of opposition.

In general, concentration matters because it determines the number and relative importance of opposition actors and their strategies. In turn, these things determine the predictability of parliamentary processes and thus the extent to which the legislature versus the electoral contest will be the chief focus of politics. Australian jurisdictions have typically had a greater number of significant parliamentary actors than envisaged by the Westminster model. This is due, first, to the presence of a separate National Party (formerly the Country Party) in a majority of Australian jurisdictions over nearly a century, especially where this party has exhibited significant independence from the Liberal Party, as in Queensland until the creation of the Liberal National Party in 2008 and in Western Australia

(WA) and Victoria for substantial periods. Its holding of a strategic bloc of votes in lower houses, which determine the formation of government, has encouraged the National Party mostly to adopt executive brokerage as its primary strategy and form coalition governments with the Liberal Party and its predecessors in several states and at the national level on many occasions. The stability of the relationship between the Liberals and Nationals, built on these foundations, has led commentators to describe this partnership simplistically as constituting a *de facto* single party. But this neglects the contingent nature of the relationship and the tensions it embodies, which have seen it frequently tested and indeed break down on a number of occasions across several Australian jurisdictions.³ Secondly, occasional control of the balance of power in lower houses of Australian parliaments by independents or, in the case of Tasmania in recent years, the Greens, is also a significant source of the dispersion of power in Australian parliaments. The Tasmanian Greens (since 2010) and particular independents (Rory McEwan in South Australia (SA) in 2002 and Elizabeth Constable in Western Australia in 2008) have recently been able to negotiate positions in the executive. But, due to their fluctuating parliamentary power and the reluctance of major parties to share executive power, minor parties and independents have mostly resigned themselves to a strategy of legislative brokerage and, in some cases, to seeking procedural change to facilitate greater roles for themselves in the parliament (Bowe 2009). Thirdly, in jurisdictions with upper houses (the Commonwealth and all states except Queensland), these institutions have probably made the most consistent contribution to diffusing opposition. In particular, Australian mainland upper houses, which are elected by PR, have provided opportunities for parties unrepresented in lower houses to have a parliamentary presence, often an influential presence due to their holding the balance of power in those chambers over recent decades. Together these three manifestations of power diffusion in Australian parliaments have made the Westminster image of opposition significantly less applicable to Australia, even if public commentary continues to focus quite strongly on the major opposition party and on the electoral contest at the next election rather than parliamentary tactics and alliances.

A second major factor from Dahl, **the extent of power sharing**, determines whether opposition is an alternative to, or a participant in, government. The more the opposition is involved in negotiating the content of legislation, the more it shares the function of governing rather than merely criticizing government policy and developing alternatives. In its classic Westminster conception, the opposition is viewed as an alternative executive; it shares with the governing party what Johnson (1997, 495) calls an 'executive outlook', or a primary interest in the attainment and exercise of executive power rather than in the limitation of power or its exercise by the government of the day. Consistent with this characteristic, classic Westminster opposition is also powerless; it seeks to replace the government at the next election but has no capacity to thwart it in the legislature. In this scenario, control over the legislative process is part of the spoils of executive office. The presence of an upper house at Westminster was always a potentially complicating factor. Hence, the idea of the government's legislative 'mandate' was developed to reconcile an upper house possessing a measure of legislative power with the notion of an opposition

3 Costar (2009) includes an account of relationships between the two parties over time in all Australian jurisdictions.

which is a 'government-in-waiting' but which does not seek to exercise power. But as the House of Lords has gained legitimacy, following recent reforms to reduce its hereditary element and introduce a fairer system of partisan representation, the varied forces of opposition in the Lords have sought to cast off the shackles of mandate theory and exert influence over the legislative process (Russell & Sciara 2007). Consequently, opposition in the UK has begun to lose some of its classic Westminster character.

In Australia, bicameralism has historically been stronger than at Westminster, due to its surer constitutional foundations. Moreover, its evolution has seen its strength grow, with democratization of state upper houses and electoral system changes in all mainland upper houses routinely placing opposition parties, singly or in combination, in a position to control the passage of legislation (Stone 2002). In this situation, opposition collectively is far from powerless and, given the democratic credentials of contemporary upper houses, executive government's claim to possess a mandate is not persuasive (Bach 2003, 276–99). Opposition parties with control of upper houses are thus necessarily participants in government since their decisions about government-sponsored legislation are vital to legislative outcomes. However, the main opposition party or bloc in Australia is not often in a position to negotiate the content of legislation with government, or defeat legislation, because government is typically able to broker more congenial outcomes with minor parties and independents in upper houses. In this situation, the main opposition party/ies has the option of opposing with no consequences for legislative outcomes. While this may appear negative or futile, such a role is important for highlighting, with regard to particular legislative measures, technical weaknesses, adverse consequences for particular interests in society, or widespread community anxiety. In all of these circumstances, there is a case for government to pause to reconsider the efficacy of its measure or to explain and justify its proposal more adequately – though, unless the major opposition parties can convince other upper house actors to support its stance, government is unlikely to be responsive. Thus there was a democratic rationale for the position articulated by Tony Abbott when he became Leader of the Opposition in 2009 that the role of the Opposition is, straightforwardly, to oppose. Such an approach also has the political advantage of harnessing disaffection with government to the opposition's cause. However, no Opposition simply opposes everything. Even the Abbott-led Liberal-National Opposition in the 2010–13 Commonwealth Parliament, which had a higher rate of negative voting than the Liberal-National Opposition in the previous parliament (2007–2010) or than Labor Oppositions during the Howard government, supported the great majority of bills. When it can find no fault with legislation or believes opposing would alienate important bodies of support inside and outside parliament, the Opposition sides with government. In 2010–2013 it did this in the Commonwealth Parliament for nearly 80 per cent of bills (PolitiFact Australia 2013).

Occasionally, the main opposition party can importantly affect legislative outcomes in Australia. For instance, the Coalition Opposition in the Senate effectively determined that there would be no price on carbon emissions in 2009–10 and the support of the Labor Opposition in the Western Australian Legislative Council was crucial in bringing about liberalization of shopping hours in Perth, an issue which had divided community opinion for a number of years, in the 2008–2013 parliament. It is on such occasions that Australia's departure from classic Westminster-style opposition is most apparent.

Thirdly, as Dahl emphasized, oppositions differ in their **goals**, or the nature and intensity of their disagreement with government. However, the literature on contemporary parties in mature democracies – emphasizing their ‘catch-all’, ‘electoral-professional’ and ‘cartel’ tendencies – suggests that government-opposition dynamics in such systems have tended in recent decades to be driven much less by differences in socio-economic principle and more by office seeking (e.g. Caul and Gray 2000). Government-opposition rivalry certainly continues to be an important means of bringing about policy change but opposition disagreement with government over policy in contemporary settings often concerns the administration of an existing policy or seeks to exploit a perceived opportunity to mobilize voters whose interests have been neglected or harmed by existing policy. These observations are truest of major opposition parties in parliaments dominated by two parties or party blocs. Smaller opposition parties in such systems or parties in multi-party parliaments are more likely to mobilize particular segments of the electorate on the basis of consistent, major disagreements with major parties based on ideology or particular group interests. Further, as Kaiser (2008) has argued, ideology or ‘policy position’ is important in facilitating or inhibiting co-operation among parties – in the formation of government, in opposition, and between government and particular elements of opposition – in the multiparty parliaments which are increasingly the norm in parliamentary democracies, including those with a Westminster heritage. For instance, Greens support for the minority federal Labor government in Australia between 2010 and 2013 was facilitated by the ideological affinity of the two parties. Thus, despite the marked decline in the intensity of disagreement between major opposition parties and government over goals in developed democracies, party goals remain significant for characterizing and explaining patterns of opposition and government-opposition relations.

There are several other factors not highlighted by Dahl which are arguably significant for characterizing and differentiating oppositions. One such, the fourth factor in the framework presented in this article, is the nature and extent of the **institutionalization** of opposition. Institutionalization involves formal recognition of opposition office holders, often including special arrangements for their placement in the parliament, additional salary and staff, and procedural entitlements in the parliament. This has been a gradual process, with variations in nature and rate of change between jurisdictions. In general, the process has begun with the recognition of a Leader of the Opposition (as early as the 1820s in the UK), followed, often with a substantial lag, by modest resources for the Leader, and subsequent expansions in the number of opposition party offices attracting special resources and in the quantum of resources. Regarding procedure, the Leader is accorded preference in asking questions in parliament, calling for censure, urgency or like debates, and in other ways which vary between legislatures. For instance, in some parliaments the Leader of the Opposition chooses the chair of the important Public Accounts Committee, as in India, or at least the chair is conventionally a senior member of the opposition, as in the United Kingdom, whereas in Australia that position is controlled by the governing party. Institutionalization extends beyond the parliament and includes such things as confidential briefings for the opposition on developments in foreign affairs and on prominent domestic issues such as national disasters. Where it has progressed furthest, institutionalization strongly accentuates the character of opposition as an alternative government. Since around 1970, a major development has been the emergence of a shadow cabinet or ministry, a

set of spokespersons each with responsibility to criticize government and develop policy alternatives in a designated subject area. In late 2013, for instance, the Western Australian Barnett Liberal-National coalition government comprising 25 ministers and parliamentary secretaries was shadowed by the Labor alternative of 32 shadow ministers and parliamentary secretaries. At the federal level of Australian government, the Labor opposition had 46 shadow ministers and parliamentary secretaries arrayed against the Abbott Coalition government of 42 individuals (30 ministers and 12 parliamentary secretaries). Commencing in 2012, the federal shadow ministry was further institutionalized through its receipt of additional remuneration (25 per cent of the base salary of a member of parliament). This is a development which can be expected to spread to other parliaments around Australia.

Like ministries, Australian shadow ministries have typically expanded at a greater rate than the size of the parliament. When a shadow ministry first appeared in Western Australia in 1974, ministers and shadow ministers together comprised around 27 per cent of the parliament; by late 2013 that proportion had more than doubled to 60 per cent. Even in the much larger federal parliament the proportion in late 2013 was around 40 per cent. This means that a substantial and growing portion of parliament's membership is absorbed in the contest between alternative executives, reinforcing the well-established executive orientation of modern Australian parliaments, a characteristic they share to a greater or lesser extent with their counterparts elsewhere. Relatedly, the development further weakens the already tenuous distinctions in Australia between government and governing party and opposition party and opposition front bench – distinctions which remain very much alive in large parliaments such as Westminster.

There are two other noteworthy consequences of the rise of the shadow ministry. First, just as an expanding parliamentary executive, and a governing parliamentary party the members of which all see themselves as part of the government, assist the head of government to maintain authority and discipline in his/her party, the burgeoning alternative executive gives the Leader of the Opposition some modest patronage power (to the extent that the leader determines shadow positions), which is strengthened where shadow positions attract remuneration. Secondly, an array of opposition spokespersons for particular areas of governmental activity probably facilitates the development of an extra-parliamentary dimension to the contest between government and opposition. Australian parliaments typically sit for no more than 60 or 70 days across 20 odd weeks of the year, but the Opposition front bench is permanently available to participate in public debate, the leader and shadow ministers being called upon by, or calling, the media to provide a response to every significant policy decision taken by the government. The degree of institutionalization would seem to be related to the level of concentration of opposition in the legislature; where opposition is highly concentrated, there is a high degree of predictability about the partisan composition of government over time and this arguably leads to what Reid and Forrest (1989, 51) describe as a 'community of interest in formalizing mutually convenient arrangements' among the small number of parties with the prospect of executive office. In Westminster-derived parliaments, institutionalization typically began before mass parties but it was the development of disciplined political parties which did most to give institutional substance to the notion of the opposition. Where concentration produced by party discipline was combined with

concentration of partisanship to produce two-sided competition for power in the parliament, institutionalization of opposition was able to develop to its fullest extent. The lower houses of Australian parliaments have typically provided such conditions.

A fifth key factor distinguishing oppositions is **size**. The number of parliamentary representatives of the opposition relative to those of the governing party, is likely to affect the authority it brings to its parliamentary roles. A large opposition, one that is similar in size to the governing party/ies, should be a strong opposition, with a sense of its moral authority to challenge government forcefully and, given the closeness of the contest for power, a strong incentive to do so. On the other hand, a small opposition, especially if this is a long term characteristic of a political system, weakens the government's sense that it is under challenge and that it needs, as a result, to remain responsive to public concerns expressed by the parliamentary opposition. These propositions would seem to apply whether opposition is concentrated or dispersed.⁴ In Australia, where opposition, especially in lower houses, tends to be relatively concentrated, a large opposition heightens the sense of two-sided competition for executive and legislative power. An opposition's ability to project itself as a government-in-waiting will be stronger the more credible the electoral threat it poses to the governing party and this will tend to be related to its parliamentary strength. In Westminster-derived systems of parliamentary government, where power is typically concentrated in the leadership of a majority party in the legislature, a persistently small opposition represents the removal of one of the few institutional checks on government. The tendency to overbearing government in such circumstances is exacerbated where opposition parties do not have the potential to check government through a second chamber. The contrasting scenarios just outlined are exemplified in Australia by the experiences of Queensland and Western Australia. Western Australia has been a jurisdiction of large oppositions. The mean and median shares of lower house seats controlled by the opposition since World War II (from the 1947 election to the 2013 election) are 42.8 per cent and 43.1 per cent. On only four occasions in 21 elections did the opposition fall below 40 per cent of the seats (leaving it more than about six seats short of a majority), and it fell below 36 per cent (more than about eight seats short) only twice. These statistics demonstrate the prominence and stability of opposition as a feature of Western Australia's political system. Such opposition poses a real (electoral) threat to government, making it more likely that government will see the need to justify the actions it takes. In comparison, Queensland opposition has been much smaller and weaker, with mean and median opposition shares of the single chamber parliament at 31.7 per cent and 32.1 per cent. In 24 elections from 1947 to 2012, the opposition share of the seats fell below 40 per cent (more than 7 to 9 seats short of a majority) on 21 occasions and below 36 per cent (more than 10–13 seats short) on 16 occasions. Government would seem to be more able to safely ignore these small Queensland oppositions, with potential consequences for the probity and openness of public administration. Weak opposition in Queensland is compounded by the absence of a second

4 None of the above contradicts Kaiser's (2008, 35) proposition that 'the policy influence of [particular] opposition parties does not necessarily depend on their strength in terms of seats but more on a combination of institutional opportunities and policy positions relative to other parties.'

parliamentary chamber, through which opposition actors have exerted significant influence on government in all other Australian states and at the Commonwealth level.

A sixth and, in the current framework, final important characteristic of opposition as a component of a political system is the regularity with which – and, in multiparty systems, the extent to which – it replaces the government. The systemic benefits of opposition are arguably most fully realized when **alternation**, or replacement of executive personnel by members of the opposition, occurs with some regularity, since a credible threat of removal from office is a powerful incentive for sustained governmental attention to the public interest. Regular replacement of governments is not a guarantee of probity in government, as illustrated by well-chronicled maladministration in Western Australia in the 1980s (see Stone 1997). However, long periods of incumbency plausibly raise the risk of extensive maladministration or corruption. Thus the unbroken participation in government of the Christian Democrats in Italy between 1946 and 1994 or, within Australia, the National Party in Queensland between 1957 and 1989 was strongly associated with extensive governmental impropriety. A more recent example is the scandal-ridden last years of New South Wales (NSW) Labor's 16 years in office ending in 2011.

Two-sided competition for government in Australian jurisdictions for most of the time since around 1910, when the modern party system became established in Australia's parliaments, has produced alternation in office but with differences in frequency between jurisdictions (Moon and Sharman 2003, 250–53). In the period since 1910, numbers of alternations vary from a low of eight in Queensland to a high of 18 in Victoria, with four jurisdictions (WA, NSW, SA, Commonwealth) lying no more than two alternations from the mean (13). Alternations have tended to become more frequent on average, and hence average periods of incumbency have tended to decline, in the past half century or so. But differences between jurisdictions have persisted. Queensland has had only five alternations since WWII and one of these came after only two and a third years of non-Labor government between 1996 and 1998. Between 1989 and 2012 the Labor Party was in government for all but this brief period; following a National Party–Liberal Party coalition and National Party government from 1957 to 1989. New South Wales has also had five alternations, with a long period of Labor government from 1978, interrupted only by seven years of Coalition government between 1988 and 1995. At the other end of the spectrum, Western Australia has had nine alternations since WWII. Periods of incumbency in that State have been two to three electoral cycles, except for the one-term Tonkin Labor government of the early 1970s and the four-term Brand-Court Coalition government between 1959 and 1971. Such a pattern of alternation seems close to ideal, encouraging opposition to strive and government to avoid complacency, allowing major opposition parties to renew their personnel while also retaining some individuals with experience of government, and providing reasonable continuity in government while helping to prevent networks of influence between particular ministers and external interests from becoming entrenched.

CONCLUSION

The article presents a framework for comparing institutional opposition in parliamentary democracies. It began with a review Dahl's pioneering contribution, identifying the main causal factors in his analysis, concentration and competition, and tracing their relationships with his other characteristics. Dahl's key factors, incorporated into a six-factor framework developed in the article, were shown to be useful in distinguishing opposition in Australia. In a number of Australian jurisdictions, opposition is both more dispersed and more involved in power sharing, in particular through the exercise of power in the legislature, than is countenanced by the Westminster conception of opposition, which remains the dominant interpretive frame in Australia. In turn, these characteristics are associated with opposition actors' interest in strategies of legislative brokerage and with the legislature as a significant site for the encounter between opposition and government. However, all of these features of opposition in Australia are primarily, if not exclusively, a product of Australia's strong upper houses, with lower house government-opposition dynamics conforming more closely to the Westminster conception. Because lower houses are where governments are formed, they tend to dominate interpretation of Australian politics, with the distinctive and important politics of upper houses tending to be overshadowed. The third factor in the framework, goals or the intensity of disagreement with government, is also drawn from Dahl. It is suggested that it is now much less important, at least among first world democracies, for differentiating major parties of government and opposition in parliaments dominated by a small number of parties than it was in the mid-20th century. But it remains important as an influence on parliamentary relationships between opposition parties and between particular opposition parties and governing parties. The fourth factor, institutionalization, is probably an indicator of the influence of executive perspectives, and of the degree of common interest among large parties, in legislatures. While procedural privileges for the leadership of the main opposition party may assist in making the opposition more effective in the legislature, institutionalization seems at least as much about giving the opposition the capacity to project itself in the community as the alternative government. It was hypothesized that institutionalization is related to concentration and alternation – with a cartel of dominant parties making provision for their sabbaticals in opposition – but it was also suggested that there may be important differences in the nature and level of institutionalization between systems which are similar in these other respects.

The final two factors, size and alternation, are measures of the systemic impact of opposition. One of the major justifications of opposition is that it enhances the accountability of government. Large oppositions and oppositions which displace, or substantially displace, governments fairly regularly are arguably more conducive, other things being equal, to governmental accountability. Together, it is argued, these six factors identify key differences among oppositions which have major effects on the political systems of which they are part.

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Commonwealth oversight arrangements – re-thinking the Separation of Powers¹

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THE EMERGENCE OF STATUTORY OVERSIGHT BODIES

The Australian constitutional system of government is premised on a principle of accountability. Government should not be arbitrary and uncontrolled, but act in the public interest and according to the rule of law. Important accountability mechanisms established in the Constitution include elections, Parliamentary processes, and judicial oversight. A vital aspect of an accountability model is that an individual who feels aggrieved by an exercise of official power should have both a legal right and a practical opportunity to question whether a government official has kept within legal bounds and acted in good faith and impartially. This questioning must be done in an independent forum that is procedurally fair and that can effectively remedy any wrongful exercise of power. Until forty years ago we relied principally on the courts, buttressed by the doctrine of the separation of powers, to be the independent scrutiny forum that was accessible to individuals. Expectations changed, as it became apparent that courts were not accessible to most people, yet dispute resolution between the community and government was of growing importance. Far greater interaction was occurring between people and government, as the scale of government regulation, benefit distribution, sanctions and licensing grew. A flawed government decision could have significant and lasting consequences for an individual. As people relied more on government to provide assistance or approval, they developed higher expectations of government to be transparent, responsive and answerable. Parliament responded by creating a range of new and independent review agencies and mechanisms to review and scrutinise executive government processes. Two prominent examples at the national level were the creation of the Administrative Appeals Tribunal in 1975, to undertake independent merit review of administrative decision making, and the Commonwealth Ombudsman in 1976, to investigate complaints from members of the public about administrative action and to conduct own initiative investigations.

1 Presentation to the Australian Study of Parliament Group Annual Conference, Perth, October 2013. The ideas in this article are spelt out in greater detail in other published papers by the author – ‘Rethinking the Separation of Powers’ (2010) 38 *Federal Law Review* 423; ‘Administrative Law Evolution: Independent Complaint and Review Agencies’ (2010) 59 *Admin Review* 52 (with Ian Carnell); and ‘The Impact of Technology on the Administrative Justice System’ (2013) 75 *AIAL Forum* 11

Many similar oversight bodies have since been established to review the actions of Australian Government agencies. Examples include the Australian Human Rights Commission, first established in 1986 as the Human Rights and Equal Opportunity Commission, to promote human rights and combat discrimination, including by investigating and conciliating complaints; the Inspector-General of Intelligence and Security in 1987, to provide independent review (including through complaints) of the agencies that constitute the Australian intelligence community; the Privacy Commissioner in 1988, to monitor compliance by government agencies with privacy principles; the Inspector-General of Taxation in 2003, to review the systems established to administer Australian taxation laws; the Australian Commissioner for Law Enforcement Integrity in 2006, to investigate and detect corruption in law enforcement agencies; the Aged Care Commissioner in 2007, to review decisions concerning aged care services; and the Office of the Australian Information Commissioner (OAIC) in 2010, to review and monitor compliance with privacy and freedom of information laws (FOI). These oversight bodies were a new and radical method of receiving and resolving disputes between people and government. Importantly, the bodies mentioned are established by statute as independent bodies that are not subject to government direction, and they are headed by officers who have security of tenure on the conditions specified in the statute. They can investigate the administrative actions of government agencies, and have both the legal powers necessary to conduct an investigation and prepare a report, and the statutory protections and immunities required by investigation staff, witnesses and complainants. The range of investigation functions and methods that are utilised by the statutory oversight bodies has also expanded. In the 1970s the focus was upon individual dispute resolution – on reviewing the merits of an administrative decision contested by an applicant for review, or investigating the adverse impact of an administrative action upon a complainant. Complaint investigation and review of individual decisions is still a core function of most oversight bodies, but other functions are now used frequently to examine more broadly the integrity of administrative systems through which individual decision making occurs. Examples include record inspection programs, administrative audits, publication of decision making guidelines, public inquiries, and training and public education. Some of the statutory oversight bodies also have jurisdiction over private sector activity. The Ombudsman can investigate complaints against government contractors that provide services to the public; the Australian Privacy Principles administered by the OAIC extend to private entities that provide health services or have an annual turnover exceeding \$3 million; and the Human Rights Commission can investigate the actions of private businesses that provide goods and services to the public. This expanded public/private jurisdiction means that there is greater harmonisation in the conduct standards expected of all bodies that provide public services, and seamless dispute resolution options are available to the public.

COMPARING COURTS AND OTHER OVERSIGHT ARRANGEMENTS

Another way of understanding the scale and significance of these developments of the past forty years is to stand back and take stock of how they mesh with conventional theories of accountability and administrative dispute resolution. In particular, we need to ask whether the constitutional doctrine of the separation of powers continues to provide

an accurate and meaningful picture of how people question the exercise of official power. According to conventional theory, there is a three way division of functions between the parliament (as law maker), the executive (to administer the laws) and the judiciary (to hold the executive to account through adjudicating individual disputes about the legal correctness of administrative decision making). There is no direct place in this theory for the new oversight bodies. Clearly they do not fit within the parliamentary or judicial branches, so the tendency is to classify them as executive branch agencies, however, this is equally problematic. The oversight bodies are different from executive departments, in terms of

The inescapable reality is that the doctrine of separation of powers no longer provides an accurate picture of how scrutiny and accountability of government action occurs.

their role and statutory independence. They chiefly examine the legality and propriety of executive actions, not implement government policy or administer government programs. The inescapable reality is that the doctrine of separation of powers no longer provides an accurate picture of how scrutiny and accountability of government action occurs. In frank terms, the role of courts is not as extensive or prevalent as conventional

theory would suggest. The task of resolving people's disputes with government, and in the process holding the executive government to account, is now extensively discharged by independent bodies other than courts. Four points bear this out.

First, few people now turn to courts to resolve their disputes against national government action, except in relation to migration disputes. For example, in 2012–13 the Federal Circuit Court received only 22 administrative law applications against Australian Government agencies (.3% of its general caseload), as against 1,981 migration applications (28% of its general caseload). The Federal Court no longer maintains separate statistics on administrative law cases, apart from migration cases. In the same period, by contrast, the Commonwealth Ombudsman received over 18,000 complaints and inquiries, touching all areas of government. The remedies provided included a decision being changed or reconsidered (624 cases), a financial remedy (807), apology (559), action expedited (467), a better explanation (807), disciplinary action taken against an official (288) and a change to a law or policy (87). Similarly high numbers of people approach other statutory oversight bodies. For example, the OAIC caseload for 2012–13 comprised 18,205 phone and 3,142 written enquiries about privacy and FOI, 1,644 complaints, and 507 applications for merit review of FOI decisions. The Administrative Appeals Tribunal, which can hear appeals under more than 450 legislative instruments, received 6,176 applications for review in 2012–13.

Secondly, access to courts may become even more difficult for most people as a result of increases in court filing fees. It presently costs an individual \$515 to commence an administrative law action in the Federal Circuit Court, plus \$615 per hearing day and additional fees for interlocutory stages and the issue of subpoenas (the costs are roughly three times higher for corporations). Higher filing fees apply in the Federal Court – \$1080 for an individual to commence an action and \$4720 for a publicly listed company. The costs will be considerably higher for a person who obtains professional legal assistance or has to take time off work to attend court or other meetings. The high filing fees for

court proceedings reflect a clear government policy to discourage people from using conventional and formal legal processes to resolve disputes. Government has strongly promoted alternative dispute resolution, the legislation regulating court proceedings requires the parties to certify that they have taken genuine steps to resolve the matter before commencing litigation, and government agencies are also expected to negotiate and explore mediation and settlement options to avoid the need for a court resolution.

Thirdly, technology is changing the face of government, including dispute resolution. People prefer to conduct many of their transactions with government online – lodging tax returns, applying for benefits, obtaining information, applying for passports, accessing health advice and complaining about or disputing administrative decisions. This trend is being actively encouraged by government, through email protocols, web access portals and downloadable apps. This new model of communication and the expectations that underlay it may not fit easily with traditional practices of dispute resolution. Nowadays people generally prefer mechanisms that are online, responsive and cost free. When dealing with government they generally want a quick response that is short and clear, and with an open line of communication that allows ongoing dialogue and interaction. People may increasingly turn away from more formal and structured processes that require forms to be prepared, lodged and exchanged, fees to be paid, evidence to be assembled, and the case to be presented orally at a scheduled day in an adversarial setting that may also be a public hearing. In short, technology is changing everything and at an astonishing pace. It is hard to see that the conventional role and processes of courts will not be fundamentally altered by these changes.

Fourthly, the community now has broad and complex expectations of oversight and accountability mechanisms. At an operational level they expect an oversight body – whether a court, tribunal or ombudsman – to be able to resolve their individual claim or complaint in a prompt and inexpensive (and hopefully favourable) manner. At an institutional level many people expect oversight bodies to provide advice and guidance on legal issues and administrative processes. They also welcome their forthright contribution to public debate about executive accountability. Courts and adversarial tribunals have traditional expertise in undertaking individual dispute resolution. They prepare reasoned decisions that may distil important principles that can be a precedent in future cases. Judges and tribunal members also contribute occasionally to public forums, though usually professional gatherings. Individual case resolution is no less important for ombudsmen, commissioners and inspectors-general. Their higher caseloads mean that most matters are despatched quickly and routinely and are not highlighted or made individually accessible in the work of the oversight body. On the other hand, it is not uncommon that some cases are selected for greater elaboration or prominence, whether as a case study, a published decision or in a special report. More importantly, however, the newer oversight bodies are relying more heavily on other publication measures to convey their work and to promote good administration and executive integrity. The OAIC, for example, publishes extensive guidelines on the FOI Act and the Privacy Acts, together with a range of other manuals, policy statements, fact sheets and business resources. These are supplemented by reports, submissions, speeches and media statements.

It is clear that this is the material that the public is most interested in accessing. Website visits to the OAIC will exceed 1.6 million this year, and are increasing by up to 20% per year. Generally, too, this material is written in a language and style that makes it more easily

understandable by the community (unlike, for example, the current approach in many administrative law cases of crafting decision-making principles under the opaque heading of ‘jurisdictional error’). In short, the community welcomes the advent of oversight bodies that can resolve individual disputes, but can also provide comprehensible guidance and can influence government in broader ways.

FITTING CONVENTIONAL THEORY TO NEW OVERSIGHT ARRANGEMENTS

The public has shown its understanding of and support for new oversight and accountability arrangements. Are other actors in the system responding in like fashion? The short answer is no. In law schools and legal scholarship the focus is still very heavily on judicial review, infused at times with value-laden distinctions between ‘courts and non-courts’, ‘hard law and soft law’ and ‘hard-edged remedies and soft remedies’. There is scarcely any acknowledgement that the administrative law jurisprudence of federal courts mostly deals with migration visa and asylum claims and may not sit comfortably in other areas of Commonwealth decision making dealing with areas such as benefit distribution, commercial regulation, professional accreditation and native title. This is not to question either the respect that courts hold in Australian society or the importance of the judicial role in holding government to account. The tradition of an independent judiciary that can make a conclusive ruling about the legality of government action is an integral and vital feature of Australian democracy and the rule of law. There is nevertheless a tendency to exaggerate the practical significance of the judicial role. This is illustrated by a recent observation of the Hon Marilyn Warren, Chief Justice of Victoria:

[W]hen the knock comes on the door late at night, when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads you on the quality of the product being bought, when a State or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.²

Doubtless the judiciary could provide an impartial review and effective remedy in each of those examples, but courts are unlikely to be the first port of call for most people. It is questionable even whether many people would go directly to a lawyer in many of those instances (except perhaps for release from custody). The more likely scenario is that an aggrieved person will seek assistance from a website or a complaint handling unit or Ombudsman. Indeed, in a digital age the possibilities for resolving a dispute are extensive, and embrace newer social media options such as tweeting a complaint, crowd sourcing a grievance or creating a new website to draw attention to an issue.

A second example of a deep-rooted judicial reluctance to adjust traditional theory to incorporate new developments in oversight and accountability was a paper by the Hon. Wayne Martin, Chief Justice of Western Australia.³ The paper trenchantly criticised the

2 The Hon Marilyn Warren AC, ‘Does Judicial Independence Matter?’, Victoria Law Foundation Law Week Oration, 27 May 2010

3 The Hon Wayne Martin AC, ‘Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government’, Whitmore Lecture 2013, 1 August 2013.

notion that statutory oversight agencies could be collectively regarded as a fourth branch of government, labelled an integrity branch. Much of the paper is an analysis of the role, work and legislative arrangements of WA statutory agencies, with some criticism of how they have portrayed their 'integrity' function. In comparing courts and statutory agencies, the Chief Justice convincingly explains that it is wrong to elevate the latter to the same constitutional plane as courts. The newer agencies do not fit easily in the constitutional matrix of checks and balances that applies to the legislature, the executive and the courts; and it is misleading to suggest that there is mutual accountability between, say, the judiciary and the Ombudsman.

The paper goes further:

The integrity agencies have an important role to play in contemporary Australia. However they are and must remain firmly within the executive branch of government, subject to the scrutiny of Parliament, and to laws passed by the Parliament and enforced by the courts. They must apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values.

With respect, this criticism misconstrues the thinking that has propelled 'fourth branch theories' of government. The objective has not been to accord a special constitutional stature or immunity to the statutory oversight agencies, nor to suggest that they are transposable with courts. The objective is rather to emphasise that fundamental changes have occurred in government and society that require us to update our constitutional thinking. The notion of a fourth or integrity branch is designed to register that courts no longer stand alone in checking and curbing government power. Statutory oversight agencies nowadays perform a major role in reviewing and scrutinising government decision-making, cementing public law values in government processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved. Labelling the statutory agencies as a 'fourth branch' has been a convenient way of stimulating debate on the evolving accountability landscape. Admittedly there are difficulties with this theory, because of the diversity of bodies that may qualify for inclusion, the differences between them, and unresolved questions about their relationship to each other and the Parliament. For those reasons other theories have also been propounded – for example, that we should regard all of them (including courts) as forming part of a 'national integrity system' that controls executive action and promotes integrity; or that we should broaden our concept of the 'justice system' to include all bodies or mechanisms that play a shared role of resolving disputes arising between people and with government.

The unifying theme in these labels is that we need a new constitutional theory to explain the more complex dispute resolution and accountability framework that has evolved over the past forty years. It is highly probable, if we were adopting a constitution afresh, that bodies such as the Auditor-General and the Ombudsman, and principles such as privacy protection, freedom of information and integrity in government, would be included within the constitution. While it is not so easy to change the text of the constitution, constitutional theory and doctrine should not be as resistant to change. The doctrine of the separation of the powers, unless questioned or 're-thought', will become a barrier rather than a key to understanding constitutional accountability.

Closing the gap: the case for a Commonwealth Anti-Corruption and Misconduct Commission

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Commonwealth politicians and public servants want us to believe they differ from other mortals. They claim to be so incorruptible — unlike their state and local government counterparts — that they don't need a watchdog. Even suspect state officials, it seems, are immune to temptation once they take a job in Canberra. The states either have, or are getting, formidable watchdogs to reduce the risk of corruption and misconduct among their officials. But the Gillard government in 2012 rejected a parliamentary committee's recommendation that it should look at establishing a similar federal body. The commentators focused more attention on the lesser issue of whether federal politicians need a code of conduct after the alleged misdeeds of Labor's Graig Thomson and the Liberal's Peter Slipper. The general consensus seems it be that they don't need oversight from a corruption body because 'everyone knows right from wrong' — a not entirely reassuring claim in the circumstances. Although it was never clear why Australian Federal Police (AFP) was less susceptible to bribery than its state equivalents, the Howard government only established the Australian Commission for Law Enforcement Integrity (ACLEI) in 2006. In 2007 the government confined the commission's initial targets to the AFP and the Australian Crime Commission with a budget of just \$2M and a staff of 9. Customs and Border Protection was added in 2012. While Labor's justice minister, Jason Clare later added the Quarantine service, AUSTRAC (the money tracking or anti-money laundering agency), CrimTrac (the body that facilitates information sharing between various police and security) and DAFF biosecurity. Until the ACLEI is properly funded, there is no way it can conduct the resource-hungry surveillance, telephone intercept and other operations essential to containing corruption at the law enforcement level. However, Clare didn't accept a recommendation from the joint parliamentary committee on the ACLEI when it was chaired by the then Labor backbencher Melissa Parke, that the Commission also cover the tax office and the immigration department. Yet both offer serious opportunities for corruption. In immigration, the minister has an unusual degree of discretion about individual cases.

It would be brave call to claim that a former immigration minister and supporter of Griffith's 'Calabrian Mafia', Al Grasby, was immune to bribery. After the murder of the Griffith anti-drug campaigner, Donald Mackay, Grassby tried unsuccessfully to have read under parliamentary privilege his false assertion that Mackay's family was responsible, contrary

the solid grounds for believing the Honoured Society order the hit. In February 2012, the government bluntly rejected the ACLEI committee's most important recommendation — that it consider establishing an anti-corruption commission to oversee all commonwealth public sector bodies. The committee's final report quoted the then Queensland premier Anna Bligh's reflections on that state's approach to integrity when it established what is now its Crime and Misconduct Commission in the aftermath of the Fitzgerald inquiry into deep rooted corruption. Bligh said, 'Despite the inevitable embarrassment from time to time, I would much rather a system which is not afraid to pick up the rock and discover the ugliness underneath than one that is content to . . . assume that an undisturbed rock is a sign of good health'. The committee said, 'There could be a lot of 'undisturbed rocks' that need to be overturned if the public is to be fully assured that integrity in the [federal] public sector is being properly maintained and safeguarded'. The Greens leader Christine Milne subsequently resurrected the committee's idea for wide ranging commonwealth integrity commission, but to no avail. The government's formal response to the committee's recommendation took the opposite approach — 'On the available evidence, there is no convincing case for the establishment of a single overarching integrity commission'. The answer assumes the existing system for detecting corruption works well.

However, with rare exceptions, nobody has taken a hard look at whether corruption or misconduct exists in a wide range of departments, agencies and ministers' offices that deal with decisions involving areas such as defence procurement, immigration, communications policy, overseas aid, foreign investment, mining development, infrastructure contracts, tax and favoured treatment for the finance and manufacturing sectors. Major Australia mining companies, or their employees, have been investigated for alleged corruption in overseas countries— resulting in some convictions. Big international arms manufacturers have paid bribes overseas. There is no compelling reason why that would not have done so in Australia. A senior politician in the 1970s was later reported to have accepted an expensive boat from a foreign company wanting to win a major contract. The donor did not win the contract. Normally, if you refuse to look, you don't find anything. In contrast, the state integrity commissions — apart from acting as a deterrent — have exposed corruption that eluded police. Yet senior journalists, who've never looked much beyond the daily drama of federal politics, assert there is no corruption at the commonwealth level, because no one has ever been convicted. Never mind that this is not correct. The *Melbourne Age*, not the AFP, unmasked the bribery scandal that engulfed two Reserve Bank subsidiary companies exporting currency-printing technology. The *Age*'s articles finally prompted a complacent RBA to call in the AFP. It found what had eluded RBA's own inquiries, namely, that corruption offences had allegedly occurred. The court processes are not finalised. Although the department of

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foreign affairs and trade (DFAT) approved all AWB Ltd contracts to sell wheat to Saddam Hussein's Iraq, it was the UN that uncovered that the company was paying kickbacks to the regime. Neither DFAT nor the AFP detected what was happening.

The existing system mainly relies on the AFP to unearth corruption at the federal departmental and ministerial level. Given the prevailing view at the highest levels of federal politics that corruption is not a problem, the AFP doesn't have strong incentive to take a good look—a partial exception being the RBA case after the bank belatedly invited it to do so. As police don't have the same distance from their political masters as independent statutory commissions, they may sometimes appear inhibited about investigating politicians. Until the ACLEI recommended a change, the AFP's standard practice had been to inform the prime minister or the justice minister of 'politically sensitive matters' involving members of parliament. In one example, the AFP told the then PM John Howard of its intention to execute a search warrant the following day on a Liberal backbencher's office. The Integrity Commissioner Philip Moss found that no one 'tipped off' the backbencher, but recommended the AFP differentiate between investigations into MPs and others when informing ministers of its activities. Marian Wilkinson's book *The Fixer* gives a detailed account of the background to an AFP inquiry involving the then federal minister Graham Richardson. The AFP accepted the evidence of Queensland's then Criminal Justice Commission that Richardson had been supplied with prostitutes by a Gold Coast businessman whose partner was attempting to win commonwealth government contracts. But the AFP found no reason to investigate further, because it said being supplied with prostitutes is not a crime. It can be, depending on the purpose.

A subsequent judicial inquiry by Russell Hanson QC said it would have been better if the AFP had tried to find why Richardson had been supplied with the prostitutes. He noted that the AFP's chief investigator had reported to his superiors that he set out to lay many of the CJC's allegations 'to rest once and for all'. The AFP has been given new powers since 2001, and many more staff, to gather security intelligence—a job previously the preserve of ASIO. At the time, an Inspector General, as well as special parliamentary oversight committee, scrutinised ASIO and five other intelligence bodies. Nothing similar applied to the AFP until after 2006.

The case of Mohamed Haneef, who was helping overcome the shortage of doctors in Australian hospitals, underlined the continuing dangers of combining intelligence gathering and expanded police powers in the one body. The AFP displayed a far more disturbing mix of incompetence, zealotry and disregard for the rights of an innocent man than any corruption commission. To its credit, ASIO advised the Howard government from the start that there was no reason to suspect Haneef of supporting terrorism. Yet the government continued to let the AFP have its head, and ministers, such as Kevin Andrews, were adamant the AFP was right. Unfortunately, the Rudd Government dumped its 2007 election promise to set up a proper judicial inquiry into the Haneef debacle.

As far as I am aware, the Inspector General of Intelligence and Security has not suffered any undue interference because of parliamentary oversight. But there will always be a risk that MPs will seek to pre-judge the outcome of an investigation by one of their own committees.

After the 2003 invasion of Iraq, the Parliamentary Joint Committee on ASIO, ASIS and DSD investigated the Intelligence on Iraq's Weapons of Mass Destruction (WMD). One committee member Kim Beazley publicly stated before it started that it should not criticise any of the Australian intelligence agencies because they all did a good job. This Committee, thanks to its Chairman, the late Liberal member David Jull, and its staff, did a good job. It rightly criticised the performance of the Office of National Assessments, which basically supported the John Howard's repeated claim that the government 'knew' Iraq possessed WMD at the time of the invasion. It also rightly praised the Defence Intelligence Organisation, which concluded that IRAQ had no WMD that could threaten other countries. Examples may exist of political attempts to muzzle state anti-corruption watchdogs. As far as I can recall, that has mainly entailed trying to prevent their establishment in the first place. Successive federal governments have been much more successful than their state counterparts in this regard. Yes, there can be dangers in having permanent watchdogs with the powers of a royal commission, unless there are checks and balances to prevent abuses of power. But a core reason not to rely on one-off royal commissions to investigate allegations of corruption is that governments who fear the outcome will not set one up.

With the watchdog approach, the original legislation, parliamentary oversight committees, counsel for witnesses, and ultimately the courts usually provide the checks and balances. Critics need to understand that these watchdogs are not meant to behave as courts. Nor is their role confined to criminal behavior. They can cover misconduct that stops short of criminality and also act as constraint on malfeasance by other public officials. Corruption watchdogs, rightly, can't send anyone to jail, nor fine or otherwise punish them; beyond making a finding of corrupt behaviour or misconduct. Only DPPs can launch prosecutions; not watchdogs. Normally, self-incriminating evidence can't be later used in court. Despite understandable public concerns that blatantly corrupt politicians may avoid a jail sentence, this safeguard is worth maintaining. Perhaps there should be greater leeway in some of the grey areas surrounding the use of subpoenaed documents and so on. However, traditional legal protections are important. Which is why I find it disappointing that most parliamentarians pay so little attention to areas that don't directly affect them, such as the abolition of these protections for sports people. Labor's Justice minister Jason Clare succeeded in passing new legislation giving the Australian Sports Anti-Doping Authority powers not available to police in criminal investigations. The law now lets ASADA to deny its 'targets' the long established 'right to silence'. Suspected murderers, major drug dealers, paedophiles, bank robbers etc don't have to answer questions during police interrogations. But ASADA can compel sports people to answer questions about whether they, or other players, took substances such as supposedly 'performance enhancing' peptides. It is far from clear that peptides enhance performance. More importantly, taking them does not break the criminal law, even if violates various sporting codes. However, in language not normally used by a justice minister about a non-criminal investigation, Clare said the government had given ASADA the powers and the resources it needs to 'hunt these people down'.

Corruption commissions can compel answers, but the evidence gained can't be used for subsequent charges. In contrast, ASADA can conduct the investigation, compel answers and, in effect, punish those it finds guilty with bans on players earning their living. In some

case, this amounts to a fine if over \$1 million before lost endorsements are included. White collar criminals often severely hurt other people, but are fined much less. Compared to anything ASADA may achieve, there is an entirely different dimension to the inquiry the NSW Independent Commission Against Corruption concluded on July 31. ICAC found that two former NSW Labor ministers Ian Macdonald, Eddie Obeid, and several wealthy businessmen, had engaged in corrupt conduct in relation to a coal mining tenement covering rural properties owned by the Obeid family. Macdonald, while mines minister, issued the mining exploration lease. ICAC said the Obeid family stood to make tens of millions of dollars from the sale of their farming properties — four times their market value— and had also received \$30 million in relation to the lease. Another \$30 million, and potentially much more, was due to follow. As well as recommending that the DPP examine possible charges, ICAC said it had provided relevant information for possible action to the NSW Crime Commission, Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Stock Exchange. ICAC's hearings gave the public a detailed insight into how the NSW Labor Party let a factional boss effectively control a state government, including the appointment and removal of premiers. ICAC showed large sums of money passing through Obeid family companies and trusts. Nevertheless, Obeid's pecuniary interest statements during his 20 years in parliament showed his MP's salary as his only income. Before entering parliament, Obeid favourably impressed Graham Richardson, Labor's state secretary in the late 1970s and early 1980s, with his fund raising and branch stacking abilities. Richardson was instrumental in Obeid gaining a seat in the upper house, which he held for 20 years. ICAC's public hearings and findings have shaken the Labor's parliamentary rump in NSW into promising much tougher internal standards, plus a call for ministers to publish their diaries online and disclose all meetings, phone conversations and interactions with lobbyists or private companies. However, there is no hint that the federal parliamentary Labor party, nor the Coalition, will now embrace calls to set up an anti-corruption and misconduct watchdog such as the states have.

Developing parliament's oversight capacity through MPs' professional development¹

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INTRODUCTION

In parliamentary democracies, a parliament's oversight capacity is a key factor affecting the functioning of a political system as a whole. The parliament is the apex institution through which the people determine the rules and standards applying to individual members of a community, the executive government and the public and private sectors. A parliament also plays a central role in determining the relationships that exist within a particular jurisdiction and beyond. In parliamentary democracies that adopt the Westminster system of responsible government, the executive is required to account to the parliament for the discharge of executive responsibilities. The executive's compliance with rules and standards relies on a culture of compliance, detection of breaches and the use of sanctions for wrong doing. A culture of compliance reduces the transaction costs of social exchanges, leaving more resources available to achieve the goals of the socio-political systems. Accordingly, the functions of any democratic parliament should include oversight in the form of feedback loops to the parliament, the executive and the people. It needs to include the collection and analysis of information, which monitors the executive's compliance with rules and standards, processes to detect breaches and the capacity to apply sanctions to those who fail to comply. These functions require both institutional and individual capacity to enhance accountability and a desire to do so. This article reports on the findings of an international study into formal induction and further development programs in a range of countries. Information through surveys and interviews was collected from elected members of ten national parliaments and those responsible for conducting training programs. Although oversight is generally accepted as a key parliamentary function, the research found that MPs' perceptions of their own and the parliament's responsibilities in this regard were less definite. Indeed, induction and training programs for MPs can be considered weak in relation to making MPs aware of their oversight responsibilities. The authors argue that it needs to be enhanced and make some suggestions about how this might be achieved.

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DEMOCRATIC SYSTEMS OF GOVERNMENT

Parliamentary democracies can be understood as complex, evolving socio-political systems (Mittleton-Kelly, 2003) in which the parliament's oversight capacity is a key factor affecting the functioning of the system as a whole. Without oversight, there is no accountability. For contemporary democracy to fulfil its promise of responsive rule (Saward, 1998), accountability is essential. Oversight and its distal outcome – public accountability – afford voters the opportunity to assess the performance of the government and hold it accountable via the electoral process. Free and regular elections allow citizens to elect, re-elect or vote against parliamentarians based on their performance and governance regime (Adsera, Boix and Payne, 2003). Indeed, cross-national, longitudinal research conducted by Adsera, et al. (2003) found that accountability (the presence of free and regular elections and well-informed citizens via a free press) explained between one-half and two-thirds of the variance in the levels of governmental performance and corruption.

The parliament is the apex institution within the governance system. It is the medium through which the people determine the rules and standards applying to individuals, executive government, the public and private sector and other organisations. It also lays down formal relationships within and across its borders. Commenting on Westminster parliaments, Griffith (2005) discusses three forms of accountability, which can be differentiated according to whom the accountability is owed. The first is *legal accountability* where the behaviours and decisions of ministers and public servants, via administrative law, can be subject to judicial scrutiny (i.e., accountability is owed to administrative law). The second is *political accountability* where the doctrine of ministerial responsibility requires ministers and government officials to be accountable to their respective Parliaments. The final form of accountability identified by Griffith (2005) is *administrative accountability* where the parliament, working through its various committees and independent watchdogs (Auditor General, Ombudsman, anti-corruption bodies etc.) hold the executive government accountable for any corruption, maladministration and waste of public money.

The executive's adherence to rules and standards relies on a culture of compliance, detection of breaches and sanctions for wrong-doing. A compliance culture reduces the transaction costs of social exchanges – in this case between the parliament and the executive – leaving more resources available to achieve whatever are the desired priority goals of the socio-political system.

This is consistent with the conservation of resources theory (COR; Hobfoll and Lilly, 1993; Halbesleben, Harvey and Bolino, 2009), which is a human resource management framework that explains how resources operate in individual and social systems. Resource theories such as COR are grounded in the notion that a minimally sufficient resource threshold is required for acceptable performance, with increasing difficulty occurring as demands outstrip the available resource pools. According to this theory, individuals, groups, organisations and institutions strive to attain, retain and protect valuable resources. This is particularly the case during times when there are few internal or external threats or demands. For institutions such as parliaments, COR theory suggests that resources contribute to further resource

gains and provide a reservoir that can buffer them in hostile circumstances or allow them to refocus resources to achieve other goals desired by these institutions

Two central tenants of COR theory are that resources are required for adaptation and change and that they must be optimised for adaptation. Essentially, there is an asymmetry between the impact of resource loss and the impact of resource gain, with the former significantly outweighing the latter. However, individuals, organisations and institutions possessing greater resources are less susceptible to resource depletion, more resilient to external threats/demands and more capable of utilising a wider repertoire of behavioural and strategic responses than their more challenged counterparts (Alvaro, Lyons, Warner, Hobfoll, Martens, Labonte, and Brown, 2010). The increasingly complex environment in which parliaments are situated, coupled with the moral hazards faced by executive government, the opposition and individual members of parliament, and where the negative consequences of their decisions may be distal and manifold, makes attaining and protecting resources essential. Accordingly, a parliament's functions should include oversight in the form of feedback loops including the collection of information that monitors the executive's compliance with rules and standards, processes to detect breaches and the capacity to sanction the executive for breaches.

These parliamentary functions require both institutional arrangements to enact democratic control and individual capacity in terms of monitoring the decisions, omissions and commissions of powerful actors in the executive, in particular. Moreover, according to COR theory, these functions (i.e., resources) should be proactively developed and nurtured during stable/munificent times, rather than reactively deployed during turbulent/hostile circumstances, so that they can be utilised for maximum benefit (Halbesleben, 2006). By institutional capacity we refer to the structures, resources and organisational culture required to oversee the executive. These complement and interact with each other. The structures are largely the constitutional environment, which the authors refer to as the legal infrastructure, including for example constitutions, statutes (e.g. audit acts), rules of procedure (or standing orders), resolutions, and rulings by the presiding officers. The resources clearly include physical resources (e.g. buildings and equipment), human resources including support and expert staff with relevant knowledge, skills and abilities (particularly in the sphere of ethical competence and good governance) and budgets for travel related to parliamentary functions. The third element is the culture affecting the attitudes and behaviour of MPs.

The interactions are familiar. The legal infrastructure establishes rules that enable political actors to perform their functions and places limits on what they do and how they do it. It creates boundaries within which cultures develop. These cultures are dynamic, adapting and changing according to political circumstances and the styles of influential personalities. Within the constraints of the legal infrastructure, cultures influence how and to what extent: individual non-government MPs and parties press for accountability; rely on newsworthy media 'grabs'; ministers respond or stonewall; and whether government backbenchers become mere foot-soldiers.

The independence practiced by independent officers of the parliament, such as the Auditor General, Ombudsman and anti-corruption commissions, must give effect to their legislated independence. Likewise, the resources determine the capacity of parliamentary committees and independent officers of the parliament to give effect to their oversight roles. Parliamentary committees must have sufficient staff and other resources to conduct research including meeting away from the parliament and holding public hearings if they are to scrutinize the executive and discharge effective oversight. Likewise, the above-mentioned independent officers of the parliament must have sufficient staff and the powers needed to investigate and report on government performance. The legal infrastructure, resources and culture are each inter-dependent, key elements of the parliamentary subsystem within the system of government.

The individual capacity of each MP is a key human resource required by the parliament as a fundamental part of its institutional capacity. The capacity of MPs is this article's central concern. Its premise is that the ability of members of a parliament to support and discharge parliament's oversight function affects its ability to perform its oversight role effectively. This is supported by the human resource development and management literature (Wexley and Latham 1991, Boxall and Steenveld 1999, Delery and Shaw 2001, Boxall and Purcell 2008, Boxall and Purcell 2011). Whilst that literature is largely derived from the study of management in private and public sector contexts, it is a useful framework when analysing and evaluating the issue of MPs' knowledge, skills, attitudes and abilities and how they can best learn and enhance those skills.

Many parliamentary oversight functions occur through parliamentary committees. The capacity of committees to perform these functions effectively is largely contingent on the knowledge, skills and abilities of individual committee members. Whilst the authors recognise that parliament, the legal infrastructure and parliamentary culture are important, this article is more interested in human resource matters, which are crucial to an oversight function.

RESEARCH

This article adds to research findings reported previously (e.g. see Coghill, Holland, Kinyondo, Lewis, and Steinack (2012), Coghill, Donohue et al. (2008), Coghill, Donohue, Holland, Lewis, Neesham, Richardson and Rozzoli (2009), Neesham, Lewis, Holland, Donohue and Coghill (2010), Coghill (2012), Coghill, Lewis and Steinack (2012). They arise from an international study of formal induction and further development programs for MPs in representative countries (Australia, Canada, Ethiopia, Indonesia, Jordan, Marshall Islands, Papua New Guinea, Romania, South Africa, Timor Leste, Tonga, United Kingdom, Uruguay, Vanuatu, Vietnam). These countries were chosen because they include established and newer democracies, parliamentary, executive presidential and hybrid models, and a range of geographic regions. The focus of the research was on the role of parliaments in producing or facilitating such programs. It examined, among other things, the parliamentary function of scrutiny, also referred to as oversight.

A small number of previous studies into education and training programs for MPs have been reported. Among the earliest was Sawicki's research on the situation (as it was then) in Poland (Sawicki, 1993). Rush and Giddings investigation into the induction of members of the United Kingdom's (UK) House of Commons (1992 and 1997) was largely concerned with practical matters that concerned MPs. However, they did report that the induction programs made reference to the scrutiny of European legislation and to MPs' accountability for their own entitlements.

Queensland Speaker Hollis reported in 2004 that the unicameral parliament provided a comprehensive induction seminar for newly elected MPs, regular information sessions for Members and a Members' Information Manual. The two day induction seminar included practical matters, a mock sitting, sessions dealing with ethics, a briefing by the Integrity Commissioner and advice on avoiding workplace harassment (Hollis, 2004).

A comparative perspective on a number of induction programs was published in *The Table* (a journal published by the Society of Clerks-at-the-Table in Commonwealth Parliaments) (The Table 2006). Those programs appear to have been overwhelmingly concerned with practical matters affecting the individual rather than focusing on knowledge and skills that could enhance the parliament's scrutiny role (Rush, 2000).

In 2007, the Inter-Parliamentary Union produced a draft program for members in advance of the first ever Timor Leste election (June 2007). Because of this somewhat unique circumstance the program had to be broader than for an already functioning parliament. In addition to orientation, it offered a series of sessions dealing with the wide range of the responsibilities and policy areas MPs were likely to encounter (Inter-Parliamentary Union 2007).

Fox and Korris (2012) reported on the induction activities offered to UK MPs elected in 2010. Although the induction program was comprehensive, overall attendance by MPs was disappointing. While almost all new MPs attended the '... unique briefing meeting in the Commons Chamber' (p566) attendance at other inductions sessions was less than optimal. This was despite political parties' 'pre-election commitment to encourage their new Members to attend the sessions once they had arrived at Westminster'. As Korris and Fox go on to explain this 'did not actually translate into any noticeably significant attendance levels' (p. 562). They also lamented the absence of ethics from the program. They explained that there had been a 'session that focused on the budget and financial scrutiny process' (p. 570) but made no reference to any on scrutiny as it relates to oversight.

In another study Johnson and Nakamura (1999 p.4) noted that MPs' perceived oversight as 'generally synonymous with scrutiny'. It 'involves monitoring executive activities for efficiency, probity, and fidelity'. The variations between parliaments use of these terms largely relates to the description of the function rather than rejecting it as an expected task.

In the research conducted for this article (referred to earlier), it became evident that MPs and parliamentary staff used terms such as 'scrutiny', 'oversight', 'parliamentary control' and 'holding the government to account' to classify oversight functions of the parliament. As one interviewee explained:

One of the things that they tend to do is to, very often they will just decide that they're going to be a very good representative, and they become a kind of ombudsperson for the constituency and they help them navigate the various bureaucracies at various levels, and so forth. And in that sense, they play a good kind of social worker role. But they're not really doing anything in terms of holding the government to account. Because that's a whole other exercise. And one I think that really frankly the parliament does rather badly. (Interviewee CA 5, para 21) (Coghill, Holland, Kinyondo, Lewis, and Steinack, 2012, p. 64)

This explanation indicates a somewhat indistinct understanding of what oversight means to MPs and the parliaments and individual parliamentarian's obligation in this regard. The use of more concise terminology may help to overcome this vagueness.

FINDINGS

Although oversight functions are generally accepted as key functions of the parliament as an institution, the perception of MPs' as to their own functions was less definite. Representation

The research findings indicate many MPs are ill-equipped at election to meet the parliament's human resource needs and that parliaments generally perform poorly in supporting MPs to learn and develop the knowledge, skills and abilities required by parliaments to enable them to undertake their oversight role in an effective manner.

was highly rated but bifurcated. On the one hand it was perceived as acting as a 'trustee' when deliberating and voting on legislation. On the other hand it was seen as taking up constituency grievances. Legislating was also recognised as an obvious major role but not so scrutiny or oversight. The latter was not identified strongly by MPs. Overall, induction and training for MPs was highly variable between parliamentary chambers in relation to their oversight responsibilities and that of their MPs. In some countries, such as Ethiopia, MPs were highly aware of induction and training programs having emphasised scrutiny and oversight. In contrast, and

despite an extensive induction program available to the very large number of new MPs elected to the House of Commons in 2010 (referred to above), one interviewee, when asked about the scrutiny/oversight role of the parliament, explained that:

Again, I think that's all done very informally. I think that'd be a case of learning on the job in this parliament. The best example there would be the select committee system, which for scrutiny, you could if you wished to go and seek guidance on how does a select committee work and there are, for example, various bits of written information about that. In fact, there's a compulsory element there because you have to sign a certain piece that says, 'I have understood the rules of select committees'. But again, once you've had that little bit of information, you just go and suck it and see and make sure you seek out experienced role models for that (UK interviewee 550048).

In Australia, all MPs newly elected to the House of Representatives in 2010 participated in an induction program conducted over one and a half days. However, it seems that any mention of scrutiny or oversight made little impression as it was not mentioned by MPs as an area of importance in the program. The lack of importance MPs attached to these responsibilities most likely reflects the priority given to them in the induction program. As the Department of the House of Representatives implied, it would have received only superficial reference. Future induction programs need to ensure that oversight functions receive a greater priority and that the same applies in all other education and training programs for MPs.

In the case of committee roles, induction is often handled at the level of each committee and consequently the pace at which it is offered provides for a thoughtful learning environment. This approach may allow for a more effective induction program, however it also points to a lack of uniformity in the education and training of committee members, which could produce less than optimal training programs in some instances.

The research findings indicate many MPs are ill-equipped at election to meet the parliament's human resource needs and that parliaments generally perform poorly in supporting MPs to learn and develop the knowledge, skills and abilities required by parliaments to enable them to undertake their oversight role in an effective manner. Much of the knowledge, skills and abilities needed for effective parliamentary oversight are not ones an executive would necessarily be keen to encourage. It is a rare government (regardless of its political leaning) that seeks vigorous scrutiny by opposition MPs. Parliamentary committees, in particular, could assist in improving oversight though their scrutiny and good governance remit. Committees are capable of assisting governments and parliaments to address more difficult and complex problems, however, to do so, they need to be properly resourced and their members adequately trained.

Given the 'wicked' policy-related issues that confront governments and the opposition, it is becoming increasingly important for parliaments to assert their separation from the executive and take a lead in developing and offering more effective induction and professional development programs. There is often a gap of at least a few weeks between the election of a new parliament and the commencement of sittings. This creates an excellent opportunity for a comprehensive induction program to be offered to newly elected MP and for updated education and training for returning MP. A more comprehensive induction program should include the elements that bear on the oversight function of parliaments and individual MPs. This needs to include the basics, as earlier research by Indra found a remarkable ignorance of the Auditor-General's role and the appropriate relationship the office should have with the parliament, government and individual members (Indra, 2005).

Parliamentary privilege is not usually associated with a parliament's oversight role. However, it does offer MPs the right to raise matters without the risk of litigation and it is expected that they will do so in a considered fashion and not for party political advantage. Education in the responsible use of parliamentary privilege could assist parliaments in exercising their oversight functions and raise the awareness of parliamentarians with regard to behaviours

that could lead to a charge of misconduct in public office. It is an area that is worthy of further attention in future induction programs.

Fundamental to an MP's parliamentary role is the ability to recognise the legal principle that parliamentarians are obliged to act in the best interests of the jurisdiction they serve and not their personal interest or the interests of lobbyists, business associates, friends or family. A more complex obligation, and one that is likely to be challenged by some parliamentarians and political scientists, is the obligation for MPs to put the interests of their electorate, the parliament and the geographical jurisdiction they are elected to represent ahead of political party interests. Given what Doring describes as the 'rather ubiquitous power of the whips' and the usually strong cohesion of political parties *vis a vis* the majority of parliamentarians, this could prove to be near impossible to achieve. However, that does not mean that the topic should be excluded from education and training programs.

Along with these obligations, is the concept of a fiduciary duty that MPs owe to members of the community. This relates to their responsibility to discharge a public trust. In Australia, these are not regarded as justiciable. Even though the United States of America (USA) does not adhere to the system of responsible government, it provides valuable signals for other parliaments. For example, a number of state courts have recently upheld atmospheric trust litigation, ruling that state governors and legislators are obliged to protect the atmosphere from pollution (Our Children's Trust, 2013). The experience in the USA has some parallels in Iceland, where the Court of Impeachment convicted a former Prime Minister for negligence whilst in office (Neate, 2012). Whilst these two examples do not relate directly to the parliament's role, they do illustrate the complexity of the system of government and the need to take these complexities and the other issues raised in this article into account when designing training programs for future parliamentarians.

Complementing and underlying these considerations is the necessity for ethical competence training throughout the membership of any parliament. The failure of even a small proportion of MPs to behave ethically can jeopardise the integrity, reputation and legitimacy of the institution of parliament and undermine its scrutiny/oversight responsibilities. The importance of such training has been recognised by the Hansard Society. It recommended mandatory scrutiny training for MPs in its report *The Challenge for Parliament: Making Government Accountable* (Hansard Society Commission on parliamentary scrutiny, 2001).

Parliaments and parliamentary staff are strongly divided on whether they should assist in training MPs to enhance their competencies when applying moral values to the identification and resolving of ethical dilemmas. The arguments against such a role include important pragmatic concerns about inadequate skills to deliver programmes intended to develop ethical competence. Another consideration relates to concerns about whether parliamentary staff should be telling MPs how they might best behave, especially about issues which fall into the ethical dilemma category. However, Australian state parliaments such as Queensland and Victoria have delivered such programmes, as have a number of foreign national legislatures. The authors maintain that training in helping to solve

ethical dilemmas is a legitimate role for parliaments and one that they should take up in defence of the interests of the institution and the system of government and governance more generally.

CONCLUSION

The following offer some suggestions for enhancing parliamentary oversight by enhancing MPs' capacities to undertake their role in a more considered and effective manner. First, the authors argue that substantial induction and professional development programs for MPs are a legitimate and necessary role of a parliamentary institution if it is to exercise its oversight responsibilities effectively. Continuing professional education is now common-place, if not a standard condition of professional practice in most professions and occupations of lesser responsibility. While the role of MP is unique, it does not preclude them from undertaking education and training programs to enhance the knowledge, skills and abilities they need to undertake their role and functions in the complex environment that is the parliament. Furthermore, participation in such programs could help develop and strengthen a culture favourable to the improved performance of oversight and other parliamentary functions. Second, such programs should be offered by the parliament or under its authority. It is a legitimate and necessary role for the peak institution of a democratic polity to undertake. Third, political parties should, as a condition of parliamentary party membership, require new and re-elected MPs to participate in continuing adult education programs orientated to enhancing the parliament's oversight (and other) functions. This suggestion is made because in many parliaments it is still the parties that exercise the greatest influence over the decisions made by MPs, including their attendance at training programs. By that the authors mean that if political parties made attendance compulsory, all MPs would attend induction and additional training programs. In practical terms, this means that party leaders and whips must demonstrate their support and insist on attendance.

The evidence from the authors' research suggests that improved induction programs and continuous professional development are needed to strengthen parliamentary oversight and that this approach is consistent with what happens in other public sector organisations and in the private sector. The performance of organizations is understood to be linked to the development of the knowledge, skills, abilities and attitudes of the people who make up those organizations. Accordingly, organizations invest in developing these qualities in the interests of the organizations themselves, not just the benefits they may bring to individual personnel. Parliaments stand to gain from investing in members of parliament in a similar manner. It is now time that they did.

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Inaugural speeches in the New South Wales parliament

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INTRODUCTION

What used to be called ‘maiden speeches’ but are now referred to as inaugural or first speeches play an important part in the parliamentary life of a Member of Parliament, a moment of achievement, a setting off point, as they step onto the parliamentary stage for the first time. At times these speeches suggest the career that is to follow; a reflection of the intellectual scope of the speech and of the debating skills and style on display. For the historian, too, first speeches occupy a particular niche, as they offer insights into a member’s values and philosophy, their policy interests and concerns. Not every inaugural speech is a triumph. Sometimes first speeches may set a false trail, when expectations are not realised. In the reverse, great careers have been built on the foundations of a shaky or mundane start. Yet that, too, is of interest, from a biographical and historical standpoint.

Discussed later in this article is the inaugural speech of Millicent Preston Stanley, the first female member elected to the NSW Parliament, whose speech was subject to several interjections. Writing on its website, the Australian Women’s History Forum comments:

But on the day of her first speech in the parliament she deflected such distraction by delivering a powerful speech worthy of the history she was making. Her maiden speech, like Edith Cowan’s, was a manifesto of the causes women so long pleaded for outside the parliament. Like their Western Australian colleagues four years before, the NSW MLAs abandoned the convention of silence for maiden speeches.²

However, was that the case in fact? In NSW, since the establishment of responsible government in 1856, there have always been first speeches, as new Members made their original contribution to debate in some form or other. Yet from when did the practice of making ‘maiden’ speeches start? Also did the practice date from around the same period for both Houses? Currently, inaugural speeches comply with the conventions that they are generally heard in silence and, while uncontroversial, are given wide latitude as to content. Has that always been the rule? The argument of the article is that, in their modest way, inaugural speeches provide a window on the evolving parliamentary culture in NSW, along with the broader political context in which it operates. For the Legislative Assembly, as a narrative spine this paper uses the first speeches of many of the Premiers of the State, tracing the record back to around 1860.³

As to terminology, Grove's *NSW Legislative Assembly: Practice, Procedure and Privilege* refers to 'inaugural (formerly first speech or maiden speech)',⁴ whereas the relevant sub-heading in *NSW Legislative Council Practice* by Lovelock and Evans is to 'First (Maiden) Speech'. In this paper, the two terms are treated as interchangeable.

NSW LEGISLATIVE ASSEMBLY

Historical overview: As in other comparable Westminster Parliaments,⁵ in the NSW Legislative Assembly inaugural speeches were traditionally made, from the 1880s onwards, during the address-in-reply debate where some acknowledgement was made of the relevant conventions mentioned earlier, even if those conventions were not always (or even usually) adhered to in many periods. In particular, those speeches moving and seconding the adoption of the address-in-reply tended to be treated with some decorum, while contributions to the debate itself and the reception they were given varied depending on the speaker. Up to the Second War and for some time afterwards these speeches were exclusively political; some were relatively short and modest in scope and content, whereas others were very different, taking a wide ranging brief and courting controversy because of their abrasive manner and content. Very few inaugural speeches were heard without interjection, a requirement occasionally mentioned at appropriate moments in the Assembly but one that was rarely complied with in practice. Interjections were common up until the late 1950s.

Outside the address-in-reply debate inaugural speeches were often, but not always, treated as part of the ordinary business of the House, and hence were subject to the same give and take of political life in the chamber. The Hansard record suggests that often a speech on a bill was simply not recognised as an inaugural speech, a situation which seems to have lasted well into the 1930s. It was certainly very rare to even remark on one's constituency in such speeches, when made on a Bill for instance, and rarer still for the speech to be proceed without interjection.

After World War 2, both the intensity of the political atmosphere and, for want of a better word, the 'larrikin' nature often on display in the Assembly, declined. In part it may have been the result of post-war prosperity and the culture of greater civility and respect for parliamentary norms engendered in the post-Lang years.⁶ Interjections were still common in the 1950s, but they seem to have died down after that. It is also the case that, while inaugural speeches remained strongly political and trenchantly argued, the abrasiveness of the earlier period also declined. The pressure cooker that had been the Assembly in the 1920s and the early 1930s became a bubbling pot, not tame by any means, but a little less explosive.

There has been a noticeable shift in the content of inaugural speeches, towards a more public sharing of personal background and experience. The influx of women into the House, albeit modest by some international standards, has had some direct influence on this process.

Procedurally, the mid-1990s were something of a tipping point in respect to inaugural speeches. Now the usual practice is to make a set piece inaugural speech which is clearly identified as such in Hansard. The content of the speeches have also changed in recent years, becoming more autobiographical and anecdotal.⁷ Their building blocks are reflections on electorates, their history, character and concerns; political motivations, influences, role models and viewpoints and thanks to supporters, staff and family. This reflects a broader shift in political culture in which family and personal history are openly acknowledged. Deborah Brennan suggests that in the 'Bear Pit' of the Legislative Assembly, inaugural speeches have become more personally revealing. She points out that, among other things, 'The speech provides an opportunity for thanks to be given publicly to family and friends, many of whom attend Parliament for the event'.⁸

Pre-federation: Focusing on the first speeches of the Premiers of New South Wales, the changing face of first speeches are illustrated by reference to selected examples. James Farnell (St Leonards), Premier from December 1877 to 1878, was first elected in May 1860 to the State's Third Parliament. Asking two questions in June 1860 of the then Premier, John Robertson, neither question bore any of the hallmarks of inaugural speeches; the same applied to Farnell's contribution in October 1860 in the debate in committee on the Crown Lands Alienation Bill.⁹

As for the address-in-reply, in the fractional era, when governments lived on their wits, these debates tended to be more testing in nature, procedurally tough and seeking to tease out confidence in the Ministry. While new members moved the adoption of the address-in-reply, any scope for making what we would recognise today as an inaugural speech was very limited; the same was true of the ensuing debate. For example, at the opening of the Third Parliament in September 1859, where land reform was the big issue of the day, the adoption was moved in short order by the new member for Darling Downs, John Douglas, with SW Gray, the new member for Kiama, being recorded simply as having 'seconded the motion'.¹⁰ At the opening of the Fifth Parliament in January 1865 neither the mover nor seconder of the motion was a new member, which is suggestive of evolving and intermittent practices.¹¹

First elected in December 1874 were two later Premiers, Alexander Stuart (East Sydney) and George Dibbs (West Sydney). Stuart spoke first in January 1875 in the politically charged address-in-reply debate, which concerned the conditional pardon granted by Governor Robinson to the bushranger Frank Gardiner who was released into exile in Hong Kong.¹² Stuart started by saying that he felt 'some diffidence' in speaking and only did so to voice the opinion of his 'large and influential constituency'. The tenor of his speech, which was punctuated by several 'Cheers' and calls of 'Hear, Hear', was in defence of the petition signed against Gardiner's release, whose 'reign of terror' was said to have turned the country 'upside down'. Stuart also defended the rights of the House to debate the question, even if the result was a change of government.¹³ It was a confident and powerful contribution and certainly not an example of a modest inaugural speech. The adoption of the address-in-reply was moved by new members Patrick Shepherd, The Nepean and seconded by JJ Wright, Queenbeyan, the first speaking at some length without interruption, the second only perfunctorily, which was the pattern in the early years of the parliament. Speaking first in March 1875 in the budget debate, Dibbs was assertive in his brief defence

of public money to boost population and production. Seemingly uninterrupted, the record makes no further suggestion that this was an inaugural speech.¹⁴

In the 10th Parliament, which started in December 1880 when Henry Parkes was Premier for the third time, the address-in-reply was moved and seconded by new members,¹⁵ and at least one other new member participated in the debate, albeit briefly, with only one interjection in total.¹⁶ Making their parliamentary debuts outside that debate were three future Premiers, all of them elected in November 1880 – George Reid (East Sydney), William Lyne (The Hume) and John See (Grafton). None of these made recognisably inaugural speeches. Quick off the mark, Reid asked his first question on 17 December 1880¹⁷ and made his first substantive speech on 8 February 1881 on a motion for the eight hour working day, which he supported in most part.¹⁸ Lyne entered the debating lists on 17 February 1881 in the budget debate, launching straight into an argument against raising taxes and in favour of a new policy on the sale of land.¹⁹ On 16 March 1881 See made a brief foray into the parliamentary debate in the budget debate on loan estimates for railways,²⁰ going on to speak at greater length in the committee stage of the debate on loan estimates for the Northern Junction Railway, from Homebush to Waratah in the Hunter region, a project he considered premature and unlikely to ‘pay for many years to come’.²¹

A notable example from the 1890s, during the debate on federation, was the inaugural speech by the new member for Grenfell, WA Holman, first Labor then Nationalist Premier. He spoke in the committee stage of the debate on the Australasian Federation Resolutions, specifically on an amendment moved by his party leader, McGowen, concerning the method of altering the proposed federal constitution. Referring at first to ‘my immature views’,²² he delivered a closely reasoned speech, nearly an hour long, with a number of interjections from leading players, Reid and See among others. Fine as it is, a harbinger of great things to come, its relationship to what we now call an inaugural speech is tenuous at best. At the very least, as a model of its kind, in form and substance, it indicates the journey such speeches have taken in the Assembly.

From federation to McKell: After the conflict over federation had been settled, testing the limits of procedural niceties were class-based issues associated with the growing influence of the Labour Party. When the new member for Hartley, James Dooley, Labor Premier in 1921–22 and Speaker in 1925–27,²³ first spoke in October 1907 he stressed his inexperience and to craved the House’s indulgence over his unfamiliarity with the ‘routine of debate in this Chamber’.²⁴ The formalities over, Dooley went on to claim that ‘no man in this State earns a thousand a year by his own personal exertion’. ‘What about a doctor?’ a member asked. Dooley responded, ‘A doctor does not earn his income by his own personal exertion. He has four or five servants, he has a groom...’, at which point he was interrupted by ‘loud laughter’.²⁵

Ironically, despite his reputation for domineering bluster, in 1914 Jack Lang delivered what by the standards of the day was a rather tame inaugural speech, more local than many in its focus, grouped around what he termed an opportunity to air his ‘grievances’.²⁶

Thomas Bavin and William McKell were both elected to the Assembly in 1917, at the time of Holman’s Nationalist Ministry, Bavin on the Government’s side, McKell in Opposition. Bavin

(Gordon) seconded the address-in-reply motion and chose for his theme the war and 'the obligation of doing the best we can to help the Empire in the war'. After two interruptions, the Speaker (JJ Cohen) sought to bring proceedings to order, saying:

Interjections are at all times disorderly. It has been a tradition of this House, and of every House which has responsible government, that new members shall be heard in silence...I ask that the honourable member be allowed to proceed without interruption.²⁷

Bavin was only interrupted on three further occasions. The interjections during McKell's inaugural speech, delivered during the same address-in-reply debate, ran into double figures. Little wonder perhaps when, in seeking to defend Labor against claims of association with the militant unionist movement the IWW (International Workers of the World), he raised the raw question of Holman's disloyalty to the Empire during the Boer War. This caused the Speaker to call him to order, saying 'It is unparliamentary to accuse any honourable member of being disloyal'.²⁸ When McKell moved on to the recent snap election, calling it a 'trick' played by Holman to disenfranchise many working people, the Speaker again pulled him up, saying:

The honourable member is exceeding the bounds of parliamentary license in accusing the leader of the National Party, or any other member of this House, of having been guilty of a deliberate trick.²⁹

His point well and truly made, twice over, like a practised barrister working on the minds of a jury, McKell apologised if he had 'transgressed the rules of debate'. In some ways the speech is a good companion to Preston Stanley's, pugnacious, wide ranging address, dealing with issues as diverse as sectarianism in politics, revived at the recent election, along with industrial law and policy, never hesitating to take up the most intense party political quarrels, and managing to insert a reference to Liberal Party members as 'oppressors of the class to which I belong'.³⁰ Pulling no punches of his own, McKell seemed happy enough to parry the interjections that came his way.

The roaring Twenties: Joe Cahill (St George) was elected to the Assembly in 1925, the same year as the redoubtable Millicent Preston Stanley. On different sides of the political divide, they belonged to a combative cohort of new members, appropriate perhaps for an election that brought Jack Lang to government for the first time. Far from avoiding controversy and littered with interjections, Cahill's own inaugural speech, made during the address-in-reply debate, was delivered in fighting terms. It was long and hard hitting, taking on the big class issues of the day, including working hours, unemployment, and the continuing fallout from the railway strikes of 1917. When Cahill rounded on the National Party member for the North Shore, Scott Fell, telling him that he regarded 'those whom you employ in your workshops as mere pieces of machinery', there followed this angry exchange:

Mr Scott Fell: That is not true!

Mr Cahill: It is true. Your experience only reaches as far as your office, where you sit in the midst of luxury.

Mr Scott Fell: That is not true either. I started from scratch!³¹

It was no time for faint hearts. The address-in-reply was moved by Dr Evatt (Balmain) who started by acknowledging that the 27th Parliament would be memorable 'because this is the first occasion on which a woman has been elected to this Assembly', a comment that provoked an unidentified Opposition member to interject, 'She is not on your side though!'³²

So it went on, until Miss Preston-Stanley (Eastern Suburbs) got to her feet some days later, again during the address-in-reply debate, to make what has become perhaps the most remarked upon inaugural speech in NSW political history. Rejecting the view that women should be protected from the 'hurly-burly' of politics, in her feminist guise she argued that as tax-payers and workers women were touched by every 'turn of the political wheel'. Never one to mince words, she said that women 'are subject to the laws you make, the inadequate wages you impose, the taxes you collect, the injustices you perpetuate, the anomalies you tolerate, and they suffer under the vital and important matters you forget to handle'.³³ That part of her speech ended with a strong statement of the contribution that only women can make to 'the life of the nation' and by emphasising that 'women's questions are national questions, and that national questions are women's questions', all of which was heard without interruption, as was her acknowledgement of the assistance provided to her by the Speaker and the officers of the House. From there the speech focused on the pressing health issues facing women and children, including the preventable deaths of 300 women a year in childbirth. The first interjection came from Nationalist's James Arkins (St George) who asked 'Are not many of the causes parental?'

From this feminist platform Preston-Stanley diverged to argue at length for the reform of the criminal justice system and the state control of breeding founded on the science of eugenics, an issue which she referred to as 'the question of the feeble-minded' or the 'pests which are undermining the tree of life'.³⁴ Obviously ever since the Second World War such views have become highly controversial but, dubious as they may be at any time, they were less shocking and extreme in the 1920s and were heard in silence.

Only after she had commented on the 'trifling and contemptible issues' which split her own side of politics, the National and Country parties, did she seek to directly address the content of the Governor's speech, taking up the cudgels in particular against the proposed 44 hours week. It was then the interruptions started in earnest, with Labor members disputing her claims about 'ca'canny' and 'go slow' industrial practices. Returning to her feminist theme, she said:

Furthermore, from the woman's point of view, has the Labor Party ever thought of even an eighty-eight hours week for women? Goodness me! the average woman works 112 hours per week, and she is lucky if she gets through in her work in that time.³⁵

From there the speech lost some direction and momentum, engaging in contemporary controversies, among them Lang's treatment of public servant Bertram Stevens, who had been driven out of Treasury. Nonetheless, in all it was a brave and politically charged speech, as radical as it was conservative, fiercely impersonal, barely mentioning her electorate let alone her personal history, a speech that certainly stretched the usual boundaries without breaking apart the rather loose fitting conventions in place in the Assembly. With interjections more the norm than the exception in the Assembly in this

period, it is not quite accurate to suggest, as Brennandoes, that those interjections were prompted solely by gender.³⁶

The political and the personal: Compared to the boisterous Lang years, after 1945 some of the heat had gone out of the political debate in NSW. Robert Askin became a member in 1950 and made his inaugural speech during the address-in-reply debate. Askin referred extensively to matters affecting his constituency (Collaroy), including the Surf Life Saving Association, and to the politics of the day, but was silent on personal issues, giving no acknowledgement to his political supporters, mentors or family.³⁷ This seemed to be the practice at the time, where thanks were restricted to the electors of the relevant constituency and sometimes to parliamentary staff.

The distinction that was maintained, up until the 1980s at least, between the public and private spheres is evident in the restraint shown in the inaugural speech made on 7 August 1974 by Mary Meillion, the first female Liberal Party member elected to the Assembly for the seat of Murray, previously held by her father JA Lawson since 1932.³⁸ Her father is mentioned as is her mother but only briefly and unsentimentally. The speech, which proceeded without interjection, concentrating almost entirely on the issues facing the Murray region.

Some inaugural speeches continued to provoke. Elected to the Assembly at a by election, Bob Carr's inaugural speech was made on 23 November 1983 as part of the second reading debate on the three cognate police regulation Bills.³⁹ He spoke on the history of the Maroubra electorate and its representation, in praise of Sir William McKell and in support of the Bills, arguing in strong terms in favour of the Wran Government's attempts to 'purify New South Wales civic life after the debauchery of the Askin years'. The more tendentious remarks prompted the interjection 'Return to the good years' by the member for Eastwood, JA Clough. Cognisant of the conventions at issue, self-consciously echoing D'Israeli and Whitlam, Carr retorted 'The time will come when you may interrupt'.⁴⁰

Still true to the political model, by the 1990s first speeches tended to make some acknowledgement of family ties. Barry O'Farrell's first speech was delivered on 19 September 1995⁴¹ during the second reading debate on the Endangered Fauna (Interim Protection) Bill. In the speech Mr O'Farrell veered away from commenting on the Bill to reflect on his constituency of Northcott and its former member, Bruce Baird, as well as at the close to thank his family. The speech also articulated his views on the democratic system of politics and on his own Liberal political philosophy, stating (in part):

All of us enter this place with a set of beliefs, values and experiences that we hope will add to party-room and parliamentary debate. Obviously, my political philosophy is Liberal. It is liberal in its concern for the rights of the individual and it is conservative in its respect for the values of the past, and recognises the limitations of both individuals and government. Many find it difficult to come to terms with the existence of both liberal and conservative strands in Liberal Party philosophy. Countless pointless debates occur on the issue and I appreciate that nothing I say will end them. However, for me there is no difficulty; instead of a problem, I see a strength.⁴²

Into the 21st century, while inaugural speeches can still carry weighty political messages, many of them also contain 'softer' elements. Migrant histories are celebrated, as are family relationships generally. Making her inaugural speech on 20 May 2003 Kristina Keneally (Heffron) said: 'My children remind me that small things matter; that learning to do up buttons on your pyjamas or pouring your own cereal is important'.⁴³ Imagine Joe Cahill or Robert Askin getting to their feet to say such a thing on the floor of the Assembly, traditionally a bastion of 'blokeyness'.

NSW LEGISLATIVE COUNCIL

The nominated and indirectly elected Council: The position in the Council is made more complicated by the changing methods of appointment or election to the Upper House, which was a nominated Chamber from 1856 to 1934, then indirectly elected by an electoral college of members of both Houses up until 1978, and only fully directly elected since 1984. From 1856 to its reconstitution in 1861 appointments to the Council were for five years only; it is doubtful that the conventions of first speeches operated in this 'quinquennial' Council, if only because it comprised very experienced men, many of whom had served in the Legislative Council in the pre-responsible government era.

Later Premier, Patrick Jennings, started his parliamentary career in the Upper House, where he made his first contribution to debate in December 1867, a brief and straightforward comment on the terms of the Municipalities Bill.⁴⁴ It seems that inaugural speeches were not made outside the address-in-reply in this early period. Nor was there much, if any scope, for such speeches to be made even in that context, which up until 1875 was referred to a select committee, followed usually by only a brief debate.

The first volume of Hansard opens on 28 October 1879, the third session of the 9th Parliament, at which time seven new Council members took the oath, one a former Council President (Sir Alfred Stephen), five former Assembly members and one man, James Norton, who was new to Parliament. By this time, the practice of new members moving and seconding the address-in-reply was followed, with the courtesies only being departed from reluctantly. However, that appears to have been the full extent of the observance of inaugural speeches. As in the Assembly, at least up until the 1940s when new members spoke first in the course of other business, including in the second reading debates on Bills, no consideration seems to have been given to the conventions of inaugural speeches.⁴⁵

The changing practices can be traced through the female members of the Upper House, from the first appointments in the pre-1934 Council up to the early 1960s. The first appointments, on 23 November 1931 in the Lang years, were Ellen Webster and Catherine Green. It was Green who uttered the first words spoken by a woman on the floor of the Chamber, in an adjournment debate on 23 December 1931, when she tangled with FS Boyce, formerly Attorney General in the Bavin Ministry and later a Supreme Court judge, over disparaging remarks he had made about Lang's latest appointees. Neither on this occasion, nor in her other early forays, was there any suggestion that Green was making a

formal first speech. Boyce was reported to have said that, since joining the Council, Green and Webster had swapped political sides, which resulted in this steely exchange:

The Hon Mrs CE Green: I desire to state that I will never vote with the Opposition, nor betray the confidence of a body of women who place their trust in me.

The Hon FS Boyce: I think it is only fair to say that I have never had any encouragement from the ladies!⁴⁶

Ellen Webster first spoke on 18 October 1932, after Lang's demise, to oppose the Farmers' Relief Bill. Sticking entirely to the terms of the proposed legislation, she described it as 'The Farmers' Enslavement Act'.⁴⁷

In the more decorous 1950s, the first woman to speak in the indirectly elected Council was ALP member Gertrude Melville. In August 1953, in what was clearly her inaugural speech, she seconded the adoption of the address-in-reply, raising equal pay for women and the high cost of maternity among other issues.⁴⁸ Melville was followed into the Council by the redoubtable Edna Roper who, on 20 August 1958, was granted the honour of moving the adoption of the address-in-reply, taking that opportunity to acknowledge Melville's ground breaking contribution in the fight for economic equality for women.⁴⁹ More telling still than these more formal occasions was the short speech of Labor's Anne Press in December 1959 on the Gaming and Betting (Poker Machines) Bill, in which she looked forward to a time when 'these iniquitous monsters are banned'.⁵⁰ Press's contribution was recognised by the next speaker, Hector Clayton, as 'her maiden speech',⁵¹ something which would not have occurred in the nominated Council or, it would seem, in the early years of its indirectly elected successor. Speaking in the debate on the budget on 20 October 1963, the first Liberal member of the Council, Eileen Furley delivered a copybook inaugural speech, which started 'To make my first speech as a member of this Parliament is, to me, a rather emotional experience', sentiments that would not have been echoed in the all-male Assembly in this period. Furley went on to make reference to her nominal predecessor, to thank members and staff and to speak widely on housing, education and youth related issues, all without interjection.⁵² Clearly the equivalent of the modern inaugural speech had arrived in the Upper House.

The contemporary period: The practice and conventions that apply to the Council in the modern period are set out in detail in *NSW Legislative Council Practice* by Lynn Lovelock and John Evans.⁵³ Unlike the Assembly, first speeches continue to be made mainly during debate on the address-in-reply or the budget debate 'as these debates are typically wide-ranging and the issue of relevancy does not arise'. It is the case, however, that these days inaugural speeches are acknowledged as such in Hansard. Where these speeches are made in second reading debates on government Bills, the same conventions apply and 'the Chair has allowed wide latitude of debate'.⁵⁴ Rulings of the Council President, dating from 1982 onwards, are cited requiring first speeches to be heard in silence 'without interjection or interruption'.⁵⁵

A window into the style and content of more recent inaugural speeches is found in three addresses from 1981, from Liz Kirkby, the first Australian Democrat, the Reverend Fred

Nile, the first Call to Australia member and Franca Arena, originally a Labor Party member and later an independent. As well as briefly thanking supporters and the like, Kirkby traversed benefits of proportional representation and such social issues as housing costs, airing concerns she said that were shared by all members, across all allegiances. Keeping to script Kirkby said: 'I shall not abuse the privilege granted me for this my maiden speech by discussing the highly controversial matters that are implicit in this large-scale programme of infrastructure borrowing'.⁵⁶ More autobiographical in approach was the Reverend Fred Nile, who spoke about his father and also canvassed the basis of his religious and philosophical beliefs, along with several issues of moral and social concern, touching on censorship, law and order and the 'gambling explosion in New South Wales'.⁵⁷ He was followed by Franca Arena who gave an account of her migrant background, spoke of her commitment to Labor values and, going into more controversial territory, set out her republican views.⁵⁸

Part of the same cohort was George Brenner, another Labor member with an autobiographical tale to tell of his early life in wartime Hungary.⁵⁹ The content depended very much on personality, background and the like. The variation in approach, with the shifting balance between the more personal and purely political, is on display in John Hannaford's speech from August 1984, very much a political creation and particularly noteworthy for its advocacy of a stronger committee system in the Upper House.⁶⁰

Taken together these speeches are a reasonable reflection of the kinds of first speeches in the contemporary Council, in which more personal elements feature before they do as a regular part of speeches in the Assembly. This may have something to do with the greater number of women in the Council Chamber and to its more fluid party mix in the directly elected era. When David Oldfield, the first and (to date) only representative of Pauline Hanson's One Nation Party, elected in 1999, made his first speech, he raised the controversial issues of race and multiculturalism, at the same time speaking at some length about his family's history, military and otherwise. Speaking of his parents and siblings, he said 'I only pray I will one day be as good as them and my brother and sisters'.⁶¹

CONCLUSION

Since the 1980s and certainly into the 1990s in both Houses, but particularly in the Legislative Assembly, there has been a noticeable shift in the content of inaugural speeches, towards a more public sharing of personal background and experience. Increasingly, family life and history is discussed, as are autobiographical reflections, matters which to some extent at least would have been considered private and ill-suited to public airing not that many decades ago. This applies with particular force to the Assembly, built on and dominated for long years by unreconstructed male attitudes and standards of conduct. Public life in general has shifted, taking the culture of the Assembly along with it. The influx of women into the House, albeit modest by some international standards, has had some direct influence on this process; and in the wider world the barriers between the public and private spheres appear to be weakening, if not actually dissolving. The changing

content of inaugural speeches in the NSW Legislative Assembly is one small window into this new landscape.

The same might be said of the Legislative Council, except that the changing culture seems to have emerged there earlier, for it is a House where a different atmosphere has prevailed. The Council is less intense in its relationship with power politics. It also has more women members historically and from the early 1980s on has experienced the impact of minor parties. . The precise reasons are hard to identify, but they would seem to lie somewhere within that causal constellation. Now the Assembly's inaugural speeches are similar to the Council's, the one distinguishing feature being the Assembly's references to distinct geographical constituencies, whereas in the Council that reference remains the State as a whole, along with any constituencies of interests or ideas that might apply.

Inaugural speeches in both Houses remain essentially political in nature, based on issues, values and concerns. Admittedly, there is nothing to compare to Millicent Preston-Stanley in the contemporary period, but that is not to say that first speeches cannot be politically tough, perhaps even controversial on occasions. Historically, at least, the NSW Parliament and the Assembly in particular, was known for its aggressive political style, its no-holds-barred debates which were not for the faint-hearted. This paper show that the history of inaugural speeches point to an era when the rule against interruption or interjection was only intermittently applied. This was certainly the situation before the Second World War, even in the address-in-reply debate where some regard was paid to the relevant conventions. On the other hand, over the past 40 years or so the conventions that apply in other Westminster Parliaments have generally been adhered to in the New South Wales, where Members making their inaugural speeches have been heard in respectful silence.

REFERENCES

- 1 This paper is a revised version of Briefing Paper 4/2013 – *Inaugural Speeches in the NSW Parliament*.
- 2 <http://www.womenshistory.com.au/image.asp?iID=313>
- 3 For more detailed commentary see – G Griffith, – *Inaugural Speeches in the NSW Parliament*, Briefing Paper 4/2013. Note that, of the ten Premiers prior to Reid (in 1894), six were Assembly members from the start of responsible government and could not have made 'maiden' speeches in any meaningful sense at a time when all members were new.
- 4 The term 'maiden speech' seems to have been replaced during the 1990s, more as a consequence of practice than pronouncement.
- 5 For a commentary on the practices in other Parliaments see G Griffith, n 3.
- 6 Jack Lang was Premier of New South Wales from 1925 to 1927 and from November 1930 until his dismissal in May 1932. He was a State Member until 1946 and remained a divisive, if waning, influence, throughout the period.
- 7 For more detailed commentary on the contemporary period see G Griffith, n 3.

- 8 D Brennan and L Chappell eds, *'No fit place for women'? Women in New South Wales politics, 1856–2006*, UNSW Press 2006, p 23.
- 9 SMH 13 June 1860 and 25 October 1860; *NSW Index to Parliamentary Debates, First to Fifth Parliaments, Volume 1 – 22 May 1856 to 15 November 1869*, p 521. Identifying a Member's inaugural speech can be difficult prior to 1879 when Hansard reports of the NSW parliamentary debates started, especially when a Member's initial contribution was in the form of questions or comments from the floor of the House.
- 10 SMH, 1 September 1859. Up until 1922 it was practice in the Assembly for the address-in-reply to be referred to a pro forma select committee, a practice abandoned in the Council in 1875.
- 11 William Walker (Windsor) has been a member since 1860; Hugh Gordon (Tenterfield) since 1861: SMH, 28 January 1865.
- 12 D Clune and K Turner eds, *The Governors of New South Wales*, The Federation Press 2009, pp 298–301.
- 13 SMH, 29 January 1875; *NSW Index to Parliamentary Debates, First to Fifth Parliaments, Volume 2 – 27 January 1870 to 9 November 1880*, p 2905.
- 14 SMH, 26 March 1875; *NSW Index to Parliamentary Debates, First to Fifth Parliaments, Volume 2 – 27 January 1870 to 9 November 1880*, p 2684.
- 15 NSWPD, 16 December 1880, p 28 (WH Pigott – Canterbury) and p 29 (JH Douglas – The Murrumbidgee).
- 16 NSWPD, 16 December 1880, p 46 (WA Brodribb – Wentworth).
- 17 NSWPD, 17 December 1880, p 58.
- 18 NSWPD, 8 February 1881, p 280.
- 19 NSWPD, 17 February 1881, p 473.
- 20 NSWPD, 16 March 1881, p 962.
- 21 NSWPD, 22 March 1881, p 1082.
- 22 NSWPD, 27 October 1898, p 1936. For comment on the speech see – D Clune and K Turner eds, *The Premiers of New South Wales, Volume 2, 1901–2005*, The Federation Press 2006, p 122.
- 23 Dooley's premiership was interrupted by Fuller's seven hour premiership on 20 December 1921.
- 24 NSWPD, 15 October 1907, p 129.
- 25 NSWPD, 15 October 1907, p 134.
- 26 NSWPD, 29 July 1914, p 498.
- 27 NSWPD, 17 July 1917, p 51.
- 28 NSWPD, 31 July 1917, p 316.
- 29 NSWPD, 31 July 1917, p 319.
- 30 NSWPD, 31 July 1917, p 324. For comment on the speech see – C Cunneen, *William John McKell: Boilermaker, Premier, Governor-General*, UNSW Press 2000, p 58.
- 31 NSWPD, 19 August 1925, p 245.
- 32 NSWPD, 12 August 1925, p 66.
- 33 NSWPD, 26 August 1925, p 369.
- 34 NSWPD, 26 August 1925, pp 374–375.

- 35 NSWPD, 26 August 1925, p 377.
- 36 'No fit place for women'? *Women in New South Wales politics, 1856–2006*, p 24.
- 37 NSWPD, 26 September 1950, p 358.
- 38 NSWPD, 7 August 1974, p 76. Meillon was elected at a by-election held on 6 October 1973.
- 39 Carr was elected at the by-election held on 22 October 1983.
- 40 NSWPD, 23 November 1983, pp 3327–3331. In 1953, Gough Whitlam's first speech had been interrupted by John McEwen, to which Whitlam replied: 'I thought that the Minister for Commerce and Agriculture (Mr. McEwen) had returned to the more congenial climate of Disraeli's day. I recollect that Disraeli said, on the occasion of his maiden speech, 'The time will come when you shall hear me'. Perhaps I should say, 'The time will come when you may interrupt me''. *Commonwealth Hansard (HR)*, 19 March 1953, p 1423 (a second member, RG Pollard, also interjected and the Speaker called for 'complete silence').
- 41 O'Farrell was elected at the general election of March 1995.
- 42 NSWPD, 19 September 1995, p 1094.
- 43 NSWPD, 20 May 2003, p 734.
- 44 SMH, 13 December 1867; *NSW Index to Parliamentary Debates, First to Fifth Parliaments, Volume 1 – 22 May 1856 to 15 November 1869*, p 1296.
- 45 See for example NSWPD, 4 December 1879, p 478 (J Stewart); 10 December 1879, p 534 (E Flood); 17 December 1879, p 629 (G Oakes).
- 46 NSWPD, 23 December 1931, p 7651.
- 47 NSWPD, 18 October 1932, p 1151.
- 48 NSWPD, 12 August 1953, p 9.
- 49 NSWPD, 20 August 1958, p 10.
- 50 NSWPD, 2 December 1959, p 2529.
- 51 NSWPD, 2 December 1959, p 2530.
- 52 NSWPD, 30 October 1963, p 6014. Furley filled a vacancy produced by the death of Leicester Saddington.
- 53 *NSW Legislative Council Practice*, Federation Press 2008, pp 334 –336.
- 54 *NSW Legislative Council Practice*, Federation Press 2008, p 335.
- 55 *NSW Legislative Council Practice*, Federation Press 2008, p 334.
- 56 NSWPD, 24 November 1981, p 622.
- 57 NSWPD, 25 November 1981, p 741. The Reverend Nile does not appear to have made a second first speech after his re-election to the Council in October 2004, following his resignation in August 2004 to run for the Senate.
- 58 NSWPD, 25 November 1981, p 744.
- 59 NSWPD, 24 November 1981, p 616.
- 60 NSWPD, 15 August 1984, p 89.
- 61 NSWPD, 26 October 1999, p 1909.

The future of euthanasia politics in the Australian state parliaments

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INTRODUCTION

Despite high levels of support for law reform recorded amongst the Australian public and a reasonable section of the medical profession, since the federal parliament overturned the Northern Territory's *Rights of the Terminally Ill Act* in 1997, voluntary euthanasia has remained illegal in Australia. Nevertheless, a significant amount of activity on the issue has continued, with bills seeking to reform the law on the practice introduced in all of the Australian state parliaments except Queensland. To shed light onto the politics of voluntary euthanasia in Australia, the article considers the attempts to legalise the practice in the South Australian and the Tasmanian state parliaments. The two parliaments are selected for detailed investigation here, as they have been the foci of the majority of activity on the issue. Whilst some argue that the parliaments have shown most promise of reform, there has been strong opposition on the issue from key members of the medical and legal professions. It is argued here that, so long as there is vocal opposition to bills in the states from medical and legal professionals, the law on voluntary euthanasia is unlikely to change in the near future.

To reach these conclusions, the article continues in five sections. Section One reviews the literature on the euthanasia politics to identify the contribution this article will make. Section Two outlines the data sources used. Section Three presents the South Australian case. The case presents new material on the politics of voluntary euthanasia in the Australian parliaments, mapping the status of bills currently being considered by the parliament and examines the activities of the interest groups and members of the key professional organisations on the issue and examines the likelihood of reform in the near future. Section Four presents the Tasmanian case. The article concludes by emphasising the implications of the findings for those who study the power of the medical profession in Australian politics and suggests avenues for future research.

RESEARCH ON VOLUNTARY EUTHANASIA

The majority of scholarly work on euthanasia has come from the field of bioethics, which bridges the fields of medicine, philosophy, medicine and law. Borry *et al.* surveyed research in bioethics journals and found that ‘the prolongation of life and euthanasia’ were the main topics of research in the field for a thirteen-year period from 1990–2003.¹ The primary focus of these studies are the controversial ethical questions relating to the practice and authors here primarily seek to evaluate existing, as well as advance new, arguments for and against legalisation of the practice.² In this literature, the Northern Territory legislation, alongside the other euthanasia laws in Washington, Oregon, Belgium and the Netherlands, are frequently used as case studies, but the politics involved with the passage of these laws is only dealt with at a generic level.³ Studies have also focussed on the operation and implementation of legislation, for example Kissanne, Street and Nitschke report clinical details of the seven patients who died under the *Rights of the Terminally Ill Act*.⁴ So, whilst there have been several studies of attitudes amongst Australian medical professionals about the practice, the political implications of their findings which are of interest here, were not discussed.⁵ In contrast, the issue of voluntary euthanasia has received much less attention in political science than in the fields mentioned above. In the political science literature, a number of studies have focussed on the issue in jurisdictions such as the Netherlands, Oregon, Denmark and Belgium.⁶ In Australia, studies have focussed on the passage of the *Euthanasia Laws Act* in the federal parliament, but have neglected decision-making on the issue in the states and territories. The focus on the *Euthanasia Laws Act* is valid, as the passage of the Act generated considerable controversy, not only because it dealt with the euthanasia issue, which at the time had not been discussed

1 Pascal Borry *et al.*, “Empirical Research in Bioethical Journals. A quantitative analysis,” *Journal of Medical Ethics* 32, no. 4 (2006).

2 For example Henk Jochemsen and John Keown, “Voluntary Euthanasia Under Control? Further empirical evidence from The Netherlands,” *Journal of Medical Ethics* 25, no. 1 (1999); John Keown, ed., *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge: Cambridge University Press, 1995); John Keown, *Euthanasia, Ethics and Public Policy: An argument against legalisation* (Cambridge University Press, 2002).

3 For example Keown, *Euthanasia Examined*, Chs 14 & 15.

4 David W. Kissane *et al.*, “Seven Deaths in Darwin: Case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia,” *The Lancet* 352, no. 9134 (1998).

5 Kuhse and Singer, “Doctors’ Practices and Attitudes Regarding Voluntary Euthanasia,”; Helga Kuhse, *et al.*, “End-of-Life Decisions in Australian Medical Practice,” *Medical Journal of Australia* 166, no. 4 (1997); Neil *et al.*, “End-of-Life Decisions in Medical Practice: A survey of doctors in Victoria (Australia)”;; Steinberg *et al.*, “End-of-Life Decision-Making”; Christina A. Stevens and Riaz Hassan, “Management of Death, Dying and Euthanasia: Attitudes and practices of medical practitioners in South Australia,” *Journal of Medical Ethics* 20, no. 1 (1994).

6 Christoffer Green-Pedersen, “The Conflict of Conflicts in Comparative Perspective: Euthanasia as a political issue in Denmark, Belgium, and the Netherlands,” *Comparative Politics* (2007); Taylor E. Purvis, “Debating Death: Religion, Politics, and the Oregon Death With Dignity Act,” *The Yale Journal of Biology and Medicine* 85, no. 2 (2012); Bernard Steunenberg, “Courts, Cabinet and Coalition Parties: The politics of euthanasia in a parliamentary setting,” *British Journal of Political Science* 27, no. 04 (1997).

before in the Australian Federal Parliament, but also because it had implications on the territories' right to self-government.⁷

The present study seeks to remedy this situation, although first, there are a small number of exceptions which do pay closer attention to the politics of voluntary euthanasia in the state and territorial parliaments, that need to be considered to further define the scope of this study. Quirk examines the constitutional context of the debate in the Northern Territory, particularly considering the problem of Commonwealth law overriding territory law and Bartles and Otlowski, discuss the defeat of the *Dying with Dignity Bill 2009* in Tasmania.⁸ Both articles provide a useful introduction to the history and present status of the law on euthanasia in each of the state and territorial parliaments and whilst Bartles and Otlowski also present a history of the 2009 Tasmanian Bill, as well as a critical evaluation of the arguments used for and against euthanasia legislation, but neither articles examine the politics involved with the passage of bills through parliament. The most substantial study of voluntary euthanasia at the state and territorial level, however, is by Nitschke and Stewart, who provide the fullest study of the campaign to legalise in the states and territories to date.⁹ Nitschke and Stewart analyse the fate of the Northern Territory *Rights of the Terminally Ill Bill* and focus on both the passage of the Act and its subsequent overturning in the federal parliament. In relation to the fate of a euthanasia bills, the authors write: '... certain ingredients are required for the successful passage of a law on VE' and '...in the mid 1990s in the Northern Territory we had, all that was needed'.¹⁰ As such, Nitschke and Stewart cite four reasons for the success of the Northern Territory Bill: first, the presence of a key actor who was willing to sponsor a bill on the issue; second, the institutional make-up of the Northern Territory House of Assembly, being a unicameral parliament, with no house of review; third, the composition of Territory society; and, finally, the mind-set of Territory people. The present study intends to update the work of Nitschke and Stewart by charting the events that have taken place since the authors wrote their study, which was first published in 2005 and second, it will focus on euthanasia politics in the states, where the key battles to legalise are presently taking place.

7 Marion Maddox, "For God and States Rights: Euthanasia in the Senate" *Legislative Studies*, 14 no. 1 (1999); Sharon Broughton, and Sonia Palmieri, "Gendered Contributions to Parliamentary Debates: The case of euthanasia," *Australian Journal of Political Science* 34, no. 1 (1999); John Warhurst, "Conscience Voting in the Australian Federal Parliament," *Australian Journal of Politics & History* 54, no. 4 (2008).

8 Lorana Bartels and Margaret Otlowski, "A Right to Die? Euthanasia and the law in Australia," *Journal of Law and Medicine* 17, no. 4 (2010) Patrick Quirk, "Euthanasia in the Commonwealth of Australia," *Issues L. & Med.* 13 (1997).

9 Philip Nitschke and Fiona Stewart. *Killing me Softly: Voluntary Euthanasia and the Road to the Peaceful Pill* (Melbourne: Penguin, 2011). Phillip Nitschke released his auto biography in 2013, see Philip Nitschke and Peter Corris. *Damned if I do* (Melbourne: Melbourne University Press, 2013).

10 Nitschke and Stewart, *Killing me Softly*, 32.

INVESTIGATING EUTHANASIA POLITICS

The present analysis focuses on the campaigns to legalise voluntary euthanasia in the South Australian and the Tasmanian state parliaments. The two parliaments were selected as research sites as they have been the site of fervent, if not the majority of recent activity on the issue.¹¹ The analysis of this activity is conducted through a case study approach. The main aim of the case studies is to shed light onto the recent activities of groups campaigning for, and against voluntary euthanasia to assess the likelihood of reform in the near future. Three main sources of data were used to construct the case studies. The first source of data is the parliamentary websites of each state parliament. Information

There has been a striking similarity in the patterns of the free voting on euthanasia bills in the South Australian and Tasmanian parliaments, which led to the failure of bills.

about the status of bills was obtained from the legislative tracking facilities on the parliamentary websites of each parliament. This information was used to map the current status of legislative attempts to change the law on the issue in each parliament. To supplement this information about the conscience votes on recent bills was taken from the division lists in *Hansard*, which was also available on the website of

each parliament, to demonstrate in numerical terms, at least, how close recent attempts to reform the law have come to changing the law. The second source of data sources are the websites of the interest groups and organisations involved, as well as media reports of recent events. These sources offer information, such as mission statements and official positions on the issue. In addition, media reports are analysed to gain insight into the presence of representatives and bill sponsors in the media at the time and evaluate the resonance of discourses about voluntary euthanasia and the attempts at the time. This information is vital to add important detail and contextual information to the legislative histories, which were mapped using the parliamentary websites. The third source of data is material from interviews with 'key players' in the attempts to reform the law in each state. Interviews were conducted with the following sets of participants: bill sponsors; parliamentary officials; presidents of the interest groups involved; and representatives of professional organisations. The majority of the interviews were conducted in Hobart and Adelaide during May 2012 and follow up telephone interviews were conducted in February 2013. The interviews were semi-structured and questions asked aimed to draw out information about each individual's involvement in the legislative process and benefit from their expertise to better understand each case. For example, parliamentary officials were questioned about the nature of the parliamentary processes involved in the passage of a law on voluntary euthanasia, particularly the Private Member's Bills process, to gain an insight into whether procedural mechanisms might present a barrier to law reform. Whilst representatives of interest groups and professional organisations were asked about

¹¹ To demonstrate this point Appendix A provides a list of bills and their sponsors in the Australian state and territorial parliaments.

their current activities and arguably, most importantly, bill sponsors were asked about the present status of their legislation. This information was used to add rich detail to the information obtained from parliamentary websites and is crucial to better understand the cases under investigation.

EUTHANASIA POLITICS IN THE SOUTH AUSTRALIAN PARLIAMENT

Of all the Australian states the largest amount of activity, in relation to the amount of legislation introduced and parliamentary lobbying, has taken place in the South Australia.¹² Despite the efforts of the opponents of bills to keep the issue off the agenda, voluntary euthanasia is far from resolved in South Australia. Almost every year since the mid-1990s, the parliament has considered at least one bill seeking to change the law. In 2012, with the failure of a bill at Second Reading by only two votes, interest group activity on the issue in the state has intensified, but this activity countered by strong opposition from members of professional organisations. To shed light on these developments, the following case study outlines the present status of bills seeking to legalise voluntary euthanasia and surveys the activities of groups that have a stake in the issue.

i) The present status of voluntary bills in the parliament

The most recent bill to receive a vote in the House of Assembly was the *Voluntary Euthanasia Bill 2012*. The bill sought to legalise active voluntary euthanasia for patients that were in the terminal stage of an terminal illness. Consideration of the bill provides an insight into the voting behaviour of MPs on the issue, as well as the level of support and opposition in the parliament. The vote on the bill was significant, not only because it failed by only two votes, but because it was the first time the issue had been voted on in the Assembly for seventeen years. So, whilst the 1995 *Voluntary Euthanasia Bill* was defeated by 30 votes to 12, the 2012 bill failed by only two votes: 22 votes to 20. Table 1 below reports the Second Reading voting on the bill on 14 June 2012 by party, as well as the level of cohesion in the parties.

Table 1: Party voting on the *Voluntary Euthanasia Bill 2012* in the House of Assembly

| | For | Against | DNV | Cohesion |
|--------------|-----------|-----------|----------|----------|
| LIB | 5 | 11 | 2 | .38 |
| ALP | 14 | 9 | 3 | .22 |
| IND | 1 | 2 | - | - |
| Total | 20 | 22 | 5 | |

¹² *ibid.*

During the voting, both parties were significantly split and only half as cohesive on the issue as they were in 1995. The bill was supported by the Premier Jay Weatherill and two senior ministers, Pat Conlon and Paul Caica although the leader of the Liberal Party, Isobel Redmond, did not vote. There was also a gender dimension to the voting. The new influx of female 'centre-left' MPs were, in large part, responsible for the increase in parliamentary support. Indeed, half of the 14 ALP members whom supported the bill were women and twice as many women MPs supported the bill as opposed it. However, arguably, the most important factor that predicted the voting patterns was the ideological and religious factions present in the Assembly. At the time, the media reported the main reason for defeat of the bill was opposition from 'conservative' Liberals and key members of Labor's right-faction.¹³ Members of Labor's right-faction who voted against the bill, included mineral resources and energy minister Tom Koutsantonis, the Treasurer, Jack Snelling, and back-bencher Michael Atkinson. Prior to the vote, the bill's sponsor, predicted that there would be significant opposition from the right-wing of the Labor Party:

Ironically, the Labor Government, the one in power in the Lower House, is dominated by Catholics. That is the right-wing faction of the Labor Party, they are nearly all Catholics. They control the Parliament because they have the majority ...and they don't want a VE bill.¹⁴

So, whilst the recent vote signals that opinion in the House of Assembly is tending towards liberalisation, the outcome of future votes is difficult to predict as five MPs did not vote. Meaning the outcome of a vote on the bills presently before parliament is likely to be close.

In 2013, the first proposal considered was Bob Such's *Ending Life With Dignity Bill 2013*, which he introduced in February. Again, the bill is deliberately narrow in scope, restricting voluntary euthanasia to the terminal stage of a terminal illness, which means that it could win the support of the five MPs who were 'undecided' in the close June 2012 vote. However, due to its narrow scope, the bill does not go far enough for the euthanasia groups. The euthanasia groups have been working with Steph Key to develop a broader bill, which might also be introduced in the near future. The second proposal will come from Steph Key, who has confirmed she will be introducing a bill.¹⁵ In February 2013, Key intended to meet again with the euthanasia lobby, including Philip Nitschke, to discuss the kind of model for voluntary euthanasia the bill will propose and also with Mark Parnell, to discuss whether he would like to work together on the bill.

13 Daniel Wills, "SA Parliament Kills Off Euthanasia Laws for the Moment," *Adelaide Now* (online edition), June 14, 2012, accessed March 3, 2013, <http://www.adelaidenow.com.au/news/south-australia/parliament-kills-off-euthanasia-laws/story-e6frea83-1226395772400>.

14 Telephone interview with Bob Such, January 31, 2012.

15 During a telephone conversation with the author on January 31, 2013.

ii) The interest groups involved

While the precise influence of interest groups is difficult to ascertain quantitatively – and membership of a particular political party was by far the best predictor of voting patterns – it is important to consider the activities of the interest groups involved in the issue.¹⁶ In contrast with the Northern Territory, campaigns in the other states have taken place over many years up until the present. During that time, the anti-euthanasia lobby has become more organised. One of the key strengths of this lobby is that it is located within the broader right to life movement, which offers access to a large support base. Organisations such as the Australian Christian Lobby have branches in each of the states and territories. However, single-issue, anti-euthanasia groups have formed, one of the most prominent being HOPE, which is directed by Paul Russell in South Australia.

However, since the overturning of the *ROTTI Bill* in the Northern Territory, the pro-euthanasia campaign has also become more organised. South Australia has one of the most highly organised voluntary euthanasia societies in Australia.¹⁷ The state's voluntary euthanasia society has been the most active in lobbying the parliament. The South Australian Voluntary Euthanasia Society (SAVES) – which was founded in 1983 and has a large membership base – has been persistently campaigning for a change in the law on end of life choices. The recent vote in the Assembly demonstrates that the group is closer to achieving success in terms of a change in the law. A key strategy that could facilitate this involves increasing its visibility amongst politicians and the public. Frances Coombe, the President of SAVES, outlined recent activity:

Over the past couple of years we have had monthly information days on the Parliament steps. It's hard to keep this issue out in the public, it's not a happy issue, death is a topic that they don't really want to think about. So if we can keep the word voluntary euthanasia out in the public face, as we do when we are on the Parliament, steps that's ideal. Parliament House is ideally situated on North Terrace, being close to the mall and also it doesn't cost us anything, which is really important, as we don't have much money being a voluntary body. So we go on there and take our placards, tables and information pamphlets and we are there for about three hours on a Friday. The Members of Parliament know we are there and it's good for them to see we are there, so they know it is an issue that has to be addressed and is not going to go away.¹⁸

16 The pattern of the free voting is in line with the findings of the free vote literature; see for example, Philip Cowley and Mark Stuart. "Party Rules, OK: Voting in the House of Commons on the Human Fertilisation and Embryology Bill." *Parliamentary Affairs* 63, no. 1 (2010): 173–181.

17 In addition, there are four national lobby organisations originating from South Australia, who work independently of the VE Societies. The four groups are: Doctors for Voluntary Euthanasia Choice; South Australian Nurses Supporting Choices in Dying; Syndicated Australian Voluntary Euthanasia Youth Advocates; and Christians Supporting Choice for Voluntary Euthanasia.

18 Interview with Frances Coombe, Adelaide South Australia, 23.04.2012.

In addition to its influence amongst MPs, SAVES also maintains its visibility in the community by holding stalls in Rundle Mall in Adelaide city centre twice a year and asking members of the public to write to their MP. Frances Coombe commented on the reception the Society has received from the public during this activity:

Twice a year we hire a space there and hand out information and there are signs and placards and we have just started asking again if people would write a letter to their MP and they were so enthusiastic it was incredible. We weren't allowed to approach people, but people were coming in droves, it's an issue that has been saturated among the public I think that they are really wanting change, saying 'why haven't they done anything?', 'you are still here'. Some people write a page, like a stream of their experiences, so that is the power of the issue at the moment.¹⁹

One of the main challenges for SAVES is to sustain their highly active campaign over time. Frances Coombe argued that the success of the society resulted from 'keeping at it':

I think it would probably have to be our lobbying over time as a society, because we are very active. The personal letters themselves make a big difference, but those who are opposed to the choice are also writing letters and communication. So I think that it is the fact that we are a strong lobbying force and we keep at it and we do it in a respectful but dogged manner, always presenting the facts. I think that is the strongest thing that it culminates after a time.²⁰

The Northern Territory and South Australian campaigns illustrate how different contexts have required different campaigning methods. The short campaign in the Northern Territory required spontaneous activity, and the limited amount of time available for opponents to organise was a key feature of the passage of the *ROTTI Bill*. However, over time, as the opposition has become more organised, a professionalised approach has been important in South Australia, not only to network with MPs and possible bill sponsors, but also to keep the issue highly visible in the community over a long period of time. In addition, the group has had to respond to continued opposition from leadership of the main professional organisations, which have played an increasingly influential role since the overturning of the Northern Territory legislation. In addition, Christian groups had launched a heavy lobbying campaign to secure the opposition of these MPs.²¹

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Wills, "SA Parliament Kills Off Euthanasia Laws for the Moment."

iii) The professional organisations involved

The *Criminal Law Consolidation (Medical Defences – End of Life Arrangements) Amendment Bill 2011* in particular prompted strong reactions from the lawyers and medical professionals' professional organisations. Since then, representatives from these organisations have upheld their opposition to the practice. For example, Dr Peter Sharley, the President of the South Australian branch of the Australian Medical Association, gave weight to the arguments of the opponents, by speaking about the bill's flaws on Radio Adelaide.²² In addition, Dr Sharley and Ralph Bönig, President of the Law Society of South Australia, issued a joint media release stating that their organisations were both opposed to the bill.²³ Nevertheless, as a national organisation, the AMA does not have a position on whether or not the law should be changed. Rather, the organisation recognises that individual doctors may have their own view on law reform. Indeed, AMA policy 10.5 states that: 'The AMA recognises that there are divergent views regarding euthanasia and physician-assisted suicide'.²⁴ Commenting on doctors views of voluntary euthanasia, Dr Simon Towler, former Branch President of the Western Australian AMA, stated that: 'There are 26,500 doctors in the AMA, (and) there are 26,500 different opinions on this issue'.²⁵ Whilst John Flannery, AMA Spokesman, explained that:

There are two things the AMA does not have a formal position on, abortion and euthanasia... The reason the AMA doesn't have a position on euthanasia is because it's one of those issues that has lots of grey around it ... doctors have their own views about the definition of euthanasia, voluntary euthanasia and assisted death. It's a very tough area to get a definitive response from the AMA on because doctors have such differing views.²⁶

However, over the past two decades, several Presidents and Branch Presidents, including Dr Peter Sharley, South Australian AMA Branch President, have spoken out against legalisation of the practice.²⁷ One of the most prominent and well-known opponents of voluntary euthanasia in the medical profession is Dr Chris Wake, former Northern Territory AMA Branch President, who was heavily involved in the campaign to overturn the Territory's *Rights of the Terminally Ill Act*. Action taken by Dr Wake included a Supreme Court and a

22 Archer, "Euthanasia Bill sparks Concern from AMA."

23 "Doctors and Lawyers Oppose Keys 'End of Life' Bill," *AMA(SA) Website*, September 12, 2011, accessed March 3, 2013, <http://www.amasa.org.au/download/Media%20releases/2011/0970%20End%20of%20Life%20Bill%2009-12%20cb.pdf>.

24 "The Role of the Medical Practitioner in End of Life Care – 2007."

25 "WA Case puts Focus on Voluntary Euthanasia Legislation," *ABC 7.30 Report*, December 1, 2000, accessed February 14, 2013, <http://www.abc.net.au/7.30/stories/s219321.htm>

26 Quoted in David Sygali, "Doctors form Lobby for Right to Die with Dignity," *Western Advocate* (online edition), November 12, 2011, accessed February 14, 2013, <http://www.westernadvocate.com.au/story/939863/doctors-form-lobby-for-right-to-die-with-dignity/>.

27 See, for example Jordan Archer, "Euthanasia Bill Sparks Concern from the AMA," *Radio Adelaide*, September 14, 2011, accessed February 14, 2013, <http://radioadelaidebreakfast.wordpress.com/2011/09/14/euthanasia-bill-sparks-concern-from-the-ama/>

High Court challenge, which were both rejected.²⁸ As a result, since the mid 1990s, the AMA has frequently been cited as opposed to law reform, despite not officially commenting on whether, or not, there should be a change in the law. At the same time, however, there are a significant number of doctors and nurses, many of whom are AMA members, who do support a change in the law. Professional groups who support a change in the law include 'South Australian Nurses Supporting Choices in Dying' and 'Doctors for Voluntary Euthanasia Choice'.²⁹ Since the late 1980s, several surveys have found that a majority of doctors and nurses favour legalised voluntary euthanasia and would support a change in the law:

- In 1988, Kuhse and Singer surveyed 869 Victorian doctors and asked: 'Do you think it is sometimes right for a doctor to take active steps to bring about the death of a patient who has requested the doctor to do this?' Sixty-four per cent of AMA members were in favour, while 62 per cent of all participants were in favour, 93 per cent thought such a request could be rational and 52 per cent of AMA members thought that the AMA should change its stance of the issue.³⁰
- In 1993, Baume and O'Malley surveyed 1268 NSW and ACT doctors: Fifty-nine per cent thought actively hastening death on request was sometimes right, whilst 96 per cent thought such a request could be rational. Fifty-eight per cent thought that the law should be changed to permit 'active' voluntary euthanasia.³¹
- In 1997, Steinberg et al. surveyed approval rates of the *ROTTI* Act amongst doctors, nurses and the community in the Northern Territory and found: Thirty-four per cent of nurses and 14 per cent of doctors strongly approved of the Act, whilst 31.7 per cent and 20.9 per cent approved.³²
- In 2007, Neil et al. surveyed 854 Victorian doctors about the legalisation of voluntary euthanasia and found: Fifty-three per cent of doctors support the legalisation of voluntary euthanasia, whilst out of doctors who have experienced requests from patients to hasten death, 35 per cent have administered drugs with the intention of hastening death.³³

28 Stephen Cordner and Kathy Ettershank, "Northern Territory Euthanasia Act has an Uncertain Start," *The Lancet* 348, no.9020 (1996): 120.

29 The position of Doctors for Voluntary Euthanasia Choice is outlined in, John O. Willoughby, Robert G. Marr, and Colin P. Wendell-Smith, "Doctors in support of law reform for voluntary euthanasia," *The Medical Journal of Australia* 198, no. 4 (2013).

30 Helga Kuhse and Peter Singer, "Doctors' Practices and Attitudes Regarding Voluntary Euthanasia," *The Medical Journal of Australia* 148, no. 12 (1988).

31 Peter Baume and Emma O'Malley, "Euthanasia: Attitudes and practices of medical practitioners," *The Medical Journal of Australia* 161, no. 2 (1994).

32 Margaret Steinberg et al., "End-of-Life Decision-Making: Community and medical practitioners' perspectives," *Medical Journal of Australia* 166, no. 3 (1997).

33 David A. Neil et al., "End-of-Life Decisions in Medical Practice: A survey of doctors in Victoria (Australia)," *Journal of Medical Ethics* 33, no. 12 (2007).

Nevertheless, since the Northern Territory law was overturned, despite widespread community and a reasonable amount of professional support for the practice, there has been no change in the law on voluntary euthanasia and assisted suicide in Australia. The attribution of anti-euthanasia comments to representatives of the AMA is a key reason for the failure of bills in South Australia and Tasmania, which must be considered in any explanation of the passage of bills on the practice.

iv) The likelihood of reform in the near future

Despite the efforts of the opponents of the bills to keep it off the agenda, the issue of voluntary euthanasia is far from resolved in South Australia. Over the past two years, several proposals have sought to develop a new model, which would provide a legal defence for doctors who administer pain-relieving drugs resulting in a patient's death. Supporters of this model include Steph Key MP (ALP) whose *Criminal Law Consolidation (Medical Defences – End of Life Arrangements) Amendment Bill 2011* sought to implement this model. Key explained the intent of the bill in a letter to *The Advertiser* on April 5th 2011 and stressed that it would not legalise voluntary euthanasia:

This Bill does not legalise euthanasia. Ending life will not be decriminalised. Faced with a charge of murder, a doctor must argue in court that their conduct was a 'reasonable' response to suffering. What is reasonable needs to be determined by the facts of the particular case. Would the ordinary person think it was reasonable conduct? Doctors are among our most respected leaders and would not lightly take such a decision. But there is no compulsion, no matter how terrible the suffering, for a doctor to comply with a patient's request. This is a matter of conscience for the doctor.³⁴

The bill was introduced into the Assembly on 10 March 2011 and had the support of the health minister John Hill and the opposition health spokesman Duncan McFetridge.³⁵ The bill passed its Second Reading 'on the voices' on the 24th March 2011, however, this was rescinded on 5 May 2011, when the Deputy Leader of the Opposition, Mitch Williams protested that the bill had been allowed to pass without sufficient debate. The bill caused controversy amongst opponents of voluntary euthanasia who argued it was too similar to the *Criminal Law Consolidation (Voluntary Euthanasia) Amendment Bill 2010*, which was previously introduced by the health minister John Hill and was a covert attempt to legalise voluntary euthanasia.³⁶ As such, there is evidence that opponents of euthanasia are taking this move seriously. In 2010, Hill said that he would not support the *Consent to Medical Treatment Bill* as it was 'too clunky' and in a surprise move, proposed his own bill, the *Criminal Law Consolidation (Voluntary Euthanasia) Amendment Bill 2010*. The bill did not progress but was taken up by Steph Key who introduced a redrafted version to allow a defence to doctors who administer pain-relieving drugs. In 2011, Hill stated his position on

34 Quoted from SAVES, "the Bulletin," 1.

35 Michael Owen, "Minister Recalls Sister as Euthanasia Law Nears," *the Australian* (online edition), March 25, 2011, accessed March 3, 2013, <http://www.theaustralian.com.au/national-affairs/state-politics/minister-recalls-sister-as-euthanasia-law-nears/story-e6frgcx-1226027710498>.

36 See, HOPE, "End of life Arrangements' or Just Plain Killing?."

the issue, saying he had been a strong supporter of euthanasia until the death of his sister from cancer a decade before. Because of her good experience with palliative care, he said he no longer supported an absolute right-to-die platform and outlined his support for the doctors defence model:

...(in certain) circumstances, if the best interests of the patient was to prescribe some drugs which would finish life, I think most of us would say, 'That's quite reasonable and the doctor shouldn't be prosecuted for doing that' -- and that's what this legislation allows.³⁷

In 2012, Hill introduced legislation on a related matter – advance directives – which has caused concern amongst anti-euthanasia groups. The *Advanced Care Directives Bill* was introduced on 17 October 2012 into the House of Assembly and intends to simplify the area of advance care directives by replacing the three existing forms of directives (the enduring power of guardianship; medical power of attorney; and anticipatory direction) with one single directive. However, groups opposed to voluntary euthanasia claim that the bill: '...sets out opportunity for the withdrawal or withholding of nutrition and hydration in circumstances where a patient is not in the last days of life' and, consequently, it is effectively allowing euthanasia because: 'actions or omissions with the intent to kill or the intent that the patient dies are either acts of euthanasia or assisted suicide'.³⁸ The bill passed through the Assembly on 15th November 2012 and is awaiting its introduction in the Legislative Council.

During an interview that took place before Hill's resignation, Steph Key emphasised the importance of the continued support on the issue:

I really think with the *Medical Defence Bill* that we have a very good chance. I think because it was the idea of the Health Minister, people seemed quite comfortable with it, because it wasn't outright voluntary euthanasia. All it said was that if under certain circumstances a doctor was charged then this would be the defence they would have and it's really unfortunate that the Health Minister was a 'purist' about it really. I understand why he was and I respect that, I introduced a bill that reflected his position as well as my own, but the reality of it in our House have got electorates that they need to think about and whether they are reflecting what their electorates think. And the feedback that people have had is that it needed more safeguards, it's a bit unfortunate really. But I'm hoping that Minister Hill will consider introducing the Bill himself.³⁹

37 Michael Owen, "Minister Recalls Sister as Euthanasia Law Nears."

38 "New Threat Please Act Now!" *Hope Website*, accessed January 12, 2012, <http://noeuthanasia.org.au/content/campaigns/south-australia.html>.

39 Interview with Steph Key, 24th April 2012, Adelaide.

During 2013 Hill announced his resignation as health minister, as he intends to retire at the next election.⁴⁰ While it is possible that Mr Hill could introduce a bill as a private member, he has yet to do so. The new health minister, Jack Snelling, is opposed to voluntary euthanasia on religious grounds, which will limit the likelihood of government involvement in the future.⁴¹ The future liberalisation of the law on end of life choices rests upon two important factors. First, continued activity on the issue, including cross-party cooperation. The joint bill introduced by Steph Key from the ALP and Mark Parnell from the Greens, indicates that there is potential for cooperation, not only across party lines, but also across both houses. The second is the five 'undecided' Assembly members whose votes could determine the fate of future proposals given the very narrow margin by which Bob Such's 2012 Bill failed.

EUTHANASIA POLITICS IN THE TASMANIAN PARLIAMENT

The Tasmanian parliament also holds promise for those seeking change. One positive sign is that, although acting in their capacity as private members, two key members of the government have emerged as the drivers of change. In June 2010, whilst in the position of Attorney General, Lara Giddings announced she would hold a public consultation and make funds available to draft a private member's bill.⁴² Since this time, Lara Giddings and Nick McKim, Leader of the Greens in Tasmania, have been working in collaboration on draft proposals for reform.⁴³ In February 2013, a discussion paper containing the model of voluntary euthanasia for Tasmania was released and legislation was introduced at the end of 2013. The following section will describe and explain the fate of the 2013 attempt to change the law on euthanasia in Tasmania, the *Voluntary Assisted Dying Bill* and consider the likelihood of reform in the near future.

40 Sarah Martin, "Ministers Depart in SA Shuffle," *the Australian* (online edition), January 15, 2013, accessed January 16, 2013, <http://www.theaustralian.com.au/national-affairs/state-politics/ministers-depart-in-sa-shuffle/story-e6frgczx-1226554136276>.

41 Daniel Wills, "Jack Snelling Tables Petition Against Euthanasia," *the Advertiser* (online edition), May 5, 2011, accessed March 3, 2013, <http://www.news.com.au/top-stories/jack-snelling-tables-petition-against-euthanasia/story-e6frfkp9-1226050108168>.

42 "Attorney General Outlines Law Reform Agenda," Tasmanian Government Media Release June 22, 2010, accessed 1 November 2011, <http://www.media.tas.gov.au/print.php?id=29810>
Meredith Griffiths, "Tasmania relaunched euthanasia debate," *ACB News the World Today*, June 23, 2010, accessed March 7, 2013, <http://www.abc.net.au/worldtoday/content/2010/s2934736.htm>

43 Matthew Denholm, "State to Push For Mercy Killing," *The Australian* (online), March 8, 2011, accessed March 7, 2013, <http://www.theaustralian.com.au/news/nation/state-to-push-for-mercy-killing/story-e6frg6nf-1226017319925>

i) The present status of bills

The *Voluntary Assisted Dying Bill* is the second main attempt to reform the law on voluntary euthanasia in Tasmania. Prior to this, leader of the Tasmanian Greens, Nick McKim, introduced the *Dying with Dignity Bill* into the House of Assembly on 26 May 2009.⁴⁴ The bill sought to create an exemption from the *Criminal Code Act 1925* for medical practitioners who assist terminally ill people to die under certain circumstances. One of the main reasons for its failure was the level of opposition it attracted, particularly from ALP MPs, in the House of Assembly. The *Dying with Dignity Bill 2009* failed at the Second Reading stage by 15 votes to 7, with two MPs absent, and one abstention. Table 5.1 indicates the pattern of the voting.

Table 2: Voting on the *Dying With Dignity Bill 2009* in the Tasmanian House of Assembly by party

| | Yes | No | DNV | Total | Cohesion |
|--------------|----------|-----------|----------|-----------|----------|
| ALP | 3 | 9 | 2 | 14 | .50 |
| Liberal | 0 | 6 | 1 | 7 | 1 |
| Green | 4 | 0 | - | 4 | 1 |
| Total | 7 | 15 | 3 | 25 | |

The bill attracted the support of all of the four Greens MPs, but only three (25 per cent) of the ALP MPs. By contrast, all Liberal members opposed the bill. Although the Greens and the Liberals remained cohesive, the ALP was split, with three MPs voting in support and nine opposing it. Despite the failure of the 2009 bill, in June 2010, then Premier Lara Giddings stated she remained committed to working with the Greens to prepare a private member’s bill on the issue, reworking the legislation.⁴⁵ During March 2011, Giddings told the *Australian* newspaper: ‘the leader of the Tasmanian Greens (Nick) McKim and I will continue to progress this initiative as private members and plan to issue a consultation paper towards the end of the year’.⁴⁶ The second reading vote on *Voluntary Assisted Dying Bill* took place on 17 October 2013. The bill would have permitted voluntary euthanasia for terminally ill patients at the late stages of illness and incorporated greater safeguards than the 2009 bill, including the requirement for three requests from a patient and the consent of two GPs to allow the practice to go ahead. Ultimately, it failed but more narrowly than the 2009 bill. Table 3 indicates the pattern of the voting.

44 For an analysis of the provisions of the Bill see Bartles and Otlowski “A Right to Die? Euthanasia and the law in Australia.”
45 Griffiths, “Tasmania relaunches euthanasia debate.”
46 Denholm, “State to Push For Mercy Killing.”

Table 3: Voting on the *Voluntary Assisted Dying Bill 2013* in the Tasmanian House of Assembly by party

| | Yes | No | DNV | Total | Cohesion |
|--------------|-----------|-----------|----------|-----------|----------|
| ALP | 7 | 3 | - | 10 | .40 |
| Liberal | | 10 | - | 10 | 1 |
| Green | 4 | - | 1 | | 1 |
| Total | 11 | 13 | 1 | 24 | - |

Debate in the Assembly had indicated a 12–12 result after all parties had granted a conscience vote on the bill, however, Greens deputy speaker, Tim Morris – who supported the Bill – was unable to cast a vote which led to its failure by two votes. Liberal Party MPs voted as a bloc, so with the support of three ALP MPs, this was enough to secure its defeat.

ii) The interest groups involved

Groups from each side of the euthanasia debate have emerged in Tasmania to support and challenge proposed legislation. One of the key groups campaigning for law reform is Dying with Dignity Tasmania which has used a variety of strategies to support law reform, but a key part of their campaign has been to ‘challenge information’. Margaret Sing, president of the organisation stated that the group has: ‘...made the commitment to use the best quality information that we can.’⁴⁷ She explained that politicians deserve to be given good quality information to make good public policy and that a key element of the anti-choice campaign is to confuse and scare politicians. So a key part of Dying with Dignity Tasmania’s strategy has been to advise politicians that they have the responsibility to check information and check what they are told. The group also invites politicians to check information given to them by Dying with Dignity Tasmania. The main focus of the campaign is on MPs, particularly continuing to support Nick McKim and Lara Giddings in their work. Margaret Sing has worked with both in the consultation process. Another focus of the campaign is on public outreach and representatives from the group have attended several U3A group meetings. Other current activities include a market stall on Salamanca Market in Hobart (corresponding with SAVES’s activities on the South Australian parliament steps), writing to directly to politicians, meetings held with experts such as urologist Dr Rodney Syme and palliative care expert Jan Bernheim. The group is frequently cited in the Tasmanian media in articles relating to the issue and has also held several workshops on advanced care planning.

iii) The professional organisations involved

An important factor in the fate of voluntary euthanasia legislation is the continued opposition from the present and past presidents of the Tasmanian Branch of the AMA, who have been widely quoted in the media and are still perceived to represent the views of the

47 Interview with Margaret Sing, Hobart Tasmania, 3.04.2013

profession as a whole. Indeed, the anti-euthanasia position of the former president, Dr Christopher Middleton, has been cited in the national media several times.⁴⁸ In November 2012, whilst taking part in a debate on the issue on ABC's *The World Today* programme, Dr Middleton maintained his position that, it is impossible to develop adequate safeguards for legalised euthanasia.⁴⁹ The present Tasmanian AMA Branch President, Dr John Davis, made claims about the level of opposition from Tasmanian doctors: 'I'm not sure that the majority of doctors, if in fact any doctors, would want to euthanase people, and that's not being taken into account' and that 'Being really blunt, this is legislation for state-sanctioned murder and the last one of those in Australia was in 1964'. However, in the same article, Nick McKim challenged Dr Davis's claims stating that: 'We have doctors who are motivated by compassion and respect for human dignity who currently euthanase patients and the AMA has just come out and sold those doctors down the river'.⁵⁰

iv) The likelihood of reform in the near future

As with the previous attempt to reform the law in 2009, party politics played a role in the voting on the bill and, ultimately, the lack of support from ALP MPs led to its defeat. The fate of future attempts to reform the law will rest on the sponsor's ability to generate support from ALP MPs, as the Liberal Party is likely to remain strongly opposed. There is also evidence that future proposals could be slowed by opposition in the Legislative Council. Even if a proposal passes the Assembly, the Legislative Council is likely to present a barrier. Although the issue has not been voted on in the upper house and voting would be unpredictable as there are 13 crossbench Independent members (with one Liberal MLC and one ALP MLC), a consideration of the vote on the *Same-Sex Marriage Bill*, which took place during September 2012, indicates that the outcome of the vote could be close. Of course, euthanasia involves different issues, but broadly speaking, same-sex marriage can be used as a barometer of the ideological commitments of MLCs. The *Same-Sex Marriage Bill* was defeated 8 votes to 6, with the ALP MLC Craig Farrell voting for the bill and the Liberal Vanessa Goodwin voting against. The five independent MLCs who voted in favour were: Rob Valentine, Kerry Finch, Ruth Forrest, Craig Farrell, Mike Gaffney and Tony Mulder. The seven independents who voted against were: Vanessa Goodwin, Tania Rattray, Greg Hall, Adriana Taylor, Rosemary Armitage, Ivan Dean, Jim Wilkinson, and Paul Harriss.⁵¹

48 For example, ABC News, "Doctors Label Euthanasia Bill as 'Poison'", ABC News (online), August 25, 2009, accessed March 8, 2013, <http://www.abc.net.au/news/2009-08-25/doctors-label-euthanasia-bill-pois-on/1403184>

Ashley Hall, "Why is Euthanasia still Illegal in Australia?" ABC News (online) November 16, 2012, accessed 8 March 2013, <http://www.abc.net.au/worldtoday/content/2012/s3634322.htm>.

49 Hall, "Why is Euthanasia still Illegal in Australia?"

50 ABC News, "Euthanasia 'state sanctioned murder'," ABC News (online), March 18, 2013, accessed March 20, 2013, <http://www.abc.net.au/news/2013-03-17/ama-rejects-euthanasia-bill/4577922?section=tas>

51 ABC News, "Tasmania's Upper House Votes Down Gay Marriage," ABC News (online), September 28, 2012, accessed March 8, 2013, <http://www.abc.net.au/news/2012-09-27/tasmania-upper-house-votes-down-gay-marriage/4284538>.

CONCLUSION

The comparison of the voting patterns on euthanasia in the two state parliaments revealed one of the main findings of this article. There has been a striking similarity in the patterns of the free voting on euthanasia bills in the South Australian and Tasmanian parliaments, which led to the failure of bills. Previously, in the Northern Territory, a larger proportion of MLAs in the parliament's conservative party, the CLP, were willing to support the law reform than their equivalents – that is Liberal MPs – in the other parliaments. Indeed, CLP support was vital to the successful passage of the Northern Territory bill. However, in the other two parliaments, Liberal MPs have almost unanimously opposed proposals to reform the law and have combined with 'right-wing' ALP legislators to defeat proposals. Another key difference in the Northern Territory was the absence of party pressure and factional voting blocs, so legislators had more freedom to act as 'independents'. In light of this, the comparison sought further to explain the opposition to euthanasia proposals, through analysis of the tactics of interest groups and professional organisations. One key reason for Liberal MPs opposition to the practice is that, since the overturning of the Northern Territory legislation, the AMA has become more strongly associated with the anti-euthanasia position. Of course, the President of the Northern Territory Branch of the AMA, Dr Chris Wake's opposition to the practice was well known during the passage of the *ROTTI Bill*, however, this was balanced by the 'Doctors for Change' movement. However, since then, due to the involvement of Dr Wake in the campaign to overturn the Northern Territory's legislation – and the continued appointment of anti-euthanasia doctors on the executive committees of several state AMA branches who have criticised euthanasia proposals in the media – the organisation has become strongly associated with the anti-euthanasia position. Nevertheless, the organisation does not have a position on the issue of law reform. Although it is difficult to calculate the extent, it is likely that this has influenced the voting on bills, in particular in the Liberal Party, by persuading any 'wavering' legislators not to vote for law reform. This has implications for the study of politics more broadly than the study of voluntary euthanasia and suggests that a study of the power of the medical profession on health policy more broadly may be fruitful. In addition, further research on the history of voluntary euthanasia in the state and territorial parliaments would be fruitful to shed more light on the future of the issue.

APPENDIX A: VOLUNTARY EUTHANASIA BILLS IN THE AUSTRALIAN COMMONWEALTH, STATE AND TERRITORIAL PARLIAMENTS (1995-PRESENT)

| Parliament | Year | Bill | (2nd Reading) Vote | | Origin |
|--------------------|------|--|--------------------|---------------------|--------|
| | | | Upper | Lower | |
| Commonwealth | 1997 | Euthanasia Laws Bill | 38 v.33 | 88 v. 35 | H |
| | 2004 | Euthanasia Laws (Repeal) Bill | | | S |
| | 2007 | Australian Territories Rights of the Terminally Ill Bill | | | S |
| | 2008 | Restoring Territory Rights (Euthanasia Laws Repeal) Bill | | | S |
| | 2008 | Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill | | | S |
| | 2010 | Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill | | | S |
| | 2010 | Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill | | | S |
| | 2012 | Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill | | | S |
| | | | | | |
| Northern Territory | 1995 | Rights of the Terminally Ill Bill | n/a | 13 v. 12 | LA |
| | 1996 | Respect for Human Life Bill | n/a | 11 v. 14 | LA |
| ACT | 1997 | Euthanasia Referendum Bill | n/a | | LA |
| | 1997 | Medical Treatment (Amendment) Bill | n/a | 9 v.8 ⁵² | LA |

52 Based on Members' voting intentions declared in the Assembly debate.

| Parliament | Year | Bill | (2nd Reading) Vote | | Origin |
|------------------------|------|--|--------------------|----------|--------|
| | | | Upper | Lower | |
| South Australia | 1995 | Voluntary Euthanasia Bill | | 12 v. 30 | HA |
| | 1996 | Voluntary Euthanasia Bill | | | LC |
| | 2000 | Dignity in Dying Bill | | | LC |
| | 2002 | Dignity in Dying Bill | 9 v. 12 | | LC |
| | 2006 | Voluntary Euthanasia Bill | 8 v.13 | | HA |
| | 2007 | Voluntary Euthanasia Bill | | | HA |
| | 2008 | Voluntary Euthanasia Bill | | | LC |
| | 2008 | Consent to Medical Treatment and Palliative Care (Voluntary Euthanasia) Amendment Bill | 9 v. 11 | | LC |
| | 2010 | Voluntary Euthanasia Bill | | | HA |
| | 2010 | Voluntary Euthanasia Bill | | | HA +LC |
| | 2012 | Consent to Medical Treatment and Palliative Care (End of Life Arrangements) Amendment Bill | | 20 v.22 | HA |
| | 2013 | Voluntary Euthanasia Bill | | | HA |
| | 2013 | Ending Life with Dignity Bill | | | HA |
| | | Ending Life with Dignity (No 2) Bill | | | |
| New South Wales | 2002 | Rights of the Terminally Ill Bill | | | HA |
| | 2003 | Voluntary Euthanasia Trail (Referendum) Bill | | 4 v. 28 | LC |
| | 2013 | The Rights of the Terminally Ill Bill | | 13 v. 23 | HA |
| Tasmania | 2009 | Dying with Dignity Bill | | 7 v. 15 | HA |
| | 2013 | Voluntary Assisted Dying Bill 2013 | | 11 v. 13 | HA |

| Parliament | Year | Bill | (2nd Reading) Vote | | Origin |
|-------------------|------|---|--------------------|-------|--------|
| | | | Upper | Lower | |
| Victoria | 2008 | Medical Treatment (Physician Assisted Dying) Bill | 9 v. 11 | | LC |
| Western Australia | 1997 | Voluntary Euthanasia Bill | | | |
| | 1998 | Voluntary Euthanasia Bill | | | |
| | 2000 | Voluntary Euthanasia Bill | | | |
| | 2002 | Voluntary Euthanasia Bill | | | |
| | 2010 | Voluntary Euthanasia Bill | 11 v. 24 | | LC |
| Queensland | | No voluntary euthanasia legislation introduced | n/a | - | - |

Abbreviations: PMB: S: Senate; H: House of Representatives; LA: Legislative Assembly; LC: Legislative Council; HA: House of Assembly

Should upper houses have ministers?

John Young

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Standing Order 34 of the New South Wales Legislative Council requires that the House will not meet unless a minister is present. An incident in 2009, when this standing order was used to manipulate the sittings of the House, led to consideration of the proposition that the exclusion of ministers from an Upper House strengthens its role as a House of Review. This article examines the proposition from the perspective of the practicalities of the Legislative Council to determine whether the exclusion of ministers would affect the Council's ability to operate as an effective House of Review.

HOW MANY MINISTERS DO AUSTRALIAN UPPER HOUSES HAVE?

In NSW, as is generally the case in other bicameral legislatures in Australia, while practice sees the majority of Ministers of the Crown located within the lower house, there are no constitutional requirements that all or any number of ministers must come from either the Lower or Upper House.¹ Traditionally, the Premier is a member of the Legislative Assembly, based on the Westminster convention that the Premier should reside in the House in which government is formed. It is unlikely that this convention will not continue to be observed.² However, the convention that the Treasurer should be drawn from the House that has primacy in relation to the financial administration of the State has fared less well. In the period from 1995 to 2010, NSW had three Treasurers, each of whom was a member of the Legislative Council. This convention, to the particular chagrin of some Westminster traditionalists, has subsequently also not been observed in other legislatures, with both Victoria and Tasmania in recent times having a Treasurer appointed from the Upper House. In the federal parliament, although there are no constitutional requirements that any ministers be members of the Senate, all governments since federation have appointed senators to the ministry. In recent decades senators have usually comprised approximately one quarter to one third of the ministry.³ The following table shows the number of Upper House members that are ministers in relevant Australian State jurisdictions⁴

* Paper first prepared for the Parliamentary Law, Practice and Procedure (PLPP) Course, University of Tasmania. The views expressed in this article are those of the author alone.

| | Upper House Members | Government Members | Ministers | Cabinet |
|-------------------|------------------------|-----------------------|-----------|---------|
| NSW | 42 | 19 | 3 | 22 |
| Victoria | 30 | 21 | 6 | 23 |
| South Australia | 22 | 7 | 3 | 15 |
| Western Australia | 36 | 21 | 5 | 17 |
| Tasmania | 15 | 1 | 1 | 9 |

In NSW, *Egan v Willis* confirmed a broad notion of ministerial responsibility, with ministers responsible to the House to which they belong, at least to the extent of requiring them to answer to the House for the administration of government:

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of the chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.⁵

Ministers as representatives of the executive government are subject to the direct scrutiny of the House to which they belong. The corollary to this is that they are not subject to the same level of scrutiny by the other House.⁶ While there have been a few occasions in NSW when there have been no ministers appointed from the Legislative Council, in recent times a significant proportion of the Cabinet have been drawn from its members, with up to seven members of the 2003–05 Carr Ministry being members of the Legislative Council. The location of ministers in the Upper House is vulnerable to the criticism that ministers are located there in order to shield them from the scrutiny of the House whose confidence is required for the maintenance of government. However, it must also be acknowledged that Lower House ministers are equally shielded from direct scrutiny of the members of the Upper House, some of whom, as is the case in NSW, are the representatives of political interests that do not easily find a representative voice in the Lower House. In one sense an ideal model of responsible government would see both Houses in a bicameral legislature have equal opportunity to directly scrutinise the representatives of the executive. It could also be argued that all ministers should be subject to the same level of parliamentary scrutiny. If there was a requirement that all ministers be located in the Lower House then at least that House would have the opportunity, through routine parliamentary processes, to hold all members of the executive to account. However, as will be examined later in this article, such a model does not necessarily mean that the Upper House could not also have regular, if not equal, opportunity to hold the executive to account.

STANDING ORDER 34 – A ROD UNINTENTIONALLY FASHIONED

Since the advent of responsible government in NSW in 1855, there has always been a representative of the executive government in the Legislative Council. While there have been a few occasions when there have been no ministers, the Vice President of the Executive Council has always been appointed from the Council. Standing Order 34 of the NSW Legislative Council provides that: 'The House will not meet unless a minister is present.' Standing Order 34 was adopted in 2004. Prior to 2004 there was a convention in the Council that the House should not meet without the presence of a minister. The intention behind the convention was the protection of the processes of the House: namely that a government representative should be in charge of items of government business, and a government representative should be present in the House to take note of or respond to matters raised during private members' business. Prior to 2004, there were a number of occasions when the convention was invoked and also, albeit to a lesser extent, when it was ignored. However, in 2009, the convention, by then enshrined in standing order 34, was invoked not as a defence to the processes of the House, but rather as a mechanism for manipulating the sittings of the House. On 24 June 2009, the sitting of the House was suspended under the provisions of Standing Order 34 when the remaining minister in the House left the chamber, thereby obliging the President to leave the Chair and to suspend the sitting until the ringing of a long bell. The suspension of the House extended for 69 calendar days over the traditional winter long adjournment, and the House did not meet again until 1 September 2009. At the time of the suspension, the House was due to sit again the following day according to sessional order. As reported in the media at the time, after losing a series of votes during the day (due to the Government's reported loss of the support of the two Shooters Party members), the Minister without warning moved a special adjournment motion, which the Opposition then sought to amend with the intention of having the House sit the next day in order to bring on the debate on the Government's NSW Lotteries (Authorised Transactions) Bill 2009, for which the Government apparently no longer had the required support. The Minister, realising that the Opposition would be successful in amending the adjournment motion, left the Chamber before the question could be put.

The adoption of standing order 34 was intended to bring consistency to the previous convention requiring the presence of a minister in the House. The convention was never intended as a mechanism to be used by the executive government to manage the sittings of the House outside of the opening and proroguing of Parliament. However, this seemingly occurred on 24 June 2009. The forfeiture by the House of its right to determine when it would meet and conduct its own business is in turn injurious to the performance of the House of its function as a House of Review. The incident in 2009 prompted the then Clerk of the Legislative Council to initiate an investigation into whether other Australian parliaments had established any requirement similar to standing order 34. It emerged that no other Houses of Parliament in Australia and New Zealand, with the exception of the New Zealand House of Representatives had a standing order requiring the presence of a minister in the House. While no other Australian Houses have a standing order requiring the presence of a minister at all times, many Houses, notably lower Houses, have a convention that a minister should generally be present in the House. By contrast, in Australian upper

Houses, generally there is no convention requiring the presence of a minister in the House. This difference of approach between lower and upper Houses around Australia reflects the differing roles of the Houses. The Lower House is the House where the Government is made and unmade, and it is appropriate for a government representative to be present at all times. By contrast, the role of the Upper House as a 'House of Review' does not necessarily require the presence of ministers in the House in all instances. Indeed, as will be discussed below, a number of jurisdictions have considered the question of whether it would be best if ministers were excluded from the membership of their Upper House.

WHAT ARE THE POTENTIAL ADVANTAGES OF EXCLUDING MINISTERS FROM AN UPPER HOUSE?

Odgers Australian Senate Practice notes that a change to exclude ministers from the Senate might well strengthen the Senate's role as the House of Review, as distinct from the electoral college role of the Lower House in determining the government. To implement such a proposal, only the Leader of the Government in the Senate would remain a member of Cabinet in order to represent the Government.⁷ This option has not been taken up by

Generally, when the activities of ministers or parliamentary secretaries are reported in the media, no distinction is made regarding to which house of parliament the minister belongs.

any government in the Senate to date. The removal of ministers from the Upper House has also been canvassed as desirable in recent government reports in Western Australia⁸ and Victoria.⁹ The Victorian Constitution Commission after weighing the arguments both against and for the retention of Ministers in the Upper House concluded that the need to have as independent an Upper House as possible should prevail.

However, similar to the situation in the federal Parliament, this recommendation has not been adopted. The basis for the argument against the presence of ministers in upper Houses is that their presence reinforces party political pressures in the House and reduces the independence of individual members, constraining the role of the House as the 'House of Review'. Ministers tend to see their role as shepherding legislation through the House with minimum amendment or controversy. In turn, members tend to shape their actions as loyal and effective party-members, worthy of promotion to the ministry, and not as independent legislators or representatives of the people, with particular expertise in relation to certain portfolios or committees. John Uhr advanced a similar argument in relation to the optimum overall size of parliaments, he stated that the potential for advancement makes for much intrigue over place and preferment with little spare time or energy for the traditional parliamentary activities of public scrutiny and review of government performance. He further hypothesised that once members come to see that ministerial life is out of reach they will turn to seeking whatever professional satisfaction one can extract from being a good backbencher by, for example 'participating in' and not just 'sitting on' committees, getting a public profile and acting as a bridge between government and community.¹⁰

WOULD THE ABSENCE OF MINISTERS IMPROVE THE PERFORMANCE OF THE NSW UPPER HOUSE?

A number of authors have commented on the impact the increase in party discipline has had on Australian parliaments. Harry Evans noted that it was a reasonable proposition that a government party majority in a House did not necessarily mean government control, but that the increase in the compulsory loyalty of government backbenchers now means that 'crossing the floor' is now such a serious step that governments are mostly able to forget the possibility.¹¹ Nevertheless, the fact that such instances of backbench independence still occur in the British Parliament¹² perhaps provides some hope that a decision to exclude ministers could, over time, erode the hold of party political dominance. It is not for this article to conclude whether or not the exclusion of Ministers from the NSW Legislative Council would increase the independence of individual members and of the House as a whole. It would be expected to take some time for any discernible benefit to manifest, particularly bearing in mind that members are elected to eight year terms of membership to the Council. For the purpose of the article it will be assumed that if Ministers were to be removed from the Council, then the executive would continue to have a single representative in the Council through the person of the Vice President of the Executive Council.¹³ It will also be assumed that the removal of Ministers is taken to mean that Parliamentary Secretaries are also not appointed from the Council. To remove Ministers but retain Parliamentary Secretaries would, while lessening the prize, not remove the potential for advancement which it is argued acts to inhibit the independence of members. The remainder of this article will discuss a number of issues, and difficulties foreseen by some, associated with the exclusion of Ministers and determine whether, in practical terms, each would add to or detract from the NSW Legislative Council's capacity to act as an effective House of Review. With respect to some of these issues, the article will examine potential mechanisms that could be employed to provide avenues by which the Council could continue to directly scrutinise the executive, notwithstanding the absence of ministers.

WHO WOULD GUIDE GOVERNMENT LEGISLATION THROUGH THE CHAMBER?

Currently, in the NSW Legislative Council the three Government Ministers are responsible for introducing and taking carriage of all government bills, whether or not the bills are within their portfolio responsibility. In addition, through the provisions of standing order 25, the parliamentary secretaries in the Legislative Council, of which there are currently five, may also take carriage of government bills passing through the House. In 2012, ninety-seven government bills were introduced into the Council. Seventy-four of these originated in the Legislative Assembly and 23 were Council bills. Of the 23 Council bills, all but two were introduced and guided through the Council by the relevant minister. However, with respect to the Assembly bills, more than half were under the carriage of a parliamentary secretary. Taking carriage of a bill outside a member's portfolio responsibility or area of interest can be a difficult task and the effectiveness with which it is done can vary according to the

complexity of the legislation; the competence of the minister or parliamentary secretary and the extent of their familiarity with the issue; and the robustness of the debate and committee process.

Delivering the second reading speech for an Assembly bill in the Council is not a challenge, as more often than not the Minister or Parliamentary Secretary seeks and is granted leave to incorporate the speech into Hansard. Leave is generally granted if the speech is the same as that delivered in the Legislative Assembly, which is generally the case unless there has been some change in circumstances during the intervening period. The challenge for the minister or parliamentary secretary from the Council is being able to knowledgeably respond during their speech in reply to any questions raised during the debate by other members and to assess and respond to any amendments moved during committee of the whole. Today, in the 55th Parliament of NSW, the likelihood of a government bill being amended against the government's wishes exists only in the Legislative Council. In 2012, fifteen government bills were amended in the Council, with a total of 63 amendments being agreed to. When Assembly bills are under consideration in the Council it is usual to have staff from the relevant government departments present and on hand in the President's gallery in order to monitor the progress of the bill and to provide assistance and advice to the minister or parliamentary secretary who has carriage of the bill. It is also not uncommon, particularly with respect to significant legislation that might be subject to amendment, to have the responsible Minister from the Assembly also present in the President's gallery.¹⁴ In these circumstances it is often the case that the minister who has carriage of the bill in the Council will take the opportunity during proceedings to liaise with the visiting Assembly Minister.

If Ministers (and Parliamentary Secretaries) were excluded from the Legislative Council, the question arises as to who would guide government legislation through the House. As discussed earlier, the removal of ministers might, for administrative reasons, only be able to be contemplated on the basis of the retention of a representative of the executive in the person of the Vice President of the Executive Council. However, to assign just one individual the responsibility for carriage of all government legislation would not on the face of it appear practical, notwithstanding that this was the case on those occasions in the past when there were no Ministers appointed from the Council. Another option would be to assign this responsibility to all or some of the government party members in the Council. However, this might also raise the risk of creating another level of, albeit informal, rank to which government party members might aspire and seek to achieve by demonstrating party loyalty. Rather than seek a solution from within the Legislative Council, an alternative can be found within the NSW Constitution.¹⁵ Section 38A of the *NSW Constitution Act 1902* provides:

38A Powers of Ministers to speak in Legislative Council

- (1) Notwithstanding anything contained in this Act, any Minister of the Crown who is a member of the Legislative Assembly may at any time with the consent of the Legislative Council, sit in the Legislative Council for the purpose only of explaining the provisions of any Bill relating to or connected with any department administered by him, and may take part in any debate or discussion in the Legislative Council on such Bill, but he shall not vote in the Legislative Council.

This provision was inserted in 1933.¹⁶ However, a provision proposed in the Constitution (Further Amendment) Bill 1929 provided for the same powers except that it applied to any minister¹⁷ who was a Member of *either House*. The provision inserted in 1933, as proposed in the later Constitution Amendment (Legislative Council) Bill, was instead confined to allowing Ministers from the Legislative Assembly to speak in the Legislative Council.¹⁸ Use of the provision has occurred once. In 1990 the Hon John Fahey, as Minister for Industrial Relations and Employment, sat in the Legislative Council during debate in committee of the whole on the Industrial Relations Bill and cognate bills. The committee proceedings lasted over ten days from 23 August to 20 September 1990 during which 484 amendments were made to the Industrial Relations bill.¹⁹ When the Legislative Council debated the motion regarding the appearance of Minister Fahey, the then Leader of the Government, extolled the virtue of having on hand the minister who was directly responsible for an intricate piece of legislation:

...I have always taken the view that where the Upper House is involved in the consideration of legislation which can be seen to be of enormous importance to the community at large, and which is seen to be of a highly technical nature, and legislation of significant volume, it is appropriate for the Minister responsible for that legislation to attend this Chamber during the committee stages to assist honourable members in understanding the bill. Obviously the Ministers in this House cannot be expected to have a detailed understanding of every piece of legislation that is introduced.²⁰

At the time of Minister Fahey's appearance there were four ministers sitting in the Legislative Council. Interestingly, earlier parliamentary debate in 1987 indicates that at that time it was understood that the provision was inserted to cater for the prospect of there being no ministers in the Council:

The Hon J R Hallam ...the practical workings of the government dictate that it is necessary for the Government to be represented in the legislative council by a member of the Executive Council....as the Constitution provides – and the Hon M F Willis would be aware of this – it is possible for a member of the Legislative Assembly who is a member of the Executive Council to come into the Legislative Council and present a bill. That requirement has been in the Act for many years. It is a convention that I doubt will ever be exercised.

The Hon M F Willis: That is exactly why it was put there.

The Hon J R Hallam: In the event of there being no Ministers who are members of this House, certainly.²¹

If ministers were to be excluded from the Legislative Council, then recourse could be made to the mechanism provided by the Constitution to have the Minister directly responsible for a government bill attend and guide its passage through the Chamber. The Government of the day would be better served by having the Minister directly responsible for a bill guiding it through the House in which it is most likely to be amended and the Council would lose nothing in its ability to act as an effective House of Review with respect to government legislation.

WHO WOULD ANSWER QUESTIONS REGARDING THE PERFORMANCE OF THE EXECUTIVE?

Chapter 11 of the Legislative Council Standing Rules and Orders concerns 'Questions Seeking Information'. Standing Order 64 (1) provides that: 'Questions may be put to Ministers relating to public affairs with which the minister is officially connected, to proceedings pending in the House, or to any matter of administration for which the minister is responsible.' Questions without notice may be put to ministers during Question Time, while written questions to ministers may be lodged with the Clerk. The three ministers currently sitting in the Legislative Council are responsible for responding to questions relating to firstly their own respective portfolio responsibilities and secondly to the portfolio responsibilities of the 19 Ministers from the Assembly that between them they represent. In 2012 in the Legislative Council, 1207 questions were asked during Question Time, while 2030 written questions were lodged with the Clerk. If ministers were removed from the Legislative Council, while the capacity for submitting written questions would remain there would be no capacity for asking questions without notice. Commentators have argued that many aspects of parliamentary activity are increasingly becoming not much more than theatre or ritual.²² This criticism can apply to Question Time, which has been described as 'tailor made for the low-minded pursuit of ministerial scalps'.²³ In comparison, the Victorian Constitution Commission was of the view that Question Time may properly be seen as a valuable part of the review and accountability process. With respect to Question Time in the NSW Legislative Council, it would not be unjust to say that the volume of information sought (not counting Dorothy Dixers) from Ministers during Question Time considerably outweighs the volume actually elicited. The point of order most frequently raised during Question Time is that the answer being provided by the Minister is not relevant to the question. It would be fair to say that when individual members are seeking detailed information of the administration or expenditure of government departments that they are more likely to seek this information by way of written questions.

As noted previously, the fact that the majority of Ministers reside in the Assembly means that the minor parties that are represented in the Council have no regular opportunity to directly scrutinise most members of the executive government. It is the case that, possibly partly because of this minority of ministerial representation, Question Time in the Legislative Council commands much less media and public interest than that commanded by Question Time in the Legislative Assembly. Given the above, it could be argued that the Legislative Council, in its duty to scrutinise and hold the government to account, would lose little if it no longer had the capacity to ask Ministers questions without notice.

Nevertheless, there is a potential mechanism by which, despite the removal of Ministers from the Council, Question Time could be retained and enhanced. This problem regarding Question Time in bicameral legislatures, whereby neither House has full opportunity to directly scrutinise all the representatives of the executive has a long history of consideration by various parliaments in Australia. At the Commonwealth level there have been a number of attempts to institute an arrangement whereby ministers in both the Senate and the House of Representatives are permitted to speak on, and be questioned about, departmental matters or proposed legislation for which they are responsible on the floor of both houses.²⁴ None of these various attempts, commencing with Andrew Inglis Clark at the Federal Convention of 1891 and including the 1986 report of the House of Representatives Standing Committee on Procedure, were successful – with more passion being evident in their opposition than in their support. It appears that in the late 1980s in NSW the concept had also been the subject of some discussion between the then government and the Legislative Council cross-bench members. The Hon Fred Nile alluded to these discussions during debate on the motion (discussed in the previous section) to invite a Minister from the Legislative Assembly to attend the Council and explain the provisions of a bill:

I wish to put on the record that the Call to Australia group warmly supports the motion moved by the Hon Elisabeth Kirkby. That motion is in line with the original promises of the Government that Ministers would be available at question time and at other times.²⁵

However, the only implementation in an Australian legislature of a regular arrangement whereby ministers from one House appeared in the other during Question Time occurred in Tasmania in 2009. The impetus for the joint question time in Tasmania was the appointment to the Ministry of an additional two Members of the Legislative Council in September 2008. At the time while three political parties were represented in the Lower House, only one of those parties was also represented in the Upper House, which was comprised of a majority of independent members and minority of Government members. This political composition meant that the two non-Government parties had no capacity, through their parliamentary membership, to directly question ministers that were members of the Legislative Council.²⁶ Before proceeding, the prospect of a joint Question Time was referred to the Joint Select Committee on Working Arrangements of the Parliament. The report of the committee found and recommended that the proposal could, and would best, be achieved by complementary resolutions of the two Houses. The arrangement commenced in March 2009 and continued until the 2011 election, following which no Ministers were located in the Legislative Council. So while it is argued that the NSW Legislative Council could continue to operate as an effective House of Review notwithstanding the loss of the opportunity to ask questions without notice, it must be noted that there is the potential to reap the purported benefits of excluding Ministers from membership of the Council while also instituting what would be a more fully representative Question Time.

WHAT WOULD BE THE EFFECT ON THE HOUSE'S COMMITTEE SYSTEM?

The work of parliamentary committees is one of the primary sources of effective Upper House scrutiny of the executive. This is certainly the case of the committee system in the Legislative Council of NSW. The effectiveness of the committee system largely depends on the commitment and interest of its members and overall also generally benefits from the diversity of views and experience that a wide committee membership brings. In the Legislative Council it is practice that ministers are not appointed to any of the Legislative Council policy or scrutiny standing committees that examine the performance of government departments. While this, quite appropriately, distances a Minister from involvement in an inquiry that may be examining his or her portfolio responsibilities, this practice has consequences for the committee workload of the other government party members. For example, in the 53rd and 54th Parliaments the then Labor Governments held 18 and 19 seats respectively in the Legislative Council. During these years, there were consistently six Ministers appointed from the Council. Taking into account that in both parliaments the President was also a Labor party member, this left 11 or 12 government party members to fill the 19 spots reserved on scrutiny and policy committees for government party members. The additional requirements to fill positions on joint standing committees and on any select committees that happened to be established, gave rise to committee overload for some government members and frequently caused scheduling difficulties for individual members serving on multiple committees. Problems such as these are further exacerbated when parliamentary secretaries also seek to lessen their involvement in committee activities. In addition, senior members of the Opposition in the Council and members elevated to the position of shadow minister also often need to seek to lessen their involvement in committees. Therefore, in terms of allowing members more time to more fully participate in inquiries and in terms of broadening the level of experience and individual perspective brought to the committee system, the removal of ministers (and the possible consequential removal of shadow ministers) from the Upper House would be beneficial.

WOULD MINISTERS BECOME LESS LIKELY TO APPEAR BEFORE COMMITTEES?

Under section 4 of the *Parliamentary Evidence Act 1901*, Legislative Council committees do not have the power to compel the attendance of members of the Assembly or of the Council to appear before them and give evidence. However, the Council could, on its own volition or at the request of a committee, direct one of its members to appear before a committee. Therefore, if Ministers were removed from the Council there would be absolutely no avenue by which Legislative Council committees could compel the attendance of a Minister. However, the loss of this potential avenue is not a threat to the effectiveness of the Legislative Council committee system. The media and the public's interest in and support for the Council's committee system is now so well entrenched that it ensures that the executive government cannot become or afford to become dismissive of Council committee inquiries.

There are a number of recent examples where the Premier and Ministers from the Legislative Assembly have voluntarily appeared (sometimes after intensive prompting by the media) as witnesses at Legislative Council committee inquiries, notwithstanding that the inquiries were viewed as being hostile or potentially damaging to the government of the day.²⁷

WOULD THE HOUSE STILL BE ABLE TO REQUIRE THE EXECUTIVE TO PRODUCE DOCUMENTS?

The power of the Legislative Council to order the production of government documents was firmly reaffirmed in *Egan v Willis* which upheld the Council's imposition of a penalty (suspension) on a member of the executive for refusing to comply with an order of the House. It has been argued that an advantage of retaining Government ministers in a House of Review is that the House can direct those Ministers to produce State articles.²⁸ However, in the NSW Legislative Council the power and the procedure for ordering government documents is now so well established that the order is not by necessity channelled through any representative of the executive in the Council. Standing Order 52 which governs the procedure for orders for the production of documents provides that: The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House. It could be argued that the ability of the House to order the production of articles is not dependent upon one (or more) of its members being a representative of the executive and the threat of a sanction being imposed upon that member should the order of the House be refused. If in the seemingly unlikely event that a future Government began to depart from the established practice of compliance with Standing Order 52, and the threat or use of sanction was required to bring about compliance then this could be achieved by the retention of a sole representative of the Government in the person of the Vice President of the Executive Council. In the current situation, where the Government does not have a majority in the House, it is likely that the Government will continue to comply with orders for documents. These orders are effectively the political demand of a majority coalition of opposition and cross-bench parties, the support of some elements of whom the Government must also rely upon for other matters to be determined by the House. The frequency with which the House chooses to exercise its power to order State documents is subject to the alliances that are made and unmade between the various political parties that comprise the House. If the removal of Ministers from the Council did over time result in greater independence in the decisions of members then, it might reasonably be assumed there would be an increase in the likelihood of the House making orders for documents.

WOULD THE PARLIAMENT AND GOVERNMENT SUFFER FROM A LOSS OF TALENT?

The NSW Legislative Council is a continuing body whose members are elected for an eight year term. General elections are held in NSW every four years, during which a periodic Council election is held for the return of half (21) of its members. The system used in

periodic council elections with group voting squares and the option to vote either above or below the line, means that the main political parties can guarantee election to the Council of a certain number of their candidates. Upper Houses, with electoral systems such as that used for the Legislative Council, are seen as an avenue by which persons of unquestionable merit but who are not interested in meeting the particular challenges of campaigning for and holding a lower house seat, could enter parliament. Such talented persons who might become very able parliamentarians might not see the Upper House as their preferred career path if they cannot become Ministers. The ability of political parties to nominate the candidate to fill casual vacancies that arise in the Legislative Council has been used recently to revive the political careers of members who were unable to retain their seats in the Legislative Assembly. Most notable of these is the Hon Michael Egan who was a member of the Council for 18 years. Prior to entering the Council by way of filling a casual vacancy, Mr Egan had served as the Member for Cronulla for two terms. More recently, following the 2011 State general election, a member who failed to retain his seat in the Legislative Assembly was subsequently elected to fill a casual vacancy in the Council.

At the same time there have also been recent examples of Members of the Legislative Council, after proving themselves and establishing a public profile in the Council subsequently moving to the Legislative Assembly. The current Minister for the Environment and the Leader of the Opposition were both previously members of the Legislative Council, prior to being elected to the Legislative Assembly in the 2011 State general election. A fundamental aspect of responsible government is that Ministers are responsible to the Parliament and through the Parliament to the electorate. It would not be unreasonable to argue that all Ministers should be made directly responsible to the electorate at each general election. A decision to exclude Ministers from the Legislative Council should not as a necessity result in a loss of talent to the Parliament or the government of the day. For the main political parties, the Council will remain as a means by which they can introduce talented persons into the parliament. If such persons prove themselves worthy and do aspire to ministerial rank, then they would eventually need to submit themselves to the electorate for a Lower House seat. While the prospect of contesting a Lower House seat might possibly dissuade some it must be noted that the existence of safe seats provides the main political parties with an ongoing means by which to guarantee a place in parliament.

WILL THE LACK OF MINISTERS AFFECT THE LEGITIMACY AND PRESTIGE OF THE UPPER HOUSE?

Up until 1987 the NSW Constitution required that the Vice President of the Executive Council be appointed from the Legislative Council. However, in 1987 the Constitution was amended so that the Vice President of the Executive Council could be appointed from either the Council or the Legislative Assembly. During the second reading speech debate in the Legislative Council on the Constitution Amendment Bill a number of speakers voiced concerns over the prospect of the House not having any ministerial representation, which was variously described as ‘a total and utter derogation of the duties of the House’

and as a 'denigration of the status of the House'.²⁹ One must ask if the legitimacy and prestige of the Legislative Council is dependent upon the appointment of ministers from among its members. If this was the case, would the level of legitimacy then wax and wane according to the number of ministerial appointments? The Legislative Council is constantly seeking to raise the level of public awareness and understanding of its role. Generally, when the activities of Ministers or Parliamentary Secretaries are reported in the media, no distinction is made regarding to which House of Parliament the Minister belongs. However, unfortunately over the last two years media reporting on four separate Independent Commission Against Corruption inquiries has significantly raised public awareness of the existence and activities of (former) Upper House Ministers. Apart from such instances of scandal, public awareness and media reporting of specific Legislative Council activities centre primarily on three things: committee inquiries, the amendment of significant government legislation, and the return to orders for State articles – neither of which are dependent upon the location of Ministers in the council. The legitimacy of the Legislative Council is based on its ability to act as an effective House of Review, and, as has been discussed, in order to undertake this role, the presence of Ministers is not a necessity and quite possibly a hindrance.

CONCLUSION

The decision to exclude Ministers from the Legislative Council could be provided for in legislation or could become a convention observed by the Government of the day. If such a decision was made, this article argues that it would not be a detriment to the Council's ability to operate as an effective House of Review. Indeed, if the hypothesised benefit of this exclusion – an increase in the independence of individual members and an erosion of party dominance – were to emerge over time, this would only increase that effectiveness. Very little is required to test this hypothesis, other than a decision and the passage of time. However, the likelihood of that decision being taken depends on those vested with the power to do so being convinced that a more effective House of Review is a desirable outcome.

REFERENCES

- 1 Section 50 of the *Victorian Constitution Act 1975* provides that no more than 6 ministers may be drawn from the Legislative Council at any one time.
- 2 For example, on 4 July 1986 following the resignation of the Hon Neville Wran as Premier, the Hon Barry Unsworth, the then Leader of the Government in the Council was appointed as Premier. Despite there being no legal or constitutional requirement for him to do so in order to remain as Premier, he resigned as a member of the Council on 15 July 1986 and successfully sought election to the Assembly at a by-election in August that same year.
- 3 Odgers, p583

- 4 Information drawn from relevant parliament websites, accessed 2 November 2012. With respect to Tasmania, the Hon Craig Farrell MLC while not a Minister is a member of Cabinet by virtue of his position as Leader for the Government in the Legislative Council.
- 5 *Egan v Willis* (1998) CLR, 424, per Gaudron, Gummow and Hayne JJ, at 453
- 6 The article acknowledges the opportunity for Upper Houses to scrutinise Ministers provided through the committee system, in particular the annual Budget Estimates. However, it must be noted that these are not frequent occurrences and that, in New South Wales, the Legislative Council cannot compel the attendance of Assembly Ministers before it or its committees.
- 7 Evans H and Laing R (eds) *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p583.
- 8 See the *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Part II, para 5.36. See also the Western Australian Commission on Government Report No 2, 1995, pp163–164.
- 9 Victorian Constitution Commission, 'A House for our Future', June 2002, pp54–56.
- 10 Uhr, J *Keeping Government Honest: Preconditions of Parliamentary Effectiveness*, article presented to the Western Australian Commission on Government, Perth, August 1995
- 11 Evans, H, *The case for bicameralism*, in Aroney et al (eds) *Restraining Elective Dictatorship*, University of Western Australia Press, 2008, p71
- 12 See for example *Rebels in the ranks sting British PM*, Sydney Morning Herald, 2 November 2012
- 13 Up until 1987, the NSW Constitution required that the Vice President of the Executive Council be appointed from among the members of the Legislative Council. However, since 1987 and currently the Vice President may be appointed from either the Council or the Legislative Assembly.
- 14 See for example, acknowledgments of the presence of the relevant Minister during debate on the Environmental Planning and Assessment Amendment Bill 2012: Legislative Council, Parliamentary Debates, 14 November 2012, p16801; and the Local Government Amendment (Conduct) Bill 2012: Legislative Council, Parliamentary Debates, 14 November 2012, p16781
- 15 A similar option also exists in Victoria, provided under Section 52 of the *Victorian Constitution Act 1975*.
- 16 The provision is referenced in the Legislative Council Standing Rules and Orders: Standing Order 163 'Explanation, under the Constitution Act, of a departmental bill'
- 17 The provision, as did section 38A when inserted in 1933, referred to Executive councilors rather than ministers, a 1987 amendment to the Act changed the terminology to Ministers of the Crown.
- 18 Twomey, A, *The Constitution of New South Wales*, The Federation Press, 2004, p690
- 19 Lovelock & Evans, *Legislative Council Practice*, The Federation Press, 2008, p207
- 20 Legislative Council Debates, 4 June 1990, pp 4889–4890
- 21 Legislative Council Debates, 27 May 1987, p12518
- 22 Various sources cited in Aroney, N, Nethercote R, Prasser S, *Restraining Elective Dictatorship: The Upper House Solution?*, University of Western Australia Press, p1.
- 23 Uhr, J, *Keeping Government Honest: Preconditions for Parliamentary Effectiveness*, article presented to the Western Australian Commission on Government, Perth, August 1995.

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- 24 D Drinkwater, *To speak or not to speak: ministerial accountability in the Senate and the House of Representatives*, Legislative Studies, Vol 13, No 2, Autumn 1999, pp47–54
- 25 Legislative Council Debates, 4 June 1990, p4890
- 26 Joint Select Committee on the Working Arrangements of the Parliament, Report No 18, *Attendance of Ministers who are Members of the Legislative Council at the House of Assembly Question Time*, March 2009, p4
- 27 For example, in 2010 the then Premier appeared before the Inquiry into the Gentrader transactions, and in 2011 the Premier, the Minister for Health and the Minister for the Environment appeared before the inquiry into the Kooragang Island Chemical leak.
- 28 See, Uhr J, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge University Press, 1998, pp230–231; and Twomey, A, *The New South Wales Constitution*, The Federation Press, 2004, p696
- 29 Legislative Council, Parliamentary Debates, 27 May 1987, p 12513; 12516

Chronicles

‘From the Tables’ – a round-up of administrative and procedural developments in the Australian parliaments¹

Robyn Smith

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AUSTRALIAN PARLIAMENT

The general election of 7 September 2013 resulted in a return to majority government, with the Liberal-National coalition winning 90 seats, the Australian Labor Party 55 seats, and the remaining seats held by independent members (two seats) and minor parties (one each to the Greens, Palmer United Party and Katter’s Australian Party). Tony Abbott was sworn in as Australia’s 28th Prime Minister on 18 September 2013. The new parliament was opened on 12 November 2013. The election delivered 42 new members, including two former members and three former Senators. At the first meeting of parliament, the Member for Mackellar, Bronwyn Bishop, was elected Speaker and the Member for Maranoa, Bruce Scott, Deputy Speaker. Upon being elected Speaker, Bishop declared that she intended to be impartial, recognising that the ‘responsibility...goes back to 1377’. She informed the House that the Chamber ‘is not a classroom; it is not a polite debating society. It is a place where we fight for ideas’ and that she intended to allow robust debate.² However, during her short time as presiding officer, she has repeatedly been called into question for her lack of impartiality, creative interpretation of Standing Orders and the ‘transgressions’ for which she ejects opposition members from the Chamber.

With the commencement of the 44th parliament, the new coalition government made changes to the Standing Orders, including:

- New meeting and adjournment times in the House and Federation Chamber and a reduction in the time allocated for the adjournment debate, the matter of public importance discussion and private Members’ business (by comparison with the 43rd parliament).
- Appointment of Chairs and Deputy Chairs of House committees by the Prime Minister and the Leader of the Opposition respectively (previously elected by committees) and an increase in the membership of House committees, from seven to 10 members.

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

2 ABC Online News, 12 November 2013

- Removal of the Speaker's discretion to allow supplementary questions during question time.
- Provision for interventions in the House (in addition to the Federation Chamber), allowing Members to ask short questions or make brief responses during other Members' speeches.

Former Prime Minister and Member for Griffith, Kevin Rudd, announced his retirement on 13 November giving rise to a by-election in his Queensland electorate, which was set down for 8 February 2014. The 12th of December was the final sitting day of 2013. After Question Time, Speaker Bishop announced the retirement of Bernard Wright as the Clerk of the House. The Prime Minister moved a motion thanking Mr Wright for his long and meritorious service to the parliament. The Leader of the Opposition and several other members spoke in support, after which the Speaker read a note from Mr Wright thanking those who had spoken. The motion was agreed to, Members rising in their places as a mark of respect. The Speaker then announced the appointment of Deputy Clerk, David Elder, as the Clerk of the House from 1 January 2014. The Prime Minister, Leader of the Opposition and Deputy Prime Minister made remarks on indulgence congratulating Mr Elder.

The General Election was also a half-Senate election. New Senators, most of whom do not take their seats until 1 July 2014, were sworn in on 7 September. Senator John Hogg (ALP, Queensland) was elected President in 2008 and there was no change to this arrangement. Two casual vacancies were created by the resignations of Senators Barnaby Joyce (LNP, Queensland) and Bob Carr (ALP, New South Wales). Carr's decision to retire required two resignations – one from the current term which ends on 30 June 2014 and one from the term commencing 1 July 2014 to which he had just been elected. The Carr situation was unique in Australian Senate practice and provided for the NSW parliament to make two appointments. For the current term, the Parliament selected Deborah O'Neill to fill the vacancy. The NSW parliament has not filled the vacancy commencing 1 July 2014, but Senator O'Neill was the nominee of her party to fill both vacancies. She was sworn in on 2 December. The Queensland casual vacancy had not been settled by year's end (see Queensland report below). The results of the Western Australia Senate election on 7 September headed for the Court of Disputed Returns following the loss of 1370 votes which could not be included in a second count (fresh scrutiny). The election was so close that the 1370 votes were argued to be critical to the outcome and an ordered recount was, therefore, jeopardised by the missing ballot papers. The recount was the second in the history of the Senate, the first also being in Western Australia following the 1980 election. Petitioners to the Court of Disputed Returns included the Australian Electoral Commission.

There were changes to the Senate Standing Orders, including temporary procedural orders modifying rules and time limits for Question Time and providing additional time for consideration of Private Senators Bills.

Parliament House, Canberra turned 25 in 2013. The anniversary was marked by a number of events throughout the year, including an open day on 24 August.

AUSTRALIAN CAPITAL TERRITORY

The Assembly passed the *Officers of the Assembly Legislation Amendment Bill 2013* which formally recognised the Auditor-General, the Ombudsman and the Electoral Commissioner as Officers of the Assembly, established the independence of these officers and created a clearer separation between those officers and the executive. The bill will commence on 1 July 2014.

The *Australian Capital Territory (Ministers) Bill 2013* was passed on 26 November. This bill provides for the number of Ministers of the Territory to be increased to enable the Chief Minister to appoint up to eight other Ministers. The ACT Cabinet presently has five Ministers who deal with 25 portfolio areas. Chief Minister Katy Gallagher is expected to appoint a sixth Minister in the new year.

In October, the Assembly adopted a Continuing Resolution which provides for the appointment of a Commissioner for Standards by the Speaker for the life of each Assembly. The resolution also provides:

- That the functions of the Commissioner are to investigate specific matters referred to the Commissioner by the Speaker in relation to complaints against Members and by the Deputy Speaker in relation to complaints about the Speaker;
- That the Commissioner report to the Standing Committee on Administration and Procedure on any complaints referred;
- That anyone may make a complaint in writing to the Speaker (or the Deputy Speaker in the case of a complaint about the Speaker) who, if she believes that the complaint is not frivolous or vexatious or for political advantage, may refer the complaint to the Commissioner for investigation and report.

By the end of the year, an expression of interest process was underway. The Assembly's Code of Conduct for members was then revised to provide that Members may make complaints to the Commissioner for Standards provided that they do so on reasonable grounds of suspected non-compliance, that complaints are not frivolous or vexatious, and that they are not motivated by political advantage. The revised code also provides that members must fully co-operate with inquiries undertaken by the Commissioner. Members of the Assembly then re-affirmed their commitment to the Code of Conduct by resolution of the Assembly in October.

NEW SOUTH WALES

A Standing Orders and Procedure Committee report entitled *Citizen's Right of Reply – Ms Lea Rosser* was tabled by the Speaker on 21 November 2013. The Committee's recommendation that Ms Lea Rosser should be given a response to references made about her in the House by the Member for Cessnock, Mr Clayton Barr MP, is the first such recommendation since the procedure was first adopted by the House on 27 November 1996. At issue were allegations made by Barr in relation to Rosser's performance as the General Manager of Cessnock City Council.

NEW ZEALAND

A fascinating tussle between the courts and the parliament has been bubbling away in New Zealand for some years, with the result being an erosion of the traditionally broad protection of parliamentary privilege by the introduction of the principle of 'effective repetition'³ in matters relating to defamation. The New Zealand precedents have had an impact in Australia where a number of matters have been originated but settled prior to adjudication in court. Pursuant to a Privileges Committee report tabled in June 2013, a Parliamentary Privilege Bill was introduced on 11 December. *Inter alia*, the bill seeks to ensure that no person may incur criminal or civil liability for making an oral or written statement that *affirms, adopts or endorses* words written or spoken in proceedings in parliament where that statement would not, but for the proceedings in parliament, give rise to criminal or civil liability. The bill has been referred to the Privileges Committee for detailed consideration and receipt of public submissions.

In November, the parliament passed the *Members of Parliament (Remuneration and Services) Act*, one of the provisions of which is to update the penalties for members who are persistently absent from their parliamentary duties without proper cause. Previously, a member could be fined \$10 for each sitting day that he or she was absent after being absent for 14 sitting days in a parliamentary session. Under the new Act, a member who has been absent from the House for more than three sitting days during a calendar year is penalised by an amount equal to 0.2 percent of the member's gross yearly salary for the fourth and each subsequent sitting day on which the member is absent. To complement these provisions, the House passed a Sessional Order, effective from 1 January 2014, which requires the Clerk to maintain a record of attendance, provides for members to be granted permission to be absent, and requires absences without permission to be recorded in the Journals.

NORTHERN TERRITORY

On 27 August 2013, leave of absence was sought for and granted to the Member for Sanderson, a government member, owing to ill health. Immediately after, leave of absence was sought for the Member for Barkly, an opposition member, owing to electorate business. Debate ensued, during which government members claimed that the Member for Barkly was engaged in remote mobile polling activities for the Member for Lingiari during the federal election campaign. After a division, leave was denied. Standing Orders provide that leave of absence can be moved without notice and that the cause and duration of the leave is given. Section 21(2)(c) of the *Northern Territory (Self-Government) Act* provides that a member who is absent without leave for three consecutive sitting days vacates his or her office as a Member. The Member for Barkly was present in the Assembly on Thursday

3 There are a number of cases in respect of this, the lead case being *Buchanan v Jennings* [2004] UKPC 36; [2005] 1 AC 115; [2005] 2 All ER 273; [2004] 3 WLR 1163; [2004] EMLR 412

29 August. This is the first occasion on which leave of absence has been denied to a Member of the Legislative Assembly.

The use of Committees by the Legislative Assembly has been scant in the past, and while it is available for the Assembly to refer bills to Committees for scrutiny, it has rarely been done. On two occasions during the period under review the independent Member for Nelson unsuccessfully sought to have bills referred to a committee. The first was on 28 November and concerned the Government's *Alcohol Protection Orders Bill* which replaced the former Government's Banned Drinkers Register. The second was on 4 December when the same Member sought to have the *Local Government Amendment (Restructuring) Bill* referred to a committee. Both motions were negatived and both bills passed. A submission dealing with committee reform is with Government for consideration.

On the final sitting day of the year, 5 December, Question Time was cut short when the Chief Minister moved a motion to establish an inquiry into the former government's granting of a crown lease to Unions NT on a heritage-listed site in the Darwin CBD known as the Stella Maris hostel. What was unusual about the motion is that the *Inquiries Act* makes it available for any minister to refer a matter for inquiry without a formal motion in the Assembly. It was also available for the Assembly to refer the matter to a committee for inquiry and report. On 18 December, the government announced that former head of the Australian Crime Commission, John Lawler AM APM, had been appointed to lead the inquiry, which would commence in January. No deadline or expected date for report was announced by the government.

QUEENSLAND

The filling of the casual Senate vacancy caused by the election of Barnaby Joyce to the House of Representatives in Tony Windsor's former electorate of New England was somewhat complicated. When parliament convened on 12 September to consider the matter, only one nomination was received. The Premier then moved that Mr Barry James O'Sullivan be elected to hold the place in the Senate. However at the time of the Premier's nomination, O'Sullivan was involved in an ongoing Crime and Misconduct Commission (CMC) investigation regarding electoral bribery. Accordingly, the Premier moved that the debate on the motion be adjourned and, further, that the meeting to elect a Senator be adjourned until 17 October 2013. This was to allow the CMC time to complete its investigation. On 17 October, the meeting was postponed again until 13 February 2014 as the CMC had still not completed its investigation. On 23 December 2013 the CMC announced that there was no offence of electoral bribery and the relevant parties had been notified of the finding. O'Sullivan's candidacy is expected to be confirmed when the parliament sits on 11 February 2014.

On 19 November 2013, the Ethics Committee tabled its report (No 139) into matters relating to the Member for Redcliffe, Scott Driscoll. The Committee recommended that the Member for Redcliffe be charged with a total of 49 counts of contempt for:

- failing to disclose interests in the Register of Members' Interests and in the Register of Related Persons' Interests; and
- deliberately misleading the House.

The Committee also recommended that the House move a motion to expel the member and declare the seat of Redcliffe vacant. Later that day, the Speaker informed the House that the member had tendered his resignation. The Assembly ordered the former Member for Redcliffe to attend the Bar of the House on 21 November 2013 to respond to the 49 charges of contempt in accordance with the Ethics Committee recommendation. The former member appeared at the Bar of the House, accompanied by his solicitor, who addressed the House on his behalf. The House debated a motion moved by the Leader of the House finding the former member guilty of the contempt charges and fining him \$90,000 in accordance with the Ethics Committee recommendations. Further, the House noted that the member had already resigned his seat, but endorsed the Ethics Committee recommendation that the cumulative effect of the contempt findings was conduct unbecoming of a member of the House and conduct which would have warranted expulsion from the Legislative Assembly. A by-election will be conducted in February 2014.

Prompted by the Member for Redcliffe's lengthy absence from parliamentary sittings between March and September 2013⁴, the Committee of the Legislative Assembly (CLA) conducted a review of Chapter 42 of the Standing Rules and Orders which relate to the absence of members from the House and vacating of seats by Members. In its report tabled on 11 September 2013, the day Driscoll appeared, the CLA recommended, in essence, that the timeframes for members to report absences from the house be significantly reduced. On 12 September 2013, the House subsequently amended Standing Orders 263A and 263B. Members are now required to notify the Speaker if they will be absent for four consecutive sitting days (reduced from 12 sitting days), or for more than four sitting days, within any period of nine consecutive sitting days. Members must advise the duration of and reason for the absence and provide appropriate evidence to support the absence. Upon receipt of written notification by a member, the Speaker must then report the member's absence or intended absence to the House. Standing Order 263B provides for the House to grant a member a leave of absence from attending the Legislative Assembly for 12 or more consecutive sitting days by motion without notice (reduced from 21 consecutive sitting days).

The Newman Government's approach to law and order has created tension between the Executive and the Judiciary, particularly in relation to legislation dealing with 'criminal organisations' and specifically motorcycle 'gangs'. Three bills – *the Vicious Lawless Association Disestablishment Bill*, the *Tattoo Parlours Bill* and the *Criminal Law (Criminal Organisations Disruption) Amendment Bill* – were introduced on 15 October and declared urgent. They were passed in the early hours of the following morning and received assent the following day. The bills amended the *Bail Act* to provide a presumption against bail for criminal motorcycle gang members and provided for mandatory sentencing in some cases.

4 Between 22 March and 11 September, Driscoll was absent for 27 sitting days, including seven days of Estimates in July.

On 31 October, Justice George Fryberg of the Supreme Court noted comments made by Premier Newman about the granting of bail during which he suggested that the courts should uphold community expectations. Justice Fryberg was concerned about the impact of those comments on the independence of the courts. His comments were made when he stayed an application for a review of a Magistrate's bikie bail decision. Justice Fryberg's decision gave rise to an appeal by the DPP, which ultimately set aside Fryberg's decision so the matter could be heard and decided. Meanwhile, on 4 November, Chief Magistrate Tim Carmody issued a Practice Direction that all contested bail applications in relation to participants in criminal organisations were to be heard in Court 20 – *his* court. Matters were further complicated when the Acting Chair of the Crime and Misconduct Commission, Dr Ken Levy, wrote an opinion piece in the local newspaper supporting the laws which gave rise to an appearance before the parliament's Crime and Misconduct Committee.

In July 2013 Premier Campbell Newman announced the establishment of a tribunal to determine the future remuneration and allowances for Members of Parliament as it was no longer tenable for the salaries of the Queensland parliament to be linked to the salaries of Commonwealth Members of Parliament. This followed an outcry in May after it was announced that members would receive a 42 per cent increase. In October, the Remuneration Tribunal decided on an increase of just under nine per cent, bringing the base salary to \$148,848 or \$11,699. A number of allowances would be abolished from 1 January 2014 and the following established instead:

- electorate allowance to be set on the basis of a combination of electorate population and electorate size with three bands established ranging from \$27,500 to \$30,000 to \$34,000;
- information and communication allowance of \$34,000 per annum; and
- general travel entitlement, including motor vehicle allowance.

Allowances are paid on condition that the member accounts for the expenditure to the Clerk. The Clerk is required to report annually on each member's expenditure. Abolished allowances include home telephone reimbursement, daily travel allocation, rail and taxi entitlements, special car allowance, state functions, flights within electorates and entertainment expenses.

SOUTH AUSTRALIA

The last sitting day of the second session and last sitting of the 52nd Parliament was 28 November 2013. The session comprised 101 sitting days – the longest, in terms of the number of sitting days, of any session of the Parliament since the 126 sitting day session of 1872. A General Election will be held in March 2014.

VICTORIA

In August 2013, there was a Joint Sitting of the Victorian parliament to fill two casual vacancies. One was caused by the resignation of Donna Petrovich MLC from the Legislative Council to contest the federal seat of McEwen. The second was the Honourable David Feeney's resignation from the Senate to contest the House of Representatives seat of Batman. Amanda Millar was selected to replace Petrovich in the Council and Mehmet Tillem to replace Feeney in the Senate.

On 12 December 2013, the final sitting day before the end-of-year break, Philip Davis, a Member of the Legislative Council, announced his intention to retire from politics. Davis, a former Leader of the Opposition in the Council, did not formally resign so his successor will not be named until parliament resumes in the new year.

Numbers in the Victorian Legislative Assembly are delicately poised with a disaffected former government member – Frankston MP Geoff Shaw – holding the balance of power as an independent and appearing to have a particular animus for Speaker Ken Smith. During the sitting week of 12 November, the opposition spoke against the government's proposed business program, arguing that the House should instead devote its time to a no-confidence motion in Speaker Smith. Shaw agreed that the no-confidence motion should be a priority, saying he had lost confidence in the Speaker. The government business program motion was defeated, which caused the government difficulty in getting its scheduled bills through the Assembly. More significantly, Speaker Smith appeared to no longer enjoy the support of the majority of members. On the Thursday of that sitting week, the Assembly descended into such uproar at the start of the day that the Speaker left the Chair, adjourning the House until its next scheduled sitting day. In the next sitting week, two opposition members were named and suspended for six sitting days each (the rest of the sitting year) – while Shaw was absent from the Chamber – giving the government control for the last two sitting weeks. Meanwhile, the Baillieu government limps along with a General Election due in Victoria late 2014.

None of the Legislative Council's three Reference Standing Committees conducted inquiries during 2013. The Reference Committees are chaired by the opposition, with the Chair having both a deliberative and casting vote, therefore being opposition controlled. The Committees have no self-referencing powers and may only conduct inquiries by referral from an increasingly timid Council.

WESTERN AUSTRALIA

In December 2013, the Procedure and Privileges Committee tabled a report recommending that the Speaker's Procedural Rules relating to procedures for the formal examination of witnesses be amended. The Report included a requirement that witnesses be notified of significant adverse references and significant adverse findings made in the course of committee inquiries, and that witnesses be provided with an opportunity to respond to these significant references and findings. The report received bipartisan support, and the Speaker announced that he had made the recommended changes to the Speaker's Procedural Rules accordingly.

Malcolm Peacock retired as Clerk of the Legislative Council in October after nearly 30 years service in the Parliament. Nigel Pratt was named as his successor and will commence in the new year.

The Legislative Council Environment and Public Affairs Committee in July commenced an inquiry into the implications for Western Australia of hydraulic fracturing for unconventional gas (fracking). This is the first time that any parliamentary inquiry worldwide has inquired into the effects of fracking from an environmental perspective, and the Committee intends to hear from the community and stakeholders as well as conduct site visits during 2014.

Book Reviews

The Whitlam Legacy

edited by Troy Bramston, The Federation Press 2013,
518pp, RRP \$59.95, direct price \$55.00

June R Verrier

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Forty years on. this book tells a tale which is still exhilarating and devastating. Awe inspiring in what it reveals of the extent of policy preparation and shocking in its revelation of the failure to engage the processes to make it happen. Editor and contributor Troy Bramston himself is obviously torn by the heights and the depths to which his analysis of the Whitlam Government phenomenon – through its Cabinet papers – takes him. His summary on pages 110–111 says it all:

Lifting off the pages is the tragic realisation that the circumstances which led to the loans affair – which in turn led to the dismissal – could have been avoided if public service advice was followed, if there were better oversight of Ministers, if Cabinet instructions were adhered to and if Cabinet processes were more effectively administered.

All entering parliament and/or aspiring to a political career should read this book – and reflect on it in the light of what became of subsequent Labor governments.

Paul Kelly provides us with a fresh look at the dismissal in the light of newly available documents, some of which are included in an appendix. However, perhaps because these are unlikely to change the minds of those who still sit so firmly on one side of the fence or the other in this matter, it is not the unravelling of this issue which is the most striking feature of this volume. Rather,

in a collection of mostly excellent essays, it is the astonishing range of achievements of Whitlam's brief tenure, how enduring the consequent changes have been and, most specifically, the telling of the reasons why.

POLICY DEVELOPMENT

How much we learn from reading this volume about how policy must be made, how the electorate must be informed, consulted and persuaded, how important the speech is to develop, articulate and promote policy and how central in this is the place of the parliament! How much of this, too, helps explain much more recent disasters when much

less experienced politicians thought they could pluck policy panaceas out of the air and run with them, with none of the extraordinarily extensive ground work that was done by Edward Gough Whitlam in what Graham Freudenberg calls his fourteen seminal years on the back bench. It is telling and it is timely to bring this aspect to light, especially in some superb policy chapters, in which (most often) those involved recall the planning and preparation in their areas, often over years, the difficulties involved, and the doing of it. As well, these chapters, such as Brian Howe's on social policy, Michael Hogan's on education, John Deeble's on health and George Williams's on law reform, put the Whitlam government's policies in historical context and trace the fate and fortunes of those changes from that time.

In some of the contributions to this volume there is naturally a little of the 'success has a thousand fathers...' syndrome as their authors naturally and rightly assert their place in this grand history. This only adds to the picture of the breadth and depth of, perhaps, this most impressive and important characteristic of those times – the policy making process. We all know that leaders don't/can't do it all on their own (though watching the Keating interviews towards the end of 2013 you would wonder whether anyone else was there!) But leadership makes it happen. Thus Susan Ryan, emphasising Whitlam's strong commitment to the equality of women and his determination to use a range of international instruments to fulfil what he saw to be Australia's responsibilities in this respect, also points out the debt he owed to the Women's Electoral Lobby (WEL), in which Ryan herself was involved. Ralph Willis, too, claims credit for the equal pay for women achievement as he did the advocacy work beforehand. In a history of health policy from the war to the present day recording the phenomenal difficulties involved, John Deeble argues that Whitlam's policy was based on the work he had done which enabled him to move so quickly and effectively on a well worked through set of proposals. His 'Implications' concluding section is a brilliant statement of the policy making process, how the context creates constraints, and how persistence, often over years is required to achieve the goal: it was unfinished business until Hawke's Accord achieved the willingness of the unions to trade off universal health insurance for wage increases (p184).

In his chapter on 'Foreign and Defence Policy', Gordon Bilney presents himself as the, then, proud diplomat playing his part in the sea changes to Australia's foreign policy which made his life so much more 'respectable' on the international stage. Bilney points to what he describes as the unprecedented absence of bipartisanship in both foreign and defence policies in the 1972 campaign. This was explained in a press conference of 5 December as a more independent stance in international affairs, one less militarily oriented nor open to suggestions of racism (p272). It included ratification or accession to a long list of international conventions, especially on racial intolerance and gender equality, and it meant changes of policy on China's recognition, participation in the Vietnam War, on South Africa, on Southern Rhodesia and on Palestine, where Australia's vote in the United Nations was changed from abstention to support of condemnatory resolutions in the first two cases and to reversal in the case of Palestine. (Compare this with Australia's most recent government which has also reversed Australia's vote on Palestine, without public discussion, announcement or explanation, unravelling years of being, in Gareth Evans terms 'on the right side of history' in this matter). Bilney describes changes which were as dramatic in the

foreign affairs area as elsewhere and often just as long in the gestation. Freudenberg, for example, recalls (p48) that Whitlam advocated Australia's recognition of China as early as 1954 – even before it became official ALP policy – and Bilney notes that Whitlam visited Papua New Guinea (PNG) six times before 1971 and understood well the (international) decolonisation imperative which allowed for nothing less than the rapid movement of PNG to independence.

Bill Morrison, perhaps due to his training as a diplomat, makes this last achievement look much easier than it was. Writing as the Minister for Territories responsible for the transition of PNG through self-government to independence, he under plays the issues arising. He is correct in his conclusion that there was no enthusiasm in PNG itself for the rapid move to independence and certainly not among the majority of the PNG Constitutional Planning Committee (CPC). However, Morrison is wrong in his assertion that the CPC simply wanted to delay independence. He neglects to record that there was also a radical nationalistic voice (essentially Somare, Momis and Kaputin) as well as a reluctant and conservative one there which – far from trying to delay independence – was working, rather, to secure the Constitution they wanted for an independent PNG which differed in some key respects from the one designed for them by Australia. This would include, in particular, recognition of the need for decentralisation in the form of regional government (in the face of the then quite real threats of the potential secession of Papua, Bougainville and the Tolais of the Gazelle Peninsula), and stringent qualifications for PNG citizenship.

Putting on the record the extraordinary strength of the policy preparation process over years, and the tools used (not least the speech) for doing so, is a major achievement of this volume. Former Prime Minister Keating is on record for making this point and, most recently, so too is former Foreign Minister Gareth Evans in his launch of Bob Carr's 'Diaries of a Foreign Minister'. In his (beautifully written) chapter Graham Freudenberg illustrates the point in the context of health policy when he states that it 'evolved ...'(including from a focus on hospitals to health insurance) '...through countless speeches between 1967–1972. The end result was Medibank, so thoroughly worked out and entrenched in those speeches that seven attempts by the Fraser Government over seven years to dismantle Medibank could not prevent its resurrection in the new and stronger form of Medicare....' (p46). More generally, Freudenberg describes the 'Its Time' policy speech as the most thoroughly prepared speech in Australian history and the distillation of a decade of policy development (p42).

IMPLEMENTATION

'Crash through'? It was no such thing – as the accounts of the policy development effort in this volume make quite clear – unless that persistent descriptor of the Whitlam government is quarantined to style not substance. In chapter nine, Troy Bramston concludes that there were more groundbreaking decisions in those first fourteen days of the duumvirate than there had been since Federation. However, he sees Whitlam's huge flaw as impatience with process and a determination to 'just do it' as he believed he had a mandate – a point also made by many of the contributors to this volume. 'Whitlam's decisions suffered because he

was too decisive and disinclined to debate' (p100). Though the point, surely, is that he had done all that. So is it the sheer figures that lead him to this conclusion, those 40 decisions in 14 days; the 823 formal submissions to Cabinet and 221 bills in 1973; in 1974 626 submissions and 1264 decisions; in 1975 516 submissions and 1,090 decisions, which he notes is in huge contrast with the previous government?

When Whitlam had done it all in the policy preparatory stakes, and even worked out how to get around what were the Constitutional blocks which had stalled Chifley's attempts at reform ('Labor's aims could be achieved without resorting to nationalisation or government controls but simply by providing better government services, Carol Johnson, p358), it is staggering that the preparatory work did not extend to process. So from awe at the preparation, even of the press, but not, ironically of Murdoch, we swing to despair at the implementation. (Eric Walsh records the work Whitlam himself did, as well as his office, on preparing the press: 'no Prime Minister before or since has made himself so openly accessible' (p149)). However, he also records that he stood up Murdoch, twice, for dinner when 'no one outside the Labor Party itself had done more than Rupert Murdoch to assist Labor's 1972 victory' (p183). No attention was given to administrative arrangements in preparation for government, or afterwards and this extended to Cabinet and its processes; the result was feral. There was no understanding of the responsibilities of Cabinet government as it came to be developed in the dramatic aftermath of its own disasters in a situation in which when ministers 'lost' in Cabinet, they could take their case back to Caucus. This was insanity. Yet Moss Cass, Minister for the Environment and Conservation – and clearly one of the burrs in Whitlam's saddle – is still defiant on this point (p347).

The results made for turning points both for the public service and for Cabinet government. For the former, John Nethercote takes the opportunity, which this 40 year perspective provides, to draw out the longer term consequences for the evolution of the public service from changes introduced at that time. These included the inevitable growth of the public service with all the new programmes to be implemented, the introduction of the ministerial staffer largely on account of the new government's distrust of the public service, and the beginning of the politicisation of the public service with the appointment of John Menadue and Peter Wilenski as head of the Prime Minister's Department and the Public Service Board respectively. These developments, Nethercote concludes, made for the beginning of the end of the grand tradition of the provision of frank and fearless advice in favour of 'responsiveness'. As for the Cabinet, Ralph Willis, a backbencher at the time, concludes the chaos of those days was the genesis of the principle of Cabinet solidarity introduced by Prime Minister Hawke on his succession to the next Labor Government in 1983. Willis also points to three lessons he learnt from his alarming ringside seat at the Whitlam Government table which were to serve the next Labor government so well. These were: that the social programme must be subject to sound economic policy; that economic reform must be graduated and achieved consultatively and with concomitant structural adjustment assistance; and, that dealing with stagflation required more than conventional fiscal and monetary policy (p122). So yes, perhaps there did indeed have to be a Whitlam-style government before there could have been a Hawke-style government.

THE ECONOMY

Ironically, as it turned out, economic mismanagement featured strongly in the campaign that brought the Whitlam government to power in 1972 (p167), but this has perhaps been lost to history because of what followed. Enough has been said about economic policy management, or mismanagement, by this government over the years, though it is still startling to see from some first hand accounts how shocking things were. The forty year perspective from which John O'Mahony is able to examine the Whitlam government's economic record is a useful one – though his conclusions are perhaps overly benign. (He even suggests if we 'counted' then as we count now, it would all look very different). From this distance, he argues that the shifts in the international environment negatively affecting Australia can be seen more clearly. He also argues that the Whitlam era straddled the hiatus between old economics and new (p166), it was one in which the policy consensus over economic management rapidly unravelled and the traditional levers of economic policy abruptly malfunctioned. This situation was exacerbated by excessive growth in wages and government spending. He lets lie the causes and consequences of those two trends and it is left to Bramston to be more blunt. He points out that no one was listening to Crean or Treasury. Cairns (who emerges in this volume as utterly economically and personally irresponsible and quite unsuited for government), replaced Crean and Whitlam instructed his Prime Ministers department to take over economic strategy. There followed the disastrous loans affair.

Through all this emerges (for so many of the contributors to this volume: Bramston, Howe, Nethercote, Deeble, O'Mahony, Easson) the quiet sanity and strength of William George Hayden, and not just on the economic front. In his strong statement of the quality of the policy preparation effort, Howe records Hayden's commitment to research-based reform (p198). John Nethercote (p141) reports the orderly approach he brought which laid the foundation for budget making for several decades, including for the first time, the creation of an Expenditure Review Committee (ERC) of Cabinet. More significantly perhaps, from the very first budget, as Acting Treasurer, Hayden was warning about the imbalances of revenue and expenditure and urging Cabinet to reduce spending to combat 'runaway inflation'. Bramston concludes that, from his study of the Cabinet papers of this period it is '... Hayden who emerges ... as the one Minister who most clearly understood the economic and budgetary challenges ... advocated the most sensible policies in response' (pp107–8) and provided 'politically prescient advice' (p111).

THE CONTEXT

Of course, it all came tumbling down anyway, fell in on its own flaws or had the misfortune to find itself in an extraordinarily hostile environment. Rodney Tiffen tells us that the obstacles pitted against this government included an opposition which ruthlessly refused to accept the legitimacy of Labor: 'the chilling reality is that in three years the Whitlam Government sought supply six times and only on one of those occasions...did the Opposition parties not speculate about blocking it' (p162). The opposition's determination

‘...to cause maximum disruption...Its ‘stop-at-nothing’ approach ...breaching long-standing conventions...’ (p122) was one marked impression left on Ralph Willis. Geoff Kitney recalls (p372) that ‘the conservative forces were as ruthlessly driven as if on a moral crusade’; Senator Peter Durack told him they were determined to get rid of the government at whatever price (p372). Kep Enderby makes the point with the figures (p335): the Senate rejected 93 bills between 1972–1975 when in the 71 years since Federation before that, only 68 bills had been rejected. There were also enough incidents of public sector recalcitrance – Waller’s reluctance to implement the recognition of China (p151); Tange’s objection to the decision to withdraw from Vietnam (p152), to draw the same conclusion about them. Add this to the fact of the inherent conservatism of the establishments in sectors targeted for reform and their resistance to change, a dramatically shifting international economic environment, and an idealistic, naive and amateur Cabinet which resisted all suggestions of discipline, or economic discipline in those circumstances, and there you have it.

CONCLUSION

Trials and tribulations, triumphs – and irreversible turning points. In George Williams’ view, the key was law reform: ‘Whitlam’s influence upon the law remains profound in areas ranging from human rights to trade practices law to family law. In these and other areas, the Whitlam Government laid the foundations of the modern Australian legal system. ‘By altering the law, he brought about long term change that no subsequent government has been able to displace’ (p288). With forty years’ hindsight the authors in this volume are able to see just how much changed forever and not just in the many policy sectors. As noted, Nethercote concludes that the period marked the end of an era in the public service (pp144–5). Nick Cater points out that the Labor Party, ‘the workers’ party was itself transformed from a bastion of social conservatism into a progressive reform movement’ (p52). There was an irreversible change in the way political campaigns were run: TV replaced the back of a truck and the town hall meeting and technology took over the office where in the beginning there wasn’t even a fax. As well, in Cater’s view, the ‘It’s Time’ campaign was the start of an obsession with the methodology of winning elections which eventually began to overwhelm the democratic process to our cost to this day (p57). Leigh Hatcher concludes that Australia was never again to see such a clear differentiation between Australia’s two major parties after which more and more they curled themselves up into smaller and smaller targets (p307) and politics was replaced by performance. This was the time, too, when the media began its inexorable shift from the role of observer and reporter to actor and party principal. Hatcher dates the change in the power balance between the press and politicians to this time (p308), the press tasted blood and were after scalps (p307). Tiffen takes up this point too. Describing Cairns and Connor and the loans affair and the ‘determined circumvention of democratic accountability that they represented, as policy folly on a grand scale’ (p164), he concludes its most lasting effect ‘was the dramatic demonstration of the efficacy of scandals.’ (p161).

A strength of this volume is its mix of 39 contributors. They represent the passionately involved, the observers, the actors, the opponents, the sceptics (though few of these) and the scholars who came later to this episode as history. There are those who were there then – as ministers, minders, willing workhorses of policy development, props (Little Pattie), press men, or apprentices – those who watched with baited breath from the sidelines (Bilney, Carr, Jones, Ryan, Willis, Howe and Kerin) – and the historians who came after who are perhaps best able to put this era in more objective context. Bramston is one of these – and his contributions are huge – and so is Carol Johnson. She is a Labor historian who puts Whitlam's policies in the continuum of Labor leaders through to Julia Gillard. Theirs is (still) a brutal, shocking, exhilarating story with much of the passion still raw as the tales are told of this roller-coaster ride through three reckless years of political history. There are some marvellously gripping accounts, Geoff Kitney's, for example, wonderfully written, beginning by taking Gough through the huge trees of the Tasmanian wilderness when campaigners felt it safer to expose him to trees than to people in that disastrous 1977 election campaign. It may be no coincidence in this still breathless, high risk, high stakes and high drama account of a near terrorised young journalist all these years later as though he were still there then, late at night, glass of red in hand, that there are more typos in this chapter than in the rest of this volume together!

Those there then put the problems plainly on the table and those who came after them make some clear eyed assessments. This is no hagiography. Gordon Bilney makes it clear that Whitlam fell short on East Timor and the Baltic States for example (p278–9), Mary Kalantzis and Bill Cope that the Whitlam Government had been 'parsimonious with both its immigration numbers and its outward demonstration of compassion towards refugees' (p 247), Michael Easson that its industrial relations changes were poorly thought through (p227), Nick Cater that some critical warning signs were ignored (p 53), and Barry Jones that Whitlam 'made some serious errors of political judgement...on people and appointments' (p382). While the overwhelming theme running through this book is of just how much changed on account of the Whitlam government, and mostly for the better, its authors do not shy away from making quite clear what the shortcomings and shortfalls were, and that there were many.

The 'ifs' of this history: Cairns, Connor, Kerr and Cabinet. If only Cairns, Connor and Kerr had not been there to do what they did, and if only Cabinet had been made to work as it should, the Whitlam government story may well have been a very different one. Yet it was remarkable anyway. Bramston's description of the Whitlam Government's achievements (pp xvii–xviii) is astonishing. Of Keating's categorisation of leaders as straight men, fixers or maddies, Gough must surely join Keating in the pantheon he put himself of maddies, for only maddies would dare to do so much. It was revolutionary in the true sense of that word. He changed Australia, its policies, its perspective, its outlook, its orientation – and he began the process of making Australia a truly independent nation.

The 'So What' question? All entering parliament and/or aspiring to a political career should read this book – and reflect on it in the light of what became of subsequent Labor governments.

The Lucky Culture

by Nick Cater. HarperCollins, 2013, 361 pp, RRP \$29.99

David Clune

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It is hard to remain indifferent about Nick Cater's *Lucky Culture*. Readers tend to pan or praise it with equal vehemence. This is unsurprising as Cater has written a provocative, personal anti-left polemic – although he denies the last label preferring to say he wants to start a discussion. His book in some ways resembles a pamphlet in the racy, argumentative 18th century British tradition. By writing in a subjective, accessible style, Cater leaves himself open to charges of crude generalisation and over-simplification, sometimes justifiably. This is perhaps inevitable, if not entirely excusable, in a work that sets out to make a controversial argument rather than an academic case: to argue is to exaggerate.

Cater is guilty of romanticising the past, painting Australia as an egalitarian utopia. Certainly, there were many good things about the old, easy-going 'Wouldn't be dead for a million quid' Australia. Geoff Bolton has written that Australian society was characterised historically by the classical ideal of the *auer mediocritas*, the golden mean or middle way. It was not a land that readily produced martyrs. However, there was also a down side that Cater ignores. A stifling and stigmatising conformity was omnipresent. There were class and religious distinctions. 'Common Catholics' were unwelcome in the leafy enclaves of Sydney's upper north shore and Jews were blackballed at exclusive clubs. Before World War Two, the children of working class families were largely excluded from certain jobs and professions. Veteran Canberra correspondent Alan Reid observed that the traditional way for a working lad to get ahead was through the 'three Ps': pubs, politics, police. Working class life was not all benevolent camaraderie, being marred by hardship, violence and oppression of women. Old Balmain boy Neville Wran once said that being in the working class was all about 'how to get out of it'. Cater's paean to the accepting world of the public bar ignores the fact that many pubs in working class areas were accurately known as 'blood houses'. Intellectuals seeking to commune with the workers were likely to leave minus a few teeth.

Cater's version of Labor history is also marked by over-simplification. He inaccurately describes the ALP as, until the 1960s, the 'party of muscular unionism run by a cadre of shop floor arrivistes'. Historically, Labor was a coalition of the working class, small farmers, elements of the lower middle class and intellectuals. Many of its leaders came up through the unions, one of the few career opportunities open to them, but acquired knowledge and qualifications in areas such as law. Curtin, Chifley and McKell were men of intellect and

vision who laid the foundations of post-war Australia. Cater is more perceptive about the dilemmas of modern Labor and the Party's 'new divide' between MPs 'from the working class heartland and those in the cappuccino belt who were obliged to conform to the sensitivities of the tertiary educated middle class'.

According to Cater, until the 1960s the main elements of the Australian world view were the 'absence of self doubt, the assertion of man's dominion over nature, the commitment to the utilitarian aim of modern science, the expectation that progress benefits not just the few but the many'. His history is more solidly based here and it is hard to disagree. Pride in Australian prosperity, progress and success in taming the bush was widespread and deep-seated. When Sir Timothy Coghlan in 1887 produced the first edition of what was to become the *Official Year Book of NSW*, he proudly entitled it *The Wealth and Progress of NSW*. Cater argues that Australia has a 'lucky culture': 'When fortune smiles, it is not by chance or benevolence; it is the dividend of an investment of human ingenuity, enterprise and energy'. Australian society was distinguished by its 'egalitarian optimism'.

However, the post-war growth of higher education has produced a 'new elite'. Australia now has a 'Knowledge Class' according to Cater: a cohort of 'tertiary educated professionals with a particular outlook that sets them apart ... They remain a minority, but the positions they occupy ... grant them a disproportionate influence on public affairs'. The 'Australian consensus' is being challenged by this 'knowledge-owning nobility that presumes to possess superior insights and manners to the broad mass of the people'. The new patrician class 'values cultural wealth over financial wealth, and accords status to those who observe its mores and obey its morality'. Cater claims that those who conform to these 'modish patterns of thought' ironically pride themselves on being 'individualists'. In fact, their world is a closed one 'of moral absolutes: equality, rights, sustainability and cosmopolitanism'.

Cater argues that the divide between the 'Knowledge Class' and the rest has become 'the dominant fault line on the cultural, social and political landscape'. Much of *The Lucky Culture* is a critique of the core tenets of the 'Knowledge Class': environmentalism, which Cater blames for the destruction of the traditional faith in science; progressivism; multiculturalism; atheism; human rights. Other chapters examine the alleged dominance of this 'elite' in the ALP, ABC and universities.

The reception Cater's book has received in some quarters tends to support his argument that the battle of ideas has become 'a contest of personal integrity. Compromise, the saving grace of democratic civil debate, is simply not on the table; debate becomes polarised between two incompatible positions'. *The Lucky Culture* has been ridiculed and trivialised as the right wing ravings of a Murdoch press hack. In reality, it is a thoughtful and thought-provoking book. Many will take issue with some or all of what Cater has written. This is what he wants: '*The Lucky Culture* comes with an open invitation to disagree. Australia is a country that thrives on discussion ... I sincerely hope that vigorous debate will ensue'.

Killing Fairfax: Packer, Murdoch and the ultimate revenge

by Pamela Williams. HarperCollins, 2013, 352 pp,
RRP \$39.99

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Pamela Williams' account of the 1996 Federal election, *The Victory*, is a classic of Australian political history. She has now written *Killing Fairfax*, another classic about an equally ruthless and bloody arena, the Australian media. It is basically the story of the ignominious decline of the once mighty Fairfax empire. Steeped in tradition and a sense of superiority, Fairfax's weakness was that it rested on one pillar, classified advertising which provided 56% of its revenue in 2004. With the rise of the internet, Fairfax was in a similar position to a medieval walled city with the advent of artillery.

Williams gives a fascinating account of the humble origins and subsequent huge growth of three internet 'pure play' companies: SEEK, carsales.com.au and realestate.com.au. While Fairfax was slow and inept in responding to the challenge of technology, the scions of two media dynasties with hatred of Fairfax in their DNA, James Packer and Lachlan Murdoch, could see its potential. All of this combined to kill the slumbering media giant by destroying its classified advertising revenue. The stock prices tell it all: in February 2013 SEEK was worth \$9.70 per share, carsales.com.au \$9.00, realestate.com.au \$25.80 while Fairfax was down to \$0.53.

Williams' book is extremely well-researched, with much use of first hand accounts from insiders. It is also superbly written – one can almost smell the sweat beneath the dark blue bespoke suits in accounts of critical encounters. The intricacies of the business world are lucidly but not condescendingly explained. *Killing Fairfax* also provides intriguing vignettes of key players – especially James Packer's troubled relationship with his overbearing father Kerry.

Killing Fairfax has one crucial message. All institutions – whether they be the 'paper of record', political parties or parliaments – need to be very aware of the phenomenal growth of technology so they can master it rather than have it master them.

Taking God to School: the end of Australia's egalitarian education?

by Marion Maddox. Allen & Unwin, 2014, 296pp, RRP \$29.99.

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The key argument in this book is that the underlying tenets of Australia's school system, which enjoyed a consensus for nearly 100 years, have been gradually undermined over the past forty years. The consequence is that the egalitarian education – that so many believe to be a feature of Australian life – is unravelling and at serious risk. The system that emerged in the latter 19th century was based on establishing compulsory schooling for all that was free and secular, and doing away with the sectarian divide that threatened the peace of the colonies. The chief threat to that system has been the emergence and growing strength of separated private, religious school systems that have been receiving increasing government aid and support for half a century.

Marion Maddox is an authority on the intersection of religion and politics in Australia. The Times Literary Supplement described her major work *God Under Howard: The Rise of The Religious Right in Australian Politics* (2005), as 'an exemplary case study of the interaction between religion and politics in Australia today'. It followed *For God and country: religious dynamics in Australian federal politics* (2001). Together they provide a solid foundation for her focus on religion and schools in *Taking God to School*. This is more than just a chronicling of what is by now a well-known story of governments, both Liberal and Labor, privileging private education and transferring public monies to private schools. Here Maddox crafts a historical narrative, albeit non-linear, that takes us from the mid 18th century up to today's highly contested and fractious disputes over school funding, curriculum policy and the very purpose of schooling.

Her account commences in Queensland in the 1970s with the rise of the Pentecostal and fundamentalist churches and the schools they established. They received critical support from the Bjelke-Petersen government and their attacks on the social sciences curriculum helped them gradually build up what were initially small schools. Maddox presents a detailed account of how these churches smoothly morphed into multi-tiered and vertically integrated businesses as well as political campaigning organisations. It is reminiscent of Thomas Frank's explanation of the rise of the hard right in the Republican Party in Kansas and Texas, which laid the seeds for the later rise of the Tea Party. The fledgling Queensland Churches systematically organised to develop a constituency to pursue their political interests, and received aid and succor from state government ministers. One of the central

figures in this movement was John Gagliardi, author of *The Marketplace: our Mission* (2007) who heard the 'voice of God' and built Citipointe church and Christian College in Brisbane in 1974. In 1990 he set out to evangelise in the Soviet Union and by 1999 had established in Kiev, Ukraine the largest Protestant church in Europe. Even though Gagliardi believes we are nearing 'the end times', Citipointe's 2012 Annual Report carries endorsements from both Campbell Newman and Tony Abbott.

Maddox's argument is that developments in Queensland overturned a century of educational consensus and seeks to trace how this fraying started and has since accelerated. In order to explain how this movement is at odds with the bulk of Australia's education history Maddox returns to the mid 19th century colonial debates to trace how and why the consensus around a secular public education was built. In the early Australian colonies politicians and many religious supported secular education as a means of overcoming the sectarianism and bitterness that by dividing children along religious lines was damaging social cohesion. In NSW Henry Parkes as Colonial Secretary revised the 1866 *Public Schools Act* abolishing the dual school system and in 1880 the *Public Instruction Act* ended state aid for denominational schools. George Higinbotham's 1886 Royal Commission in Victoria considered state aid to private schools as a duplication of services and a waste of scarce public resources. While in South Australia in 1896 voters overwhelmingly supported three referendum questions endorsing secular education. The result was a universal, free and secular school system, which was seen as a means of fostering a pluralist and democratic society.

Australia's school system was composed of a public system comprising local and comprehensive schools, a small number of elite private schools and a Catholic systemic system that relied heavily on deploying unsalaried nuns and brothers to keep costs down. Children attended schools in their neighbourhoods and mixed with others with different abilities and from different backgrounds, making friends with those who lived nearby. Competition between schools and therefore the need for marketing barely existed and schools were not ranked in league tables. Fast forward to the 1960s and Maddox examines how governments started to overturn this long consensus by beginning to divert public money to private education, and using it as a means of gaining political advantage over their opponents. First Robert Menzies in the 1960s began state aid with at least one eye on the dissension it would create within the ALP. This section reminds us just how important and serious this issue was in the 1970s. Gough Whitlam was almost expelled from the ALP for his support of Commonwealth aid to both public and private schools; the ALP National Executive intervened in the Victorian branch when the state Executive opposed state aid and overrode the decision of the parliamentary leader Clyde Holding to support it in the 1970 election campaign. These disputes also gave rise to community groups opposed to state aid such as the DOGS (Defence of Government Schools). The DOGS lodged legal challenges, ran candidates for parliament and as Maddox reminds us instigated a number of creative and inventive public demonstrations that challenge the idea that culture-jamming is just a recent phenomenon. Whitlam's fateful pre-1972 election promise that no school would lose any funding set a norm that politicians ever since have lined up to support. Once elected, Whitlam set up a national Schools Commission under Peter

Karmel, which found that private schools resources ranged from 40–235% of that received by public schools. Whitlam tried to amend his pre-election pledge to mean that only ‘needs based aid’ was intended, not funding for wealthy grammar schools. Malcolm Fraser however used Whitlam’s election commitment as a springboard to increase and spread out the Commonwealth’s support for private schools.

In the final chapters Maddox concentrates on more recent times and notably the ‘Christ-centred, bible-based, taxpayer-funded’ schools. These are the fastest growing sector for enrolments in Australia, with around 130,000 students spread across 500 schools. She introduces a broader readership to new terms such as ‘themelic’ schools, which operate in the belief that the Bible is ‘inerrant’, a 19th century expression meaning that the Bible is free from error in all about which it speaks. Hence these schools teach creationism based on the Genesis account of the world’s creation in six days as literal truth. In general these schools receive a disproportionate amount of state funding, more than even traditional elite private schools, with for example Bible Baptist College in Western Australia receiving 85% of its recurrent funding in 2010 from the state. More importantly though these are ‘one-way’ schools, that is, they expect to receive government funding while at the same time claiming exemption from government regulation especially in the areas of discrimination law and curriculum compliance. Some have a fundamental hostility to the idea of government in general. These schools do however engage in the political scene through well organised and politically-savvy peak lobbying groups such as the Australian Christian Lobby (ACL). The ACL won the agreement of Julia Gillard in 2013 to continue the existing exemptions from revised discrimination legislation before she had even referred it to the ALP caucus. Exemptions from the discrimination laws give the school management a powerful weapon to dismiss staff for reasons unrelated to their teaching work and contribute to a very uneven employer-employee relationship. In other instances they have been used to exclude or expel some students on grounds that would not be possible in a state school.

Not content with erecting separated schools for the children of evangelical families, a number of the churches believe they have a role to spread the word in public schools. The challenge here is getting into the schools. Maddox highlights two examples. The first is the programs conducted by the Hillsong Church with its Shine program aimed at girls, and its Strength program directed towards boys. On the surface these programs can appear as strength-based activities intended to build self-esteem and confidence. The real aim though is to reach ‘unchurched’ young people as part of a recruitment program.

The second scheme, the National School Chaplaincy Program, is much better known. Created by John Howard in 2006 Maddox describes how many evangelicals saw it as an opportunity to proselytize and to ‘make disciples’ of children. Some such as Access Ministries used it as a beachhead for other volunteers to follow and form school-based congregations. The original three year program received \$90 million and by 2009 Kevin Rudd announced a further two years funding of \$42million accompanied by a review. Astonishingly Julia Gillard then not only pre-empted the program review by announcing its continuation before the report was delivered but increased the amount to \$222m over three years, a rate more than double that committed by John Howard.

Maddox's main interest is the fundamentalist schools seeing them as being more corrosive of whatever remains of an egalitarian system. However, the serious government money goes to the elite private schools of the establishment, in both per capita student funding but perhaps more importantly in the huge outlays of capital funding for libraries, theatres, aquatic centres, gymnasiums. These schools are not the bible colleges of suburban Perth or Brisbane or the new regions of north-west Sydney but ones that are very well known such as Cranbrook, SCEGGS, Knox, Scotch College, PLC, St Peters Adelaide. These schools are long-standing and connected to established religions yet they too might be seen to find comfort in taking their Bible literally when it suits, and apply a materialistic rather than spiritual interpretation of Matthew's gospel 'For whoever has will be given more, and they will have an abundance'.

This is an important book and successfully brings academic discipline to writing a book for an informed general readership. Some sections such as the arguments around 'neo-liberalism' and Michael Pusey's theory from the early 1990s of the capture of Australia's policy makers bog down. And in other places excursions into religious doctrinal disputes are somewhat arcane for those not so interested in theological clashes among contending Christians. Here can also be detected some umbrage taken by Maddox at the fundamentalists claiming a position of theological superiority over other (mainstream) Christian churches and their beliefs and practices. Currently we are witness to a concerted effort to, in Tony Abbott's words, 'reshape our country'. The potential risk is destroying the foundations of what characterised Australian egalitarianism – universal health care, universal education, and a minimum wage. These are not misguided efforts but rather carefully and consciously developed policy, and they will not stop merely as a result of being exposed. Schools have become a central focus of this effort. The past 40 years has been a battleground of ideology designed to stigmatise public education. But as Maddox points out the 'resacralisation' of Australia's schools took off just when Church attendance and religious adherence were collapsing. She contends that the religiosity of Australia's school systems and of Australia's population is running in opposite directions. In 2013 Christopher Pyne and Tony Abbott made symbolically clear the coalition's support for the Bible-based school sector by launching its election education policy in the hall of the Penrith Christian School. The coalition argues that the private sector should deliver more, and that the free market is more efficient and increased competition is the way to drive quality. But Maddox's book makes clear that as far as education goes this argument ignores important parts of our history. It harks back to early colonial times of division and duplication and one that the nation's founders roundly rejected in favour of a publicly funded secular education. Marion Maddox is right to alert us that the universal public education system is at risk and the dangers inherent in it's undermining.

