



**“Parliamentary speech and the location of decision making”**

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Parliament is perceived as a particular theatre of action by its participants. So, parliamentary debates have become rehearsed theatre, where adversarial protagonists line up against one another and perform to bolster their own party support (and that of the leadership) and shore up their own political credibility.<sup>1</sup>

... democratic legitimacy rests on authentic deliberation... deliberation induces individuals to think through their interests and reflect upon their preferences, becoming amenable to changing the latter in light of persuasion from other participants... to the extent effective deliberation occurs, political outcomes will secure broader support, respond more effectively to the reflectively held interests of participants, and generally prove more rational.<sup>2</sup>

Uhr and Wanna have described State Parliaments as “unoccupied museums occasionally opened for the passing of bills, where members of the executive, with its extensive entourage, camp uncomfortably like modern day Bedouins for the duration of sittings...” The main weakness of Uhr and Wanna’s description is that it fails to take account of the revival of the Legislative Council... where the passage of government legislation has become a consultative process.<sup>3</sup>

## Introduction

Which of these three very different views of parliamentary debate and proceedings is most accurate? Is the idea of Parliament as a deliberative forum simply a quaint hang over from a bygone era, or does it have an ongoing relevance? What are the purposes of parliamentary speech and what are the locations of real decision making power in a modern Parliament? Are parliamentary rules of debate and conventions which assume the existence of a deliberative body now obsolete, or is there still merit in the process of decision making envisaged in those rules and conventions? What is the impact of the deliberative process evident in much parliamentary committee work on parliamentary debate and consideration of legislation? Should more of the work of consideration of legislation occur in parliamentary committees?

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

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<sup>1</sup> R A W Rhodes, John Wanna & Patrick Weller, *Comparing Westminster*, Oxford University Press, 2009, 169.

<sup>2</sup> John Dryzek & Valerie Braithwaite, “On the Prospects for Democratic Deliberation: Values Analysis Applied to Australian Politics”, *Political Psychology*, 21(2), 2000, pp 241-242.

<sup>3</sup> David Clune & Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, Federation Press, 2006, p 687.

## Theoretical framework: deliberative democracy

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

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

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<sup>4</sup> John Dryzek & Patrick Dunleavy, *Theories of the Democratic State*, Palgrave Macmillan, 2009, p 215.

<sup>5</sup> Ibid, p 216; John Uhr, *Deliberative Democracy in Australia*, Cambridge University Press, 1998, p 4.

<sup>6</sup> Uhr, *Deliberative Democracy in Australia*, p 10.

<sup>7</sup> Dryzek & Braithwaite, “On the Prospects for Democratic Deliberation.”

<sup>8</sup> See for example Margaret Gollagher & Janette Hartz-Karp, “Deliberative Collaborative Governance, at <http://www.newdemocracy.com.au/library/research-papers/item/131-deliberative-collaborative-governance>, accessed at 4.26 pm, 15/9/2014.

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

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

<sup>11</sup> Steiner et al, *Deliberative Politics in Action*, p 17.

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

John Uhr, in his 1998 book *Deliberative Democracy in Australia*, suggests that one of the attractions of deliberation is its capacity to be used as a concept or theme that ties together all the threads of political theory relevant to parliamentary government. However, he cautions against unworldly versions of deliberative theory that place undue weight upon shared rationality or consensus: “Deliberative processes are not recipes for consensus and rational harmony... politics is concerned with the clash of alternative views... majorities must eventually win.”<sup>16</sup> Rather, for Uhr the value of deliberation is that it requires governments to meet “a basic test of public accountability by openly debating and defending their proposals” as well as providing “equality of opportunity so that all representatives can contribute to public debate and to the collective determination of legislative proposals.”<sup>17</sup>

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

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<sup>12</sup> Steiner et al, *Deliberative Politics in Action*, p 135.

<sup>13</sup> Ibid., p 136.

<sup>14</sup> Ibid., p 137.

<sup>15</sup> Ibid., p 158.

<sup>16</sup> Uhr, *Deliberative Democracy in Australia*, pp 93-94.

<sup>17</sup> Ibid.

<sup>18</sup> Clune & Griffith, *Decision and Deliberation*, p 15.

## The Legislative Council of New South Wales

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

### ***51st Parliament: 1995-1999 – intense scrutiny of legislation***

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

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<sup>19</sup> Ibid., pp 567, 609-611.

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

<sup>21</sup> Clune & Griffiths, *Decision and Deliberation*, p 632.

<sup>22</sup> Ibid., pp 628-9.

<sup>23</sup> *Egan v Willis* (1998) 195 CLR 424.

<sup>24</sup> *Egan v Chadwick* (1999) 46 NSWLR 563.

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

While my first four years in this place involved a steep learning curve, it presented a time of great opportunity to leave my mark on the statute book of New South Wales and make my contribution as the single Greens member. That was a very exciting time, in large part because we have a fine balance in this House. There were many Independents and small party groups... Another wonderful learning experience for me was to sit in awe and trepidation—because I had to make a decision at some stage—as I listened to the debates between Jeff Shaw and John Hannaford, as the Attorney General and shadow Attorney General. I must say, my general tendency was towards my good friend Jeff, but John Hannaford was so skilled. He was an orator in the House. So often while he was speaking in the House he just glared at me. I thought: Oh my God, this is a very difficult situation.<sup>26</sup>

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

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

The deliberative nature of Legislative Council proceedings at their best is illustrated by the proceedings on one government bill in particular, the Industrial Relations Bill 1996. This bill was considered in committee-of-the-whole for 35 hours and 53 minutes, over seven days. A total of

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<sup>25</sup> Clune & Griffith, *Decision and Deliberation*, p 632.

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

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

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

147 amendments were considered, with 62 of these (including 53 Opposition amendments) agreed to.<sup>29</sup>

A detailed review of the parliamentary debate on the Industrial Relations Bill 1996 against something like the “Discourse Quality Index” used by Steiner et al is beyond the scope of this paper. However, even a cursory reading of the debate in committee-of-the-whole reveals numerous examples of active debates over particular amendments, including multiple contributions by members addressing and responding to questions and concerns raised by one another, in an effort to persuade one another (or at least the key cross bench members whose vote varied from one amendment to another) of their viewpoint.<sup>30</sup> Also evident from a reading of these debates is the frequency of comments from members that they have listened intently to one another (even if ultimately disagreeing), with phrases used including: “I invite honourable members to consider carefully the words uttered..,” “I was interested in the contribution...” and “I am interested to hear the arguments...”<sup>31</sup> Perhaps the best example showing the degree to which members listened to, and were persuaded by, one another during these debates is this contribution from the Hon John Tingle at the end of a lengthy debate about an amendment concerning preference in employment:

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

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

I have given a lengthy explanation of my views on the matter because the step I am about to take is not an easy one. I will have to vote against my earlier conviction for the sake of the safety of workers in New South Wales. The Minister said to me, "You are not going to support the re-committal, are you?" I said, "Yes, because I want to hear what the

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

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

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

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

Leader of the Opposition has to say." I am glad that I supported that motion to recommit the clause. I could have voted with the Government on the first occasion and none of this debate would have taken place. The recommittal of this clause was not a time-wasting exercise. The debate has revealed so much, and I am sure that we have all benefited from it despite the fact that we are all exhausted after such a lengthy consideration. Humiliating as it may be, I am glad that I have had the opportunity to reverse my vote on this issue.<sup>33</sup>

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

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

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

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

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

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

<sup>35</sup> *Ibid.*, pp 8-10.



Whilst legislation continues to be subjected to rigorous scrutiny in the Legislative Council in the 55<sup>th</sup> Parliament, including in committee-of-the-whole, there is an important difference in the dynamic evident now from the 1990's. Whilst the fact that the Government does not have a majority in the Council continues to necessitate negotiation and can result in improvements to legislation, and it is sometimes the case that the outcome on a particular bill or amendment does not become evident until the question is put and the House divides, it is almost always the case that the positions of each party has been determined outside the chamber, prior to the conclusion of debate and the committee stage. Indeed, it is now rare for Bills to proceed into the committee stage until negotiations outside the chamber have concluded. Critical negotiations and attempts to resolve impasses seem to take place elsewhere, rather than on the floor of the House. There are no doubt a range of reasons for this change, as the House has in a sense "matured" and its composition and the roles of political parties represented has become more stable. An important difference is that, whilst during the 1990s there were a number of members who were the sole representative of their political party and who therefore were not subject to the constraints of decisions in party rooms, there is now no cross bench member from a political party with less than two members (the cross bench currently consisting of five Greens, two Christian Democrats and two Shooters and Fishers party members).<sup>36</sup> The different dynamic does, however, raise a number of questions about the different roles of parliamentary speech in these circumstances.

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

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

The bill was introduced into the Legislative Council and declared urgent on 9 November 2011. Following the Minister's second reading speech, however, debate did not resume until 23 November. During the intervening period there was clearly a great deal of activity, lobbying and negotiations, particularly involving the Police Association. Indeed throughout the final sitting week of the year, a negotiating team from the Police Association were frequently seen in the parliamentary cafeteria between meetings with cross bench members and government officials.<sup>37</sup> Upon debate resuming 20 members spoke (including a number of Government speakers, apparently while negotiations continued with the Shooters and Fishers Party members who were

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

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

quoted in the media as stating that they “would not blink”<sup>38</sup> before being adjourned overnight. The next evening debate concluded, with a brief but crucial contribution by the Hon Robert Brown from the Shooters and Fishers Party, in which he described the negotiations conducted behind the scenes:

A considerable amount of work has been done during this week by the Minister for Police and Emergency Services and his staff and the Police Association. I have a sense that we are there. Let me define there: My left hand is stretched out to the left-hand side of my body, and that is where the Government started; my right hand is stretched out to the right-hand side of my body, and that is where the Police Association started. They are not in the middle but they are somewhere closer to where the Police Association probably wants to be for its members than I thought was possible a week ago.

We have attempted to test the Government's position on the issues that the Police Association has brought to the Christian Democratic Party and the Shooters and Fishers Party. We have done that this week in a number of meetings with both parties individually and with both parties in the same room... At times I did not think we were going to get the concessions that we have. Again, I do not think the Police Association will endorse this amended bill, but I think the association will stand up and say, "It is better than what it started out as..." It is not going to be to everybody's satisfaction, but we are now in a position where we can argue the amendments in the House.<sup>39</sup>

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

### **Free votes since 2011: respectful debate and reflection**

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

... a more open, interesting and vigorous deliberation which is less formulaic and partisan in character. With free votes there is more occasion and inclination to listen to the views

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<sup>38</sup> Ibid.

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

<sup>40</sup> Anna Patty, “\$100 million extra for passage of police disability bill,” *Sydney Morning Herald*, 26/11/2011, p 9.

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

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

of others, to acknowledge and even accommodate arguments which a member may not agree with at first... tending to give parliamentary debate more personal colour and intellectual interest than usual.<sup>43</sup>

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

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

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

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

The Hon. Duncan Gay pointed out that this type of debate brings out the best in us all. I greatly respected and appreciated the contributions by many members today, in particular, the contribution of the Hon. Trevor Khan. Yes, it was pointed out that it may

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<sup>43</sup> Ibid., p 43.

<sup>44</sup> Cathryn Cummins, *Who else can judge the judges? The role of Parliament in the removal of judicial officers from judicial office*, Parliamentary Law Practice and Procedure Course 2011, Final paper, p 7.

<sup>45</sup> *NSWPD (LC)* 13/10/2011, pp 6162, per Mr David Shoebridge; 6167, per Dr John Kaye; 6174, per the Hon Melinda Pavey; and 6177, per the Hon Michael Gallacher.

<sup>46</sup> Ibid., p 6162-3, per Mr David Shoebridge.

<sup>47</sup> Ibid., p 6173, per the Hon Duncan Gay.

<sup>48</sup> Ibid, p 6166, per Mr David Shoebridge.

have been the case for the prosecution but it was certainly a well-structured, well thought out and well-presented argument that dealt with the case before us...<sup>49</sup>

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

### **Parliamentary committee work: extraordinary outcomes and working relationships**

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

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

... I commend the work of the Select Committee on the Partial Defence of Provocation. As a committee member, I extend my genuine gratitude to every member of the committee... In large part we put aside party differences that often generate the heat in this House, if not the light. We had genuine discussions about problems in existing law and came to grips with issues presented to us on both sides of the argument...I would be surprised if a single member who went in with a perception came out with the same view after reading the submissions and hearing the evidence and the discussion around the table over the course of the months that the inquiry proceeded...<sup>52</sup>

I congratulate the seven members of the committee, who were drawn from across the political spectrum. We worked together to produce a report with recommendations that were reached unanimously. That is a major feat as this issue is a complex and often contentious one within our legal system. There was no dissenting report or statement from any member of the committee...<sup>53</sup>

I thank the Hon. Trevor Khan, my Labor colleague the Hon. Adam Searle, Mr David Shoebridge and the Hon. David Clarke, who all have a legal background and certainly helped me understand some of the complex issues and consequences of whichever path our recommendations followed. As others have said, this inquiry was an example of the parliamentary committee process at its best. Mr Scot MacDonald, the Chair of the

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<sup>49</sup> Ibid., p 6174, per the Hon Melinda Pavey.

<sup>50</sup> Ibid., p 6177, per the Hon Cate Faehrmann.

<sup>51</sup> Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, 2013

<sup>52</sup> *NSWPD (LC)*, 21/5/2013, p 20456, per Mr David Shoebridge.

<sup>53</sup> Ibid., per the Hon Walt Secord.

committee, Reverend the Hon. Fred Nile, and I as lay people also contributed to the process to produce a report and suite of recommendations that reflect community expectations and values... Reverend the Hon. Fred Nile was an absolutely excellent Chair of this committee. He brought great skills not only to the hearings, which often were quite difficult and emotional, but also to our deliberative meetings and discussions.<sup>54</sup>

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

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

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

This committee investigated a complex area, namely, the use of cannabis for medicinal purposes, and came to an agreement that, I think, in equal measures was open-minded and open-hearted. I should point out that the committee members came from a diversity of backgrounds comprising the Shooters and Fishers Party, the right of the Labor Party, the Hon. Charlie Lynn from the Liberal Party, The Nationals and me representing The Greens. We had different perspectives, yet we reached a unanimous report. It is to the credit of the Hon. Sarah Mitchell, committee staff and members that we landed somewhere that was positive, open-minded and open-hearted.<sup>57</sup>

I am a very proud conservative, so any discussion about relaxing attitudes towards drugs was always going to be a big call. Therefore, I congratulate those who appeared before the committee because many had strong and informed views about the pros and cons of the use of cannabis for medical purposes.<sup>58</sup>

On 16 September 2014 Premier Baird announced that the NSW Government would support a clinical trial for medical cannabis.<sup>59</sup>

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<sup>54</sup> Ibid., per the Hon Helen Westwood. Although it should be noted that, during the take note debate, one member who did not serve on the committee, the Hon Dr Peter Phelps, raised concerns about the consensus position reached by the committee.

<sup>55</sup> General Purpose Standing Committee No. 4, *The use of cannabis for medical purposes*, 2013.

<sup>56</sup> *NSWPD (LC)*, 27/8/2013, p 22746, per the Hon Trevor Khan.

<sup>57</sup> Ibid., 20/8/2013, p 22373, per Dr John Kaye.

<sup>58</sup> Ibid, 27/8/2013, p 22746, per the Hon Charlie Lynn.

<sup>59</sup> *NSWPD (LA)*, 16/9/2014, p 15, per the Hon Mike Baird.

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

## Some reflections

### The purposes of parliamentary speech

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

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

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<sup>60</sup> *Minutes of Proceedings*, 26/11/2013, p 2261.

<sup>61</sup> Dryzek & Braithwaite, “On the Prospects for Democratic Deliberation,” pp 241-242.

<sup>62</sup> Griffith “Free votes,” p 43.

<sup>63</sup> *NSWPD (LC)* 9/9/2014, p 44, per the Hon Dr Peter Phelps MLC.

"The utmost latitude of discussion is ensured; but, after free deliberation, the action of the majority is unimpeded."<sup>64</sup>

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

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

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

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

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<sup>64</sup> William Edward Hearn, *The Government of England: Its Structure and Its Development*, Second edition, Longmans Green and Co, London & George Robertson and Co, Melbourne, 1887, p 556.

<sup>65</sup> Uhr, *Deliberative Democracy in Australia*, p 93.

## Locations of decision making

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

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

As noted above, where in the case of the Police Amendment (Death and Disability) Bill decisions had been made in negotiations outside the chamber, and debate resumed and concluded only at the end of those negotiations, during the remaining debate time the decisions reached were publicly articulated. This is not always the case with other important decisions taken in the parliamentary context but outside the chamber.

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

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

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<sup>66</sup> Steiner et al, *Deliberative Politics in Action*, p 122.

<sup>67</sup> Rhodes, Wanna & Weller, *Comparing Westminster*, p 169.



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

Of course, prior to matters being debated within party meetings, they are first considered by the leadership group, or in the case of the Government, by the Cabinet. Like the party room, proceedings in Cabinet are the subject of strict confidentiality rules. The minutes of cabinet meetings only record proposals and decisions rather than the details of discussions and do not identify the views of particular Ministers. Under the *Archives Act 1983 (Cth)* cabinet documents are made publicly available after either 20 years, or 30 years for cabinet notebooks.<sup>70</sup> Cabinet documents in NSW may be the subject of applications under the *Government Information (Public Access) Act 2009* after 10 years, and under the *State Records Act 1998* there is a presumption that they will be open for inspection after 30 year, although they are not the subject of annual publication in the in the same way as Commonwealth Government cabinet papers, evidently following a lack of media interest in the past.<sup>71</sup> Steiner et al identify processes and debate in cabinets as one area of interest for future research by those concerned with deliberative democracy and the role of discourse, along with other forum and decision making bodies including courts, bureaucracies, inter-governmental and non-government organisations,<sup>72</sup> although the absence of records of debate in many of those bodies would make the conduct of an analysis of deliberations difficult.

## **Rules of debate and conventions concerning parliamentary speech**

The key procedural rules common across Westminster style parliaments are based on the first of the “great principles of English parliamentary law,” namely that public business shall be

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

<sup>69</sup> Sean Nicholls, “For better or for worse, this is the policy that will define Baird’s reign,” *Sydney Morning Herald*, 11/6/2014, p 4.

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

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

<sup>72</sup> Steiner et al, *Deliberative Politics in Action*, p 166-168.

conducted in a “decent and orderly manner.”<sup>73</sup> The rules that flow from this first great principle are concerned with such things as the giving of notice, the routine of business and restrictions on the suspension of standing orders. The rules of debate are a subset of parliamentary procedure. According to Uhr, “the rules of debate are the fundamental rules of the game of political deliberation” as they “serve to ease deliberation in common: to raise it to an art; to ensure the hearing of every opinion and side in a just and due proportion.”<sup>74</sup>

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

Uhr, Steiner et al and others point out that the rules and conventions that operate in second chambers tend to promote deliberation. The clearest example of these second chamber rules is the existence of the filibuster as a procedural tool able to be used as a veto-point by the minority in the US Senate.<sup>75</sup> Within parliamentary second chambers the equivalent provision is the procedure laid down for the use the “gag” or “guillotine,” which in the case of the Legislative Council is clearly designed to make its use an absolute last resort, and the conventions around its use.<sup>76</sup> Other conventions, such as that prior to speaking in debate members should be in the chamber to listen to the contribution of the preceding speaker, so as to be able to respond to that speech, and the following speaker, so as to listen to any responses to their speech, are premised upon parliamentary debate being dynamic and deliberative rather than a series of set piece contributions. The application of these conventions has a self-reinforcing quality: “deliberative norms can become inscribed in an institution with actors following these norms as a normal part of the institutional routine.”<sup>77</sup>

The existence of written Standing Orders and long standing conventions is not sufficient, on its own, to ensure that debate is conducted in an appropriate manner. Even in the NSW Legislative Council there have been periods when, despite the best endeavours of Presiding Officers to enforce the rules, tendencies to boorish behaviour on the part of a small number of members have had a disproportionate effect on the tenor of debate. It is therefore pleasing to note that, in recent years, despite intense policy differences, clashes of ideology and complex matters of conscience being debated, there has been a noticeable return to the measured and “deliberative”

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

<sup>74</sup> Uhr, *Deliberative Democracy in Australia*, p 228.

<sup>75</sup> Steiner et al, *Deliberative Politics in Action*, p 127.

<sup>76</sup> Uhr, *Deliberative Democracy in Australia*, p 144.

<sup>77</sup> Steiner et al, *Deliberative Politics in Action*, p 126-7.

conduct of debate more typical of the Legislative Council. Such a change does not occur by accident, but rather through the commitment and constant vigilance of all members, and the preparedness of those in leadership roles to counsel members about the appropriate norms of behaviour. Perhaps induction programs for new members have also had a positive impact in this regard.

### **An enhanced role for parliamentary committees in the legislative process?**

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

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

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

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

However, perhaps the major advantage of parliamentary committees is that it allows all members to receive and hear evidence together and to engage in a collective process of reasoning in the light of that evidence, with that evidence generally given in public.<sup>81</sup> This is perhaps most fitting in relation to the scrutiny of legislation, and would in many ways be a logical extension of and adjunct to the detailed consideration of amendments in committee-of-the-whole, the origins of which in House of Commons during the reign of James I seems to indicate a desire on the part of members to deal in open in the House with the process of enacting legislation which had up

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<sup>78</sup> Rhodes, Wanna & Weller, *Comparing Westminster*, pp 200-201.

<sup>79</sup> Steiner et al, *Deliberative Politics in Action*, p 88.

<sup>80</sup> Steiner et al, *Deliberative Politics in Action*, p 88.

<sup>81</sup> Legislative Council, Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council, 20/9/2013, pp 26-27, per the Hon Max Willis.

until that point been conducted behind closed doors.<sup>82</sup> Griffiths and Clune warned in *Decision and Deliberation* that the transparency of the parliamentary process is at risk if too much of the consultation and negotiation around legislation takes place outside the chamber.<sup>83</sup>

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

The consideration of bills by standing or select committees allows more effective scrutiny of legislative proposals than is possible in the whole Senate... Exposing bills to this heightened scrutiny makes for better legislation. Amendments to make improvements to bills are more likely to emerge from the process. If the framers of legislation know that it is to be subjected to this kind of scrutiny, and to the critical examination of those likely to be effected by it, they are likely to give more care and attention to their proposals, in anticipation of explaining them to Senate committees... It is not the practice of the Senate to delegate to committees the power to amend bills, but they may recommend amendments, which may then be considered by the Senate. That consideration is apt to be expedited by the work of committees.<sup>84</sup>

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

### **A footnote: the impact of humour on parliamentary speech**

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

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<sup>82</sup> Lynn Lovelock, “Amendments in Committee,” paper presented to the Fourth Australasian Legislative Drafting Conference, Sydney, 5/8/2005, p 2.

<sup>83</sup> Griffiths & Clune, *Decision and Deliberation*, pp 679-680, 699.

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

<sup>85</sup> David McGee, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> edition, Dunmore Publishing Ltd, 2005, pp 351, 356.

<sup>86</sup> *Parliament of Queensland Act*, s 93.

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

## Conclusion

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

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

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

Thirdly, the existing and long standing rules and conventions which provide the framework for measured and respectful parliamentary debate continue to be important. Even where there are marked policy differences and ideological clashes, experience in the NSW Legislative Council suggests it is possible for debate to be conducted in a "deliberative" manner. Such an environment does not arise by accident, though, and its maintenance requires the commitment

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

<sup>88</sup> Dryzek & Dunleavy, *Theories of the Democratic State*, p 215.

<sup>89</sup> Dryzek & Braithwaite, "On the Prospects for Democratic Deliberation," p 241.

<sup>90</sup> Uhr, *Deliberative Democracy in Australia*, p 93.

and vigilance on the part of all participants and those in leadership roles. Induction programs for new members should also include material on the rules of debate and the value of those rules.

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