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Australasian Parliamentary Review

Editor: Dr Colleen Lewis, colleen.lewis@monash.edu

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From Your Editor

Colleen Lewis

The *Australasian Parliamentary Review* (APR) is one of the few journals that focuses predominately, but not exclusively, on Parliaments. It exists to make an informed contribution to the study of Parliament and the fundamental role it plays in democratic political systems. It has been my privilege and pleasure to edit this important publication since 2014.

I am standing down as APR editor on 1 August 2017 and am delighted to advise that Professor Rodney Smith from the University of Sydney will take on the editorship from that date. The Australasian Study of Parliament Group (ASPG) and other subscribers to APR are indeed fortunate to have such an eminent scholar as the new editor. I know Rodney will take the journal to new heights as people of Rodney's standing in the broader political science community invariably do.

During 2014 I coedited the journal with former editor Jennifer Aldred and took on the sole editorship in 2015. The 2015 Spring/Summer edition was coedited with Dr Isla Macphail. I have always had Jennifer's support behind the scenes and learnt a lot from her as I did Isla. I thoroughly enjoyed working with them both.

I would also like to express my sincere thanks to all who contributed articles to each edition during my time as editor I am wiser from having read and edited your considered and well-researched articles and I mean it when I say it was a pleasure to work with you all. I am looking forward to having the time to be a potential contributor to APR myself.

To all members of the ASPG, I thank you for allowing me to contribute to the life of the journal these past three years.

While on the subject of change, I need to advise APR readers of the resignation of Liz Kerr from authorship of the From the Tables section of the journal. Thank you Liz for your hard work on behalf of the APR and welcome to Tim Bryant, Clerk Assistant (Committees), Senate, who has kindly taken on the role.

This edition of the journal has interesting and informative article that you will enjoy reading. Topics covered include political leadership and public policy debates that arose in the 2016 Federal election, authored by Andrew Gunn and Michael Mintrom; an article written by Frank Mols and Jolanda Jetten on One Nation, which analyses why income can be a poor predictor of outcome. A contribution by Kate Mihaljek

examines the extent of New South Wales Legislative Council's power to order papers from organisations that are not in the control of a minister; Susan Walton and Deborah Bennett's article focuses on issues that arise for the New South Wales Parliamentary Library as it attempts to navigates 'an ocean of media'; the recent state election in Western Australia and its implications is the focus of an article by Martin Drum and Glenda Bourne; parliamentary oversight of Australia's regional processing arrangements is addressed by CJ Sautellel; and Eline Salevao's contribution offers a Samoan case study on language and the law.

Readers will see that Gerard Carney's article is in three parts. I originally intended to publish part one in this volume and part two and three in the November/December edition of APR. I suggested splitting the article because, if published as a single article, the word length would have been in excess of 13,500 words, which is over three times the length of most articles accepted for publication in the journal. However, after taking into account a reviewer's comment on the importance of the issues raised by Professor Carney and other positive reflections, I made the decision, as editor, to publish it as a three- part article in this volume.

This edition also includes a piece by Roger Scott, which is based on an address he delivered to an event hosted by the Queensland Chapter. It outlines the origins of the Australasian Study of Parliament Group. I feel confident that what Roger has to say will be of interest to ASPG members.

This edition also provides information about the International Political Science Association's (IPSA) conference to be held in Brisbane in 2018. This is a highly prestigious international event and many of the papers will refer to aspects of parliamentary studies, including parliamentary processes, the reputation of parliaments, the contribution and behaviour of parliamentarians and the influence these matters have on democracy and its reputation as a political system.

I close by wishing Professor Rodney Smith every success in his role as Editor, APR. I hope he enjoys it as much as I have done these past three years.

Articles

Parliamentary Privilege – Part 1: The test of necessity

Gerard Carney[1]

Gerard Carney is Professor of Law, Curtin Law School, Curtin University, Western Australia.

INTRODUCTION

Of all areas of the law, parliamentary privilege in Australia and elsewhere remains clouded in a veil of mystery. This is due in part to the relatively few cases that reach the courts, compounded by the failure in their reasoning to connect sufficiently with the existing jurisprudence. This article focuses on recent judicial pronouncements in Canada[2], United Kingdom[3] and New Zealand[4]. Regrettably, these pronouncements confuse rather than clarify the position. Moreover, it is argued here that they threaten in some respects the foundations of parliamentary privilege. In so doing, they ought to be, and in fact are, ringing parliamentary alarm bells.

One should never forget Professor Enid Campbell's famous observation in 1966: without Article 9 freedom of speech, parliaments would have evolved into "polite but ineffectual debating societies"! Essentially, the ambiguities of parliamentary privilege as it includes the freedom of speech in Article 9 of the Bill of Rights 1689 have come home to roost. No longer can Houses of Parliament based on the Westminster model rely upon the courts, and hence the common law, to declare the scope of parliamentary privilege. Although the actual decisions, except for a couple of notable exceptions[5], are correct, their reasoning often fails to acknowledge the established principles, nor pay sufficient regard to earlier decisions, nor explain why they omit to do this. Arguably they ignore the broader impact of their "radical" approach on the functioning of parliament itself.

Overall one would have expected a more sophisticated judicial analysis, given the delicate nature of the relationship between the legislature and the courts in this area. Instead, there is an evident lack of appreciation of the careful sensitivity required when courts are asked to define the relationship in ways not previously considered.

1 Profound acknowledgement must be given to my friend and colleague, the late Dr Peter Johnston, who encouraged me to write this (3-part) article, who partially reviewed it before he died, and who left me with useful editorial comments. To Peter this article is dedicated. All errors are mine alone.

2 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

3 *R v Chaytor* [2010] UKSC 52.

4 *Attorney-General and Gow v Leigh* [2011] NZSC 106.

5 *Jennings v Buchanan* [2005] 1 AC 115 at [13], [2005] UKPC 36, [2005] 2 NZLR 577; *Attorney-General and Gow v Leigh* [2011] NZSC 106.

In these recent decisions, the courts have understandably been wary about venturing into fundamental issues of principle when faced with claims of parliamentary privilege; generally in the circumstances there was little basis for such claims. But in the process of correctly rejecting these claims, the courts have enunciated alternative principles or concepts that raise their own difficulties. Under these circumstances, it has been necessary in the past for Parliament to respond legislatively, as it did in the UK in 1689 to clarify these principles. The Australian Parliament also did this in 1987.[6] It now seems to be the time for other Parliaments to follow suit.

This article is to be published in three parts: Part 1 considers the *test of necessity* adopted by the Supreme Court of Canada in *Canada (House of Commons) v Vaid*[7]; Part 2 considers the assertion of the *exclusive cognisance* of each House by the UK Supreme Court in *R v Chaytor*[8]; and Part 3 considers the adoption of those two concepts and their impact on Article 9 of the Bill of Rights by the Supreme Court of New Zealand in *Attorney-General and Gow v Leigh*[9]. The conclusion in Part 3 recommends that both concepts should be abandoned in order to preserve rather than undermine parliamentary privilege and thereby maintain the appropriate relationship between the courts and parliament.

THE TEST OF NECESSITY

Apart from the freedom of speech enshrined in Article 9 of the Bill of Rights 1689, the immunities, rights and powers enjoyed by the UK House of Commons and by its members and others are not statutorily defined. Similarly in those jurisdictions that have statutorily adopted the immunities, rights and powers enjoyed by the UK House of Commons, whether or not as of a prescribed date, none has attempted to define them exhaustively. Only the Commonwealth[10] and Queensland[11] Parliaments have statutorily defined "proceedings in Parliament" for the purposes of Article 9 of the Bill of Rights.

A convenient list of powers of the UK House of Commons is as follows:

- To determine the qualifications of its members
- To regulate and discipline its members
- To control its proceedings
- To conduct inquiries
- To punish contempts

6 *Parliamentary Privileges Act* 1987 (Cth).

7 [2005] 1 SCR 667.

8 [2010] UKSC 52.

9 [2011] NZSC 106.

10 *Parliamentary Privileges Act 1987* (Cth) s 16(2).

11 *Parliament of Queensland Act 2001* (QLD) s 8(2).

For those jurisdictions which have not statutorily adopted the immunities, rights and powers of the UK House of Commons, it has been well established since the 1840s that a test of necessity applies so that their legislative chambers only possess "such [privileges] as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute".[12] In so holding, the Judicial Committee of the Privy Council in 1842 in *Kielly v Carson*[13] held that the House of Assembly of Newfoundland lacked the power to punish persons for contempt committed *outside* the House. This lack of power was extended in *Doyle v Falconer*[14] to deny power to punish contempt committed *within* the House. On the other hand, the more important privileges of freedom of speech[15] and the power to order the production of documents[16] from the Executive are recognised as necessary for the effective functioning of each House. Enid Campbell has suggested that the Privy Council's restrictive view may have been due to the fear that colonial legislative chambers might follow the example of the UK House of Commons in the 1840s when it arguably abused its power by punishing the Sheriff of Middlesex for contempt for enforcing a judgment of a common law court.[17]

Recently, the Supreme Courts of Canada and New Zealand have adopted a test of necessity even where their Houses have statutorily adopted all the privileges of the UK House of Commons including Article 9 of the Bill of Rights as of a certain date. And even the UK Supreme Court followed suit in relation to its own House of Commons in *R v Chaytor*.

The following analysis explores whether resort to this test of necessity has put into question the very existence of well-established privileges, or merely their scope or application to new circumstances.

Canada (House of Commons) v Vaid

The decision of the Supreme Court of Canada in *Canada (House of Commons) v Vaid*[18] concerned a complaint filed with the Canadian Human Rights Commission by Mr Vaid who was employed as the chauffeur to the Speaker of the House of Commons. His complaint alleged that the decision to dispense with his position in an administrative restructure violated the *Canadian Human Rights Act* 1985 as it constituted workplace discrimination. The jurisdiction of the Canadian Human Rights Tribunal to investigate the complaint was challenged by the Canadian House of Commons and its Speaker, primarily on the basis of parliamentary privilege. Specifically, they argued that

12 *Kielly v Carson* (1842) 4 Moo PC 63 at 88.

13 Ibid.

14 (1866) LR 1 PC 328.

15 See *Gipps v McElhone* (1881) 2 LR (NSW) 18 at 21, 24, 25; *R v Turnbull* [1958] Tas SR 80 at 83-4; *Chenard & Co v Arissol* [1949] AC 129 at 134.

16 *Egan v Willis* (1998) 195 CLR 424; (1996) 40 NSWLR 650.

17 Enid Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press 1966) at 20.

18 [2005] 1 SCR 667.

the employment of House staff as a matter of "internal affairs" fell within the exclusive jurisdiction of the House. This basis for denying the Tribunal's jurisdiction was unsuccessful.

Justice Binnie, who delivered the Court's judgment, begins with the statement: "It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs."[19] In particular, his Lordship explained why the courts do not normally interfere in the "workings of Parliament". This is because such "intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable ...".[20]

His Lordship lists[21] 12 propositions, which in his opinion have been agreed to by the courts and parliamentary experts. They generally refer to the inherent privileges enjoyed by provincial parliaments in the absence of a statutory adoption of those of the UK House of Commons. The test of necessity for these inherent privileges, according to proposition 4, is to ensure a level of "autonomy required by legislative assemblies and their members to do their job".[22] This assessment should be made at the time the alleged privilege is claimed, so parliamentary history while highly relevant is not conclusive. Proposition 10 lists various "categories" of privilege. These include: "freedom of speech … ; control by the Houses of Parliament over 'debates or proceedings in Parliament' …; the power to exclude strangers from proceedings …; disciplinary authority over members … and non-members who interfere with the discharge of parliamentary duties …; … immunity of members from subpoenas during a parliamentary session …" Justice Binnie concluded that "[s]uch general categories have historically been considered to be justified by the exigencies of parliamentary work."[23]

Of particular significance are propositions 6, 7 and 9:

PROPOSITION 6

> When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive:
>
> > The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behoves us to ask anew: in the Canadian context of 1992, is the right to exclude

19 Ibid at 680.

20 Ibid at 680-1.

21 Ibid at 685-690.

22 Ibid at 686.

23 Ibid at 689.

> strangers *necessary to the functioning of our legislative bodies?* [Emphasis added.] (*New Brunswick Broadcasting*, per McLachlin J at p 387)[24]

PROPOSITION 7

> "Necessity" in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what "the dignity and efficiency of the House" require ... (quoting from *New Brunswick Broadcasting* at p 383).[25]

PROPOSITION 9:

> Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate ... .[26]

It is evident that Binnie J placed extensive reliance for these propositions on the earlier decision of the Supreme Court of Canada in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*,[27] which concerned the "inherent privileges" of the provincial legislature of Nova Scotia. The Supreme Court in that case held that the Nova Scotia House of Assembly had the inherent power to exclude strangers from its chamber, specifically the media who wanted to film its proceedings. In reaching this conclusion, the majority of the Court applied a test of necessity to determine that this power was an inherent privilege and, as such, it was not subject to the Charter being part of the Constitution itself. The test of necessity applied was whether the existence of the power to exclude strangers from the proceedings of the Assembly was necessary for the *functioning* of the House.

However, the position of both Houses of the Canadian Parliament is quite different from that in Nova Scotia. The Canadian Parliament was empowered by s 18 of the *Constitution Act 1867* to enact legislation to define the privileges, immunities and powers of each of its Houses provided that they do not exceed those of the UK House of Commons at the time of the enactment. Accordingly, s 4 of the *Parliament of Canada Act 1985* vests in each House of the Canadian Parliament the privileges, immunities and powers of the UK House of Commons as at the enactment of the *Constitution Act 1867*. It also enables them to be updated by a later Act of Parliament provided they do not exceed those of the UK House of Commons at that time. It should be noted here that the Supreme Court in *Vaid* accepted that the human rights in the *Charter* did not trump parliamentary privilege because one part of the Constitution cannot abrogate another part of the Constitution. This applied to both inherent and legislated privilege,

24 Ibid at 686-7.

25 Ibid at 687.

26 [2005] 1 SCR 667 at 688.

27 [1993] 1 SCR 319.

which enjoyed the same constitutional weight as the Charter. Accordingly, any exercise of privilege retained immunity from judicial review.[28]

Most significantly, Binnie J acknowledged that this case raised a new issue: whether the "necessity" test applied to the privileges statutorily adopted for the Canadian Parliament.[29] His Lordship concluded it did not apply where a privilege is authoritatively established, but indicated where this is not so, the necessity test would apply:

> [T]he framers of the *Constitution Act,* 1867 thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity. ...
>
> Nevertheless, while s 18 of the *Constitution Act, 1867* provides that the privileges of the Canadian Parliament and its members should not "exceed" those of the UK., our respective Parliaments are not necessarily in lock step. It seems likely that there could be "differences" consisting of parliamentary practices inherent in the Canadian system, or legislated in relation to our own experience, which would fall to be assessed under the "necessity" test defined by the exigencies and circumstances of our own Parliament. This point would have to be explored if and when it arises for decision.[30]

Accordingly, his Lordship acknowledged that the first step for a court in determining a claim of privilege in relation to the Canadian Parliament is to see if that privilege has been authoritatively established by the courts in relation to that Parliament or the UK House of Commons.[31] If not, then the claim must be tested by the court "against the doctrine of necessity, which is the foundation of all parliamentary privilege."[32]

Binnie J intimated the likelihood that some claims of privilege might not be authoritatively established, since the UK position, where much is unwritten, was "somewhat unsettled". His Lordship recognised for Canadian courts "a good deal of flexibility to meet changing circumstances" where there is "little formal adjudication of the boundaries of UK privilege in the British courts".[33] Consequently, "the task of defining [the UK House of Commons] privileges is not straightforward" and that "[t]he scope of parliamentary privilege in the UK is a matter of controversy in the UK itself (as described at some length in the British Joint Committee Report)."[34] So his Lordship concluded that where a privilege is not authoritatively established:

28 [2005] 1 SCR 667 at 693.

29 Ibid at 691.

30 Ibid at 694-5.

31 Ibid at 695.

32 Ibid at 696.

33 Ibid at 695-6.

34 Ibid at 694.

> [Canadian] courts will be required (as the British courts are required in equivalent circumstances) to test the claim against the doctrine of necessity, which is the foundation of all parliamentary privilege. Of course in relation to these matters, the courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfil its functions.[35]

Accordingly, Binnie J proceeded to resolve this case in two steps.

First, his Lordship asked if the existence of a general privilege in relation to the "management of employees" has been established by prior authority either in Canada or in the UK[36]? In concluding that no such privilege had been so established, his Lordship rejected[37] Maingot's view[38] and the latter's reliance on *R v Graham-Campbell; Ex parte Herbert*,[39] that the courts' lack of jurisdiction over internal parliamentary proceedings extended to "areas of administrative concern, such as the sale of liquor on the premises and the rights of employees in their relations with the House of Commons or the Senate".

In *R v Graham Campbell, ex parte Herbert*, the Divisional Court of the King's Bench Division held in an extremely brief judgment that the *Licensing (Consolidation) Act* 1910 (UK) did not operate within the Palace of Westminster so that the sale of liquor by servants of the Kitchen Committee of the House of Commons was beyond judicial review. To hold otherwise would intrude on the exclusive power of the House over its "internal affairs".[40] The Court was also persuaded by viewing the legislation as incapable of applying to the House, simply as a matter of practicality.

In rejecting Maingot's view in this respect, the Canadian Supreme Court was entirely justified. There is no authority other than *Ex parte Herbert* for holding that parliamentary privilege might extend to the ordinary administrative activities of parliamentary precincts. Such activities are patently not essential to the functioning of the deliberative and law-making functions of each House.[41]

Second, having concluded that there was no authority in support of such a privilege, Binnie J then took the extraordinary step of asking whether such a privilege could be supported "as a matter of principle under the necessity test"[42]? His Lordship had no difficulty in concluding that this test of necessity failed to support a broad privilege as claimed, although he equivocally expressed the view that he had "no doubt that

35 Ibid at 696.

36 Ibid at 703.

37 Ibid at 707.

38 See JP Joseph Maingot QC, *Parliamentary Privilege in Canada*, 2nded 1997, House of Commons and McGill-Queen's University Press, 301.

39 [1935] 1 KB 594.

40 Ibid per Chief Justice Hewart at 602 and Avory J at 603, with whom Swift J concurred.

41 See *Slipper v Magistrates Court of the Australian Capital Territory* [2014] ACTSC 85.

42 [2005] 1 SCR 667 at 709.

privilege attaches to the House's relations with *some* of its employees".[43] But in the absence of appropriate evidence he was unable to define this category. His Lordship agreed with the UK Joint Committee Report[44] that it is not helpful to describe a House as having exclusive jurisdiction over its "internal affairs".[45]

With respect, this second step ought not to have been taken. It is not the role of the judiciary to create new parliamentary privileges. Its role is to determine the existence and scope of those privileges that have survived into the 21st century. If additional privileges need to be recognised, it is for the Parliament to determine this by legislation. The courts can clarify the precise scope of existing privileges but they exceed their judicial function if they assert that they can independently create by common law new privileges based upon a so-called test of necessity. The Court ought to have confined its role to the first step above by simply rejecting the claim of privilege made in that case.

The judgment seems to elevate "necessity" from being the underlying rationale and justification for parliamentary privilege to being the ultimate or critical test against which any claim of privilege must be judged:

> In order to sustain a claim of parliamentary privilege, the assembly must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.[46]

This approach might be justified when determining the *precise scope* of an established privilege, in the absence of established authority, such as when defining the outer limits of "parliamentary proceedings" for the purposes of Article 9 freedom of speech. But it should not be applied in determining a claim of privilege not previously and authoritatively established. The *existence* of a particular privilege, immunity or right, ought to be confined to an examination of history and precedent. Otherwise, the courts might believe that they can create new privileges at common law. This role now belongs to Parliament by enacting legislation.

A further concern with the approach adopted by Binnie J is that it undermines the parliamentary intention to adopt the privileges of the UK House of Commons *as at 1867*.

The judgment perceptively acknowledged the difficultly at times of the distinction which allows the courts to define the scope of a privilege but not to review its actual

43 Ibid at 712.

44 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, para 241.

45 [2005] 1 SCR 667 at 702.

46 Ibid at 699-700.

exercise.[47] But in this case no real difficulty arose because the issue was clearly the *scope* of the privilege, namely: whether the Canadian House of Commons had exclusive jurisdiction in relation to matters concerning its employees (this being the Speaker's claim of a privilege over the management of his employees) or only a limited category thereof.

This issue, as to which parliamentary officers whose relations with the Houses are protected by parliamentary privilege and those who are not, was effectively side-stepped by Binnie J. Is a dividing line to be drawn by reference to their seniority, role, or the particular duty or task involved? It seems most likely that it is the last of these that is decisive, given the need to link their involvement with the core of parliamentary proceedings. This may be analogous to the distinction drawn by the *Melbourne Corporation* principle, which affords wider protection to the most senior State public servants from having their respective roles interfered with by the Commonwealth. The level of protection depends on the importance of their role to the essential functioning of the Executive Government of the State.[48] No bright line can be drawn in that regard and the issue is one dependent on degree and impression, which parliament is best able to assess. Similarly, parliamentary privilege is likely to protect the official activities of the most senior parliamentary officers, such as the Clerk of each House, who are essential to the functioning of each legislative chamber.

The test of necessity espoused in *Vaid* has since been uncritically adopted in the United Kingdom in *R v Chaytor* to recognise and define the scope of the so-called privilege of "exclusive cognisance" of its House of Commons. That development in the United Kingdom is examined in Part 2 of this three-part article.

47 Ibid at 700.

48 See *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.

Parliamentary Privilege – Part 2: Exclusive cognisance of internal affairs

Gerard Carney

Gerard Carney is Professor of Law, Curtin University Law School, Curtin University, Western Australia

INTRODUCTION

This Part 2 considers the assertion of the *exclusive cognisance* of each House by the UK Supreme Court in *R v Chaytor*.[1] It follows the discussion in Part 1 which considered the *test of necessity* adopted by the Supreme Court of Canada in *Canada (House of Commons) v Vaid*[2] in determining whether the House of Commons had exclusive jurisdiction over an alleged case of workplace discrimination by the Speaker of the House. Instead of rejecting the claim simply on the basis of established authority that the exclusive jurisdiction of a house of parliament does not and has never extended to the ordinary administrative functions of a house, the Court took the unprecedented step of enquiring whether a House ought to have exclusive jurisdiction in such functions as a matter of necessity. This was a step too far. It suggests that the courts have the capacity to recognise a new parliamentary privilege, when it has been established since the 19th century that only Parliament has this capacity by legislation.

Unfortunately, this test of necessity espoused in *Vaid* has since been uncritically adopted in the United Kingdom in *R v Chaytor* to recognise and define the scope of the so-called privilege of "exclusive cognisance" of its House of Commons.

EXCLUSIVE COGNISANCE OF INTERNAL AFFAIRS

This so-called concept of "exclusive cognisance" has an obscure pedigree. It was described by the UK Supreme Court in *R v Chaytor*[3] as a power and immunity of the UK House of Commons in relation to its "own affairs".[4] It is argued here that it is merely the well-established and fundamental exclusive privilege of each House to control its own proceedings, and not a separate and distinct jurisdiction. Further, the adoption of "affairs" instead of "proceedings" has distorted the nature of the privilege and set in train a line of reasoning which is highly misleading in so far as it encourages challenges

1 [2010] UKSC 52.

2 [2005] 1 SCR 667.

3 [2010] UKSC 52.

4 Ibid at [63] per Lord Phillips, with whose judgment Lord Hope, Baroness Hale, Lord Brown, Lord Mance, Lord Collins and Lord Kerr agreed at [128].

to be brought to the jurisdiction of the courts in cases merely on the basis that they have some connection with the broad concept of the internal affairs of parliament. Ironically, as with the concept of necessity discussed above, confusion of concepts increases the prospect of judicial review of parliamentary privilege with consequential risks of further obfuscation.

The principal case responsible for this unfortunate development is the decision of the UK Supreme Court in *R v Chaytor*.

R v Chaytor[5]

The three appellants in this case claimed that criminal charges of false accounting against them under the *Theft Act* 1968 (UK) were precluded for infringing parliamentary privilege. This was because the charges concerned alleged abuses of their parliamentary expenses committed when they were members of the House of Commons. The UK Supreme Court, affirming the decision of the Court of Appeal, held that the three MPs were subject to the criminal jurisdiction of England. Lord Phillips and Lord Rodger separately delivered two principal judgments. Lord Hope, Lady Hale, and Lords Brown, Mance, Collins and Kerr jointly concurred with both judgments. Lord Clarke separately concurred with both but differed from Lord Rodger in relation to the issue of waiver (see below).

While the outcome in *Chaytor* is clearly correct, the various reasoning takes one on a journey which has more twists and turns than the *Tour de France*, leaving the implications of the decision somewhat up in the air and inconclusive. In summary, the decision is, on one hand, unhelpful in so far as it fails to distinguish between two forms of immunity: that under Article 9 of the Bill of Rights 1689; and the "exclusive cognisance" of each House. Yet, on the other hand, it is helpful in confirming the limited scope of parliamentary privilege, especially in relation to the criminal prosecution of MPs and the administration of a House and the parliamentary precincts.

Each of these points is considered in turn.

Lord Phillips accepted, arguably without adequate explanation of the distinction, the twin-pronged basis of immunity relied on in the appellants' appeal: Article 9 of the *Bill of Rights* 1689; and the exclusive cognisance of Parliament. His Lordship correctly concluded that no violation of Article 9 occurred because the lodgement of returns did not occur as part of the "proceedings of Parliament":

> Thus precedent, the views of Parliament and policy all point in the same direction. Submitting claims for allowances and expenses *does not form part of, nor is incidental to,* the core or essential business of Parliament, which consists of collective deliberation and decision making. The submission of claims is an

5 [2010] UKSC 52.

> activity which is an incident of the administration of Parliament; it is *not part of the proceedings in Parliament*.[6] (emphases added)

As for the second basis for the claim of privilege, Lord Phillips defined "exclusive cognisance" as "the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province of the former."[7] Illustrative of this boundary, his Lordship distinguished between:

- actions in contract or tort arising out of the internal administration of the Houses which are unlikely to fall within the exclusive cognisance of a House – referring specifically to the reasoning of Judge Russell in *Bear v State of South Australia*[8] as one "likely to be followed"[9]; and
- actions for judicial review in relation to the conduct by each House of its internal affairs which are likely to fall within the exclusive cognisance of a House (citing two examples: *Re McGuinness's Application*[10] and *R v Parliamentary Commissioner for Standards, Ex parte Al Fayed*[11]).[12]

Both these categories concern *action by the House*. This is a key point. Activities that merely occur within the precincts of Parliament should not be seen as automatically raising potential for a claim of parliamentary privilege. Such a claim can only arise when a House exercises a power which is the subject of judicial challenge.

In *Bear v South Australia,*[13] Judge Russell QC sitting in the South Australian Industrial Court held that a claim for personal injury, incurred at work by one of the catering staff employed by the Joint House Committee of the South Australian Parliament (a body corporate under s 3 of the *Joint House Committee Act* 1941 (SA)) to serve in the members' dining room in Parliament House, was not precluded by parliamentary privilege. His Honour surprisingly followed *R v Graham-Campbell ex parte Herbert*[14] in accepting that "the provision of refreshments to members and officers of Parliament by the Committee is protected by the privileges of Parliament in that the provision of such refreshments on the premises conduces to the energetic discharge of the duties inherent in the legislative process of the two Houses".[15] Nonetheless, he distinguished the personal injury claim before him because "[t]he plain fact of the matter is that

6 Ibid at [62].

7 Ibid at [63].

8 (1981) 48 SAIR (Pt 2) 604.

9 [2010] UKSC 52 at [75].

10 [1997] NI 359.

11 [1998] 1 WLR 669.

12 [2010] UKSC 52 at [76].

13 (1981) 48 SAIR (Pt 2) 604.

14 [1935] 1 KB 594.

15 (1981) 48 SAIR (Pt 2) 604 at 620.

her relationship with Parliament is not part of the internal business of Parliament but rather it is a relationship between Parliament and a stranger."[16] Accordingly, his Honour accepted that the *Workers Compensation Act* 1971 (SA) applied and so had "the effect of regulating the conduct of Parliament through one of it committees in relation to its business engagements with strangers."[17] Lord Phillips[18] questioned the presumption, derived from the decision in Ex parte Herbert,[19] that a statute did not apply to activities within the Palace of Westminster unless expressed to do so. He referred to the opinion of three Law Lords in 1984, Lord Diplock, Lord Scarman and Lord Bridge of Harwich, as members of the Committee for Privileges, that ss 2 to 6 of the Mental Health Act 1983 applied to members of the House of Lords despite the absence of any express statement in that Act.

Analysis of exclusive cognisance

This concept of "exclusive cognisance" is not one that has previously been viewed as conferring immunity on a member or anyone else. What it seems to be referring to is a merger of two distinct principles: first, the power of each House to control its own proceedings; and secondly, the inability of the courts to exercise judicial review of those proceedings. As distinct principles of parliamentary privilege, they should not be lumped together. Parliament and the courts need to maintain the distinction between:

1. The power of each House to control its own proceedings as one of the accepted powers of the UK House of Commons referred to earlier. It is not a power to control "internal affairs", which, as a matter of definition, is capable of a much wider scope than merely the "proceedings of the House"; and
2. The inability of the courts to exercise judicial review of the proceedings of each House. This stems from the distinction drawn in the 19th century by the decisions in *Stockdale v Hansard*[20] and the *Case of the Sheriff of Middlesex*[21] whereby the courts determine the *existence and scope* of the rights, privileges and immunities of each House and of their members, but not to review *their exercise* as such. Judicial reluctance/refusal to review the exercise by a House of its powers stems from an appreciation of the separation of their respective powers, if not avoidance of being accused of interfering with parliamentary proceedings.

Yet, as noted earlier, the distinction between judicial review of the existence and scope of parliamentary privilege and its exercise is not as clear as might first appear. This is particularly evident in the divergent approaches of the High Court in *Egan v Willis*[22]

16 Ibid at 623.

17 Ibid at 622.

18 [2010] UKSC 52 at [78].

19 [1935] 1 KB 594.

20 (1839) 9 Ad & El 1; 112 ER 1112.

21 (1840) 11 Ad & El 273; 113 ER 419.

22 (1998) 195 CLR 424.

where, on the one hand, a majority of the Court was prepared to rule on the power of the NSW Legislative Council to order the production of documents by a minister who was a member of that House in order to decide whether a resolution to suspend that member for non-compliance authorised the alleged trespass to his person when forced by the Sergeant at Arms from the chamber. Whereas on the other hand, McHugh J, displaying a more sensitive grasp of the subtle nature of the relationship between the Parliament and the courts, confined the court's jurisdiction to determining whether the Legislative Council had the power to suspend a member for obstructing the business of the House, leaving it open to the House to exercise exclusively its jurisdiction to determine whether a member was in fact so obstructing.[23]

In *Chaytor*, the prosecution of MPs for a criminal offence of theft on the basis of abusing their parliamentary allowances did not involve any review of the *exercise* of any right, privilege or immunity by their House. The only potential immunity the defendants were entitled to claim derived entirely from Article 9.

Wider statements of exclusive parliamentary jurisdiction should not have been relied on since they predate the judicial settlement of this fundamental principle in *Stockdale v Hansard*[24] and the *Case of the Sheriff of Middlesex*.[25] For instance, *Blackstone's Commentaries* in 1830 state: "... the whole of the law and custom of parliament has its origin from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.'"[26]

Furthermore, such a principle of judicial restraint does not amount to an immunity, separate from that conferred by Article 9, since the two are inextricably bound together. As *Odgers*[27] states in relation to the Australian Senate: "The immunity of parliamentary proceedings from impeachment and question in the courts is the only immunity of substance possessed by the Houses and their members and committees." This immunity has, according to *Odgers*, two aspects:

i. immunity from civil or criminal action and examination in legal proceedings of members ... and of witnesses and others taking part in proceedings in Parliament; and
ii. immunity of parliamentary proceedings as such from impeachment or question in the courts.

Regarding the relationship between Article 9 and the "exclusive jurisdiction of Parliament", Lord Rodger observed: "Article 9 cannot be intended to apply to any matter

23 Ibid at 458-459.

24 (1839) 9 Ad & El 1; 112 ER 1112.

25 (1840) 11 Ad & El 273; 113 ER 419.

26 *Blackstone's Commentaries*, 17th ed 1830, vol 1, p 163 (cited in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at p 7).

27 *Odgers' Australian Senate Practice*, 13th ed, Ch. 2.

for which Parliament cannot validly claim the privilege of exclusive cognizance."[28] This is arguably misleading given that Parliament's exclusive jurisdiction has been eroded by statute (and possibly by non-use), while the absolute protection of Article 9 can only be abrogated by a clear statutory intent. Is not the reverse the case: exclusive cognisance extends only to the extent that Article 9 is capable of operating? Consequently, his Lordship errs when he proceeds to formulate only "one basic question: does the matter for which the appellants are being prosecuted in the Crown Court fall within the exclusive jurisdiction or cognizance of Parliament – or, more particularly, of the House of Commons?.[29] With respect, this expansive common law approach purports to render the statutory protection of Article 9 effectively redundant – something that is palpably impossible.

First Report of the UK Joint Committee on Parliamentary Privilege

A significant boost for the concept of exclusive cognisance as a parliamentary privilege, if not the genesis of its recent recognition, is found in the *First Report of the UK Joint Committee on Parliamentary Privilege*[30] in 1999 where it suggested that "exclusive cognisance" offered an alternative source of protection to Article 9:

> 117. There is another category of material which does not fall within Article 9 but can nonetheless claim to be within Parliament's right to control its own affairs (exclusive cognisance) and therefore protected under that heading. This comprises work done in providing services under the direction of the House or its presiding officers. Examples are arrangements made by Black Rod and the Sergeant-at-Arms for the security and proper functioning of the two Houses, and action taken by either House to implement decisions of the Speaker or relevant committee on, for instance, the use of committee rooms, or the rules governing parliamentary groups.[31]

This theme was elaborated in Chapter 5 of the Report entitled "Control by Parliament over its Affairs" where its opening paragraph describes Article 9 as "one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone. Such matters will not be reviewed by the courts."[32] After stating that this "principle manifests itself as a collection of related rights and immunities"[33], the Chapter discusses the following rights in order:

- the right of each House to provide for its proper constitution;
- the right to judge the lawfulness of own proceedings;
- the right to institute inquiries and call for witnesses and papers; and

28 [2010] UKSC 52 at [102].

29 [2010] UKSC 52 at [104].

30 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1.

31 Ibid at para 117.

32 Ibid at para 229.

33 Ibid at para 230.

- the right of each House to administer its internal affairs within it precincts.

While the first three rights are well-established powers, the fourth is not. It is actually covered by the first two rights. The right of each House to administer its internal affairs should not be listed as a separate privilege. This explains the difficulty which the Committee expressed when embarking on its discussion of this fourth right: "In one important respect this heading of privilege is unsatisfactory. 'Internal affairs' and equivalent phrases are loose and potentially extremely wide in their scope."[34] That is precisely the point. The Committee ought to have subsumed it within the first two rights that already encompass it.

Moreover, the Committee's report cites two examples of this fourth right or privilege that on analysis actually fall under the other rights listed above:

- *Bradlaugh v Gosset*[35]where the court refused to intervene over a UK House of Commons resolution preventing Charles Bradlaugh, an avowed atheist, from taking the oath as a newly elected member pursuant to the *Parliamentary Oaths Act* 1866 (UK). This directly concerns the second right above – the lawfulness of the proceedings of the House.
- The *Zircon* affair where, despite a court earlier refusing to interfere, the House of Commons Privileges Committee accepted that a court would have jurisdiction to prevent the showing by members of a film in the parliamentary precincts, since this was not protected as parliamentary proceedings.[36]

The Committee also included in this fourth category certain management functions relating to the provision of services in either House, except that these were "only exceptionally subject to privilege"[37] since "the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly".[38] Two examples of privileged management decisions were given:

- a Speaker's decision as to which facilities within the precincts of the House are to be available to members who refuse to take the oath or affirmation.[39]
- a presiding officer determination as to what steps will be taken by the parliamentary library to inform members of matters of significant political interest.[40]

34 Ibid at para 241.

35 (1883) 12 QBD 271.

36 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, paras 243-245.

37 Ibid at para 248.

38 Ibid at para 247.

39 Ibid at para 247 which in fn 282 cites *R v The Speaker, ex parte McGuiness,* 1997 NI 359 (Northern Ireland High Court, 3 October 1997, Kerr J).

40 Ibid at para 247.

The second instance was derived from an example given by the House of Commons librarian[41] where the library made the *Spycatcher* book available to members while the book was the subject of an injunction against publication. Both these management decisions should only enjoy immunity if they are either within the protection of Article 9 or otherwise constitute an exercise of one of the two listed privileges above.

Even if common law recognition of the exclusive jurisdiction of each House over its "internal affairs" is maintained, it should not be characterised as creating any immunity from the law. That immunity derives exclusively from Article 9. If this is acknowledged, the difficulty of keeping the "exclusive cognisance" of each House over its "internal affairs" within manageable bounds is alleviated. Rather, the reference to "internal affairs" should be to the narrower concept of "internal proceedings" encompassed within the protection of Article 9.

The Report recommended a statutory provision to effect a dividing line to identify those "activities directly and closely related to proceedings in Parliament".[42] Given the acknowledged difficulty in drawing this line – a line the Committee was not prepared to draw in relation to the correspondence of members[43] – what necessity is there to create a new area of immunity outside Article 9?

Other commentary

Like the First Report of the UK Joint Committee, the 2013 New Zealand Privileges Committee Report[44] accepted two distinct privileges. It noted that "Professor Joseph points to the essential difference in the two privileges: freedom of speech being concerned with protecting Parliament's core business, and exclusive cognisance with protecting actions that enable Parliament to discharge its core business".[45] However, as indicated above, the better view is that there is only one relevant privilege, namely Article 9, which protects both these aspects.

The view expressed in *Erskine May*[46] about exclusive cognisance is consistent with the view contended here. That authority accurately refers to "exclusive cognizance" as "the privilege of both Houses to the exclusive cognizance of their *own proceedings*" (emphasis added).[47] *Erskine May* does not use the more indefinite and misleading tag of "internal affairs".[48] This narrower privilege, which is acknowledged to be "closely

41 Ibid at fn 283.

42 Ibid at para 251.

43 See discussion below at p 25.

44 Report of the Privileges Committee, New Zealand House of Representatives, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, June 2013.

45 Ibid at p 20, citing Joseph, Philip A, "Constitutional Law" in New Zealand Law Review, 2012, at 530.

46 Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London, pp 227-233.

47 Ibid at 227.

48 Barwick CJ in *Cormack v Cope* (1974) 131 CLR 432 at 454 accepted that "the intra-mural deliberative activities of the House [of Representatives]" were immune from judicial review.

related to the claim of freedom of speech in and underlying the Bill of Rights", is described as "the right [of both Houses] to be the sole judge of the lawfulness of their own proceedings, and to settle – or particularly from – their own codes of procedure."[49] *Erskine May* gives a number of examples[50] of this privilege all of which, except for two[51], relate to the proceedings of the House. *Bradlaugh v Gosset*[52] is cited as the principal authority where Stephen J stated:

> the House of Commons is not subject to the control of … [the] courts in its administration of that part of the statute law which has relation to its own *internal proceedings* … Even if that interpretation should be erroneous [the] court has no power to interfere with it, directly or indirectly. (emphasis added)

In *Bradlaugh*, as noted earlier, the Court refused to assist Charles Bradlaugh to take the oath pursuant to the *Parliamentary Oaths Act* 1866 (UK) upon his election as a member of the House of Commons. The restraint on his doing so flowed from a resolution of the House. Accordingly the matter was properly regarded as within the exclusive jurisdiction of the House.

As for the two decisions cited by *Erskine May* that do not concern the internal proceedings of a House as such, both are of dubious standing.[53] As noted earlier, the Divisional Court in *R v Graham Campbell, ex parte Herbert*[54] held that the *Licensing (Consolidation) Act* 1910 (UK) did not, as a matter of construction, operate within the Palace of Westminster. Accordingly, the sale of liquor by servants of the Kitchen Committee of the House of Commons was held to be beyond judicial review, falling within the exclusive power of the House over its "internal affairs".[55] In *Re Application McGuinness,* a decision by the Speaker of the UK House of Commons, withdrawing certain facilities from members who had not taken the oath, was held by the Northern Ireland High Court[56] and then by the European Court of Human Rights[57] as not open to judicial review. Notably, the Speaker's decision was later "superseded" by a resolution of the House.[58]

To conclude this general analysis of "exclusive cognisance", there is a problem with this so-called concept of each House having an area of exclusive jurisdiction whenever legal proceedings are brought against a member of parliament. Houses do not have an

49 Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London at 227.

50 See eg *British Railway Board v Pickin* [1974] AC 765.

51 R v *Graham Campbell, ex parte Herbert* [1935] 1 KB 594 and *McGuiness v United Kingdom* 1997 NI 359.

52 (1884) 12 QBD 271 at 278.

53 See eg Enid Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press, 1966 at p 78.

54 [1935] 1 KB 594.

55 Ibid per Chief Justice Hewart at 602 and Avory J at 603, with whom Swift J concurred.

56 1997 NI 359.

57 Application No 39511/98 [1999].

58 CJ (2001-2) 274-5: Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London, at 228.

exclusive jurisdiction over their members as such. Each House has rights, privileges and immunities, as do their members individually. Courts have a limited jurisdiction in relation to these rights, privileges and immunities, in so far as they can determine their existence and scope, but they cannot review their exercise as such. The appropriate approach, it is submitted, is to regard all legal proceedings against members as prima facie within the jurisdiction of the courts, except in so far as they purport directly to question or review:

- under Article 9, the members' freedom of speech or debate in parliament or the proceedings of Parliament; or
- an *actual exercise* by a House of its rights, privileges or immunities.

Each House has exclusive jurisdiction in relation to its own "proceedings". That is different and more narrow than the concept of its "internal affairs".

Criminal prosecution of MPs

Where *Chaytor* is helpful is in affirming that Article 9 immunity is unlikely to protect any physical acts of MPs, whether occurring during parliamentary debates within the chamber of the House or outside the chamber within the parliamentary precincts. Lord Phillips accepted the dicta of Stephen J in *Bradlaugh v Gossett*[59]: "I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice." His Lordship observed[60] that "Parliament" had never challenged, in general, the jurisdiction of the criminal courts. He cited, for instance, the conviction of John Bellingham in May 1812 for the murder of the Prime Minister, Spencer Percival, at the entrance to the lobby of the House of Commons. Lord Phillips also accepted the criminal courts' jurisdiction even if Bellingham had been a member of parliament.[61] Lord Rodger expressed a similar view.[62]

In such cases, there will be overlapping jurisdictions whereby the House may charge the member with contempt of parliament, and/or a criminal or civil suit may be brought in the courts. Cases within the chamber of a House itself or even during the course of its proceedings are very rare. The most prominent are:

- The case of *Sir John Eliot*[63] in 1629 involved an assault on the Speaker of the UK House of Commons who was held down in his chair by certain members as allegedly seditious comments were made in debate. Criminal convictions of the members involved for both offences of sedition and assault were later overturned by the

59 (1884) 12 QBD 271 at 283.

60 [2010] UKSC 52 at [80].

61 Ibid.

62 Ibid at [99].

63 *R v Eliot, Holles & Valentine* (1629) 3 State Trials 293.

House of Lords as a violation of parliamentary privilege.[64] Yet it is recognised that this reversal ought to have been confined to the conviction for sedition.[65]

- In 1988 a member of the UK House of Commons was punished by the House for damaging the mace during a heated debate and for disrespect shown the Chair.[66]

Incidents are more likely to occur outside the chamber of a House within the parliamentary precincts[67], such as the assassination of Prime Minister Spencer Percival. Article 9 protection clearly cannot apply to these incidents. Lord Rodger cited[68] other examples: theft by an MP from another MP in a room of the House, or from the till in the Members' Dining Room; intentional damage of a statue in the lobby of the House of Commons; and the offences in *Chaytor* itself.

Lord Rodger also adopted[69] the distinction drawn by Stephen J in *Bradlaugh v Gossett*[70] between an "ordinary crime" (eg theft; physical assault eg of the Speaker in the chamber as in *Eliot*), which falls within the normal criminal jurisdiction of the courts and of which the House has never claimed exclusive cognisance, and "a crime (such as sedition) which a Member of Parliament committed by saying something in the exercise of his freedom of speech in the House". The latter is likely to be within the exclusive jurisdiction of the House. His Lordship concluded that the offences in *Chaytor* were ordinary crimes and not within the exclusive cognisance of the House because:

> … nothing in the particulars in the indictments indicates, or even suggests, that the prosecution of the charges would raise any issue as to decisions of the House or of its Committees, or of any officers or employees acting in their behalf, as to the system or its operation. Nor would the prosecution touch on any other core activities of Members of the House which the privilege of exclusive cognizance exists to protect – their right, for example, to debate, to speak, to vote, to give notice of a motion, to present a petition, to serve on a committee and to present a report to the House. In short, there is nothing in the allegations against the appellants which relates in any way to the legislative or deliberative processes of the House of Commons or of its Members, however widely construed.[71]

With respect, this distinction between an ordinary crime and one within the exclusive cognisance of a House is, in the absence of some rationale to support the distinction,

64 3 State Tr 332.

65 See Enid Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press 1966) at 196 fn 9.

66 Referred to by Lord Phillips in *R v Chaytor* [2010] UKSC 52 at [80] Cf Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London, at 454-455.

67 Such as the incident in the Queensland Parliament House on 4 August 1939 when members of the Labor Party caucus were held hostage in the chamber of the former Legislative Council by disgruntled framers who were later acquitted in a jury trial: Clem Lack (ed), *Three Decades of Queensland Political History 1929-1960*, SG Reid Government Printer Brisbane, Part XII, pp 661-666.

68 [2010] UKSC 52 at [99].

69 Ibid at [113].

70 (1884) 12 QBD 271 at 283.

71 [2010] UKSC 52 at [122].

unhelpful. It seems preferable to simply restrict the scope of Article 9 protection to oral and written statements made in debate or parliamentary proceedings. This prevents reliance on or reference to those statements (and their surrounding factual context) in any criminal or civil proceedings. Instead it is preferable to acknowledge, as Lord Phillips[72] did, the possibility of overlapping jurisdictions where the crime constitutes both a contempt of the House, as well as a criminal offence. In such cases, his Lordship envisaged that whichever jurisdiction is invoked first, the other jurisdiction will normally respect that process:

> Where a prosecution is brought Parliament will suspend any disciplinary proceedings. Conversely, if a Member of Parliament were disciplined by the House, consideration would be given by the Crown Prosecution Service as to whether a prosecution would be in the public interest.[73]

The former situation occurred in the *Poulson Affair* in the 1970s when the House of Commons waited for the outcome of a prosecution initiated before undertaking its own investigation. This resulted in one person being charged with contempt and the others exonerated. The latter situation occurred again in 1988 when the House of Commons punished the member for damaging the mace. The Director of Public Prosecutions subsequently halted an attempt to bring a private prosecution. In other cases, the House is likely to direct the Attorney-General to prosecute the matter in the courts.[74] Lord Phillips[75] outlined instances of cooperation between the UK House of Commons and the Police over the investigation of members who are suspected of having committed a criminal offence:

- In 2008, an agreed statement was issued (following a meeting between the Chairman of the Committee on Standards and Privileges, the Parliamentary Commissioner for Standards and the Commissioner of Police of the Metropolis) that the police would peruse their own investigation, that there would be mutual liaison between the relevant authorities including the referral by the Parliamentary Commissioner to the police of suspected criminal activity by members for further investigation, and that criminal proceedings against members would usually take precedence over the House's own disciplinary proceedings.
- In 2008, the Speaker issued a protocol over the execution of search warrants in the House by the police, para 2 stating: "The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts."

There appear to be no comparable protocols reached between the Houses of Australian parliaments and prosecution authorities in relation to the prosecution of MPs for offences. There is, however, an agreement in place since 2005 for the execution of

72 Ibid at [81].

73 Ibid.

74 See Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London at 197.

75 [2010] UKSC 52 at [84-87].

search warrants in relation to the offices of members of the Commonwealth Parliament following the Federal Court decision in *Crane v Gething*.[76]

The appellants' reliance in *Chaytor* on the exclusive cognisance of Parliament failed because the House had never claimed a comprehensive and exclusive jurisdiction over criminal offences committed within Parliament. Indeed the House demonstrated a preference for the normal criminal process to apply, and cooperated to facilitate the necessary police investigation. Lord Phillips[77] concluded that even if the House had decided not to cooperate with the police over these prosecutions, criminal prosecutions would not be precluded (seemingly because they concerned the administration of the business of the House – which fell outside the absolute protection of Article 9.) While the scheme established by the House for the payment of allowances and expenses to members was beyond judicial review (apparently because of Article 9), review of the manner in which the scheme is implemented was not beyond judicial examination.[78]

BRIBERY OF MPS

Chaytor also addressed the peculiar problem under Article 9 that arises in the prosecution of bribery offences in relation to MPs. For instance, where a member agrees outside Parliament to accept a benefit corruptly in return for agreeing to make a speech in the House. The member is clearly liable to be charged with contempt by the House. There are, however, two competing viewpoints on whether Article 9 protects the MP from prosecution for bribery.

The first, which has overwhelming support, is that Article 9 does not prevent prosecution since all the elements of the offence occurred outside the scope of Article 9, that is, up to the point the MP agrees to make the speech in return for the benefit. No reference to any actual speech is needed for conviction.[79] This is the position adopted by a majority of the US Supreme Court in *United States v Brewster*[80] in holding that no comparable privilege, under the "Speech or Debate" clause in Article 1 section 6 of the US Constitution, prevented a bribery prosecution of a member of Congress when the offer of a bribe was accepted outside the House. No proof of anything in the course of its proceedings was required. This view has also been followed in the UK in the *Harry Greenway case*[81] where an unsuccessful application was brought by a member of the House of Commons to quash an indictment for the common law

76 (2000) 169 ALR 727. See *Odgers' Australian Senate Practice* 13th ed at 47. A similar protocol was adopted for the Tasmanian Parliament in 2006: *Odgers'* ibid.

77 [2010] UKSC 52 at [92].

78 Ibid at [92].

79 Also supported by Odger's Senate Practice Ch 2 fn 71. See G Zellick, "Bribery of Members of Parliament and the Criminal Law" [1979] Public Law 31. See also R v White (1875)13 SCR (NSW) 322 where an MP was offered a bribe in the lobby of the NSW Legislative Assembly by White whose conviction for bribing an MP was upheld.

80 (1972) 408 US 501.

81 [1998] PL 357.

offence of bribery for violating parliamentary privilege. It was alleged that the member had used his position as a member of parliament to further the interests of a company in his constituency. Buckley J outlined[82] comprehensively the public policy grounds for not extending the privilege to prevent the prosecution of members of parliament for bribery. He referred to the Report of the Royal Commission on Standards of Conduct in Public Life[83], and noted in particular that courts are better equipped to deal fairly with a prosecution for corruption than a parliamentary committee.

The competing view is that Article 9 should preclude prosecution because this would indirectly question the motives of the MP when speaking under privilege. This is what Article 9 was designed to prevent according to the much-quoted statement by Lush J in *Ex parte Wason*:

> I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.[84]

This is also the position adopted by the Supreme Court of India in *Rao v State*.[85] It might alternatively be supported on the basis that communications with an MP about an intended parliamentary speech are protected by Article 9 as part of the "proceedings of Parliament".

Lord Phillips in *Chaytor* indicated that there was some basis to this competing view. Despite weighty considerations for allowing the prosecution of MPs, his Lordship[86] noted the "powerful dissent" of Brennan J (with whom Douglas J concurred) in *Brewster* that the majority approach in that case "put in question the defendant's motive for the legislative acts which followed, even if those acts did not have to be considered by the court". His Lordship continued: "The dissent in *Brewster* is food for thought. Accusing a Member of Parliament of taking bribes in exchange for statements to be made in the House will necessarily raise an inference that any statements that were subsequently made were corruptly motivated, even if this forms no part of the criminal inquiry."[87]

With respect, this line of reasoning fails to give sufficient weight to the importance of ensuring the integrity of political office. Moreover, the argument that Article 9 is intended to protect MPs from having their motives and intentions *indirectly* called into question is now of dubious value. Decisions, such as *Laurence v Katter*[88] in Australia and *Jennings v Buchanan*[89] in New Zealand, which deny Article 9 protection for effective repetition outside parliament of defamatory statements made under privilege, are

82 Ibid at 361-363.

83 Cmnd 6524 (1976), chaired by Lord Salmon.

84 (1869) LR 4 QB 573 at 577.

85 (1998) 1 SCJ 529.

86 [2010] UKSC 52 at [40].

87 Ibid at [44].

88 (1996) 141 ALR 447.

89 [2005] 1 AC 115 at [13]; [2005] UKPC 36; [2005] 2 NZLR 577.

inconsistent with this wide view of Article 9 privilege. How might the possibility of a bribery prosecution in these circumstances deter or hamper an MP in debate? Article 9 protection ought to be confined to prevent direct questioning or actual legal liability being imposed on members, or any other legal consequence which is likely to have a real chilling effect on their freedom to express their views in parliamentary debate or before parliamentary committees.

CONCLUSION

Although the outcome in *R v Chaytor* was correct and that it provides useful clarification of the dual jurisdiction of parliament and courts to prosecute MPs for criminal activities, it is submitted that the United Kingdom Supreme Court went too far in recognising an "exclusive cognisance" of each House. A preferable approach is to accept that all legal proceedings against members of parliament should be viewed as prima facie within the jurisdiction of the courts except when they directly question the members' freedom of speech during the course of parliamentary proceedings under Art 9, or an actual exercise by a House of its rights, privileges or immunities.

Part 3 in the next issue of this journal, which concludes this article, will consider the adoption of the test of necessity and exclusive cognisance and their impact on Article 9 of the Bill of Rights by the Supreme Court of New Zealand in *Attorney-General and Gow v Leigh*. The conclusion in Part 3 recommends that both concepts should be abandoned in order to preserve rather than undermine parliamentary privilege, and thereby maintain the appropriate relationship between the courts and parliament.

Parliamentary Privilege – Part 3: Article 9 "proceedings of parliament"

Gerard Carney

Gerard Carney is Professor of Law, Curtin Law School, Curtin University, Western Australia

INTRODUCTION

This is the final part of an article which argues that the Supreme Courts of Canada, United Kingdom and New Zealand have adopted radical approaches to parliamentary privilege which ought not to be followed. Part 1 considered the *test of necessity* adopted by the Supreme Court of Canada in *Canada (House of Commons) v Vaid*[1] which could be used by courts to find new parliamentary privileges. Part 2 examined the assertion by the UK Supreme Court in *R v Chaytor*[2] of the *exclusive cognisance* of each House which potentially restricts the scope of judicial review. Finally, Part 3 considers how the Supreme Court of New Zealand in *Attorney-General and Gow v Leigh*[3] adopted both the test of necessity and exclusive cognisance to narrow the protection of freedom of speech under Article 9 of the Bill of Rights. The conclusion reached here is that both concepts should be abandoned in order to preserve rather than undermine parliamentary privilege, and thereby maintain the appropriate relationship between the courts and parliament.

ARTICLE 9 "PROCEEDINGS OF PARLIAMENT"

The third significant decision that this article addresses is that of the Supreme Court of New Zealand in *Attorney-General and Gow v Leigh.*[4] This decision arguably threatens to extend the scope of the absolute protection confirmed by Article 9 of the Bill of Rights while hampering the provision of advice to ministers to enable them to respond fearlessly to parliamentary questions. Unlike *Vaid* and *Chaytor*, the actual decision in *Leigh* is most unfortunate, the product of a short and inadequate analysis of the law of parliamentary privilege. Not surprisingly, it provoked the New Zealand Parliament

1 [2005] 1 SCR 667.

2 [2010] UKSC 52.

3 [2011] NZSC 106.

4 Ibid.

into a legislative response – the enactment of the *Parliamentary Privilege Act 2014* (NZ) outlined below.[5]

Leigh had serious repercussions for the relationship between New Zealand Ministers of the Crown and their department heads in so far as the Supreme Court found that the absolute freedom of speech enjoyed by ministers and members in the House, for what they say there did not extend to the prior advice given to a minister by their departmental officials. This was so even when the advice was given to allow the minister to answer a question in the House on notice. Although the Court accepted that this advice was an occasion of qualified privilege, this meant that the legal proceedings could not be struck out. Consequently, there was the potential for litigation in relation to all advice given to enable a minister to answer a parliamentary question or even to participate in a parliamentary debate.

Attorney-General and Gow v Leigh

In 2007 the New Zealand Minister for the Environment was asked a written question for oral answer in the House of Representatives. In response to the Minister's request for a departmental briefing on the matter, Mr Gow, a Deputy Secretary, briefed the Minister both orally and in writing. In reliance upon this the Minister answered the question in the House. Subsequently, Ms Leigh sued the Deputy Secretary for defamation on the basis of his ministerial briefing.[6] The surprisingly short judgment, delivered by Tipping J on behalf of the Supreme Court that comprised Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ, refused to dismiss the proceedings as a breach of parliamentary privilege.

At the time of this decision, the source of parliamentary privilege in New Zealand (including the absolute protection of freedom of speech) was s 242 of the *Legislature Act* 1908 (NZ).[7] This provision continued to adopt the privileges, immunities and powers of the UK House of Commons as at 26 September 1865. This date was originally prescribed by s 4 of the *Parliamentary Privileges Act* 1865 (NZ) which was enacted to ensure that the New Zealand Parliament was not dependent solely on the inherent powers of a colonial legislature, namely, those necessarily incidental to its existence and functions.[8] Reference has already been made to the similar statutory adoption by the Canadian Parliament two years later in 1867, which was also fixed at the date of enactment.

Other statutory provisions impact on parliamentary privilege in New Zealand. Prominent in this case was s 13(1) of the *Defamation Act* 1992 (NZ):

5 Report of the Privileges Committee of the New Zealand House of Representatives, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, June 2013.

6 It is unclear how the details of that briefing became known to her.

7 This provision has since been replaced by s 8(1) of the *Parliamentary Privilege Act 2014* (NZ) (see below) which nonetheless is to the same effect.

8 See *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 255.

13 Absolute privilege in relation to Parliamentary proceedings

(1) Proceedings in the House of Representatives are protected by absolute privilege.

(2) Any live broadcast, by any broadcaster, of proceedings in the House of Representatives is protected by absolute privilege.

(3) The following publications are protected by absolute privilege:

(a) the publication by or under the authority of the House of Representatives, of any document:

(b) the publication, to the House of Representatives, of any document, either by presenting the document to, or laying the document before, the House of Representatives:

(c) the publication, by or under the authority of the House of Representatives, or under the authority of any enactment, of an official or authorised record of the proceedings of the House of Representatives:

(d) the publication of a correct copy of any document or record to which paragraph (a) or paragraph (c) applies.

This provision does not detract from the statutory adoption of the immunities, privileges or powers of the UK House of Commons (as at 26 September 1865) since s 15 provides that "[n]othing in section 13 … limits any other rule of law that relates to absolute privilege", while s 54 provides more specifically:

54 Act not to derogate from Parliamentary Privilege, etc

Nothing in this Act derogates from any of the powers, privileges, and immunities that, immediately before the commencement of this Act, were enjoyed by-

(a) the House of Representatives:

(b) Members of Parliament:

(c) any committee or subcommittee of the House of Representatives.

Tipping J regarded s 13(1) of the *Defamation Act* 1992 as "consistent with Article 9 of the Bill of Rights Act (sic) 1689 and the exclusive cognisance or jurisdiction rule which is largely the opposite side of the Article 9 coin".[9] His Honour adopted the rather narrow view of Binnie J in *Vaid*[10] that "the purpose of parliamentary privilege is to recognise Parliament's exclusive jurisdiction to deal with complaints within its privileged sphere of activity."[11]

9 [2011] NZSC 106 at [2].

10 [2005] 1 SCR 667 at [4].

11 Ibid. The status of the Bill of Rights 1689 in New Zealand is inherited statute law confirmed by the *Imperial Laws Application Act* 1988 s 3 and Sch 1.

Necessity test

Given there was no statutory definition of "proceedings in the House of Representatives " in the *Defamation Act* 1992 (NZ), the Court[12] followed the similar approaches taken by the Canadian Supreme Court in *Vaid*[13] and by the UK Supreme Court in *R v Chaytor*[14] that activities outside the actual debates of a House might be protected by absolute privilege provided protection is "necessary for the proper and efficient functioning of the House of Representatives".

Reliance[15] was placed upon the judgment of Patteson J in *Stockdale v Hansard*[16] for the proposition that "necessity is the rationale which underpins absolute privilege in respect of Parliamentary proceedings". The closeness of the connection with the ministerial response in the House was only one factor. Pivotal to the Court's decision was: "Has Mr Gow shown that without this kind of occasion being regarded as absolutely privileged the House could not discharge its functions properly?.[17] Surprisingly, the Court came to a negative conclusion.

The Court rejected the Speaker's submission that the test should be whether the ministerial briefing was reasonably incidental to the discharge of the business of the House. This approach resembled that adopted in s 16(2)(c) of the *Parliamentary Privileges Act* 1987 (Cth) which the Court simply dismissed as not reflective of the common law.[18] The Court did not accept that the Privy Council in *Prebble v Television New Zealand Ltd*[19] had indicated that s 16 of the Commonwealth Act codified the common law view of Article 9, confining instead its endorsement to s 16(3). This interpretation is hard to justify given the specific reference to the Commonwealth Act itself *and* subs (3) in the relevant passage from *Prebble*: "That Act [ie *Parliamentary Privileges Act* 1987 (Cth)], therefore, declares what had previously been regarded as the effect of Article 9 and subs (3) contains what, in the opinion of Their Lordships, is the true principle to be applied."[20]

The Court took issue with the previously incontrovertible observations of David McGee in his authoritative third edition[21] that the legal foundation of parliamentary privilege in New Zealand is the 1865 and 1908 statutes referred to above.[22] In doing so, the Court took the view that the statutory adoption of the privileges of the UK House of Commons

12 [2011] NZSC 106 at [8].

13 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

14 *R v Chaytor* [2010] UKSC 52.

15 [2011] NZSC 106 at [6].

16 (1839) 9 A & E 1; 112 ER 1112.

17 [2011] NZSC 106 at [6].

18 Ibid at [10].

19 [2004] 3 NZLR 1.

20 Ibid at 8.

21 David McGee, *Parliamentary Practice in New Zealand*, 3rd ed 2005 Dunmore Publishing Ltd, Wellington, at 606.

22 [2011] NZSC 106 at [12-13].

as of 26 September 1865 did not preclude the common law of New Zealand developing those privileges after that date.[23] The common law in this respect was "not frozen in time".[24] Its continued development depended on the principle of necessity. That significant and problematic issue, not previously explored, is discussed below.

In *Leigh* the Court concluded that the test of necessity could not be satisfied. It reached this conclusion by first finding that Mr Gow could rely on the defence of qualified privilege under s 19 of the *Defamation Act* provided he was not "predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication". Next it asked whether it was necessary for the efficient functioning of the Parliament that Mr Gow should be accorded absolute privilege in circumstances where he was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication. The Court concluded that the test of necessity posed in this way could not be met:

> It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose.[25]

With respect, the issue ought to have been posed differently. It would have been more pertinent to ask: is absolute privilege necessary in order for the Minister to be adequately and fully informed to enable him to make a full and frank response to the parliamentary question? A significant factor in making that assessment is whether the departmental official briefing the Minister would feel in any way inhibited from giving full and frank advice because of the risk of being made liable for doing so. Despite this being obvious, the Court rejected this "chilling effect" in perfunctory terms:

> If the absence of absolute privilege chills any inclination of public servants to advise Ministers with ill will or otherwise to make improper use of the occasion, that would be no bad thing. To the extent that any chilling effect may otherwise inhibit public servants we consider there are two answers. First, this seems inherently unlikely, and secondly, the risk is not such as to require the balance between vindication of reputations and absolute privilege to be struck in favour of the latter.[26]

This dismissal of the "unlikely" effect of a defamation suit on the mind of a public servant is considered further below.

The Court adverted at the end of its judgment to the possibility that the ministerial statement in the House made under privilege might become implicated in any defamation proceedings brought against the departmental briefing official. One instance was postulated – where the advisor might claim that the ministerial statement

23 Ibid at [14]

24 Ibid.

25 Ibid at [19].

26 Ibid at [21].

differed from this advice. The judgment referred to *Jennings v Buchanan*[27] to suggest by analogy that such a comparison may not precluded by Article 9.[28]

Professor Joseph[29] seems content to accept the common law test of necessity in *Vaid* and *Chaytor* since both cases were concerned not with Article 9 but with the so-called common law privilege of exclusive cognisance. The error of the New Zealand Supreme Court, in his opinion, was to transpose that common law test to a statutory privilege. The preferable view as submitted earlier is that legally there is no common law privilege of exclusive cognisance and even if there were, a test of necessity is inappropriate.

Article 9 protection – incidental operation

Central to *Leigh* was the extent of the incidental protection of Article 9. The core protection of Article 9 covers all statements made during and as part of the proceedings of a House including the speeches and debates of members in the House, as well as witnesses appearing before the House or its committees. Less clear is the extent to which Article 9 protection extends to communications which occur outside these formal proceedings of a House and of its committees. This depends on the interpretation of "proceedings in parliament" in Article 9.

A strictly literalist interpretation would confine Article 9 protection to the formal proceedings of the House and of its committees. The obvious benefit of this approach is that it avoids the need to formulate an effective test for any incidental operation of Article 9 protection. The equally obvious drawback is that it leaves members vulnerable outside the formal proceedings of parliament by restricting their capacity to be sufficiently informed.

While no authority has ever suggested that Article 9 protection be confined strictly to formal parliamentary proceedings, it could be that in the light of *Leigh* this is becoming the position. It entails increasingly the denial of Article 9 protection to activities that are incidental to those formal proceedings. This is apparent when one compares those instances of denial with those where Article 9 protection has been upheld.

The only instances before *Leigh* where Article 9 protection was recognised, judicially and/or by a House, to apply outside formal parliamentary proceedings are:

i. Discussion between members before or after parliamentary debates of matters "closely related" to matters pending or relevant to those debates eg discussion of draft or actual speeches, questions and motions.[30]

27 [2004] UKPC 36, [2005] 2 NZLR 577.

28 [2011] NZSC 106 at [22].

29 Philip A Joseph, "Constitutional Law" [2012] *New Zealand Law Review* 515 at 529-530.

30 See the report of the UK Select Committee on the Official Secrets Act, HC 101 (1938-39) p v; agreed to by the House of Commons CJ (1938-39) 480; quoted in Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges and Usage of Parliament*, 24th ed 2011 LexisNexis London, at p 236.

ii. Drafts and notes preceding parliamentary speeches and debates prepared by members, their research assistants (including parliamentary library staff[31]) and advisors; whether ultimately used or not.[32] For instance, the Select Committee of the House of Commons on the *Official Secrets Act* concluded in relation to the *Duncan Sandys* case in 1939 that Article 9 protection does extend to a situation "where a member sends to a minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed".[33] This conclusion was later endorsed by the House of Commons. *Odgers Senate Practice*[34] regards briefing notes provided by an advisor to a senator for purposes of proceedings in the Senate or in Committee as privileged even when retained in the possession of the advisor.

iii. Professor Joseph[35] asserts: "No action may lie against ministry officials or parliamentary staffers who facilitate the core business of the House or its committees (that is, proceedings in Parliament), or against members of the public who petition Parliament or testify before its select committees (*Lake v King* (1667) 1 Saund 131, 85 ER 128; *R v Abingdon* (1794) 1 Esp 226, 170 ER 337; and *R v Creevey* (1813) 1 M & S 273, 105 ER 102)."[36]

iv. Reference should also be made here to those communications covered by the statutory definition of "proceedings in Parliament" in s 16(2) of the *Parliamentary Privileges Act* 1987 (Cth) (and the similar definition in s 9(2) of the *Parliament of Queensland Act* 2001):

   a. means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the forgoing, includes:

      i. the giving of evidence before a House or a committee, and evidence so given;

      ii. the presentation or submission of a document to a House or committee;

      iii. the preparation of a document for purposes of or incidental to the transacting of any such business; and

      iv. the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

31 UK Select Committee on the Official Secrets Act, HC 101 (1938-39) at para 115.

32 UK Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, paras 113-114: "It would be absurd to protect a speech but not the necessary preparatory material".

33 Report of the House of Commons Select Committee on the Official Secrets Act (1939); HC (1938-39) 101, para 4: cited with approval in the Report of the UK Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, para 114.

34 13th ed Ch 2.

35 Philip A Joseph, *Constitutional Law* [2012] *New Zealand Law Review* 515 at 531.

36 Of the three situations he refers to there, the latter two are clearly established as protected by the cases he cites. But they do not refer to the first mentioned situation.

Pursuant to this statutory definition, the following communications have been regarded as protected by Article 9:

- communications from the public to a member which are later raised by the member in the House. *Erglis v Buckley*[37] held that the composition, typing, printing and sending of a letter to a Queensland Minister at her invitation for the purpose of reading it to the Legislative Assembly was all privileged within s 9(2) of the *Parliament of Queensland Act* 2001, being all related to transacting the business of the House; but this privilege did not extend to the later publication of that letter in a hospital ward after it was read in the House. Nor did it prevent the publication in the House from being used to calculate damages.[38]
- communications from the public to a member which are acted upon by the member with a view to raising it in the House.[39]
- possibly communications from the public to a member until such time as the member decides whether to act on them or not.[40]

On the other hand, there is authority that denies Article 9 protection to:

i. caucus meetings of members [41] or committees of members not nominated or appointed by a House.[42]
ii. communications between a member and a minister on constituency matters.[43]
iii. communications between a member and the public on a matter of public interest[44] or a personal matter.[45]
iv. communications between a member and parliamentary library staff or research assistants unrelated to future parliamentary proceedings.[46]
v. ministerial instructions to parliamentary counsel on the drafting of a Bill.[47]

37 [2005] QCA 404.

38 Ibid per MacPherson JA at [35].

39 *O'Chee v Rowley* (1997) 150 ALR 199 at 209.

40 See Senate Committee of Privileges 72nd Report, *Possible Improper Action Against a Person (Dr William De Maria)*, 1998.

41 David McGee, "Parliament and Caucus" [1997] New Zealand Law Journal 137.

42 UK Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, para 102.

43 *Strauss Case* where the House of Commons overrode the recommendation of its Privileges Committee to extend Article 9 protection: UK *Report from the House of Commons Committee of Privileges*, Session 1956-57; *Parliamentary Debates*, UK House of Commons, 8 July 1958, p 591.

44 See *R v Rule* [1937] 2 KB 375; *R v Grassby* (1992) 55 A Crim R 419, 428-30.

45 See *Rivlin v Bilainkin* [1953] 1 QB 485.

46 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, paras 116 and 118.

47 *Sportsbet Pty Limited v NSW (No 3)* [2009] FCA 1283.

vi. the impact of an alleged defamatory statement made under privilege enabling it to be taken into account in any award of damages for equivalent statements made outside the privilege.[48]

Parliamentary reviews have not supported any extension of Article 9 protection to members' correspondence. The UK Joint Committee on Parliamentary Privilege[49] recommended no extension of Article 9 to cover communications between members and ministers. It only reached this conclusion after carefully weighing the competing factors. In maintaining the *Strauss* position, the Committee relied on at least four "problems of principle"[50]: the need to have a clear and defensible boundary for Article 9 protection which would be difficult to maintain if only certain correspondence is protected (eg with ministers but not public servants); the availability of the defence of qualified privilege in defamation cases; the need to confine the exceptional scope of absolute protection under Article 9 to the core activities of Parliament; and the few if any cases of members being sued for acting on behalf of their constituents.[51] In the Joint Committee's view, these factors outweighed several substantive countervailing factors: the logic of absolutely protecting members who raise matters with a minister directly rather than during question time; the confinement of qualified privilege to defamation actions (so unavailable to protect members from liability for breaches of the Official Secrets Acts or breach of court orders); and the "inconvenience and expense" of having to defend such actions.[52] What ought to be included in this last mentioned factor is the chilling effect on members of the possibility of being sued.

A similar view against extending Article 9 protection to members' correspondence was adopted in Australia by the House of Representatives Standing Committee of Privileges in November 2000.[53]

Summary view

A considered decision not to extend Article 9 protection to a broader class of communications with a member should not result in a contraction of the scope of protection that has previously been recognised, especially if this would undermine the fearlessness of members and parliamentary witnesses to speak out under Article 9 protection. *Leigh* fails to accord sufficient weight to the importance of ministers being able to account to their House fully and fearlessly on every issue raised there.

48 *Erglis v Buckley* [2004] QCA 223 per McPherson JA and Fryberg J; contra Jerrard JA.

49 Joint Committee on Parliamentary Privilege, First Report of Session 1998-99, *Parliamentary Privilege*, HL 43-1/HC 214-1, paras 103-112.

50 Ibid at para 107.

51 Ibid at paras 107-112.

52 Ibid at paras 107-108 and 111.

53 Report of the inquiry into the status of the records and correspondence of members (November 2000 Canberra; PP 417/00) at para 4.16 and recommendation No 1 at 4.17.

The critical importance of the need to remove this chilling effect on members when they participate in parliamentary proceedings is widely recognised by the parliamentary handbooks and the courts as *fundamental* to Article 9 protection. *Odgers Senate Practice* states: "It has long been regarded as absolutely essential if the Houses of the Parliament are to be able to debate and to inquire utterly fearlessly for the public good."[54] In *Sankey v Whitlam*[55], Gibbs ACJ stated: "...one important reason for the privilege stated in Article 9 is that a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences." This factor was elaborated on in *Prebble* by Lord Browne-Wilkinson:

> ... the basic concept underlying Article 9, viz the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the Courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament, he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.[56]

Obviously members need to be fully informed when bringing a matter to the attention of their House. So it is self-evident that their role is undermined if their sources of advice are not also protected under Article 9. How can a member speak fearlessly in the House if he or she is aware that the sources of their information face possible legal action for advising the member? How could the Minister in *Leigh* have felt free to answer fully the question given on notice in the New Zealand Parliament had he known that his departmental advisor faced the risk of a defamation action? The cursory manner by which this state of affairs was rejected by the Supreme Court of New Zealand is, with respect, incomprehensible.

A worrying potential consequence of *Leigh* is a rear-guard action by a House, intent on protecting a member's informant, by finding any action taken or threatened against that informant to constitute a contempt of parliament. This has already occurred in Australia where the Senate found contempt committed where those, who had provided senators with information relied on for statements made in the Senate, were subjected to defamation proceedings[57] or disciplinary proceedings[58] for doing so. The prospect of a House charging a litigant like Leigh with contempt risks a serious constitutional conflict between the courts and parliament.

54 13th ed Ch 2.

55 (1978) 142 CLR 1 at 35.

56 [2004] 3 NZLR 1 at 8.

57 See 67th Report of Senate Privileges Committee (Sept 1997).

58 See 72nd Report of Senate Privileges Committee (June 1998).

Evolution of parliamentary privilege

Another factor relied on in *Leigh* was the assertion that the common law of parliamentary privilege cannot be frozen in time. This is a perspective that has not been highlighted before by the courts or by parliamentary experts. The explanation for this is probably the long-standing view that the law of parliament is of ancient roots, which matured in the 19th century, susceptible to change only by statute. For instance, Isaacs J in *Commonwealth v Colonial, Combing, Spinning and Weaving Co Ltd*[59] (*Wooltops* case) pronounced in relation to the *Bill of Right*s 1689:

> That Act is a definite law which, though, as May says in his *Parliamentary Practice* (10th ed p 4) it 'was but a declaration of the ancient law of England,' stands nevertheless as an unrepealed enactment operating of its own force as a law and as part of the Constitution of England ... And, *except so far as altered by local statute*, it is part also of the Constitution under which every Australian ... lives and moves. (emphasis added)

Isaacs J was adverting to the adoption of the privileges of the UK House of Commons by s 49 of the Commonwealth Constitution as at the establishment of the Commonwealth, 1 January 1901. This means that changes in those privileges under UK law since that date are not adopted by s 49. What then is the capacity to alter those privileges under Australian law? Section 49 contemplates this to be by an Act of the Commonwealth Parliament:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The issue raised in *Leigh* arises equally under s 49 of the Commonwealth Constitution, as well as in all jurisdictions[60] that adopt the privileges of the UK House of Commons as at a prescribed date. To what extent are the courts entitled to "develop" those adopted privileges in the absence of legislation? As these privileges are sourced in the common law, that is the *lex et consuetudo parliamenti*, this is an obvious issue. *Coke's Institutes* contemplated the evolution of parliamentary privileges "out of the ancient rolls of Parliament and other records, and by precedents and continued experience."[61]

Clearly, by virtue of statutory adoption, the courts are not entitled to adopt new privileges, nor reject any of the adopted privileges. But are they entitled to expand or contract adopted privileges? This is where the principle of necessity was relied on in *Vaid*, *Chaytor* and *Leigh*, to deny the claim of privilege in each case.

59 (1922) 31 CLR 421 at 463.

60 See eg Queensland Parliament (*Constitution of Queensland 2001* s 9 as at the establishment of the Commonwealth (ie 1 January 1901)); Canadian Parliament (*Parliament of Canada Act* 1985 s 4 as at enactment of the *Constitution Act* 1867); New Zealand Parliament (*Legislature Act* 1908 s 242 as at 26 September 1865).

61 Coke, 4 Inst. 15: cited in Quick & Garran at p 501.

It does not seem justified for a court to ignore or override earlier authority on the basis that it is now out of date in terms of what is "reasonably necessary" today. That would be inconsistent with each Parliament's statutory adoption of the UK privileges *as at the prescribed date*. In the absence of earlier authority, the principle of necessity is certainly a significant factor that can assist the court to resolve any ambiguity[62] in the scope of the claimed privilege. It could be argued that this was the case in *Vaid* and *Chaytor*. But it is not legitimate for a court to rely principally on this test for resolving a privilege claim, without referring to earlier authority or commentary, as occurred in *Leigh*.

New Zealand reaction

In response to the recommendations of the 2013 Report of the Privileges Committee of the New Zealand House of Representatives,[63] the New Zealand Parliament enacted the *Parliamentary Privilege Act 2014* (NZ) to reverse the effect of the decisions in *Leigh* and *Jennings v Buchanan* by clarifying the nature and scope of parliamentary privilege, and in particular, to define the expression "proceedings in Parliament" in Article 9. Sections 9 to 15 of the NZ Act closely follow the terms and effect of s 16 of the *Parliamentary Privileges Act 1987* (Cth). Of special significance in this discussion are the following provisions, which give effect to one of the purposes of the Act listed in s 3(2)(c) – to alter the law decided in *AG v Leigh*:

- s 10(2)(c) which includes within the meaning of "proceedings in Parliament" – "the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee;" and
- s 10(4) and (5) which prohibit the use of any "necessity test" in deciding whether words are spoken or acts are done for the purpose of transacting the business of the House.

CONCLUSION

Hopefully the three Parts of this article demonstrate the need to confine the so-called "test of necessity" to those jurisdictions which rely on the inherited privileges of the UK House of Commons, and so not to extend it generally to all privilege claims, ostensibly as a way of "up-dating" those privileges to modern times. That is the task of the legislature, not that of the judiciary.

As for the so-called principle of "exclusive cognisance", hopefully this article has also shown that this is not an additional source of immunity distinct from that given statutory force by Article 9 of the Bill of Rights 1689. What that expression

62 Interesting to find *Bourinot* assert in 1884 that the UK privileges were then as well established and as accurately defined as the common law generally: J G Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (Montreal, Dawson Brothers, 1884) at 188-189.

63 *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, June 2013.

encompasses is actually the power of each House to regulate its own proceedings, and the inability of the courts to review any exercise of that power by a House.

The scope of parliamentary privilege must be kept narrowly defined. *Chaytor* is faithful to that objective. It must be confined to protect the essential functioning of parliament. Only to that extent should it protect members of parliament in the performance of their dual parliamentary functions of creating and reviewing legislation and of holding the Executive Government accountable to the people.

Political Leadership and Public Policy Debate in the 2016 Australian Federal Election

Andrew Gunn and Michael Mintrom

Andrew Gunn is a Postdoctoral Researcher, Faculty of Education, Social Sciences & Law, University of Leeds

Michael Mintrom is a Professor, Public Management, Monash University and an Academic Director at the Australia & New Zealand School of Government.

ABSTRACT

In all democracies, elections offer vital opportunities for engaged discussion over current problems and desirable policy responses. In the 2016 Australian Federal Election, debate centred on whether the conservative Coalition or the Labor Party could be most trusted in managing the economy. The Coalition emphasised 'jobs and growth', driven by support to business. The Labor Party emphasised placing 'people first', claiming sustained economic growth requires enabling all people to participate effectively in society and the economy. Playing to voter concerns over their personal finances, political leaders mostly debated the economy, tax policy, and health care funding. We review the debate on those policy issues. We also discuss three issues that received muted attention, despite their broader significance – climate change, treatment of asylum seekers, and marriage equality. The electoral policy debate and the resulting configuration of Australia's Parliament reveal a conspicuous lack of effective policy leadership. The demands of tactical politics in contemporary Australia have drawn leaders' attention away from governing for the long term. Further, current political leaders have difficulty forging parliamentary consensus, and effectively engaging the Australian public on the policy challenges facing the country. We discuss the implications of this situation.

POLITICAL LEADERSHIP AND PUBLIC POLICY DEBATE IN THE 2016 AUSTRALIAN FEDERAL ELECTION

The Australian Federal Election of 2016 saw the conservative incumbent Coalition Government returned to power, with a reduced and very thin majority in the House of Representatives. The Government's pre-election lack of support in the Senate had prompted the dissolution of both Houses of Parliament in May 2016 and the scheduling of a July election. The election returned an even more splintered Senate. In the opening months of 2016, the Prime Minister, Malcolm Turnbull, deliberately pursued a course of action that would trigger the early election. The resulting composition of Parliament was unambiguously worse for Turnbull and his government than how it was before the election.

Divisions in the current Australian Parliament pose risks for the stability of the returning government. Under such circumstances, legislative proposals attracting any dissent among Coalition Members of Parliament are difficult to pass through the House. Further, to gain legislative approval, any bill that moves through the House requires extensive negotiation and willingness to compromise in the Senate. The composition of the current Parliament gives Malcolm Turnbull and his government little room to establish and pursue an ambitious legislative agenda while ignoring countervailing arguments.

We review the prominent policy issues in the 2016 Australian Federal Election. We also discuss three issues that received muted attention, despite their significance, namely: climate change, treatment of asylum seekers, and marriage equality. The policy debate during the election, and the resulting configuration of Parliament, indicate a lack of effective policy leadership in Australia. The demands of tactical politics tend to deflect attention from governing for the long term. Further, current political leaders have difficulty forging parliamentary consensus, and engaging the Australian public on major policy issues. We discuss the implications of this situation, which places Australia in contrast to other liberal democracies, most notably Canada and New Zealand.

POLITICAL LEADERSHIP AND POLICY DRIFT

In all democracies, elections present important opportunities for engaged discussions over current problems and desirable policy responses. It is puzzling then that in the lead up to Australia's 2016 Federal Election, neither the conservative ruling Coalition (comprising the Liberal Party and the National Party) nor the Labor Party developed manifestos powerfully articulating major points of difference with their opponents. Certainly, policy differences were revealed as the election campaigns progressed. Yet often those differences were muted as Malcolm Turnbull and Labor Party leader Bill Shorten jockeyed to portray themselves as the best person to serve as Prime Minister. Serious discussion was lost of how a future Coalition or Labor-led government would pursue a distinctive policy agenda. In the respective election campaigns, strong policy leadership was never touted as a credential for effective government. When policy issues receive limited attention in national elections, political scientists take note[1].

Given the muted policy debate, it would be reasonable to conclude little was at stake in Australia's 2016 Federal Election. Yet Australia faces serious policy challenges. Those challenges have become acute over the past decade as the ruling parties – be they the Coalition or Labor – have been riven by leadership troubles. During this time, many commentators have warned that major policy issues exist and that they require urgent

1 Mark Boyd and Babak Bahador, 'Media coverage of New Zealand's 2014 election campaign' *Political Science*, Vol. 67, No. 2 (2015) pp. 143-160; Ian McAllister, Clive Bean, and Juliet Pietsch, 'Leadership change, policy issues and voter defection in the 2010 Australian election' *Australian Journal of Political Science,* Vol. 47, No. 2 (2012) pp. 189-209.

attention[2]. The ruling parties and oppositions have heard those warnings. Yet, with respect to realising policy change, those warnings have gone unheeded.

At the federal level, Australia has been in a period of policy drift. The gap between what policy experts have been saying and the lack of policy change deserves scrutiny. It provides the central focus of this paper. We ask: Why have Australia's political leaders failed to discuss serious policy issues in public and shape public sentiments about desirable future policy directions for the nation? Our answers focus on communication problems. The Australian polity does not need a new super breed of politician to address those problems. The current breed could do it. But they will need to develop skills that have rarely been apparent in recent years. These are the skills of listening to others, building parliamentary consensus, and crafting political narratives. As former New Zealand Prime Ministers John Key and Helen Clark have shown, those skills can assist political leaders in surmounting obstacles to policy change[3].

POLICY DIFFERENCES BETWEEN THE COALITION AND THE LABOR PARTY

The main policy issues debated in Australia's 2016 Federal Election focused on alternative approaches to economic management. With Malcolm Turnbull at the helm, the incumbent Coalition centred its election campaign on its credentials for transitioning Australia from the mining boom through to a new phase of economic growth. Meanwhile, the Labor Party contended that sustained economic growth can occur only when efforts are made to prepare and support all people to participate in society and the economy. Here we discuss those different perspectives on economic management. We then explore related differences in taxation policy and health care funding – both of which received attention during the election campaign. These were not the only issues debated. But exploring these three prominent policy debates offers insights into contemporary Australia's political and social cleavages.

Economic Management

The economy is the key issue for voters in virtually every election in Australia, as elsewhere[4]. Evidence suggests that in Australia's 2016 Federal Election, voters cared deeply about their own economic fortunes. The electorate was wary of the implications

2 Ross Garnaut, *Dog Days: Australia after the boom*. (Collingwood: Redback 2013); Julianne Schultz. 'Captains don't always know best: Making the system fit for purpose' *Griffith Review,* Vol. 51 (2016) pp. 7-10.

3 Jess Nichols, 'Helen Clark: A pragmatic, strong Prime Minister' *Political Science*, Vol. 56, No. 2 (2004) pp. 99-109; Grant Duncan, 'A beginner's guide to New Zealand's strangest election' *The Conversation,* 16 September 2014; Richard Mulgan, 'New Zealand's John Key can show Malcolm Turnbull how to lead a stable government' *The Public Sector Informant*, 6 October 2015.

4 Timothy Hellwig and Ian McAllister, 'Does the economy matter? Economic perceptions and the vote in Australia' *Australian Journal of Political Science* (2016), pp.1-19.

for their personal finances that would accompany any tax changes or changes in subsidies for services – especially those in health care.

The Australian economy has proven remarkably resilient over recent decades. It has now enjoyed 25 years of continuous growth. This can be attributed to a strong export sector, led by shipment of natural resources – coal, iron ore, and other mineral deposits – to China. However, agricultural products are also significant export items, along with manufactured products and a growing export market in services. Starting during the John Howard-led Coalition Governments of 1996-2007, efforts have been made to diversify the Australian economy[5]. They continue. Commenting on Australia's economic outlook in early 2016, the *Organisation for Economic Cooperation and Development* observed that boosting productivity growth requires a focus on innovation. 'Targeted R&D policy, university-business linkages and effectiveness and efficiency of financial support for research are important'[6].

Before the Global Financial Crisis of 2007-2008, the Australian Government was running annual budget surpluses. This allowed the Kevin Rudd-led Labor Government to enter short-term deficit spending to stimulate the economy and keep it buoyant. Measures to fund capital works across the entire economy generated this result. However, the Government's budget has never returned to surplus. Indeed, the annual budget deficits have been growing. The forward estimates released with the Budget in May 2016 projected continuing deficits over the coming years, with a return to surplus late in the 2020s. Those projections were based on estimated annual growth in Gross Domestic Product above 3 per cent. That figure is optimistic, given a longer-run average growth rate of closer to 2 per cent.

When the Coalition Government came to power in 2013, led by Prime Minister Tony Abbott, it established a National Commission of Audit. Working on a short timeframe, the Commission forcefully recommended managing government expenditures and revenues[7]. The Commission's work informed the 2014-2015 Budget announced in May 2014 by then-Treasurer Joe Hockey. Claiming a need for urgent budget repair, Hockey proposed unpopular spending cuts and tax increases. While many commentators acknowledged that such actions were necessary to return the government budget to surplus, many of the proposals were seen as unfair, especially since they had not been mentioned in the election just a few months earlier. The unpopularity of the Budget, and the Government's difficulties in getting support for it in the Senate, damaged the standing of both the Prime Minister and the Treasurer. The bungled maiden budget was the first of a series of self-inflicted injuries that put Tony Abbott and Joe Hockey on the road to political oblivion; by the end of 2015, both sat on the backbenches

5 Michael Mintrom and John Wanna, 'Innovative state strategies in the antipodes: Enhancing the ability of governments to govern in the global context' *Australian Journal of Political Science,* Vol. 41, No. 2 (2006) pp. 161-176; Michael Mintrom, Chris Salisbury, and Joannah Luetjens, 'Policy entrepreneurs and promotion of Australian state knowledge economies' *Australian Journal of Political Science*, Vol. 49, No. 3 (2014) pp. 423-438.

6 OECD, 'Australia' in OECD Economic Outlook, Vol. 2016, No. 1, OECD Publishing, Paris, (2016), p.86.

7 Charis Palmer, 'Commission of Audit lays path for deep cuts' The *Conversation*, 1 May 2014.

of Australia's Parliament. Abbott and Hockey's actions did not lose the Coalition the 2016 election. But they created mistrust that continued to dog Malcolm Turnbull and that created space for the Labor Party's Bill Shorten to position himself as a credible alternative Prime Minister.

On the specifics of economic management, the Coalition and Labor presented similar timeframes for bringing the federal budget back into surplus. The Coalition proposed to do this by further reducing government spending and by stimulating more economic activity, which would generate more tax revenues. The primary means of stimulation involved progressively reducing business taxes. Malcolm Turnbull spoke continuously of 'Jobs and Growth'. His proposed tax cuts were estimated to cost the government over $50 billion in lost revenues over the coming years. Turnbull claimed this form of economic stimulus aligned well with the Government's *National Innovation and Science Agenda*, which he had launched in December 2015. Throughout the election campaign, Turnbull frequently appeared at locations exemplifying the commercialisation of science, such as advanced manufacturing centres and start-up hubs[8].

Other specific actions were proposed to promote economic growth. For example, the Coalition's proposal to re-establish the Australian Building and Construction Commission (which operated from 2005 to 2012) was touted as a way to reduce inefficiencies in the building industry. The Labor Party had abolished the Commission when in government and remained strongly opposed to its reintroduction. In the past, the Commission had monitored the sector and enforced restrictions on unlawful industrial action[9]. The lack of Senate support for this measure had been the trigger for the double dissolution of the Australian Parliament and the calling of an early election in 2016.

Bill Shorten and the Labor Party proposed economic growth through placing 'people first'. Shorten made political gains by construing Malcolm Turnbull as out of touch – more at ease among business elites than those in the suburbs struggling to raise families and meet their mortgage payments. Yet, in making 'people first' his touch-stone, Shorten promised more spending at every turn. How more spending on health care, schools, and social services could be funded without increasing the budget deficit was never explained. While honing his human touch, Shorten opened himself to Turnbull's caricature of him as a high-spending, high-taxing Labor Party hack.

Tax Policy

Talk of raising taxes is political suicide, especially during an election campaign. If politicians must mention taxes, their only safe approach is to promise to cut them. In the Australian Federal Election of 2016 both leaders of the major parties did as

8 Michael Koziol, 'How Malcolm Turnbull's innovation agenda failed to take flight' *The Sydney Morning Herald*, 18 July 2016.

9 Michael Barry, 'Employer and employer association matters in Australia in 2015' *Journal of Industrial Relations*, Vol. 58, No. 3 (2016) pp. 340-355.

expected. The Coalition stuck to proposals made in the budget of May 2016. They promised to drop the tax rate for small businesses and progressively extend the change to all businesses. The Coalition also promised to reduce taxes for middle income earners, by raising one of the current tax brackets. The Coalition also promised to remove an unpopular 2 per cent temporary deficit levy for high income earners. In response, the Labor Party promised to support the Coalition's tax break for middle income earners and to reduce the tax rate for small businesses. The Labor Party proposed to keep the temporary deficit levy for high income earners and opposed the eventual expansion of lower tax rates to all businesses.

The biggest tax policy difference between the Coalition and Labor concerned the capital gains tax on property and the tax breaks for rental property owners commonly called 'negative gearing'. Negative gearing allows property investors who make a loss to reduce the tax they pay on other income. Australia has more than 2 million landlords, and more than 60 per cent made a loss in the 2013-14 financial year. During the 2016 election campaign, the Coalition vowed to change neither the capital gains tax discount nor negative gearing. In contrast, Labor proposed to limit the discount on the capital gains tax. It also proposed to restrict negative gearing concessions to owners of new homes.

To reduce budget deficits, governments must balance annual revenues with annual expenditures. That can only be achieved through a combination of increases in tax revenues and reductions in expenditures. If the economy grows sufficiently rapidly, it is possible that enhanced tax revenues will contribute to deficit reduction without a change in policy settings. Malcolm Turnbull and the Coalition argued that business tax cuts would stimulate the Australian economy sufficiently to raise tax revenues. Beyond that, little was said either by the Coalition or Labor on how their specific tax and spending proposals would impact on the overall budget situation. Here we saw political leaders seeking to promote and maintain positive images of themselves through deliberate avoidance of frank discussion of major policy issues. Such slight-of-hand can create short-term gains. But ultimately, it serves to erode public trust in political leaders, their parties, Parliament, and government[10]. This should be a matter of concern for those who value effective democratic government.

Health Care Funding

In advanced welfare states, citizens have long looked to government as a financial saviour in times of personal distress. Australians put a lot of value upon public health care and have resisted any moves to reduce government funding of health care services. People want to feel assured that if they or close family members face a catastrophic health incident then there will be a public health system standing ready to help. Medicare is the public health insurance program that the Australian government uses to cover GP visits and many hospital services.

10 Clive Bean, 'Party politics, political leaders and trust in government in Australia' *Political Science*, Vol. 53, No. 1 (2001) pp. 17-27.

Against that backdrop of public sentiment, successive Australian governments have seen public health care costs rising, partly owing to the increasing costs of highly skilled medical specialists and the equipment they use, and partly because of an ageing population[11]. This has prompted various proposals to reduce calls on public health services. The Coalition government's notorious 2014 budget made provision to save $50 billion over eight years by changing the federal government's hospital funding agreements with the states and territories. At that time, a co-payment for GP visits was also introduced but was scrapped in 2015 because of the controversy it caused. When the co-payment for GP visits was scrapped, a freeze was placed on indexation of Medicare schedule fees until 2020. This served to limit payments and open the way for doctors to introduce or increase patient co-payments for visits.

Throughout its 2016 election campaign, the Labor Party made 'Saving Medicare' a central pillar of its strategy. Bill Shorten, and his Labor colleagues, criticised the Coalition's health care funding and said the Coalition would eventually privatise Medicare. The Coalition had made no public pronouncements to this effect. However, it was not an unreasonable inference to draw, given the governing Coalition's recent record on seeking to reduce health care costs[12].

Late on election night, when it was apparent no clear winner would emerge for several days, Prime Minister Malcolm Turnbull appeared before a group of supporters. In a speech he declared: 'The Labor Party… ran some of the most systematic, well-funded lies ever peddled in Australia …telling vulnerable Australians that Medicare was going to be privatised or sold, frightening people in their bed and even today, even as voters went to the polls… there were text messages being sent to thousands of people across Australia saying that Medicare was about to be privatised by the Liberal Party'[13].

It is generally considered that Bill Shorten's portrayal of the Coalition as eager to privatise Medicare closed the gap between Labor and the Coalition parties in the 2016 election. Certainly, Labor's 'Mediscare' campaign was alarmist. But it underscored a major difference between the parties. While the Coalition has made some unpopular efforts to arrest growing expenditures on health care, the Labor Party has had the luxury of promising both to balance the budget while maintaining or increasing health care funding. The Medicare dispute highlights the need for more clear-eyed public discussion of fiscal constraints, policy preferences, and trade-offs between increasing tax revenues or reducing service provision. Effective political leadership is crucial to enabling such discussion[14].

11 Jeffrey Richardson, 'Can we sustain health spending?' *Medical Journal of Australia*, 16 Jun 2014, pp. 629-31.

12 Chris McCall, 'Concerns raised over future of Medicare in Australia' *The Lancet*, 388 (10042) Jul 23 2016, p.323.

13 Herald Sun, 'Malcolm Turnbull, Bill Shorten election night speeches in full' Herald *Sun*, July 3 2016.

14 Vishaal Kishore, 'Avoiding the simplicity trap' *Griffith Review*, Vol. 51 (2016) pp. 54-72; Joe Wallis, 'Understanding the role of leadership in economic policy reform' *World Development*, Vol. 27, No. 1, (1999) pp.39-53.

MUTED POLICY ISSUES

The focus on the economy and voters' short-term financial security in the 2016 Australian Federal Election ensured many important policy issues received limited attention, from both the candidates and the media. Here, we discuss three such issues: policy initiatives to mitigate climate change, the treatment of asylum seekers, and marriage equality. Discussion of these topics raises big questions about values in contemporary Australia, Australia's support for international conventions, and the collective future of Australians.

Mitigating Climate Change

Over the past decade, Australian federal politicians have engaged in fierce debates concerning the threat of climate change and what, if any, policy approaches should be used to mitigate global warming[15]. There are two good reasons why mitigating climate change might have loomed large as an issue in the 2016 Federal Election. First, policy differences on this matter were defining features of the federal elections of 2013 and 2010. Second, the Paris Agreement of 2015, achieved under the United Nations Framework Convention on Climate Change, saw the international community reach a broad consensus on commitments needed to mitigate global warming[16]. At the Paris meetings, the Coalition Government pledged to reduce Australia's emissions by 26-28 per cent below 2005 levels by 2030. Incidentally, this pledge was among the weakest in the developed world[17]. Following the Paris agreement, the Coalition Government promised to review its climate policies in 2017, ahead of the United Nations' global stock take of national pledges in 2018.

It would have been appropriate for Coalition and Labor candidates to debate alternative policy approaches to mitigating climate change during the Australian Federal Election of 2016. Instead, both party leaders avoided discussion of carbon taxes or emissions trading schemes. They settled for presenting slightly different goals for cutting emissions of carbon dioxide – and said virtually nothing about the policy approaches needed to achieve those goals.

The reasons for the muted policy debate on climate change in 2016 become clear when we look back a few years[18]. When Kevin Rudd-led the Labor Party to victory in the Australian Federal Election of 2007, he talked loudly about climate change as one of 'the great moral challenges of our time'. Rudd portrayed himself as a different

15 Stewart Williams and Kate Booth, 'Time and the spatial post-politics of climate change: Insights from Australia' *Political Geography,* Vol. 36 (2013) pp. 21-30.

16 Robert Falkner, 'The Paris Agreement and the new logic of international climate politics' *International Affairs*, Vol. 92, No. 5 (2016) pp. 1107-25.

17 Robyn Eckersley, 'Environment and climate change' in 'Election 2016: what will a re-elected Coalition government mean for key policy areas?' *The Conversation,* 10 July 2016.

18 Nick Economou, 'The Environment in the 2013 Election: Controversies over climate change, the carbon tax and conservation' Chapter 20 in Carol Johnson, John Wanna, and Hsu-Ann Lee, *Abbott's Gambit: The 2013 Australian Federal Election* (Canberra: ANU Press, 2015).

candidate, prepared to take a bull by the horns, unlike his climate change-denying opponent, the incumbent Coalition Prime Minister, John Howard. On becoming Prime Minister and leading the Labor Government, Rudd worked to create an emissions trading scheme, which would start out with a fixed price for carbon for an initial period. Facing difficulties gaining support for the scheme in the Senate, where Green party senators opposed it, Rudd reached out to then-Liberal Party leader Malcolm Turnbull. The Liberal leader indicated he would be willing for his party to vote with Labor on this issue, allowing the emissions trading scheme to pass the Senate. For this apparent act of treachery to his party, Malcolm Turnbull was dumped as leader, to be replaced by Tony Abbott by a narrow margin. Abbott, like Howard before him, was understood to be a climate change denier.

In the Australian Federal Election of 2010, Julia Gillard led the Labor Party to a narrow victory and maintained her role as Prime Minister. However, during the ensuing term in office, then-Opposition leader Tony Abbott gained much traction in the media and electorate through his construal of Labor's 'fixed price for carbon' as a 'carbon tax'. Entering the 2013 Federal Election, the Labor Government was once again led by Kevin Rudd as Prime Minister. By now, it was easy for Tony Abbott to portray Rudd and his party as advocates of a carbon tax – a portrayal that damaged the Labor Party in the polls, and contributed to the Coalition's electoral victory.

Entering the 2016 Election, both Malcolm Turnbull and Bill Shorten were clearly scarred from previous entanglements – their own, or those of their party colleagues – over addressing climate change. This explains why they tended to discuss only goals and timelines for reduction of carbon emissions and shy away from discussing the policy mechanisms needed to achieve those goals. In the process, an issue that increasing numbers of people view as significant received little attention. With limited action being taken in Australia to mitigate the country's contributions to climate change, Australia appears out of step with the actions of other signatories to the 2015 Paris Agreement.

Treatment Of Asylum Seekers

As a prosperous, peaceful nation, Australia is an attractive destination for immigrants. Over many decades, the country has received immigrants on various quota schemes. Those immigrants have included refugees from war-torn nations and asylum seekers. Along with those seeking to resettle in Australia through formal channels, others have sought to enter the country informally. (Clarification of terms is useful here. A migrant is anyone who seeks to move overseas. A refugee does so in conditions where they have been forced from their homeland. An asylum seeker is someone who claims to be a refugee, but whose claim is yet to be definitely evaluated, either by the UN High Commissioner for Refugees or by a government that is a signatory to the 1951 United Nations Convention on Refugees. Australia is a signatory).

Waves of asylum seekers have paid people smugglers to get them to Australia by boat – often first through Indonesia. The activities of refugees and people smugglers have

generated major political debates in Australia[19]. The plight of 438 refugees rescued off the coast of Australia in August 2001 by the Norwegian freighter the *Tampa* looms large as an example of Australia's fraught stance on how best to respond to unplanned refugee arrivals. Those on board were denied entry to Australia and were transported to detention camps in Nauru. In the campaign leading up to the Australian Federal Election of October 2001, incumbent Coalition Prime Minister John Howard defended the actions of his government, famously declaring: 'We will decide who comes to this country and the circumstances in which they come'[20].

The Howard Government's hard line towards unplanned refugee arrivals was relaxed during Australia's years of Labor Government (2007-2013), when Kevin Rudd and Julia Gillard served in the Prime Ministerial role. As a result, illegal boat arrivals increased significantly and calls were made for new policy solutions. Around 45,000 refugees and asylum seekers arrived in Australia by boat during the term of the Labor Government[21].

In the Australian Federal Election of 2013, Liberal Party leader Tony Abbott campaigned strongly on the slogan of 'stop the boats'. On gaining office, the Abbott-led Coalition government moved rapidly to instigate *Operation Sovereign Borders*. This served to militarise elements of the Australian Federal Government's immigration processing activities. Any naval engagements with vessels suspected of carrying refugees were deemed military operations that could not be discussed by politicians. This removed the possibility of naval encounters with boat people gaining media attention. Within weeks of the policy shift, evidence was released that the hard line was succeeding in stopping boatloads of refugees entering Australian waters.

The plight of refugees in off-shore detention centres in Papua New Guinea, Nauru and Manus Island was a source of considerable public discussion in Australia during the 2013-16 term of the Coalition Government. Given this, and the extensive debate on treatment of boat-borne refugees in previous Australian federal elections, it was surprising that their fate received very limited discussion during the 2016 Federal Election.

Two factors appear to have muted debate on refugees and asylum seekers arriving by boats. First, much of the policy debate focused squarely on issues directly affecting the financial situation of Australian voters. Second, the Labor Party was instrumental in taking the issue off the table. During the Labor Party's annual conference in July 2015, Bill Shorten convinced his colleagues to adopt the policy position of the Coalition government with respect to offshore processing and boat turn-backs. In contrast with the Coalition, Labor proposed to improve procedural and processing safeguards under the onshore programme. The Party also committed to deeper regional co-operation on

19 Caroline Fleay, John Cokley, Andrew Dodd, Linda Briskman, and Larry Schwartz, 'Missing the Boat: Australia and Asylum Seeker Deterrence Messaging' *International Migration* Vol. 54, No. 4 (2016) pp. 60–73; Jaffa McKenzie and Reza Hasmath, 'Deterring the 'boat people': Explaining the Australian government's People Swap response to asylum seekers' *Australian Journal of Political Science,* Vol. 48, No. 4 (2013) pp. 417-430.

20 John Howard, 'Election Speech' delivered at the University of Sydney, NSW, 28 October 2001.

21 Greg Sheridan, 'Policy failure creating a monstrous problem' *The Australian*, 8 June 2013.

a refugee humanitarian intake scheme. And it proposed to increase the annual intake under Australia's humanitarian programme[22]. Those are important policy differences – especially in how they would treat presently-detained asylum seekers.

This issue, that had been political dynamite during several recent federal elections, was muted in 2016. Through trial and error, successive Australian governments have come to see that a hard line on unplanned boat arrivals is the only way to stop the people smuggling businesses. However, criticism and condemnation of the policy voiced by the *Australian Human Rights Commission* president Gillian Triggs, and media reports of appalling conditions in the offshore detention centres, are a reminder that Australia's international humanitarian reputation remains at risk.

Marriage Equality

Marriage equality – sometimes referred to as same-sex marriage or gay marriage – has emerged globally over the past two decades as a classic morality policy issue[23]. When groups first began lobbying for marriage equality, legislators in many jurisdictions moved to 'protect' marriage as a heterosexual institution. Following this trend, in 2004, then Australian Prime Minister John Howard led his Coalition colleagues in successfully legislating a swift change to the Marriage Act. Until then, the Marriage Act had not provided a definition of marriage. Howard's efforts ensured the Act defined marriage as the 'voluntarily entered-into union of a man and a woman to exclusion of all others'. In acting decisively, Howard and his Liberal Party colleagues deferred protracted policy debate[24].

Since 2004, calls for legislative changes to allow marriage equality in Australia have grown louder. Today, marriage equality is established in many places, including Australia's closest peer nations, the United Kingdom, the United States, Canada, and New Zealand. In 2015, then-Prime Minister Tony Abbott declared the push for marriage equality to be 'an important issue', following news that a referendum in Ireland had strongly backed a constitutional change introducing marriage equality. After some heated debate within the Coalition, Abbott declared that any vote in Parliament on the matter should be preceded by a plebiscite. Prior to becoming Prime Minister, Malcolm Turnbull had positioned himself as pro-marriage equality and in favour of a free vote in Parliament. However, recognising the power of highly conservative members of the Coalition, Turnbull moved to supporting a plebiscite. Entering the 2016 Election, Turnbull claimed a plebiscite could be held before the end of 2016.

Having capitulated to the socially conservative wing of the Liberal party, Malcolm Turnbull cast himself during Australia's 2016 Federal Election as pro-plebiscite, while

22 Emily Darling and Sarah Davies, 'Spot the difference: Labor vs the Coalition on asylum seekers'. *The Conversation*, 5 August 2015.

23 Carol Johnson, 'Fixing the meaning of marriage: political symbolism and citizen identity in the same-sex marriage debate' *Continuum,* Vol. 27, No. 2 (2013) pp. 242-253.

24 Ryan Goss, 'Explainer: what is parliament's role in the marriage equality debate?' *The Conversation*, 24 August 2016.

shrewdly staying silent on what a plebiscite would entail. One campaign commentator observed: 'It's a neat pre-election trick in which the Coalition is taking the political dividend of appearing modern and progressive, while studiously avoiding discussion of critical details of its plebiscite. These include when the vote will be, what the question will be, whether the anti-change campaign will get government funding…'[25]. Government ministers tended to avoid answering specific questions on the plebiscite during the campaign, calling them 'hypothetical' because the details had not been finalised, and put to neither Cabinet nor party room.

In contrast, the Labor Party promised a vote in the Australian Parliament to legalise same-sex marriage. Delivering a speech to the National Press Club during the campaign, Bill Shorten declared 'The first piece of legislation I introduce into the 45th Parliament will be a bill to amend the marriage act, a simple change. The words "a man and a woman" are replaced with "two people", no $160 million plebiscite, no hurtful, hateful government-sponsored advertising campaign for us'[26].

It is difficult to tell how political positioning on marriage equality by Malcolm Turnbull and Bill Shorten shaped the electoral fortunes of their respective parties. The matter has resurfaced following the election. The scheduling of a plebiscite would first require legislative approval. But given the composition of the House and Senate, and the deep divide within the Coalition on this matter, even securing that approval seems virtually impossible for the government. Meanwhile, Australia is starting to look out of step with other nations on this significant civil rights issue. More importantly, we see here an instance of national politicians seemingly paralysed by political discord and unable to provide the kind of leadership that allows for mature, respectful conversation about Australia's social values and commitments.

THE NEED FOR POLICY LEADERSHIP

The policy debate in the 2016 Australian Federal Election was lacklustre. This was not because there was a dearth of important matters for discussion. After years of policy drift, growing budget deficits, and the accumulation of many unsustainable entitlements across social services, there is an urgent need for serious policy discussion. Yet we found in this election a tendency for Australia's political leaders to either be in lockstep – in agreement on broad policy approaches with a few minor adjustments around the edges – or to display a mutually-agreed willingness to avoid important policy issues for fear of the electoral fallout.

Why have Australia's political leaders shunned the responsibility of shaping public sentiments about desirable future policy directions for the nation? Apparently, much

25 Mark Kenny, 'Election 2016: Malcolm Turnbull's marriage equality Faustian pact is unravelling'. *The Sydney Morning Herald*, 29 June 2016.

26 James Massola, 'Federal Election 2016: Same-sex marriage will be my first bill, Opposition Leader Bill Shorten Promises' *The Sydney Morning Herald*, 29 June 2016.

comes down to their desire to win short-term tactical advantages against each other. We have seen extensive evidence of this, both between the parties (which is to be expected) and within the parties (which points to an overall lack of discipline within the party ranks).

Here, we discuss several elements of political leadership that could greatly improve policy discussion in Australia. They would contribute to forging a stronger consensus on desirable social and economic outcomes and the policy settings that could best contribute to their attainment. The elements we discuss all require effective communication skills, including: building parliamentary consensus, articulating political narration, and listening to others – especially those with whom you often disagree. Based on Australian political history[27] and the experience of recent New Zealand Prime Ministers, we contend that these skills can greatly assist politicians in surmounting obstacles to policy change.

Forging Consensus

Over the past decade in Australia, the office of Prime Minister has at times been held by people with a tendency to adopt strong views on specific issues, and broach no arguments for seeing things differently. This lack of willingness to compromise with others contributed greatly to the demise of both Kevin Rudd and Tony Abbott. Not only did these leaders have difficulties working across parties lines to broker legislative deals, they also had difficulties working with their own Cabinet colleagues and backbench members of their own parties. This culture of the strong man resulted in some terrible policy choices in the case of Kevin Rudd (for example the introduction of the fatally flawed home insulation program) and some ridiculous 'captain's calls' in the case of Tony Abbott (for example, reinstating knights and dames in the Order of Australia only to give the first of the new knighthoods to Prince Philip, the Duke of Edinburgh).

This tendency to adopt strong views and broach no countervailing arguments has created a culture in Australian national politics where the art of compromise has been lost. Compromise has come to be seen as weakness, rather than as an essential element of the stock and trade of governing. When Malcolm Turnbull created the conditions for a double dissolution of Parliament in May 2016 and the calling of an early election, he judged it within his powers to lead an election campaign that would return the Coalition to government with working majorities in both the House and the Senate. The resulting Parliament showed the folly of Turnbull's judgement. In the election's aftermath, former Prime Minister Abbott noted the difficulty of reducing the deficit over recent years and claimed 'this government has been in office – not in power'[28].

27 Tracey M. Arklay, 'Leadership Lessons: Minority Governments, Independents and Relationships' *Australian Journal of Politics & History*, Vol. 60, No. 1 (2014) pp. 58-72.

28 Phillip Coorey, A government in office but not in power' *Australian Financial Review,* 25 Aug 2016.

The only way forward for the current Coalition Government, in terms of successfully pursuing a legislative agenda, involves working closely with Members of Parliament from across the party divisions. The legislative difficulties experienced by the Coalition in the previous Parliament remain; having no majority in the Senate means the governing party needs support from right of centre independents and micro-parties to pass its legislation[29]. Although this issue is particularly applicable to the Senate, the general point stands for the House as well – where the Coalition itself comprises an array of members who rarely speak with one voice. The practices of inclusive decision-making, listening, consultation and compromise need to be put into continuous use. They are badly needed within the Cabinet, within the Coalition, within the House, and within the Senate. Efforts to forge consensus within Parliament could be usefully supported by broader public efforts in the electorate. Commenting on the election outcome, former Secretary of the Australian Treasury Ken Henry observed that Australians 'want a government that leads in a genuinely inclusive way. They want a government that engages with them openly and honestly about the challenges and opportunities facing the nation'[30]. That kind of public engagement was completely missing during the lead up to the 2016 election.

Political Narrative

A common complaint levelled both at Australian politicians, and their public service advisors, is that they too often fail to provide compelling narratives supporting proposed policy positions[31]. For example, shortly after the 2016 election, the bond rating agency *Standard and Poors* joined this chorus of complaint, warning that Australia could soon lose its AAA credit rating. The basis for that warning was the view that Australian political leaders are unable to persuade the public that significant budget repair is in order, and that such repair calls for a combination of spending cuts or tax increases[32]. The inability of Australian governments to define and articulate coherent narratives around a policy issue has also been shown to result in contradictory and disjointed policy outcomes[33].

Effective politics calls for the effective crafting of narratives. These narratives tell us who we are, what we stand for, and what vision of the future is worth working together to create. When narratives are well chosen, they can motivate people to think differently about their collective destiny. A classic example is John F. Kennedy's address before

29 Derek McDougall, 'The Australian Federal Election of 7 September 2013: A Watershed?' *The Round Table: The Commonwealth Journal of International Affairs,* Vol. 103, No. 3 (2014) pp. 289-299.

30 Ken Henry, 'Voters aware of nation's troubles but our politicians dither' *The Australian,* 6 July 2016.

31 James Button, *Speechless: A Year in My Father's Business* (Melbourne: Melbourne University Publishing, 2013); Carmen Lawrence, 'The memory ladder: Learning from the past, living with doubt' *Griffith Review,* Vol. 51 (2016) pp. 24-31.

32 S&P Global Market Intelligence, 2016.

33 For the example of energy policy, see Bevan Warren, Peter Christoff, and Donna Green, 'Australia's sustainable energy transition: The disjointed politics of decarbonisation' *Environmental Innovation and Societal Transitions,* Vol. 21 (2016) pp. 1-12.

a joint session of the United States Congress in May 1961, where he said: 'I believe that this nation should commit itself to achieving the goal, before the decade is out, of landing a man on the moon and return him safely to the earth'[34].

Returning the Australian federal budget to surplus is a more modest task than enacting a moon shot. But it requires an effort on the part of political leaders to find compelling ways of discussing why Australia's current policy settings are not sustainable. In the process of finding voice to tackle the economic challenges, there is good reason to believe Australia's current leaders might also find the conversation skills and ways of storytelling that will also aid in navigating Australians through complex issues like climate change, the treatment of asylum seekers, and marriage equality. This may seem a tall order. However, other politicians elsewhere have perfected the art of political narrative and made change possible. Further, this kind of change requires a step up in the skills of politicians – something that is surely easier to achieve than major structural changes to our political institutions.

CONCLUSION

The public policy debate in the 2016 Australian Federal Election was dominated by discussions over whether the Coalition or the Labor Party could be most trusted in managing the economy. The Coalition emphasised 'jobs and growth', to be driven by appropriate support to business and a renewed innovation policy. The Labor Party emphasised putting 'people first', claiming sustained economic growth requires enabling all people to participate in society and the economy. Playing to voter concerns over their personal finances, the party leaders mostly debated the economy, tax policy, and health care funding.

We have discussed the policy debate on those three issues. We have also discussed three issues that received muted attention, despite their significance – climate change, treatment of asylum seekers, and marriage equality. Along with economic management, tax policy, and health care funding, those issues will continue to be discussed in Australia in the coming years. We do not suggest the issues we have highlighted here are the only ones of contemporary concern in Australia. Rather, many other pressing policy issues require careful attention, including foreign policy, education policy, and infrastructure development.

Australia has been in a period of policy drift for close to a decade. This is despite the pressing need for serious policy discussions and policy development work to occur. The limited policy debate during the 2016 election, and the current configuration of Parliament, both highlight the need for improved policy leadership. Australia's political leaders are yet to raise their sights from tactical politics to governing for the

34 John M. Logsdon, *John F. Kennedy and the Race to the Moon* (New York: Palgrave Macmillan US, 2010).

long term.[35] As such, it is difficult for them to forge consensus in Parliament and communicate to citizens the seriousness of the policy challenges Australia faces. Getting out of this dilemma may prove difficult. The Australian polity does not need a new super breed of politicians to do this; the current breed could accomplish it. One approach would involve putting aside years of in-fighting within the parties and unpleasant interpersonal exchanges between leaders in Parliament. Unfortunately, the prospect of this appears remote. Were it to occur, Australia's political leaders could then focus on the legacies they hope to leave and the example they want to set in leading public debate and shaping policy futures.

35 See: Jonathan Boston, *Governing for the Future: Designing Democratic Institutions for a Better Tomorrow* (Bingley, UK: Emerald Group Publishing, 2017).

Western Australia's state election of 2017: what are the implications?

Martin Drum and Glenda Bourne

Martin Drum is an Associate Professor in Politics and International Relations at the University of Notre Dame, Western Australia

Glenda Bourne is a Master of Philosophy Student at the University of Notre Dame, Western Australia

ABSTRACT

Western Australia's (WA) election in March 2017 was keenly followed by political observers around Australia. Nationally, much attention focused on the performance of Pauline Hanson's One Nation Party, which had re-emerged as a political force at the Federal level in 2016. There was particular interest in how a preference deal between One Nation and the Liberal Party would play out in the electorate. For many voters though, the overall state of the WA economy, the performance of the WA Government, and a number of contentious local issues would play a major role in determining their vote. Whilst the Labor Party performed extremely well in the Legislative Assembly, their strong electoral performance did not translate into a majority in the Legislative Council (even with support from the Australian Greens), raising questions around the voting system in that House. As a consequence, the new government faces the twin challenges of a large and restless backbench in the Legislative Assembly, coupled with the challenges of passing legislation in the Legislative Council.

The WA election has much to tell us about the volatility of the electorate, the importance of economic outcomes to the fate of governments, and public cynicism around political deal making. A similar swing within WA at a Federal election could have serious implications for Australia's Federal Government in 2019.

INTRODUCTION

On March 11th, 2017 Western Australian voters went to the polls to elect their 45th Parliament. The Liberal and National parties had performed very strongly at the previous election in 2013. The Liberal Party won 31 seats in the 59-seat chamber, enough to govern in their own right. Their alliance partners the National Party won 7 seats, including two new seats in the mining and pastoral region, where they had traditionally polled poorly. By contrast the Labor Party had gone backwards, winning 21 seats, down from 28 at the previous election. Much had changed in Western Australia since that time, and the WA election of 2017 delivered a very different outcome. It is important therefore, to examine political events in WA to provide an explanation and to see what we can learn from the result, especially within a national context.

WA POLITICS SINCE 2013

During the first term of the Barnett Liberal-National Government (2008-2013), Western Australia's economic boom was in full swing. From 2010-2012 the unemployment rate was in decline; at the time of the 2013 election, the state's unemployment rate, whilst rising, was still the equal lowest in the country (Cassells 2017). Despite the Global Financial Crisis, overseas demand for WA's mineral resources remained high; the average March 2013 price for iron ore remained at a heady $139.87 (Index Mundi 2017). Workers were flocking to WA from the rest of the country, fuelling housing demands. In late 2012, the Housing Industry Forecasting Group was anticipating a 20% increase in the number of dwellings being built in the 2012-13 financial year (HIFG 2012). Such a favourable economic environment clearly assisted the fortunes of the Barnett Government.

In contrast, the fortunes of their political opponents was notably poor in early 2013, with the unpopularity of the then Labor Federal Government, led by Julia Gillard, being a significant factor. Federal Labor consistently trailed in the polls during the first half of 2013, and Gillard was also personally unpopular, especially in Western Australia. She avoided WA during the 2013 state election and WA state Labor leader Mark McGowan admitted that he had asked her to stay away (Perpitch 2013). Exit polls at the WA state election of 2013 showed that 51% of voters believed the performance of the Federal Labor Government was an important factor in how they voted (Taylor 2013).

The economic and political environment, both of which worked in the government's favour, were soon about to change. The changing economic fortunes of the state, and the projected rises in recurrent expenditure were already on the radar of the WA Treasury ahead of the 2013 election. In a highly unusual move, the WA Under Treasurer Tim Marney publicly called on political parties not to make lavish election promises, given that revenue from state royalties would be less than previously expected, and that the state's share of the GST would continue to decline. His warning was ignored, with Treasury analysis showing that Liberal Party promises would add $1.2 billion to state debt by 2016, and that Labor promises would add $1.7 billion to state debt in the same time frame (Barrett 2013). The Liberal figure was itself predicated on the assumption of $3 billion in Commonwealth contributions that had not yet been pledged. The Nationals, who continued to remain in government after 2013, did not submit their separate promises for analysis. Managing the commitments of both alliance partners would present problems for then Treasurer Troy Buswell in framing the first budget of the government's second term, with several prominent election promises such as the Max light rail to Mirrabooka already being pushed further into the forward estimates.

By September 2013, the broader political environment was also changing. When the Federal election was held that month Labor was swept from power. The result in WA was especially strong for the Liberal Party, who won 12 of the 15 available seats. Their WA primary at 47.31% was the highest they achieved in any state or territory. The defeat and replacement of the Federal Labor Government in September 2013 meant that the unpopularity of Federal Labor in WA, acknowledged as a factor by both sides of politics

at the time of the 2013 state election in March, was not so much an electoral issue. In its place there were instead expectations placed on the new Coalition Government at the Federal level, to deliver a better Goods and Services Tax (GST) outcome, as well as additional infrastructure funding. Given the strong presence of WA members in the Federal Cabinet and Liberal party room, this expectation was if anything heightened.

ACHIEVEMENTS

The Barnett Government enjoyed a number of achievements during its period in office. A range of new hospitals were built in regional and metro areas, including the new Fiona Stanley hospital (begun under Labor), along with the Perth Children's hospital (though this hadn't opened by the time of the 2017 election). Three major infrastructure projects, Elizabeth Quay, Perth City Link, and Perth stadium were either completed or well underway by 2017. WA nurses and doctors received significant wage increases, making them amongst the best paid in the country. A number of major road projects were completed, including the extension of Mitchell Freeway and the Gateway project around Perth airport. A new independent public school model was introduced, which focused on increasing the autonomy of local school management. The Royalties for Regions program poured new funding into regional services and facilities. A new no-fault motor vehicle insurance scheme to cover people catastrophically injured in accidents was introduced.

PROBLEMS AND CONTROVERSIES

As the Barnett Government's second term continued, the deteriorating state of the Government's finances led to the delaying of a range of projects which it had promised to deliver. The MAX light rail proposal, which was designed to link Morley and Mirrabooka with the Central Business district (CBD) and other major hubs including Subiaco, the University of Western Australia and Curtin University, was repeatedly delayed and then removed altogether. The extension of the Joondalup train line to Yanchep was likewise delayed, as was the Albany Gas pipeline. Other promises were broken, including a pledge to keep Tier 3 rail lines open in the Wheat belt, and a pledge to keep electricity price rises at or around the rate of inflation.

The state Treasurer Troy Buswell was involved in a series of car crashes on the evening of Sunday February 23, 2014. The crashes were initially covered up, but their exposure led to Buswell's resignation from Cabinet; he ultimately resigned from Parliament in September that year. His departure represented a further blow to the Government, as Buswell was widely considered as the most likely replacement as Premier should Barnett depart. The Government had already lost a former Treasurer and potential leadership aspirant Christian Porter, who had entered Federal politics at the 2013 Federal election. Buswell was also one of the Government's strongest performers in the Parliament and media and his departure left a gap that proved difficult to fill.

THE LEAD-UP TO THE ELECTION

The last 12 months of the 45th parliament were extremely eventful in WA politics. The three largest political parties all experienced leadership controversies, which put on full public display internal party tensions and fears.

The first party leader to face a challenge was Labor Leader Mark McGowan. In March 2016, a year out from the 2017 election, former Federal Minister Stephen Smith announced that he was prepared to take on the leadership role, if invited to do so by the party. Whilst Smith clearly had some support within the state Labor caucus, McGowan's supporters quickly rallied behind him publicly, and demanded that Smith withdraw his candidature. Motions supporting McGowan's leadership were passed unanimously by both the shadow cabinet and the Labor caucus, effectively killing off Smith's challenge. He withdrew unconditionally. The challenge itself was curious, since Labor had led the two party-preferred polling for a considerable period, and McGowan enjoyed a comfortable lead over Barnett as preferred Premier, stretching all the way back to December 2013 (The Australian 2017). Clearly though, there were some people in the Labor Party who still doubted his ability to win. Ironically, when a poll was held in the immediate aftermath of the challenge, the standing of McGowan and the Labor Party rose, to 56-44 two party-preferred, and McGowan led Barnett 61-39 as preferred premier (Parker 2016).

Emblematic of modern politics, attention then focused on the leadership of Premier Colin Barnett. Unlike McGowan, Barnett could not call on strong polling numbers in his defence. He did though, emphasise the longstanding stability and electoral success he had enjoyed to date. When the leadership challenge in WA state politics did eventuate it came not from a Liberal MP, but instead within the Nationals. The WA Nationals, the junior alliance partner within the Government, had harboured high hopes of securing a senate seat at the 2016 Federal election. Prime Minister Malcolm Turnbull had requested and received a double dissolution, meaning that there were 12 seats available, twice the normal number. The Nationals, however, received just 2.53% of the vote, and were eclipsed by the resurgent One Nation Party, who attracted 4.03%, much of it in regional WA. Whilst the Nationals missed out, WA elected a One Nation Senator for the first time. The Nationals' challenge was brought on by their former state leader Brendan Grylls. Grylls was one of the architects of the "Royalties for Regions" policy, which was credited with saving the party from political extinction in WA following "One Vote One Value" electoral reform; under his leadership the party had increased its seats at both the 2008 and 2013 elections. Grylls felt that the party had not sufficiently differentiated themselves from the Liberals under his successor Terry Redman, and would suffer the same fate as the Liberal Party, which he believed was destined for defeat in the upcoming state election. He publicly advocated for a new measure to help alleviate the Government's deteriorating financial situation – a sharp increase to the royalties which large miners BHP and Rio paid under their state agreements, from 5c per tonne to $5. After two marathon party room meetings, the Nationals emerged to announce that Grylls had been returned as leader. His proposal

was quickly adopted as party policy and was to become the defining feature of the Nationals' campaign. Grylls' return as Leader put further strain on what was already a fractious relationship between them and their alliance partners in the Liberal Party; Grylls personally inflamed the situation by declaring that the Liberals should also change their leader if they wanted to win.

While the travails of the National Party briefly occupied centre stage, the Government continued to trail in the polls, and attention soon returned to the issue of Premier Barnett's leadership. Whilst Barnett had enjoyed a net positive in personal approval ratings through his first term, this changed into negative territory from the second half of 2013 onwards. By late 2016, Barnett's approval ratings were among the worst of any incumbent Australian Premier in Newspoll history (Bonham 2016), reaching a low of -33 in November (The Australian 2017). A poll of 11 Government-held marginal seats commissioned by disgruntled businessmen in late August 2016 showed that 10 of them would fall to the Labor Party. Unsurprisingly the poll's findings were used to call for Barnett to stand down. After months of rumour and speculation, in September 2016 two Ministers, Dean Nalder and Tony Simpson resigned and announced that they had lost faith in Barnett's leadership. Nalder indicated that he would stand for the leadership if his colleagues voted for change. No other Minister publicly backed a challenge, although cabinet ministers Mike Nahan, Joe Francis and Peter Collier later admitted that they should have changed the leader (Adshead 2017b: 6-7; Tillet 2017: 6). A subsequent vote in the Liberal Party room to spill the leadership failed, but it did attract the support of almost one-third of Liberal MPs (15 out of 46). Deputy Liberal Leader Liza Harvey later pointed to this period as central to the loss of support within the electorate (Adshead and Butterly 2017).

By late 2016 there was increasing pressure on the Government to articulate how it would deal with mounting state debt. The 2016-2017 state budget had projected that debts levels would reach $33.8 billion by the end of that financial year, and $40.1 billion by 2020 (Government of Western Australia 2016). The initiative favoured by Treasurer Mike Nahan was to sell 51% of Western Power, the monopoly provider of electricity services in metropolitan Perth. The Government, in announcing that they would go ahead with the proposal, estimated that they would raise $11 billion from the sale (O'Connor 2016). Given that the proposal was immediately condemned by the Labor Party Opposition, the matter was set to become a key election issue in March 2017. Polling consistently showed that privatising Western Power was unpopular with the electorate. On the eve of the election, even 67% of One Nation voters, being courted by the Liberals for their preferences, said opposition to Western Power privatisation was important to their vote, with only 14% saying it was unimportant (Burrell 2017: 2).

The second initiative that garnered attention during late 2016 was a controversial road extension across Perth's southern suburbs. Known alternatively, as Roe 8 or the Perth Freight Link, the Barnett Government signed contracts to proceed with a new section of road extending Roe Highway as far as Stock Rd. The Government argued

that the new road was a critical step to enable freight to reach Fremantle port. Many environmentalists opposed the project on the grounds that the Beeliar wetlands, a unique area of environmental significance, would be heavily impacted by the proposal. The project was also criticised on the grounds that the new road wouldn't actually reach Fremantle port, and that an additional stage (Roe 9), which the Government committed to during the campaign period, would not either. In the final weeks of the campaign the Government ruled out building the final phase (Roe 10) in the short to medium term. For its part Labor argued that it would prioritise the building of a new port in the Kwinana area.

THE CAMPAIGN

The one issue that dominated in the local and national media was the preference deal made between the Liberal Party and One Nation. Under the deal, One Nation "how to vote" cards would direct preferences in the Legislative Assembly towards Liberal candidates. In return, the Liberal Party would formally preference One Nation in all its "above the line" votes in the Legislative Council. This arrangement was more beneficial to One Nation for a number of reasons.

One Nation's best chance of election lay with its Upper House candidates; in the Legislative Council "regions" they needed to receive just 14.3% of the vote to guarantee a seat. Under the preferential system still used in WA, approximately 96% of preferences in the Upper House are transferred according to party wishes, because of the prevalence of "above the line" voting, where preferences are distributed according to preference cards submitted by parties to the Western Australian Electoral Commission (WAEC). This meant that One Nation could be confident of getting Liberal preferences, and getting them in the Upper House seats where it mattered. As it turned out, more than 97% of Liberal voters voted "above the line" in the Legislative Council (Green 2017: 46-75). By contrast the deal was not nearly as generous to the Liberal Party. Firstly, there was no guarantee that One Nation candidates would have "how-to-vote" cards at sufficient polling booths, and in the event they did, voters for One Nation typically make up their own minds when casting their votes. Nor did it help that One Nation campaigned against a range of Government decisions, especially their proposal to sell Western Power. Exacerbating this problem was the unwillingness or inability of One Nation to run candidates in a number of key seats where their preferences might have proved useful to the Liberals, including Balcatta, Bicton, Burns Beach, Joondalup, Kingsley, Morley, Mount Lawley, Perth, and Southern River. All of these seats changed hands at the election.

Perhaps even more tellingly, the preference deal consumed an extraordinary amount of media coverage during the election period, thereby making it extremely difficult for the Liberal Party, which trailed in the polls throughout, to get their message out. A barrage of bad news stories focusing on One Nation candidates and policies emerged on an almost daily basis, and the Premier found himself being forced to respond to them.

As the campaign went on he distanced himself more and more from the deal, finally declaring: "I don't feel comfortable with some of their policies. Some have a racist tone to them" (Butterly 2017a: 6).

One Nation leader Pauline Hanson visited WA during the penultimate week of the campaign and found herself enmeshed in controversy after making anti-vaccination comments and expressing support for Russian President Vladimir Putin. WA Liberal President Norman Moore remarked afterwards that One Nation had been polling well, but once she said some "silly comments about some silly things", this hurt her campaign. He said that the media had unfairly focused on the preference deal, instead of policy issues (Butterly 2017).

The Liberal campaign itself was hardly a smooth affair. The Premier was never able to lift his popularity figures and a range of brutal analyses emerged in the aftermath of the election from Liberal Party figures themselves. Outgoing Corrective Services Minister Joe Francis claimed that "dysfunction" between the Premier's office, Ministers' offices and backbenchers was a problem (Adshead 2017b: 6). A leaked report from the campaign chair of the Liberal Riverton campaign reportedly cited "poor and arrogant leadership by Colin Barnett", "poor and lazy performance by a number of elected members", and "internal party squabbling and rampant power broking", along with "no clear vision" from the party (Adshead 2017).

The Nationals' campaign was dominated by their new policy of increasing the royalties paid by major iron ore companies. This gave their candidates a different talking point to the Liberals and they were able to advance this proposition during discussions around the current budget deficit. Whilst polling on the policy proved inconclusive, a concerted and well-resourced campaign against the policy was waged by the mineral resources sector. The Chamber of Minerals and Energy admitted that it spent around $2 million on the campaign against Brendan Grylls (WaToday 2017). This was to prove decisive in the two new mining seats, which the Nationals had captured at the 2013 election, one of which was held by Grylls himself.

Hindsight tends to situate winning campaigns as effective ones. Optimism at the potential seats that could be won combined with the slog of 8 and a half years in opposition led to a disciplined approach by the Labor Party that contrasted with the problems experienced by their opponents. Labor focused on a number of prominent themes, and emphasised them daily throughout the campaign. These included: plans to create jobs in order to generate economic growth; funding for infrastructure, especially public transport; opposition to the privatisation of Western Power; and attacks on the government's economic management. In the southern suburbs Labor ran heavily against Roe 8. Their promotion of the Labor team and their candidates on social media was also a strong feature of their campaign.

The Greens' campaign focused heavily on their opposition to Roe 8 on environmental grounds. They also discussed reform of campaign donations. Whilst the Greens' positions on many of the most prominent issues did not differ markedly from the Labor Party's, there is evidence that they picked up some of the disaffected votes during the

course of the campaign. A Reachtel poll published at the outset of the campaign had them polling at 6.5%, yet their final primary vote was 8.91%.

ELECTION RESULTS

Whilst most analysts were predicting a Labor victory, few would have contemplated its size. The Labor Party picked up an additional 21 seats, winning 41 seats out of a possible 59.[1] It was the highest percentage of seats the party has ever won in the WA Legislative Assembly and was their highest primary vote since 1989 under Peter Dowding. For the Liberals, the extent of the disaster came as a shock. Whilst Liberal MPs in marginal seats were not expecting to retain them, the defeat of Liberal Ministers Joe Francis, Andrea Mitchell and Albert Jacob, who all held what appeared to be relatively safe seats, was particularly disappointing for the party. Francis and Jacob in particular, were seen as future leadership material. For the Labor Party, it was a vindication of the approach taken by Labor Leader Mark McGowan, who emerged with a strong mandate for change.

As always, the results varied depending on the area. As expected, most of the carnage occurred in the Perth Metropolitan area. In the city alone, Labor picked up 17 seats, which had Coalition majorities based on 2013 figures. The North Metropolitan Region, which in previous elections contained the most swing seats and had a strong bearing on who won government, provided six wins for Labor. The East Metropolitan Region saw the largest number of gains for Labor, with the Government losing 8 seats. The South Metropolitan region had remained strong for Labor in recent elections, and it had retained a stronghold even in 2013. Just three additional seats were won in this region.

Not nearly as many regional seats changed hands. Labor picked up just four seats outside Perth, including the notionally Liberal Collie-Preston where Labor's Mick Murray was already the sitting member. A further seat amongst the four was Murray-Wellington, which is on the outskirts of Perth

Seats in the outer metropolitan areas of Perth have seen the biggest swings in recent electoral cycles, and this election was no different. The seats of Darling Range (18.9%), Butler (18.5%), Swan Hills (18.3%), Wanneroo (18.2%), and West Swan (18%) all experienced large swings away from the Government. But the two largest single swings came in the regional centres of Bunbury (23%) and Geraldton 21.5%). Furthermore, there were still sizable swings in inner city seats such as Mt Lawley (12.9%), Perth (14.6%), Maylands (15.2%), and South Perth (12.9%). Given the comprehensive nature of the Labor landslide there were very few metropolitan areas spared.

In regional WA, there were not so many seats that changed hands. The Nationals fared well in their agricultural heartland, holding all their seats in the agricultural region. In the mining and pastoral region however, they lost both the mining seats that they

1 Labor had 21 seats in the 44th parliament. It entered the election with 20 seats notionally Labor, based on the 2015 electoral redistribution.

picked up in the 2013 election. The Liberals won the seat of Kalgoorlie, and the seat of Pilbara, held by Nationals leader Brendan Grylls, was lost to Labor. Whilst the Nationals had not traditionally polled well in mining areas prior to 2013, their loss this time round was undoubtedly due to their proposal to increase mining royalties paid by Rio Tinto and BHP. The mining sector framed this policy as a tax hike on mining and campaigned ferociously against it. Whilst Labor held their existing regional seats they were unable to make big inroads in the Liberal and National-held seats outside of Bunbury, Geraldton, Pilbara and the semi-rural seat of Murray-Wellington.

In the WA Legislative Council, both Labor and the Australian Greens made significant gains, although not enough to command a majority, even with all their MPs put together. Labor won 14 seats (up 3) and the Greens 4 (up 2), making a total of 18 seats in the 36-seat chamber. Liberal MLCs were the biggest casualties, with the party plummeting from 17 seats to 9. The new MLCs included 3 One Nation MPs, and one Liberal Democrat. The Nationals went from 5 seats to 4. The makeup of the new Legislative Council sparked new debate over the voting system used to elect members, given that 6 members were elected from the mining and pastoral region from only 50,564 votes, whilst each of the three metropolitan regions (again electing 6 members) had more than 340,000 votes cast. This discrepancy continues to grow every electoral cycle, meaning that electoral reform is likely to be a priority for the government in the 45th Parliament.

WESTERN AUSTRALIA'S 45TH PARLIAMENT: WHAT CAN WE EXPECT?

The 45th Parliament of Western Australia saw both a Labor landslide victory in the Legislative Assembly, coupled with a "hung" Legislative Council. In the Legislative Assembly, the better than expected victory saw a number of new Labor MPs elected, including some who the party may not have expected to win, such as Robyn Clarke in Murray-Wellington, Barry Urban in Darling Range, Yaz Mubarakai in Jandakot, and Jessica Stojkovski in Kingsley. Keeping all 56 of their MPs united and satisfied will be a challenge. Far from promoting new MPs, the incoming Premier Mark McGowan was forced to leave out four MPs who had served in the shadow Cabinet during Opposition: Peter Watson, Kate Doust, Margaret Quirk and Chris Tallentire. Whilst Watson and Doust were elected Speaker of the Legislative Assembly and President of the Legislative Council respectively, Tallentire had to settle for a parliamentary secretary role, whilst Quirk missed out altogether. The only new MP to enter Cabinet was Labor veteran Alannah MacTiernan who had previously been Minister under the Gallop and Carpenter Governments from 2001-2008, as well as a Federal MP. As in other states, many Labor MPs are members of union-aligned factions; within months of the new parliament being elected, several left-wing unions were speaking out against the Government's proposed reforms to WA's energy market, and urging Labor MPs to resist them (Emerson 2017a). Such a clash could be the first of many between a Government, which is arguing for the need to introduce more competition into service provision, and

its union supporters who are worried about loss of jobs and compromising the quality of public services.

In the Legislative Council, different problems lie ahead. The Government will need to accept that it cannot always prevail, and that there is a need to negotiate on any contentious legislation. Even during its initial weeks of sitting, the new Government regularly lost procedural votes. Of the other parties represented in the Upper House, only the Greens could be regarded as their natural allies. Even here there could be tension as the Greens are likely to test Labor on both fracking bans and uranium mining, where the two parties differ in their approach. If the Labor party can secure Greens support, they will still need one additional vote to pass most legislation.

As outlined above, one of the more pressing issues for the new Government is likely to be electoral reform, in particular an end to the malapportionment in the Upper House which has seen the over-representation of regional MPs at the expense of metropolitan areas. There is also likely to be discussion around moving to an optional preferential system in the Upper House, similar to that imposed in the Senate in 2016, where voters would have greater control over where their preferences go. Both of these measures are likely to be supported by the Greens, but electoral reform requires two further votes in the Legislative Council (an absolute majority of 19 votes out of 36) to be successful. If these measures are not supported by the Liberal Opposition, The Nationals, One Nation, and Shooters and Fishers parties, with 8 seats between them, are likely to need some convincing, given that all three of these parties derive greater support in regional areas than in Perth. Of the cross-bench parties, only the Liberal Democrats, whose vote is stronger in the city, would see such reform as being in their strategic interests.

A further area of reform in the new Parliament is likely to be around political donations. Prior to the state election, the Labor Party promised “More transparency, integrity and accountability in political donations”, including online disclosure of donations, a reduction in the public disclosure threshold, spending caps for candidates and political parties during election campaigns, and more transparency around third party fundraising bodies (WA Labor Party 2016). The issue of campaign spending by third parties was brought into stark relief by the extraordinary funds expended by the minerals and resources sector against the National Party, especially in mining areas. Because of this, the Nationals would likely team up with the Greens (who campaigned heavily on the issue ahead of the election), to deliver Labor the numbers it needs to pass such reforms.

NATIONAL IMPLICATIONS

The WA 2017 election attracted a high level of interest across Australia. Much of this was focused on the resurgence of the One Nation party under Pauline Hanson. Given that WA had elected a senator from One Nation, and that the party had played a significant role in the 2001 WA election (the last time it campaigned heavily at WA state

level), it was expected to perform well. In January a poll was released from Reachtel that had One Nation on a primary of 10.8% state wide (Adshead 2017c). Such a figure presented potential dilemmas for the other parties contesting the poll. The Nationals were already wary of the One Nation threat; as discussed above, this played a role in their switch of leadership to Brendan Grylls. Their policy of increasing mining royalties was designed to differentiate them from their Liberal partners and lay the groundwork for additional spending in regional areas. For the WA Liberal Party, the One Nation vote was set against a big slide in their primary vote. They feared that these votes would not come back as preferences. As Federal Liberal Senator Mathias Cormann argued on election night:

> If we wanted to minimise losses, maximise our chances of hanging on to seats, we needed to be able to source preferences. Clearly these weren't going to come from Labor or the Greens (Wright and Butterly 2017: 9).

Nationally many Federal Liberal powerbrokers feared that they too were leaking votes to One Nation, especially in Queensland. They were also keen to secure One Nation support for their legislative agenda. Media reports indicated that Matthias Cormann and fellow Federal Liberal Senator Michaelia Cash were involved in sealing the preference deal directly with Pauline Hanson (Butterly and Parker 2017: 6). The deal was seen as a "litmus test" for other deals between the two parties at state and Federal level.

On many measures, the deal was a complete failure for the Liberal Party at least. We will never know how many potential Liberal voters changed to Labor or other minor parties out of distaste for One Nation, but senior Liberal figures pointed to this phenomenon after the election, saying that constituents had raised this intention with them frequently on the campaign trail. One senior Liberal summed it up like this "it's not easy to sell a message of political expediency" (Butterly and Parker 2017: 6).

The upside of the deal was virtually non-existent. Of the 59 seats in the Legislative Assembly, it is impossible to find a single electorate where One Nation preferences enabled a Liberal Party candidate to win the seat. As highlighted above, One Nation did not stand candidates in many of the Liberals seats that were under siege, and where they did stand candidates the preference flows to the Liberals were not sufficient to save them. Based on their early campaign polling numbers, the One Nation vote did slip markedly, but they did poll 8.5% in the seats they contested (Green 2017). Their electoral outcome was still strong as they were able to take advantage of the Upper House voting system and win 3 seats, including one in the Perth metropolitan area. Only in the mining and pastoral region did Liberal preferences assist their election.

At a national level, there are significant lessons to be drawn from WA. If the Liberals were to strike a deal on preference with One Nations, even in the Senate, this would likely become a significant campaign issue again. One notable outcome of the deal was that WA Premier Colin Barnett was asked to comment on every revelation coming out of the One Nation campaign, from strange policy positions to problems in candidate selection. Were this to be repeated nationally, it could potentially derail, in a similar

fashion, the Prime Minister's attempts to outline his achievements in office and his vision for the future. Furthermore, the problem of losing potential Liberal voters disillusioned by the deal would be magnified. This would especially be a problem in the states where support for One Nation is not high, such as South Australia, Victoria and Tasmania.

The one unknown is how a preference deal would play out at a state level in Queensland, which is due to go to the polls in 2018. Queensland is the state with the strongest support for One Nation, and polls suggest that the party will have a major impact on the election result. Recent electoral reform returned to the state to compulsory preferencing, meaning that formal votes for the Party will now need to go somewhere. There are likely to be more seats in Queensland where One Nation preferences will matter. Any deal still carries the risks outlined above though; the LNP leader would likely find themselves aligned to One Nation and forced to respond to the Party's controversies. Such a deal may not play out well in parts of Brisbane, where there are many close seats. An analysis of preference flows in Queensland in 1998 (where there was a preference deal between the Liberals/Nationals and One Nation) identified peculiar outcomes where the Coalition Government benefitted in some areas but lost out in others, making it difficult for either side of politics to form government (Green 2017a). Certainly former Queensland Nationals Senator Ron Buswell, who worked to undermine One Nation support in the late 1990s, was unequivocal in condemning the deal in WA: "That was a terrible terrible deal. Whoever worked it out didn't understand it" (Wright 2017: 5).

While much of the analysis has focused on the ramifications of the deal for the Liberals, there was also dissatisfaction from a One Nation perspective. Pauline Hanson argued that "actually doing the deal with the Libs has done damage to us" (Adshead 2017a: 8), claiming that being associated with the unpopular Liberal Party in WA tainted her party. Whilst Hanson was undoubtedly seeking to deflect attention from her own poor campaign performance, there appeared to be truth in her claim; One Nation's attempt to run as a party of "outsiders" was undermined by exchanging preferences with a Government they were trying to critique. A Reachtel poll in February 2017 confirmed this: 54% of One Nation voters disapproved of the preference deal their party had made with the Liberal Party (Emerson 2017).

There were other lessons from WA which Australia's political parties could draw on, whether in other states or nationally. We saw once again the increased volatility in the electorate, where many voters were prepared to change their vote from the last election. Following on from recent examples in the Northern Territory and Queensland, the party of government suffered massive losses. This confirms recent voting trends away from governing parties in Australia. Of the eight Federal, state and territory elections held in Australia since 2013, no Government has managed a swing towards it. The task of satisfying the electorate is proving extremely difficult in the current environment.

Much has been written about the disaffected nature of the electorate. Two factors, which are traditionally linked to engagement with the political process, are the overall voter turnout and the rate of informal voting. In the case of the former, the turnout in the Legislative Assembly was 86.90%, slightly lower than the 2013 mark of 89.21%. The rate of informal voting in the Legislative Assembly decreased from 6% in 2013 to 4.54% in 2017, and 2.42% to 2.35% over the same period in the Legislative Council (Green 2017: 7, 44). These figures need to be treated with caution however, as they may be linked to other factors. The slightly lower turnout for instance, needs to be read in the context of legislative changes, which enabled the WA Electoral Commission to add more voters to the electoral role. Equally the decrease in the rate of informality could be attributable to pre-election education campaigns carried out by the Commission.

The increased volatility in the Australian electorate needs to be understood in the light of contemporary economic conditions within jurisdictions that vote. One of the most striking differences between WA in 2013 and 2017 was the changed economic circumstances faced by voters. As outlined above, in 2013 unemployment in WA was lower than other states, the price of WA's mineral resources such as iron ore remained high, and housing demand was strong with workers coming to the state to seek greater economic opportunities. If we fast forward to 2017, the opposite was true. The unemployment rate in WA in March 2017 was the equal highest in the nation (Cassells 2017). In four years the price of iron ore had slipped from $139.87 to $87.20 (Index Mundi 2017). Instead of the Housing Industry Forecasting Group anticipating a 20% increase in the number of dwellings being built in the next financial year, they were predicting a decrease of 26% (HIFG 2016). Western Australia's economic outlook in 2017 was much more gloomy than in 2013; whilst it is difficult to predict the impact of this on the electoral outcome, it is reasonable to argue that the WA election offers evidence that voters' perception of their economic situation can impact their vote.

A further discussion point is what the vote means for the Federal Government's fortunes at the next election, due in 2019. Western Australia remains one of the bastions of support for the Turnbull Government. Despite losing two seats at the 2016 election, the Liberals still hold 11 of the 16 seats in Western Australia. In the aftermath of the WA election, *The Australian* newspaper overlaid the state results into the 16 Federal seats and found that 10 of the 11 current Liberal MPs would have lost their seats; only Deputy Prime Minister Julie Bishop would have survived (Riordan 2017). Whilst there are different factors at play at state and federal politics, and such a swing would seem extremely unlikely, the potential loss of Liberal seats in WA looms large. Federal polling in WA following the state election, commissioned by the *West Australian* newspaper, produced a swing of 7.6% away from the Liberal Party, projecting a loss of 5 seats, including those held by Ministers Christian Porter, Ken Wyatt and Michael Keenan (Tillet 2017a). On these figures, the Federal Government could fall on the results in WA alone. Federally, much of the voter anger in WA focuses around the low rate of return the state receives under the GST distribution, with the same poll indicating that 90% of Western Australians were unhappy about this issue in particular.

The electoral fortunes of the Turnbull Government may depend on their ability to find a solution to this problem, whilst at the same time not disadvantaging the current level of funding provided to other states.

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Fifty Shades of Grey(hounds): The extent of the NSW Legislative Council's power to order papers from organisations not in the control of a minister

Kate Mihaljek

Kate Mihaljek is Acting Principal Officer, Legislative Council, Parliament of New South Wales.[1]

INTRODUCTION

This paper examines the consequences of the 2016 return to an order for state papers from Greyhound Racing New South Wales (NSW) on the power of the NSW Legislative Council to order the production of papers from certain organisations.

The power to order the production of state papers is fundamental to the Council's scrutiny role. This paper considers the extent of that power vis-a-vis statutory bodies and other organisations outside direct ministerial control.

The paper commences by providing an overview of the constitutional context of the Council's power to order papers and details previous attempts by the Council to order the production of documents from certain statutory authorities. The paper then provides a detailed examination of the return to order submitted by Greyhound Racing NSW in 2016, which marked a distinct turning point in the compliance of statutory authorities with orders for papers. It also examines the Council's recent attempt to order the production of documents from St Vincent's Hospital Australia. The paper concludes with a hypothetical case study concerning the Sydney Motorway Corporation which tests the breadth of the Council's scrutiny power.

BACKGROUND – RESPONSIBLE GOVERNMENT, POWERS AND PRIVILEGES, EGAN DECISIONS

Responsible government defines the relationship between the legislature and the executive. Executive accountability – the parliament's role in scrutinising the actions of

1 The views expressed in this article belong to the author and are not the views of the Parliament of New South Wales.

the government – is a central tenet of responsible government in New South Wales.[2] Predictably, there is tension between the executive and the parliament concerning the Council's scrutiny function and the boundaries of parliamentary privilege. The judiciary has played a key role in defining the practice of responsible government in the state, thus assisting to define the scope of the Council's powers and privileges.[3]

Parliamentary privilege refers to "… the special rights and powers possessed by individual houses of a parliament and the various protections accorded by law to members of a parliament and other participants in parliamentary proceedings."[4] The most significant powers of the Council are those directly relevant to its scrutiny and legislative review functions, including the power to order the production of documents.[5] The most significant immunity of the House is freedom of speech in debate.[6]

The sources of parliamentary privilege in NSW include the common law principle of "reasonable necessity"; Article 9 of the *Bill of Rights 1689*, which applies by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*; and miscellaneous statutory provisions such as the *Parliamentary Evidence Act 1901*.[7]

In NSW, the Egan cases confirmed that the power to order the production of state papers is "reasonably necessary" for the Council to effectively perform its scrutiny function.[8] The court did not consider whether the Council can order the production of documents not in the control of a minister such as a statutory authority or papers held by a private individual.[9]

Certain findings in the Egan decisions are commonly cited when taking a more expansive view of the Council's scrutiny function. For example, Priestley JA held in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 that:

2 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (The Federation Press, 2008), p 14. Also see Anne Twomey, Executive Accountability to the Australian Senate and the New South Wales Legislative Council, *Australasian Parliamentary Review*, Vol 23(1), Autumn 2008, 257-273, p 257; Lynn Lovelock, The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On, *Australasian Parliamentary Review*, Spring 2009, Vol. 24(2), 199-220, pp 219-220, p 203; Peter Loney, Executive Accountability to Parliament – Reality or Rhetoric?, *Australasian Parliamentary Review*, Spring 2008, Vol 23(2), 157-65, p 158.

3 Lovelock and Evans, op.cit., pp 14-15. See for example, *Clayton v Heffron* (1960) 105 CLR 214 at 251.

4 Enid Campbell, *Parliamentary Privilege*, (The Federation Press 2003), p 1.

5 Lovelock and Evans, op.cit., p 47.

6 Lovelock and Evans, op.cit., p 47.

7 David Blunt, Parliamentary Privilege: New South Wales Still At The Cutting Edge, presented at Legalwise Seminar, 10 June 2016, p 2. Also see Lovelock and Evans, op.cit., p 47, pp 57-58.

8 *Egan v Willis and Cahill* (1996) 40 NSWLR, 650; *Egan v Willis* (1998) 195 CLR 424.

9 Lovelock, op.cit., p 103; and Blunt, op.cit, p 8.

> … it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws.[10]

This position was cited with approval by the majority, Gaudron, Gummow and Hayne JJ, in *Egan v Willis* (1998) 195 CLR 424.[11] Gaudron, Gummow and Hayne JJ also noted that *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 found that:

> … the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.[12]

While the Council's power to order the production of state papers is well-established, the NSW Clerk of the Parliaments has noted that the power of the Council to order papers from organisations not in the control of a minister, such as those held by statutory authorities or by a private organisation, did not arise in the Egan cases.[13]

This "grey area" is of increasing importance as governments, including the NSW Government, shift away from traditional means of public service delivery.

PROCEDURES FOR ORDERING THE PRODUCTION OF PAPERS

The Legislative Council's standing order 52 details the process for ordering the production of documents. Under this standing order, any member of the House may give notice of motion for an order for papers. If the House agrees to the motion, the Department of Premier and Cabinet is advised of the order and coordinates the Government's response – that is, provides the return to order.[14]

PREVIOUS ATTEMPTS BY THE NSW LEGISLATIVE COUNCIL TO ORDER PAPERS FROM STATUTORY BODIES

Prior to 2015 the Council attempted to order the production of papers from statutory bodies on at least three occasions – the Audit Office of New South Wales, SAS Trustee Corporation and Greyhound Racing NSW but usually in the context of orders to other

10 *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Priestley JA at 692; Also see Correspondence, M G Sexton SC and A M Mitchelmore, Crown Solicitor's Office, Question of powers of Legislative Council to compel production of documents from executive, 9 April 2014, p 6. Tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458 – 2459.

11 *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 454.

12 *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 452.

13 Blunt, op.cit., p 8.

14 See NSW Legislative Council, *Orders for papers*, https://www.parliament.nsw.gov.au/lc/Pages/Orders-for-papers.aspx.

agencies.[15] Each of these bodies failed to comply with the orders and the Council chose not to pursue its powers in relation to these matters presumably because the returns to the orders from the other agencies satisfied the information needs of the House and its members.

Audit Office of NSW

The Audit Office of New South Wales is a statutory authority, established under the *Public Finance and Audit Act 1983*, that conducts audits for the Auditor-General.[16] In 2005 the Council ordered the Audit Office, amongst other agencies, to produce documents in its possession or control regarding road tunnel filtration.[17] The return to order from the Department of Premier and Cabinet advised that "No response has been received from the Auditor General" in regards to the order.[18]

SAS Trustee Corporation

In 2011 the Council ordered the production of documents from SAS Trustee Corporation, and other agencies, relating to the eligibility of Mr John Flowers MP, Member for Rockdale, to be elected to the Legislative Assembly.[19] SAS Trustee Corporation is the trustee of certain superannuation schemes.

It had been reported that Mr Flowers was in receipt of a disability breakdown pension and claiming benefits in breach of section 13B of the *Constitution Act 1902*.[20] The Government attempted to remedy the situation by introducing the Superannuation Amendment (Breakdown Pensions) Regulation 2011 to enable SAS Trustee Corporation to cancel a breakdown pension under certain circumstances. The making of the Regulation was raised in Question Time on 4 and 5 May 2011.[21]

In an effort to ascertain further information on Mr Flowers' eligibility for office, on 6 May 2011 the Opposition sought all documents relating to this matter to be tabled in the House. The initial resolution was amended by the Hon Luke Foley MLC to exclude personal medical records.[22]

15 Blunt, op.cit., pp 9-10.

16 Audit Office of New South Wales, *About Us*, http://www.audit.nsw.gov.au/about-us, 2016.

17 *Minutes*, NSW Legislative Council, 24 February 2005, p 1251.

18 Correspondence from Col Gellatly, Director General, Department of Premier and Cabinet to the Clerk of the Parliaments, 10 March 2005, p 2, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 22 March 2005, p 1283.

19 *Minutes*, NSW Legislative Council, 6 May 2011, p 64.

20 ANZACATT, *Parliament Matters*, Issue 26, August 2011, p 31.

21 See for example, *Hansard*, NSW Legislative Council, 4 May 2011, Hon Luke Foley MLC, pp 73-74, p 75; Hon Tony Kelly MLC, pp 78-79; *Hansard*, NSW Legislative Council, 5 May 2011, Hon Luke Foley MLC, pp 178-179, pp 183-184; Hon Peter Primrose MLC, p 181, pp 185-186; Hon Penny Sharpe MLC, p 187.

22 *Hansard*, NSW Legislative Council, 6 May 2011, Hon Luke Foley MLC, p 305.

The return to order was received on 20 May 2011, including correspondence from Mr Chris Durack, Chief Executive Officer of SAS Trustee Corporation, stating that advice from Mr John McDonnell, Assistant Crown Solicitor, concluded "… that some documents were not permitted to be produced to either the Department of Premier and Cabinet or the Legislative Council, for the purposes of the Resolution."[23]

The Crown Solicitor's advice contended that the Council could not require SAS Trustee Corporation to produce documents under standing order 52, nor could it require the Minister administering the *Superannuation Act 1996* to produce documents, as the Minister's power of direction and control did not extend to requiring the production of documents relating to an individual member to the Council, the Minister or the Department of Premier and Cabinet.[24] It was further argued that SAS Trustee Corporation would be in breach of the *Privacy and Personal Information Protection Act 1998* if the documents were produced.[25]

Despite the advice, SAS Trustee Corporation did produce certain public and confidential documents.[26]

Greyhound Racing NSW

In 2013, the Council ordered the production of documents in the possession, custody or control of the Office of Liquor, Gaming and Racing or Greyhound Racing NSW concerning racing agreements.[27]

At the time of the order, Greyhound Racing NSW was the body corporate responsible for providing strategic direction and leadership in the development, integrity and welfare of greyhound racing in New South Wales.[28] Greyhound Racing NSW was a statutory authority that tabled its annual report in Parliament[29] and whose members were appointed by the minister on the recommendation of a selection panel which is also appointed by the minister.[30] Section 5 of the *Greyhound Racing Act 2009* specified that Greyhound Racing NSW was independent of the Government.

The response to the order from the Department of Premier and Cabinet included documents from the Office of Liquor, Gaming and Racing, but did not include documents from Greyhound Racing NSW, stating "… Greyhound Racing NSW (GRNSW)

23 Correspondence, from Chris Durack, Chief Executive Officer, SAS Trustee Corporation, to Ms Rachel McCallum, Executive Director, Legal Branch, Department of Premier and Cabinet, 19 May 2011, p 1, tabled by the Clerk in the Legislative Council, *Minutes*, NSW Legislative Council, 24 May 2011, p 115.

24 John McDonnell, A/Crown Solicitor, Crown Solicitor's Office of New South Wales, *Advice Flowers J F – SO 52 Call for Papers,* p 2, tabled by the Clerk in the Legislative Council, *Minutes*, NSW Legislative Council, 24 May 2011, p 115.

25 ibid.

26 ANZACATT, op.cit., p 31.

27 *Minutes*, NSW Legislative Council, 27 November 2013, pp 2268-2269.

28 The evolution of Greyhound Racing NSW is discussed in detail later in this chapter.

29 Section 16, *Greyhound Racing Act 2009*.

30 Blunt, op.cit., p 11.

does not represent the Crown and is not subject to direction or control on behalf of the Government."[31]

The Council did not pursue the non-compliance of Greyhound Racing New South Wales at this time. As noted above, despite the absence of documents from Greyhound Racing NSW a large number of documents were returned from the Office of Liquor, Gaming and Racing.[32]

GREYHOUND RACING NSW – A NEW PRECEDENT

While the Council chose not to pursue the above statutory authorities for not complying with standing order 52, there has recently been a marked turn in the evolution of returns from statutory authorities.[33]

Following the 2013 order for papers and the completion of the Select Committee on Greyhound Racing in New South Wales inquiry, on 9 September 2015, the Council ordered the production of papers in the possession, custody or control of Greyhound Racing NSW relating to greyhound welfare.[34]

In line with the procedures established in standing order 52, the Council directed the order to the Department of Premier and Cabinet.

The Department of Premier and Cabinet response to the resolution was received on 14 September 2015, and restated that section 5 of the *Greyhound Racing Act 2009* provides that Greyhound Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the government.[35] The Department of Premier and Cabinet also noted that the Council may liaise directly with Greyhound Racing NSW in relation to the order.[36]

In response to this correspondence, on 16 September 2015 Dr John Kaye MLC gave notice of a motion refuting the suggestion that Greyhound Racing NSW, as a statutory body, was outside of the scope of the Council's scrutiny purview, highlighting the findings of the Egan decisions.[37] The motion asserted that the Council could order papers from Greyhound Racing NSW and that failure to comply with the order was an unacceptable interference with the capacity of the House to fulfil its constitutional roles.[38] The motion was not moved and later expired.

31 Correspondence from Phil Minns, Acting Director General, Department of Premier and Cabinet, to the Clerk of the Parliaments, 4 December 2013, p 1, tabled by the Clerk in the Legislative Council, *Minutes*, NSW Legislative Council, 30 January 2014, p 2304.

32 ibid.

33 New South Wales Legislative Council, *House in Review*, Volume 56/32, pp 6-7.

34 *Minutes*, NSW Legislative Council, 9 September 2015, pp 373-374.

35 Correspondence from Paul Miller, General Counsel, Department of Premier and Cabinet to the Clerk of the Parliaments, 14 September 2015, p 1, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 15 September 2015, p 396.

36 ibid.

37 *Notice Paper*, NSW Legislative Council, 16 September 2015, pp 1863-1864.

38 ibid, p 1864.

The Council did not immediately contact Greyhound Racing NSW regarding its response to the order for papers; rather legal advice was sought on the matter from barrister, Mr Bret Walker SC. Mr Walker's advice was received on 18 November 2015.

The Walker advice

Mr Walker's comprehensive advice considered the powers of the Council to call for papers from statutory authorities.

The advice provided a wider interpretation of the Egan decisions noting Gaudron, Gummow and Hayne JJ reference to John Stuart Mill's argument that "it is the task of the legislature to watch and control the government and to throw the light of publicity on its acts."[39] Additionally, Mr Walker highlighted that the majority had cited *Lange v Australian Broadcasting Corporation* concerning the nature of the executive.[40]

Mr Walker said that notwithstanding the lack of a House of Commons equivalency provision regarding the Council's privileges, it is valuable to obtain guidance from Westminster on such matters where the House of Commons has the power to call for documents from a wide range of public bodies: [41]

> Returns may be moved ... relating to any public matter, in which the house or the Crown has jurisdiction. They may be obtained from all public offices, and from corporations, bodies, or officers constituted for public purposes, by Acts of Parliament or otherwise: but not from private associations, such as Lloyds', for example, nor from individuals not exercising public functions.[42]

Mr Walker opined that in accordance with the Council's scrutiny function, the House can order the production of documents from public bodies or persons who are not subject to ministerial direction or control, such as Greyhound Racing NSW:

> In my opinion it follows from the nature of the Council as one of the Houses of Parliament, and from its scrutiny function, that the fashion for committing public administration to entities, groups or persons who are not subject to ministerial direction or control, is not capable of shrinking the scope of papers within the desirable grasp of the Council to compel production.[43]

39 Bret Walker SC, *Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government*, p 6, tabled by the President in the Legislative Council: *Minutes*, NSW Legislative Council, 18 November 2015, p 608.

40 ibid.

41 ibid, p 8.

42 ibid, p 9 quoting Prof Josef Redlich, *The Procedure of the House of Commons – A Study of its History and Present Dorm*.

43 ibid, p 11.

Mr Walker added "It would be perverse to suppose that Parliament has enacted the existence and nature of such authorities in order to remove the public affairs for which they are responsible from Parliament's own scrutiny."[44]

Mr Walker concurred with the suggestion that the Council liaise directly with the relevant body rather than via the Department of Premier and Cabinet.[45]

Mr Walker concluded that the Legislative Council may directly order the production of documents from "independent" bodies or persons with public functions, such as Greyhound Racing NSW, which would be compelled to comply as failure to do so may lead to being in contempt of Parliament. Furthermore, in accordance with the *Parliamentary Evidence Act 1901*, the responsible officer of Greyhound Racing NSW may be compelled to give evidence including the production of documents, to the Council or a committee.[46]

When tabling Mr Walker's advice in the House, the Hon Don Harwin MLC, then President of the Legislative Council, noted that the matter raises important and complex procedural and legal issues, and that any non-compliance with an order of the House is an extremely serious matter.[47]

Events following the Walker advice

On 23 February 2016 Dr John Kaye MLC gave notice of a motion reaffirming the order for papers made on 9 September 2015 and ordering the Clerk to communicate the resolution directly to Greyhound Racing NSW.[48] The motion was not moved.

Mr David Shoebridge MLC then gave notice of a motion reaffirming Dr Kaye's order for papers on 21 June 2016.[49] Again, the motion was not moved.

Not long after, political events transpired to help the Council's cause. In August 2016, the NSW Government announced it would shut down the greyhound industry and introduced the Greyhound Racing Prohibition Bill 2016 to ban greyhound racing in NSW from 1 July 2017.[50] The *Greyhound Racing Prohibition Act 2016* was passed the same month and included provisions to dissolve Greyhound Racing NSW.[51] Section 27 of the Act detailed procedures for the Minister for Racing to receive and publish documents from Greyhound Racing NSW:

> … at any time after the date of assent to this Act and until the dissolution of Greyhound Racing NSW, require Greyhound Racing NSW to produce any specified

44 ibid, p 11.

45 ibid, p 12.

46 ibid, pp 15-16.

47 *Hansard*, NSW Legislative Council, 18 November 2015, Hon Don Harwin MLC, p 13.

48 *Notice Paper*, NSW Legislative Council, 23 February 2016, p 3277-3278.

49 *Notice Paper*, NSW Legislative Council, 21 June 2016, pp 4957-4958.

50 *Hansard*, NSW Legislative Council, Hon Duncan Gay MLC, 10 August 2016, p 8.

51 Section 25, *Greyhound Racing Prohibition Act 2016*.

record or class of records of Greyhound Racing NSW and may make information in the record or records publicly available.[52]

Following the passage of the *Greyhound Racing Prohibition Act 2016*, the Council made a further order on 14 September 2016 for papers to Greyhound Racing NSW or the Minister for Racing relating to greyhound welfare and any other legal or other advice regarding the scope or validity of the order.[53] Paragraphs 1 and 2 of the order asserted the powers of the House – setting out Greyhound Racing NSW previous non-compliance with the Council's orders and key sections of Mr Walker's advice concerning the powers of the Council to call for papers from so-called "independent" entities and its ability to deal directly with such bodies.[54] Paragraphs 3 and 4 of the order detailed section 27 of the *Greyhound Racing Prohibition Act 2016*.[55]

Notwithstanding the provisions of section 27 of the new Act, Greyhound Racing NSW provided a return to order directly to the Council on 12 October 2016 including 48 boxes of non-privileged documents and 118 boxes of privileged documents.[56] In addition, the Department of Premier and Cabinet responded noting that it had been advised that Greyhound Racing NSW, not the Minister for Racing, would be responding to the order.[57]

Consequences of the Greyhound Racing NSW 2016 return to order

The NSW Clerk of the Parliaments stated that the Greyhound Racing NSW return to order has gone "… some way to settling a question over the Council's power to order the production of papers from statutory bodies."[58] While earlier advice from the Crown Solicitor's Office had provided a restricted view of the Council's power in such matters, the Walker advice gave considerable weight and authority to the Council's claim that it was entitled to call for papers from statutory authorities. The advice included a wider interpretation of the Egan decisions concerning the Council's scrutiny power and emphasising a more expansive interpretation of the executive branch to include statutory authorities and public utilities which are obliged to report to the legislature or to a minister. Ultimately, Mr Walker concluded that the Legislative Council, as a House of Parliament, may use its scrutiny power in relation to "independent" entities, groups

52 Section 27, *Greyhound Racing Prohibition Act 2016*.

53 *Minutes*, NSW Legislative Council, 14 September 2016, pp 1123-1124.

54 ibid.

55 ibid, p 1124.

56 Correspondence from John Gibbons, Greyhound Racing Administrator, Greyhound Racing NSW to the Clerk of the Parliaments, 12 October 2016, p 1, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 12 October 2016, p 1137.

57 Correspondence from Karen Smith, Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet to the Clerk of the Parliaments, 12 October 2016, p 1, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 12 October 2016, p 1137.

58 See New South Wales Legislative Council, *House in Review*, Volume 56/32, p 2.

or persons who are fulfilling public administration functions including those not subject to ministerial direction or control.

Successive governments had also taken a conservative approach to the Council's power to order papers from statutory authorities. However, in choosing to respond directly to the Council's further order for papers on greyhound welfare – as opposed to allowing the Minister for Racing to respond – it can be argued that Greyhound Racing NSW and the NSW Government have acknowledged and acquiesced to the Council's power to order papers from statutory authorities. The response sets a significant precedent and may encourage the Council to actively pursue non-compliance from statutory authorities or other quasi-governmental bodies in the future.

It should be noted that the Council has thus far not pursued the Minister's office for not complying with the 15 September 2016 order.

Following mounting public pressure, on 11 October 2016 the Hon Mike Baird MP, then Premier of New South Wales, announced that the NSW Government intended to overturn the greyhound racing ban.[59] On 6 April 2017, the NSW Parliament passed the Greyhound Racing Bill 2017 which repealed the *Greyhound Racing Prohibition Act 2016*.[60] The Act overturned the legislated prohibition on greyhound racing in New South Wales which would otherwise come into effect from 1 July 2017 and established a very different, and much stronger, regulatory regime to protect animal welfare.[61]

ST VINCENT'S HEALTH AUSTRALIA – ANOTHER FRONTIER

The following case study examines the power of the Council to order the production of papers from an organisation in receipt of government funding and, it could be argued, under the indirect control of a minister – St Vincent's Hospital Sydney, a subsidiary of St Vincent's Health Australia.

In early 2016 media outlets reported that Dr John Grygiel had been under-dosing chemotherapy patients at St Vincent's Hospital Darlinghurst.[62] On 25 February 2016, the Council resolved to order papers in the possession, custody or control of the Minister for Health, St Vincent's Health Australia or NSW Health regarding the matter.[63]

St Vincent's Hospital Sydney Ltd, which operates St Vincent's Hospital Darlinghurst, is listed as an affiliated health organisation in Schedule 3 of the *Health Services Act 1997*.

59 *Hansard*, NSW Legislative Assembly, 11 October 2016, Hon Mike Baird MP, p 18.

60 *Votes and Proceedings*, NSW Legislative Assembly, 6 April 2017, p 1166,

61 *Hansard*, NSW Legislative Assembly, 28 March 2017, Hon Paul Toole MP, pp 62-66.

62 See for example, Leigh Sales and Matt Peacock, *Up to seventy cancer patients under-dosed during treatment at Sydney hospital*, 7.30, 18 February 2016, http://www.abc.net.au/7.30/content/2015/s4409507.htm; Matt Peacock, *Up to seventy cancer patients given wrong drug dose for three years at Sydney's St Vincent's Hospital*, ABC News, 19 February 2016, http://www.abc.net.au/news/2016-02-18/st-vincents-patients-underdosed-on-chemo-drugs/7179990

63 *Minutes*, NSW Legislative Council, 25 February 2016, p 678.

The hospital receives recognition and funding from the NSW Government enabling it to operate as part of the public health system.[64] As a condition of subsidy St Vincent's Hospital must comply with all relevant policy directives issued by the NSW Ministry of Health.[65] The Minister for Health and the Secretary of NSW Health have extensive powers under the *Health Services Act 1997* to direct and regulate the activities of affiliated health organisations including that:

- the Minister determines the level of funding to be provided to affiliated health organisations
- the Minister determines the role, functions and activities of any recognised establishment or recognised service of an affiliated health organisation
- the Minister approves the affiliated health organisation's by-laws.[66]

On 1 March 2016, the Department of Premier and Cabinet forwarded correspondence to the Clerk of the Parliaments advising that it would be collating the responses to the order from the Minister for Health and NSW Health.[67] The department noted it would not be collecting responses from St Vincent's Health Australia as the organisation is outside the scope of executive government and not under the direction or control of a Minister:

> …. St Vincent's Health Australia is a group of not-for-profit companies operating under the stewardship of Mary Aikenhead Ministries.
>
> It does not form part of the Executive Government of New South Wales and nor is it otherwise subject to Ministerial direction and control.[68]

The Department of Premier and Cabinet noted that the Council may need to liaise directly with St Vincent's Health Australia in relation to any documents that may hold in relation to the order.[69]

The Department of Premier and Cabinet included correspondence from St Vincent's Health Australia in its return to order. The document noted independent legal advice had confirmed that St Vincent's Health Australia, as an independent, non-government entity was not required to comply with an order for papers from the Council:

> St Vincent's Health Australia Limited is an independent, non-government entity limited by guarantee, established under the *Corporations Act 2001* (Cth). Consistent

64 See Submission 49, NSW Health, pp 2-3, NSW Legislative Council, Select Committee on off-protocol chemotherapy in New South Wales, Inquiry into off-protocol chemotherapy in New South Wales.

65 NSW Health, op.cit., p 15. Also see NSW Legislative Council, Select Committee on off-protocol chemotherapy in New South Wales, Inquiry into off-protocol chemotherapy in New South Wales, Evidence, Ms Karen Crawshaw, Deputy Secretary, Governance, Workforce and Corporate, NSW Ministry of Health, 31 October 2016, pp 27-28.

66 NSW Health, op. cit., p 2 and p 16.

67 Correspondence, Paul Miller, General Counsel, Department of Premier and Cabinet to the Clerk of the Parliaments, 1 March 2017, p 1. Tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 8 March 2016, p 695.

68 ibid.

69 ibid.

> with your advice [to the Clerk of the Parliaments on 1 March 2016], our independent legal advice has confirmed that Standing Order 52 and its Order for Papers does not apply to St Vincent's Health Australia (or any of its subsidiaries including St Vincent's Hospital Sydney Limited).[70]

However, St Vincent's Health Australia noted that St Vincent's Hospital Sydney was participating in an independent review being conducted by the Cancer Institute of NSW and the Clinical Excellence Commission on behalf of NSW Health under section 122 of the *Health Services Act 1997*.[71] Furthermore, as the Cancer Institute of NSW and the Clinical Excellence Commission had "complete and unrestricted access" to St Vincent's Hospital Sydney documents relating to the matter it was expected that the relevant information would be tabled by those bodies subject to standing order 52.[72]

Correspondence included in the return to order from the NSW Ministry of Health to the Department of Premier and Cabinet also indicated that the relevant documents from St Vincent's Hospital pertaining to the issue and submitted to the review under section 122 of the *Health Services Act 1997* were contained in the return:

> Of note an Inquiry under section 122 of the *Health Services Act 1997* is currently in progress in relation to mattes within the scope of the Order [Standing Order 52]. Caution is advised on the use and disclosure of relevant material provided under the Order, to avoid prejudicing the conduct of the inquiry.[73]

Later in 2016 it was reported that Dr Grygiel had also been under-dosing chemotherapy patients in clinics at Bathurst and Orange and Macquarie University Hospital.[74] Following these reports, the Hon Walt Secord MLC, gave notice of a motion for an order for papers in the possession, custody or control of the Minister for Health, NSW Health or Macquarie University Hospital as the hospital operates as part of Macquarie University, which is a statutory body that provides an annual report to the Parliament.[75]

The notice was not moved and later expired.

On 11 August 2016, the Council established the Select Committee on off protocol prescribing of chemotherapy in New South Wales to examine various matters including the ability of St Vincent's Hospital to comply with the Ministry of Health's policies and guidelines.[76] The committee is due to report in May 2017.

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70 Correspondence, Toby Hall, Chief Executive Officer, St Vincent's Health Australia to Paul Miller, General Counsel, Department of Premier and Cabinet, 17 March 2017, p 1. Tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 17 March 2016, p 772.

71 ibid.

72 ibid.

73 Correspondence, Karen Crawshaw, Deputy Secretary, Governance, Workforce and Corporate, NSW Ministry of Health to Karen Smith, Deputy General Counsel, Department of Premier and Cabinet, 16 March 2017, p 1. Tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 17 March 2016, p 772.

74 See for example, Leigh Sales and Matt Peacock, *St Vincent's chemotherapy dosing scandal deepens, 'too soon to say' if patients adversely affected*, 7.30, 22 March 2016, http://www.abc.net.au/7.30/content/2015/s4461874.htm.

75 *Notice Paper*, NSW Legislative Council, 3 May 2016, p 4238.

76 *Minutes*, NSW Legislative Council, 11 August 2016, pp 1050-1054.

Consequences of the non-compliance by St Vincent's Hospital Sydney

St Vincent's Hospital is not within the sphere of the executive government. However, it is more tenuous to suggest that it lies far outside the parameters of ministerial direction and control. The hospital depends on the NSW Government, and other sources, for funding and operates under a strict agreement that can see the minister cease funding if St Vincent's Hospital fails to meet the appropriate policies and guidelines.

It could be argued that ordering the production of documents from St Vincent's Hospital is within the purview of the Council's scrutiny function as the hospital operates as part of the public health care system and is dependent on the government funding.

Furthermore, it would be odd to allow the documents to be provided to a review under section 122 of the *Health Services Act 1997* – particularly, as in this instance, if NSW Health forwards the documents on to the Council as part of an order for papers.

Also, as the Council can establish a select committee to specifically inquire into the same matter that is subject to an order for papers and has the power to summons witnesses to attend and give evidence, it seems incongruous for the House itself to not be able to call on those same organisations to provide documents under standing order 52.

Interestingly, the timeline for events for the St Vincent's Hospital order for papers occurred almost in parallel to the 2015/16 order for papers from Greyhound Racing NSW. The Greyhound Racing NSW precedent may have been more firmly set if the Council had resolved to order the production of documents from Macquarie University Hospital. However, unlike the 2015/16 greyhound welfare order, the St Vincent's order resulted in a large number of documents being returned from NSW Health, presumably satisfying the information needs of members and the House, and precipitating the establishment of the Select Committee on Off-protocol prescribing of chemotherapy.

SYDNEY MOTORWAY CORPORATION – A HYPOTHETICAL LEAP

The previous sections have considered actual instances where the Council has grappled with its power to order papers from bodies not under the direct control of a minister, and in the instance of Greyhound Racing NSW there is a level of resolution on the issue. In light of the increased outsourcing of government activity,[77] it is interesting to consider a hypothetical case study of how the Council may deal with other quasi-governmental bodies.

The Sydney Motorway Corporation is the private company limited by shares and established by the NSW Government under the *Corporations Act 2001* (Cth), responsible for the delivery of the WestConnex motorway, a major infrastructure project expected

77 Walker, op.cit., p 3.

to cost approximately $15 billion.[78] The Sydney Motorway Corporation is governed by a majority independent board that is appointed by its joint shareholders, the NSW Treasurer and the NSW Minister for Roads, Maritime and Freight.[79] Roads and Maritime Services is the client of the Sydney Motorway Corporation, and has a key assurance role on behalf of the NSW Government.[80]

The Sydney Motorway Corporation was chosen for this hypothetical case study because there has been discussion in the NSW Parliament and the media as to whether the NSW Government established the organisation as a private company to shield it from parliamentary and media scrutiny.[81] To promote greater transparency the Opposition introduced the Government Information (Public Access) Amendment (Sydney Motorway Corporation) Bill 2016[82] and the Greens gave notice of a proposed Joint Select Committee on the WestConnex Motorway Project that would have examined the relationship between WestConnex and the Sydney Motorway Corporation.[83]

Interestingly, Mr Dennis Cliche, Chief Executive Officer of the Sydney Motorway Corporation, accepted an invitation to attend the examination of the Roads, Maritime and Freight portfolio at the Inquiry into Budget Estimates 2016-2017 and answered certain questions.[84] However, during the hearing following a question about the reporting practices of the Sydney Motorway Corporation the Hon Duncan Gay MLC, then Minister for Roads, Maritime and Freight, advised the reporting on the Sydney Motorway Corporation is outside the scope of budget estimates as the organisation is not a state-owned corporation.[85] The Minister added that he did not have to answer questions about the Sydney Motorway Corporation.[86] Further, it was noted by Mr Ken Kanofski, Chief Executive of Roads and Maritime Services, that information

78 Sydney Motorway Corporation, *Governance*, http://sydneymotorway.com.au/governance; NSW Parliamentary Research Service, *WestConnex: A timeline of key developments*, Issues Backgrounder, Number 3/September 2015, p 4; Jacob Saulwick, WestConnex governance shake-up as Parramatta Road tunnel nears, *Sydney Morning Herald*, 3 June 2015. There was an order for papers to the Premier, the Minister for Planning, the Minister for Roads and Ports, the Department of Planning and Infrastructure, Roads and Maritime Services, and the Department of Premier and Cabinet regarding the WestConnex business case in 2014, *Minutes*, NSW Legislative Council, 4 March 2014, pp 2323-2324.

79 Sydney Motorway Corporation, *Governance*, http://sydneymotorway.com.au/governance.

80 Sydney Motorway Corporation, *Governance*, http://sydneymotorway.com.au/governance.

81 See for example, *Hansard*, NSW Legislative Assembly, 25 February 2016, Ms Jodi McKay, pp 27-28; *Hansard*, NSW Legislative Assembly, 1 June 2016, Ms Trish Doyle, pp 53; Jacob Saulwick, WestConnex shielded from scrutiny after control handed to private corporation, *Sydney Morning Herald*, 16 October 2015.

82 *Hansard*, NSW Legislative Assembly, Jodi McKay, 25 February 2016, pp 27-32.

83 *Business Paper*, NSW Legislative Assembly, 5 May 2016, Ms Jenny Leong, p 2194.

84 See for example, NSW Legislative Council, General Purpose Standing Committee No. 2, Inquiry into Budget Estimates 2016-2017, Evidence, Mr Dennis Cliche, Chief Executive Officer, Sydney Motorway Corporation, 29 August 2016, p 3, p 4, p 5.

85 NSW Legislative Council, General Purpose Standing Committee No. 2, Inquiry into Budget Estimates 2016-2017, Evidence, the Hon Duncan Gay MLC, Minister for Roads, Traffic and Infrastructure, 29 August 2016, p 14.

86 ibid.

about WestConnex, apart from those details that are commercial-in-confidence, is available through the *Government Information (Public Access) Act 2009* process.[87]

Mr Cliche's appearance at Budget Estimates highlights the complexities concerning the parliamentary oversight of the Sydney Motorway Corporation. Attending, without a summons, and giving evidence at an inquiry examining the expenditure of the NSW Government's annual budget is a tacit acknowledgement of the Council's scrutiny power and the accountability processes established as part of a responsible government.

In a further recent development, Mr Cliche was invited to appear at a public hearing in April 2017 for the Portfolio Committee No. 2 inquiry into road tolling. After initially accepting the committee's invitation, Mr Cliche cancelled his appearance.[88] The Sydney Morning Herald reported Mr Cliche declined to appear on the basis that the Sydney Motorway Corporation is a private company and is not responsible for setting policy on road tolls.[89] It was further contended that Mr Cliche will be "forced to front" the committee.[90] However, as at early May 2017, it is unclear whether Portfolio Committee No. 2 will summons Mr Cliche to appear as a witness.

While it can be argued that as the Sydney Motorway Corporation is outside the scope of the executive government because it was established under the *Corporations Act 2001*, the argument is compromised by the fact that two NSW Government ministers appoint the board and are the sole shareholders in the company. In the future if the House chooses to direct an order for papers to the Sydney Motorway Corporation it is unclear whether the organisation would be required to comply with the resolution. Similarly, it is uncertain if the Council would pursue the order through its own processes or through judicial adjudication.

CONCLUSION

The NSW Legislative Council holds a reputation as an active House of Review that has a well-established scrutiny function. The Egan decisions confirmed that the power to order the production of state papers is reasonably necessary for the Council to effectively perform its scrutiny function but did not consider if the Council could order the production of documents not in the control of a minister.

The power to order documents outside of direct ministerial control may never be black and white as it is unlikely that the Council would pursue judicial review on the matter. However, the Council's pursuit of Greyhound Racing NSW for the production of papers

87 NSW Legislative Council, General Purpose Standing Committee No. 2, Inquiry into Budget Estimates 2016-2017, Evidence, Mr Ken Kanofski, Chief Executive, Roads and Maritime Services, 29 August 2016, p 24.

88 NSW Legislative Council, Portfolio Committee No. 2, Inquiry into road tolling, Evidence, the Hon Greg Donnelly MLC, 11 April 2017, p 1.

89 Matt O'Sullivan, *WestConnex boss to be forced to appear before inquiry into Sydney road tolls*, Sydney Morning Herald, 16 April 2017.

90 ibid.

concerning greyhound welfare through 2015/16 suggests that the Council considers statutory authorities within the scope of its oversight function and has certainly assisted settling the matter to a lighter shade of grey. As previously mentioned, had the notice concerning the order for papers to Macquarie University Hospital been resolved, the precedent may have been more firmly entrenched.

St Vincent Australia's non-compliance with standing order 52 highlights the complexities of parliamentary oversight of non-government organisations in receipt of government funds and, arguably under the indirect control of the Minister.

Similarly, the hypothetical case study concerning the Sydney Motorway Organisation is a darker shade of grey and demonstrates the increasing challenges for parliamentary oversight of executive activity.

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One Nation's support: why "income" is a poor predictor[1]

Frank Mols and Jolanda Jetten[2]

Frank Mols is a Lecturer in Political Science at the University of Queensland, School of Political Science and International Studies

Jolanda Jetten is Professor of Social Psychology at the University of Queensland, School of Psychology

ABSTRACT

One Nation made a remarkable comeback in Australian politics in 2016, securing four senate seats in the 2016 federal elections. This comeback was immediately attributed to growing hardship among ordinary hard-working Australian "battlers" or "losers of globalization", who, so the argument typically goes, are doing it tough financially since the Global Financial Crisis. What such accounts overlook is growing evidence showing personal income is a poor predictor for populist voting. A recent survey revealed that this also applies to One Nation voting. More specifically, what is being overlooked is a growing body of research showing that both, hardship (relative deprivation) and affluence (relative gratification) can increase the appeal of anti-immigration messages. In this paper we review the literature examining the link between affluence and populist voting, and urge researchers examining the appeal of populist parties to account for both, relative deprivation and relative gratification processes.

INTRODUCTION

The assumption that economic crises provide 'fertile soil' for populist anti-immigration parties is remarkably pervasive, and often presented as self-evident. Likewise, when explaining the electoral success of these populist parties, we are typically turning our eyes to those with the lowest incomes, not to those with middle or higher incomes. The underlying logic of this conventional wisdom is that those doing it tough financially (either because of an economic crisis or because they are poor) feel most deprived. This then triggers a sense of frustration, which turns into aggression and hostility towards those that are seen as competitors in a tough economic market. Hence, people are then more prone to support parties that take a strong stance on immigration — or anyone who is not seen to be as "one of us" who is regarded as competing with us over "our" scarce resources (Riek et al, 2006). While there

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2 Correspondence concerning this article should be addressed to Frank Mols, School of Political Science and International Studies, University of Queensland, Brisbane, Qld 4072, Australia. Email: f.mols@uq.edu.au

is considerable support for this rationale, there is another story to be a told. As we have shown in our book *The Wealth Paradox* (Mols & Jetten, 2017), there is robust empirical evidence suggesting that populist parties can also thrive in times of economic prosperity. Moreover, while these parties may have appeal among the lower income voters, they may be just as likely to attract the vote of relatively affluent voters.

For example, we examined long-term election results in France, Sweden, Austria, Switzerland, the Netherlands and Australia (from the 1970s onwards) and found very little evidence for a correlation between a country's economic performance (using per capita GDP and unemployment figures as indicators) and populist electoral success. Neither did we find much evidence for a correlation in these countries between surges in immigration and asylum requests and populist electoral success. In fact, when we looked closely at the success of, among others, populist anti-immigrant parties in the Netherlands, Austria and Australia, we saw that it was often in times when the economy had been booming and when unemployment had been low for a couple of consecutive years that these parties could celebrate their biggest electoral victories. These findings clearly run counter to the conventional wisdom view that populist parties can be expected to thrive when people are doing it tough financially.

The results of these voting patterns in different countries raised some interesting questions. However, because these studies did not allow us to infer any causality (i.e., that a prosperous economy and wealth *causes* people to become attracted to parties with an anti-immigrant agenda), we also examined the effect of economic conditions on the appeal of populist parties experimentally. For example, we conducted an experiment in which Australian participants were ad-randomly assigned one of two groups (Mols & Jetten, 2015). One group of participants were presented with a fabricated newspaper story informing the reader that the economy of Australia was looking good and that the economy was expected to continue to grow (economic growth condition). The other group of participants were presented with a doom and gloom newspaper story, with a headline stating "economic downturn for foreseeable future" (economic decline condition). After this, participants read a speech by a politician advocating for greater restrictions on immigration and, subsequently, they were asked how compelling they found the speech. Analyses of these ratings showed that participants in the condition that predicted economic growth expressed stronger anti-immigrant sentiments than participants who had been reading the newspaper article predicting economic decline. These data provided experimental evidence for the voting patterns that we had observed in various countries: economic prosperity (and in this case not economic downturn) can increase the appeal of anti-immigration messages.

We also conducted experiments in which participants were invited to join a virtual hypothetical society called Bimboola (Jetten, Mols & Postmes, 2015). We informed participants that, like most societies, there are wealthy groups and poorer groups in Bimboola. In the next phase of the experiment, participants were randomly allocated to either a poor group, a moderately wealthy group, or a group with above average wealth. In order to make participants realise what it is like to be poor or wealthy, we asked

them to purchase a house, a car etc. to start their new life in Bimboola. While those assigned to the wealthiest group were presented with lavish mansions and expensive cars to choose from, those in the lowest income group could only choose from a list of rundown houses and cars. We found that this purchase exercise made the wealthiest group feel relatively gratified and the poor group relatively deprived. We then informed participants that a new group would join their hypothetical society, and that this group would need assistance to get started in their new life. Here, we encountered a V-curve pattern, with those in the wealthiest and poorest wealth groups displaying the more negative attitudes towards the newcomers. The findings we encountered were consistent with earlier research into V-Curve patterns (Grofman & Muller, 1973; Guimon & Dambrun, 2002), showing that, at times, the responses of those who are relatively gratified (i.e., wealthy) are not that different from those who are relatively deprived (i.e., poor, see also see Jetten, Mols & Ryan, 2017; Jetten, Mols, Healy & Spears, 2017).

The main lesson to emerge from our (historical and experimental) work is that populist parties attract two kinds of voters: those doing it tough financially (those experiencing Relative Deprivation) *and* those on higher than average incomes (those experiencing Relative Gratification). Interestingly, recognition of the possibility that we should not overlook the wealthy group when it comes to understanding anti-immigrant sentiments was powerfully hit home when analysing the surprise results in the 2016 UK Brexit referendum and the 2016 US presidential elections. Exit polls conducted during the UK Brexit referendum revealed that two-thirds of those turning out to vote were middle-class. Of those who voted "Leave" 59% were middle-class (A, B, or C1) as opposed to 24% of voters in the lowest two social classes (D, E) (Dorling, 2016). Another case in point are exit polls conducted during the 2016 US Presidential elections. The findings of these polls showed that Trump voters earn *more* than average, and that they are *less* likely to be affected by globalization and immigration (Rothwell & Diego-Rosell, 2016). These findings are at odds with the way that the Trump victory was explained in the media. Commentators quickly pointed the finger to low-income earners, or "losers of globalization in rustbelt states" who, so they argued, had suffered most from the fallout of the Global Financial Crisis (GFC). Another example is Geert Wilders' Freedom Party (PVV) in the Netherlands. A survey conducted in the Netherlands in 2010 (Syncovate/Ipsos) revealed that PVV voters were 21% more likely to earn *more* than the average income, not less.

To be sure, we do not dispute that the GFC has affected low-income earners significantly or disproportionately, and this may well have increased perceived relative deprivation, anti-establishment resentment and the appeal of populist politics. What we do suggest however it that it is time to recognize that populist parties tend to *also* have appeal among more affluent sections of the electorate. Once this is recognised, it is clear that we cannot sustain the stereotypical view of the populist voter, which singles out older, white, male, less-well-educated, low income earners as the most likely people to vote for a populist candidate or party. As can be seen from the recent surprise referendum/election results in the UK, USA and Australia, to rely on this stereotype is to seriously underestimate the breadth of the appeal of such parties, this because it

neglects that affluent voters are just as likely (and at times more likely) to vote for a populist candidate or party.

The question that arises from this is whether we can also find evidence for this when considering the support base for Australia's One Nation party. Who is most likely to vote for Pauline Hanson's party: the poor or the wealthy? We turn to this question next because it is clear that Australia's One Nation party, established in 1997 by Pauline Hanson, represents an equally fascinating case study for those interested in the relationship between economic crises and populist voting.

ONE NATION'S REMARKABLE RISE AND RESURGENCE

One Nation secured 8.4% of the vote in the 1998 Australian federal elections, and 22.7% of the vote in the 1998 Queensland state elections. The party subsequently faced frequent internal divisions, lawsuits and allegations of electoral fraud, and this may well explain the gradual decline in support for the party. One Nation secured only 4.3% of the vote in 2001, 1.2% in 2004, and 0.3 in 2007. In Hanson's home state of Queensland, One Nation secured 8.7% of the vote in 2001, 4.9% in 2004, and 0.6 in 2006. Although the party continued to contest elections, its leader Pauline Hanson relinquished her leadership position and disappeared from the public eye.

Going back to the 1998 electoral victory, it is clear that the economy in Australia was doing quite well at that time. Australia had experienced five consecutive years of GDP growth (from US$ 308bn in 1993, to US$ 427bn in 1997), and a steady decline in unemployment, from 10.6% in 1992 to 7.7% in 1998. Although the economy had begun to show some signs of slow-down, it was by no means a cause for concern, and One Nation's 1998 success can therefore hardly be attributed to a recession or a fear of looming economic downturn.

Hanson made a comeback in 2013, when she took part in the 2013 Australian federal elections as a One Nation senate candidate representing New South Wales. Although she failed to secure a senate seat, her popularity was growing, and in November 2014 she accepted an offer from the party executive to return as the One Nation party leader. She subsequently contested the seat of Lockyer in the 2015 Queensland State elections, but was narrowly defeated by Liberal National Party candidate Ian Rickuss. However, six months later Hanson was more successful, when her party took part in the 2016 Australian federal election. Although One Nation secured insufficient votes for a seat in the House of Representatives (1.3% of the vote), the party surprised friend and foe by securing four seats in the Australian Senate.

Also here, there seems to be little evidence that One Nation's revival can be attributed to voters adversely affected by economic downturn. There is widespread consensus among economists that Australia has weathered the GFC storm extremely well, thanks to a well-regulated banking sector and a continuing (although currently slowing) resources boom, fueled by Asian demand for coal and iron ore. Indeed, it is not

uncommon to hear economists describe the Australian economy as "the envy of the world". Although Treasurers will rightfully point to the dangers of complacency, and the need to curb budget deficits, the Australian economy was in a good condition in 2016.

Political commentators subsequently turned their attention to the 2017 State elections in Western Australia. A ReachTEL poll conducted in November 2016 revealed that One Nation could secure 9.9% of the vote, and the question on everyone's mind was now whether *One Nation* would be able to consolidate its revival. However, a second poll, conducted by ReachTEL in February 2017, showed the party's support was starting to erode (dropping from 9.9% to 8.5%). The Labor party would end up winning government with a landslide victory, and One Nation ended up performing even worse than the latest polls had suggested (securing only 4.9% of the vote in the WA legislative assembly, and 8.1% (3 seats) in the WA legislative council). Researchers and other commentators appeared to agree that One Nation's disappointing result was due to internal unrest and a preference deal with the Liberal party that backfired.

Researchers have begun to gather data on the typical One Nation voter, and the results, summarized by David Marr in a recent article in *The Guardian* (27 March 2017), reveal once more that the stereotypical "losers of globalization" narrative can be misleading. To be sure, some findings appear entirely consistent with the stereotypical "losers of globalization" view. For example, the article reports that One Nation attracts more men than women (56% vs. 44%), that a relatively high percentage of One Nation voters self-identify as working class (66%), and that One Nation voters are more likely to indicate to be worse off financially than 12 month ago (68%). Yet, the same research contains further evidence of the Wealth Paradox, showing that One Nation voters are typically "in work and middling prosperously" and "not on welfare". As Marr observes, "One Nation voters are no more likely to be at the bottom of the management heap than anyone else […] but Hanson supporters are oddly gloomy about their prospects." Marr also notes that One Nation voters are gloomier about the state of the economy than other voters, with 73% indicating the economy is "a lot worse" than twelve months ago.

WHY INCOME IS SUCH A POOR PREDICTOR

It should be clear from the above that "income" is a very poor predictor and there is no simple relationship between income and the vote for a populist party. Indeed, both those on lower incomes and those on higher incomes may be attracted to such populist parties. While we understand the sentiments of those at the bottom of the income hierarchy, it is a bit harder to explain why people on average or above-average income become frustrated with their (personal and collective) economic position and feel the need to "lash out" to minorities or immigrants who are not in direct competition for scarce resources. How can we explain this?

The first thing to note is that we should not treat the variable "income" in the same vain as we treat, say, "gender" or "age". When we ask people to indicate their gender

or age, we ask them to provide objective personal characteristic. To treat appraisals of one's income in a similar way, is to overlook that the amount of income a person earns does not tell us much about whether the person in question feels satisfied with this income, or whether the person in questions feels they deserve more income or more wealth. To understand this, it is important to be mindful of the fact that questions about whether one feels deprived or gratified and whether one is happy with ones income always reflect *relative* comparisons. A person on low income may feel deprived when watching a documentary about wealthy families able to afford expensive holidays on cruise ships, but feel gratified when comparing oneself with the neighbor who cannot afford to go on a holiday. Likewise, a bank teller with a permanent position may feel deprived when reading about a new round of bankers' bonuses, but feel gratified when comparing the self to a bank employee whose contract will not be renewed. What is more, people are more likely to compare their own situation to others who are somewhat similar to them, not to those that are very different. This is because such comparisons are more meaningful and informative in everyday life. In our example, the poor person will be more likely to compare him/herself to the neighbor who cannot afford a holiday than to super wealthy hedge fund managers. Likewise, the bank teller will be more likely to compare him/herself to the unfortunate contract worker, rather than the CEO who earns a massive annual bonus. In other words, we are naturally inclined to compare ourselves with people who are not dissimilar from us, and disinclined to compare ourselves with people who we view as "in a different league" altogether. In that sense, people can maintain that they are relatively gratified and they might feel fortunate with what they have.

However, such feelings of relative gratification are challenged when it is harder to make such positive comparisons. For example, when one feels that one is not getting the salary increases that one deserves and when one's income level is stagnant, or when other people seem to climb the ladder faster than they do, regardless of their actual income, people start to feel deprived. Importantly too, such sentiments are most likely to come to the fore among those segments in society that feel relatively entitled: those at the upper end of the income ladder. Dorling (2016) identifies this as one of the main reasons why the relatively affluent voted to leave the EU: it was this segment of society that felt their economic situation had been stagnating after years of austerity measures by the government.

There are other processes at play. As we have observed elsewhere (Jetten, Mols, Hayley, & Spars, 2017) even though the poor are chronically worried about what tomorrow might bring, people on above average incomes may have their own fears and anxieties. For example, in particular in economically uncertain times, they may fear their wealth is a bubble about to burst, and they may worry about losing everything overnight. Such feelings of "status anxiety" and a "fear of falling" further fuel a concern for tomorrow and lead to a strong desire to maintain the status quo. This is associated with fears for change —such as change associated with higher immigration quotas and greater rights for minorities.

It is clear that populist parties understand the fears of the relatively wealthy quite well. As we have shown in our work (Mols & Jetten, 2015), populist leaders paint a particular picture of the economy, and provide a specific narrative about who they hold to account for the country's (economic or other) woes. And because populists rely heavily on nostalgic narratives, their appraisals of the economy are inevitably negative and declinist, this is because the current situation is compared with a more glorious imagined past (Mols & Jetten, 2014).

Rather than to represent "*working* class people", which would only appeal to poor working class voters who experience objective relative deprivation, populist leaders tend to use the more encompassing term "working families", a category with which voters of all income groups can identify. Although mainstream party leaders now also use the term "working families" to broaden the appeal of their message, populist leaders tend to use the term working families in a more powerful conspiracy narrative, in which working families are pitted against "the malicious super-wealthy globalist elite", and in so doing, populist leaders are able to engender a sense of relative deprivation and victimhood among both, voters on low incomes and voters with above-average incomes.

It should be clear from the above, that One Nation's successes and failures have little to do with the actual state of the economy, and the same can be said about populist parties more generally. As we explain in our work, their success can be explained by cultivating a narrative and/or instilling a sense of relative deprivation among voters who by objective standards can be said to experience relative gratification (Mols & Jetten, 2015; 2017).

CONCLUSION AND SUGGESTIONS FOR FUTURE RESEARCH

The year 2016 turned out to be a year of surprise election results in the English speaking world, with Pauline Hanson making a comeback in Australia, British voters choosing to leave the European Union and U.S. voters choosing Donald Trump as their next President. The Dutch national elections, on the other hand, produced less of a surprise result, with the Liberal Party remaining the party with most seats in parliament, and the populist Freedom Party (PVV) performing well (increasing its number of seats from 15 to 20) but not as well as predicted (securing 13% and less than most polls had predicted). Commentators may be inclined to view the Netherlands as the bellwether for global populism, but it might be best to refrain from such grand claims and to wait until France and Germany have held their elections later this year.

As for One Nation's future prospects, the same can be said. The Queensland State elections are expected to take place before the end of this year, and it will be interesting to see whether Hanson can capitalize on her home advantage, and whether the party can maintain its current level of support. In our view it is time for a rethink for those seeking to better understand the appeal of One Nation, or populist parties like One Nation for that matter. As we have shown in our recently published

book *The Wealth Paradox* (Mols & Jetten, 2017), populist parties can thrive in times of economic prosperity and among more affluent voters, and this evidence runs counter to the conventional wisdom view that populist parties thrive in times of crisis, and among white, male, low-income earners. We hope that our book will help to debunk these two myths, and that it paves the way for research that pays due attention to both, relative deprivation and relative gratification as factors that can fuel populist anti-immigration voting.

Future research may also want to focus on the role of societal norms, values, culture and ideology, and on the role of (objective and perceived) inequality. For example, we might expect populist parties to have greater appeal in countries with high levels of inequality and/or a large proportion of people on low-incomes. However, that would be to overlook that the appeal of such parties also depends on societal values, and whether inequality is perceived as fair or unfair. According to this reasoning, one would expect voters to be more sensitive to inequality in meritocratic societies, where everyone is considered able to make it to the top if only they try hard enough, and where people can become preoccupied with keeping up with the Joneses'. Conversely, one would expect voters to be less sensitive to inequality in aristocratic societies, where voters have little choice but to accept that upward mobility is highly unlikely or impossible.

In sum, the "losers of globalization" thesis may be intuitively appealing, especially for those of us who empathize with the most vulnerable in society who stand to lose from ever-growing globalization. However, as researchers we have a duty to do justice to complexity, and the evidence we have gathered clearly tells a different, more complex story. We hope that our work, brought together in *The Wealth Paradox*, will inspire others, and that researchers will take account of relative deprivation *as well as* relative gratification processes when examining the link between economic conditions and populism.

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‘We’re gonna need a bigger boat’: Navigating an ocean of media in the New South Wales Parliamentary Library

Susan Walton and Deborah Bennett

Susan Walton is a Librarian at the New South Wales Parliamentary Library.

Deborah Bennett is Parliamentary Librarian at the New South Wales Parliamentary Library.

‘Media is the first thing any politician with any responsibility thinks about in the morning and the last thing they think about at night. No decision beyond what to have for lunch is made without a thought for what the media and communications angle might be.’

Dobson, 2015

INTRODUCTION

Media monitoring is one of the most highly valued services provided by Parliamentary libraries. We also know that parliamentarians and their staff increasingly access information while on the move.

The media is an integral part of the work of each Member of Parliament and, in this age of the 24-hour news cycle, the way in which it is delivered to the members is becoming increasingly important. The ultimate aim of the library is to provide access to products that successfully deliver what they want, when they want it and to which device they want to receive it. This has been achieved using a self-service web portal provided by iSentia.

The challenge now is how best to capture and alert members to social media, particularly from Twitter and Facebook, which more and more members are using to communicate with their constituents.

As media activity is of such interest to Parliament, the Library’s heavily used media service makes newspapers, radio and television broadcasts easily accessible to members, wherever they are. Librarians select and keep articles for future reference and the newspaper collection spans nearly 100 years.

Beginning in 1910 with hand-written index cards, changing in 1975 to cutting and storing articles directly from the newspapers before finally receiving and archiving all

media digitally in the late 90s, the manner in which the library collects media has come a long way since its inception.

This article will discuss the importance of media to members of parliament and how this has developed through the years in Australia's oldest Parliamentary Library, the New South Wales (NSW) Parliamentary Library.

THE NSW PARLIAMENTARY LIBRARY

The NSW Parliamentary Library was established in 1840 to support the members of the Legislative Council of New South Wales. As was the case with parliamentary libraries of this time it was essentially a '… cultured gentleman's library where members could read their favourite newspapers and find the occasional literary allusion or a quotation for their speeches.' (Biskup, 1994)

In 1965, H. L. McLoskey[1] discussed the future of parliamentary libraries pointing out that libraries were the best means for the propagation of knowledge. (McLoskey, 1965) This view was borne out as the NSW Parliamentary Library continued to grow throughout the 20th century, even as it remained very much in the style of the stereotypical 'traditional' library. By the 1990s however, the explosion of new technology prompted a change in library services. This was accompanied by the realisation that members of parliament (MPs) and their staff were clients with complex and unique needs, particularly in relation to media services. These services have become even more specialised in the 21st century. (Fraser & Martin, 2010)

MEDIA MONITORING FROM 1910 TO 2017

The NSW Parliamentary Library has been collecting and indexing media for archiving purposes since as early as 1910. Initially collecting only newspaper articles, as technology marched onward the library's media collection grew to include television, radio and online content.

In the early days of the library, it was the task of librarians to look through the daily newspapers[2] and take note of any articles they felt would be useful to the work of the MPs. Once identified, the article information (newspaper, date, a brief line of information on the article and page number) was collated and hand-written onto index cards (see Figure 1). These same details could be copied out multiple times, depending on how many subject headings were used to index a specific article e.g. the same article could be indexed using the headings *Parliament NSW*, *Legislative Council* as well as the names of any members mentioned within the article. Hard copies of the

1 NSW Parliamentary Librarian, 1944-1962

2 These were generally the Sydney Morning Herald and the Daily Telegraph, however a number of other newspapers were also perused for content e.g. the Labor Daily and the Liberal Opinion.

newspapers were also kept. They were bound together, usually a month at a time, and stored in the library for future use. Librarians who wanted to retrieve articles searched the index cards for particular subjects. Once they identified an article they wanted, they then went to the bound volumes of newspapers and followed the details on the index cards to find the specific article.[3]

Figure 1: An index card from 1911; A long-suffering library staffer sorting daily newspapers, circa 1996

This practice continued until 1975 when the index cards were put away in favour of the very time-consuming 'cutting and pasting' method of retaining media. Librarians still read through the daily newspapers and identified those articles that may be of use but rather than writing the details on a card, the article was cut-out and pasted onto a sheet of paper and stored in subject folders. Often one article could have multiple subject headings meaning that the article had to be photocopied a number of times and placed in the appropriate subject folders. As there was no such thing as full-text searching then, the articles had to be exhaustively indexed. Depending on its scope, one article could be copied and placed in up to ten or more different subject folders.[4]

It wasn't until 2009 that librarians were finally able to put away their scissors and glue and rely solely on technology in order to store and retrieve newspaper articles. A daily feed of articles in PDF format was received from a media monitoring vendor, a librarian selected which articles would be retained and these would be uploaded and indexed within the library management system (LMS).[5] As technology had advanced to the point where most MPs and their staff all had computers on their desks, the beauty of this process was that as soon as the articles were uploaded to the LMS they were instantly available to the library's clients via the catalogue. Even better was that more than one person could access the collection at the same time. It was at this time that the library

3 The index cards remain in the keeping of the NSWPL and are sometimes still used by the librarians when a request is made for "pre-digital" media articles and information.

4 As with the index cards, the "clippings files" are still kept by the NSWPL and used regularly.

5 This practice still continues as the library retains its own digitised newspaper archive accessible through the catalogue.

also began making available snippets of news from television and radio as well as emailing to members a daily alert service of online news, known as eClips. However, this *still* didn't quite encompass the needs of members.

The work of a member of parliament has become increasingly complex and unique. As elected officials they are expected to encompass many roles including law-making and investigating and then communicate their thoughts and arguments to their fellow MPs and the public. Taking these multiple roles into account it is unsurprising that today's MPs are extremely time poor and, consequently, have certain expectations of what is needed to help them successfully complete their duties. Generally, the success of the internet and the evolution of information services have been such that time-poor users became 'far less inclined to spend their scarce time on activities that could be carried out over the internet.' This has resulted in the move to the 'one-stop shop' approach, where users can satisfy most of their information needs from one, preferably online, service point. (Galluzzi, 2010) This attitude was certainly reflected by NSW's members of parliament.

In 2014 a strategic review of the library's services was conducted which included over 50 interviews with members of parliament, their staff, Clerks and other senior departmental staff. As was expected, the interview responses proved that members highly valued the library's media monitoring service. However a more interesting result emerged that showed a concern regarding the 'siloed' nature of each media type. Due to technology restrictions and staffing, the various media types could only be obtained from different library service points and members needed to make multiple requests and interact with a number of different specialist library staff in order to receive content across all the various forms of media. Unsurprisingly, in the interview discussions with members the idea of the 'one-stop shop' approach towards accessing all types of media was especially well received. The solution to this issue came in the form of Mediaportal, a commercial product that offered an integrated platform which combined print, online, television and radio news. The library worked with the vendor to create a customised version of the portal to include particular publications and programs (both metropolitan and regional NSW), as well as retrieve any media item that contained the name of all current members of parliament. Each member was given their own login in order for them to further customise their portals and set-up personal feeds to retrieve media items via email specific to their electorates and interests.

Giving members their own versions of Mediaportal meant that they could now access all forms of media (with the exception of social media) from any device, on any day and at any time. Of course, this doesn't mean that the library has completely abandoned its role in this area. As Mediaportal was rolled out over a number of months, library staff provided intensive training to MPs and their staff who wished to get the most out of their portal. For those MPs who aren't so keen on using it or remain too time-poor, the specialist library staff is still available to fulfil their media monitoring requests – as they have been since 1910.

MEDIA RELEASES

Beginning in 1976, the library has been collecting media releases distributed by MPs. Initially collected in hard copy and bound into volumes, the technological march onwards allowed the library to begin storing media releases digitally within the LMS from 2000. Whilst this was a success in terms of greater accessibility, unfortunately the advances in technology didn't necessarily make the working lives of library staff any easier. The daily collecting and uploading of the individual documents remained an inconsistent and laborious process. Library staff had to rely upon being supplied with the media releases by MPs' staff via email or 'borrow' them from the nearby press gallery pigeonholes. These were then copied, uploaded to the library catalogue and the hard copies continued to be collated and bound into volumes.

Once the internet became a common workplace tool, library staff could search online for media releases, download them direct from members' websites and add them as PDFs to the catalogue, negating the need for keeping hard copies. However, the fact that the media releases were widely dispersed across a number of websites meant that the process of trawling for and collecting the data was still extremely time consuming. Staffing and time constraints often meant that some releases failed to be picked up. This meant that neither library staff nor our parliamentary clients could entirely depend upon the media releases database as a definitive tool. The solution to this problem was automated web crawling technology.

In 2012/13 the library collaborated with a vendor to use open source components to create an interface that utilised a web crawling program to 'scout' for and pick-up media releases and add them to our LMS. The primary goal was to set up an efficient and effective way of retrieving and adding selected media releases to the Library's digital repository. The resulting product 'harvests' media releases from websites, emails and alerts, placing the digital document into the library's interface and extracts the metadata. The interface allows library staff to review each media release and adjust the metadata before sending it into the digital repository and catalogue. The success of this product was not only a huge saving in staff time (from one library staff member spending most of the day sourcing and uploading media releases, the process now takes the staff member one to two hours at most) but also in the fact that the media releases database became a more trustworthy tool. The ability to retrieve a significantly greater number of media releases, especially those from backbenchers and cross-benchers which had previously been difficult to source, means both library staff and MPs can be confident they will gain a definitive picture of today's issues when searching in the future.

CHALLENGES

As easily accessible as technology has made media these days it does also bring with it a number of challenges. The main challenges currently faced by the NSW Parliamentary Library are:

1. How to collect and archive the deluge of social media.
2. Finding a balance between maintaining both a physical collection and a digital one.

SOCIAL MEDIA

In 2012, Malcolm Turnbull (then the Shadow Minister for Communication) lamented the decline of traditional journalism and the rise of social media in its place, the impact of which was that '… the 24-hour news cycle has become instead an opinion cycle.' (Turnbull, 2012)

Members of parliament, and the public who have elected them, now have a greater expectation of mutual engagement on all matters of policy and legislation. (Missingham, 2011) Political debate no longer occurs within parliament alone. These days this exchange is readily provided via social media, particularly Twitter and Facebook. In real time, parliamentarians can impart to their constituents (or 'friends' and 'followers') information about legislative goals and achievements. (Lawless, 2012)

Accessing the internet to connect with voters during election campaigns is not a new thing. It began in 1992 with the Clinton administration and in the 1996 USA election where both sides of politics took advantage of this technology to distribute information to the electors.

As more of the population connected online (then known as Web 2.0) social media became more important. Blogs were set up, Meetup was used and data mining began. The USA presidential campaign of 2008 saw a significant turning point for political election strategies and social media. A well-documented example, which became known as the 'Facebook election' (Johnson & Perlmutter, 2010) was Barack Obama's team delivering segmented social media strategies for targeted social groups using MySpace, Twitter, LinkedIn and Facebook. 'The campaign demonstrated a nuanced understanding of almost every social networking platform'. (Harfoush, 2009)

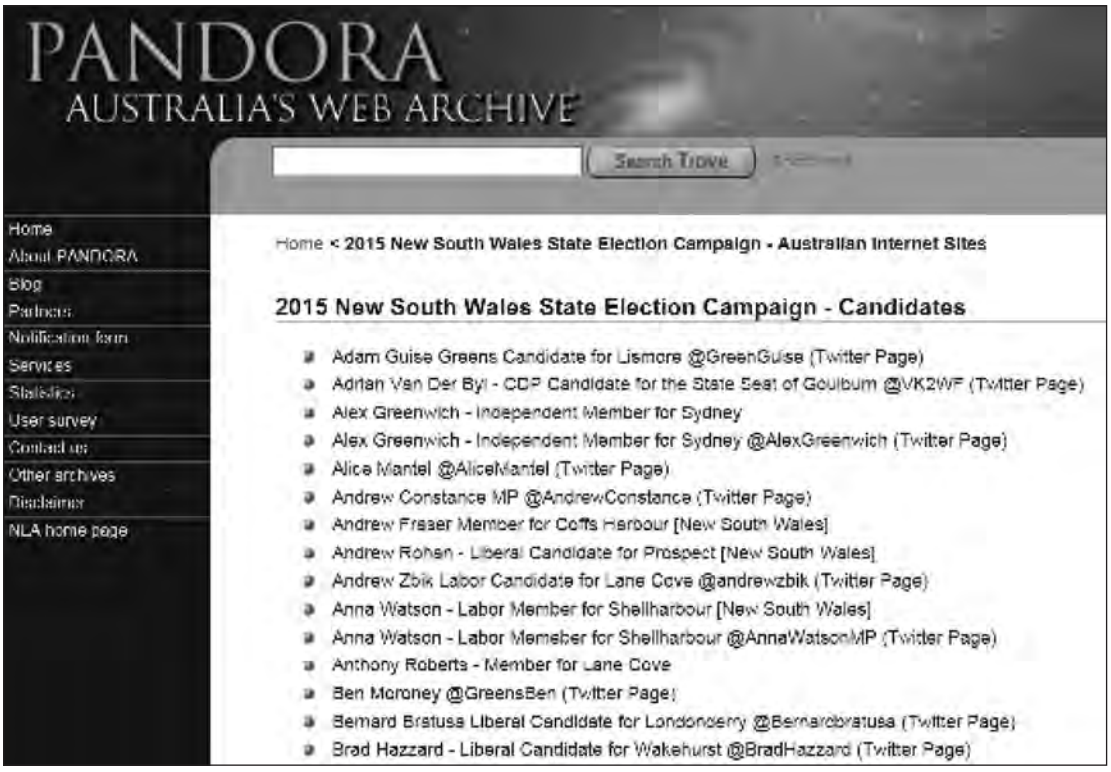
In countries with a two party system, social media gives minor parties and independents a chance to distribute their message, without the cost of advertising. (Chen, 2013)

> Social media allows politicians to set their own agendas, bypassing the media, and getting their message directly to voters. By sidestepping the media and possible media framing, politicians have complete control of their message, which is often further disseminated through the media, as the outlets sometimes report what politicians post on their page (Balsey 2016)

Monitoring of social media shows that using social media accounts, as part of a political and communication strategy, can add to the election campaign. This trend has been seen to continue after the campaign and politicians are keen to generate visibility, share opinions, proposals and projects to their electorate via this medium. Monitoring social media enables MPs to be more responsive to the electorate and has now become an essential part of most MPs' media and communication strategy. There is now a direct line of communication between constituents and the MP, meaning the public has been given a more convenient way to respond or raise issues.

As discussed earlier in this paper, the Parliamentary Library has a collection of newspaper articles and media releases going back to 1976. What happens now that some MPs are bypassing traditional communication strategies, such as media releases, and announcing decisions and policy on social media? Currently these are not collected or archived. The National Library of Australia has archived all social media from election campaigns via Pandora (See Figure 2) as have the State Library of NSW with #electcollectnsw. The CSIRO using their product Vizie have worked with the State Library of NSW to collect and archive social media posts concerning the 2015 NSW election. (CSIRO, 2015)

Figure 2: Pandora's archive of 2015 NSW election candidates



It has fallen on the library to try and navigate a method through the madness that is social media, not only to make it available now but also to ensure its accessibility in

the future. As a result we are currently investigating ways to capture and archive social media for all our MPs, not only during election campaigns but during their term of office to add to the impressive archive of media held by the library.

Former Premier Mike Baird's use of social media showed the importance of collecting and archiving this material. He increased his awareness to millennials and others by tweeting about The Bachelor and Taylor Swift to his over 65,000 Twitter followers and 116,000 Facebook 'friends'. (Tweet nothings from a likeable daggy dad, 2017) He also used social media to announce policy, the most well-known being the greyhound racing ban in NSW. At a glance you can see there were over 35,000 reactions, over 9,000 shares and over 11,000 comments on this one post. (See Figure 3)

Figure 3: Mike Baird's Facebook post from July 7 2016

It is not by choice that we can only reproduce here the Facebook post and not the Twitter post. When Baird retired earlier this year, his Twitter account was deactivated very soon after the announcement, meaning all his posts are no longer available in the public domain. (Bramston, 2017)

As a state Parliamentary library, is it our responsibility to archive social media posts of our Members? Ministers' social media posts are officially State Records, and need to be archived according to section 3 of the State Records Act 1998. Whilst NSW State Archives and Records do retain some social media from Ministers, it is not easily accessible. In NSW there are 135 MPs. Some are very active on social media, others not as much but most have a presence of some sort. Unlike Ministers, MPs' posts are not considered State Records and there is no legal requirement for them to be archived. However, here in the NSW Parliamentary Library we do believe we hold this responsibility.

If we look at what is happening in the USA, we can see that it's likely MPs will become more active rather than less active. Former President Obama's social media has been archived by the White House and consists of a fully searchable database of over 250,000 posts, photos and videos of the Obama White House years, and is made available in the interest of historical preservation and transparency.

Recently, the library has been investigating products to help archive social media posts of our MPs in the same we way have been collecting and archiving media releases. The collection of media releases and newspaper articles held by the library are regularly used when conducting research for MPs. If more MPs were to bypass the more traditional avenues for social media, future research will be more difficult or even impossible. Currently it's only possible to search Twitter and Facebook accounts if the account is active.

Other issues also arise; do we just collect the original post? What about the comments attached to the posts? As you can see by the example of Mike Baird's social media, they can be considerable. Would the comments be useful going forward? Are they important historically? The Obama social media archive only retains the posts not the comments, and when collecting for historical purposes this may be enough.

When monitoring current social media, the number of comments, the number of shares, the coverage and the emotion demonstrated is also likely to be very important to MPs. Analysis and trends can be very telling, giving guidance and understanding of public opinion as well as 'buzz' or sentiment to identify influencers and engage with targeted groups. Ideally the library would like to offer an archive and relevant analytics of all MPs social media presence. As more MPs embrace social media platforms to communicate with the public and their constituents, analytics will also evolve and data analysis will become more important.

With all this in the forefront of our minds, the library is currently preparing a survey and focus groups to discuss with MPs exactly what they would like from a social media monitoring service.

BALANCING THE PHYSICAL COLLECTION VS THE DIGITAL COLLECTION

Despite the advantages of the 24/7 accessibility of media to both library staff and MPs, attempting to preserve for future use the huge amount of media that is produced daily is a challenge the library has been facing for some time. Whilst the demand nowadays is for most information to be available online instantly, there is still a need for the library to maintain a physical collection. As much as everyone would like all the answers to be found on the internet there are still times when only a hard copy will do, particularly when it comes to older items that haven't yet been digitised. Going forward, the question is what do we keep and how do we keep it?

A major part of maintaining a library collection is the constant need to review, evaluate and select (or de-select) the individual items within the collection. Considering the massive amount of print, online and broadcast media that comes through the library each day, this task alone would require an enormous effort of manpower and facilities. However, if we were to commit to such a task the next issue would consequently be, in which format do we preserve the material? Technology has advanced so quickly in the last decade or so that the NSW Parliamentary Library already has obsolete formats, such as audio cassettes, within its collection. Not only is there the issue of whether or not to retain these items but also how would they be converted for future use, how much would it cost and would there still be the technology readily available to do so?

One solution has been to 'outsource' the collection, as has been done in the case of Mediaportal. But just as physical space is an issue for library collections, so too is online material. Currently, the Mediaportal archive keeps print items for twelve months and broadcast items for 45 days only. Due to the size of media files (particularly television clips) there just isn't enough digital space to keep indefinite archives of material. Again, there has to be an evaluation and selection made regarding what is retained and for how long. Obviously it isn't just librarians who are still to find the perfect balance between technology and traditionalism.

CONCLUSION

From physically scanning newspapers and writing out index cards, from 'cutting and pasting' to a digital collection, the NSW Parliamentary Library has continually looked for new and efficient ways to collect and distribute media in all forms.

With the use of technology and associated products MPs now have their 'one stop shop' of media. The library is committed to working with our clients to supply their media needs, now and in the future. Social media is a current challenge, as is the amount of news resulting from the 24 hour news cycle, and these won't be the last challenges that need to be faced. As technology evolves and parliaments change, so will the parliamentary libraries.

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Offshore, Out Of Reach? Parliamentary Oversight Of Australia's Regional Processing Arrangements

CJ Sautelle

CJ Sautelle is a Principal Research Officer at the Department of the Senate

INTRODUCTION

For much of the last fifteen years, the question of how to manage the flow of asylum seekers seeking to come to Australia by boat has been one of the most controversial in the Australian political landscape. The policies of successive Australian governments in this area have generated extensive and heated debate, raising deep questions in the community relating to human rights, national security and Australia's place in our region.

Processing asylum seekers who arrive by boat offshore, in facilities located in Papua New Guinea and Nauru, has been one of the most contentious aspects of this policy area. Offshore processing was initially implemented by the Howard Liberal-National Party Coalition Government and was operational from 2001 to 2008.[1] It was subsequently reintroduced as a policy measure by the Gillard Labor Government in 2012 and continued by the current Coalition Government. Since its reestablishment in 2012, the offshore processing regime has been the subject of sustained criticism from human rights groups. Both processing centres have experienced violent disturbances and rioting, and concerns have been raised about perceived secrecy and lack of transparency in relation to the funding and operations of the centres.

In recent years, the Australian Parliament has conducted various inquiries through its committees to seek information and exercise oversight of this policy domain. These committees have experienced some unusual challenges in their endeavours, due to the contentious nature of the subject matter as well as jurisdictional and procedural limitations associated with investigating activities taking place outside of Australia. This paper analyses the experiences of several of these committees. It starts by broadly sketching the function and powers of committees, including limitations associated with extraterritorial inquiries. It then examines some specific committee inquiries conducted into Australia's immigration detention policies, and discusses some common themes emerging from these examples.

1 The introduction of offshore processing built upon Australia's pre-existing policy of mandatory immigration detention for asylum seekers arriving in Australia by boat, introduced by the Keating Labor Government in 1991. For an overview of the development of immigration detention policy in Australia to 2013, see: Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia', *Parliamentary Library*, 20 March 2013.

ROLE OF COMMITTEES IN OVERSEEING GOVERNMENT POLICY AND EXPENDITURE

A keystone principle of Australia's system of government, and the broader Westminster tradition from which it derives, is that the expenditure proposed by the Executive government must be subject to parliamentary approval.[2] The Commonwealth parliament is responsible for scrutinising government expenditure and holding the government to account for the money it spends on behalf of the taxpayer.[3] In addition to this responsibility, the parliament plays a broader role in overseeing and investigating the functioning of government administration and the implementation of government policy. *Odgers* describes the role of the Senate in this regard as being to 'probe and check the administration of the laws, to keep itself and the public informed, and to insist on ministerial accountability for the government's administration'.[4]

The parliament exercises these accountability functions through a range of mechanisms. Primary among these is the use of committees to conduct detailed inquiries into the specifics of government expenditure, and the development and implementation of particular policies. Senate committees, in particular, have a history of conducting inquiries into contentious policy issues and controversial events, due largely to the Senate's composition as a chamber that is rarely government-controlled.

Powers of committees

The parliamentary power of inquiry is regarded as an essential characteristic of a legislature, necessary in order to fulfil its legislative function.[5] In practice this inquiry power is delegated to committees, which are often vested with significant authority by their parent chambers in order to conduct their inquiries. For example, Senate Standing Committees are granted powers to send for persons and documents, move from place to place, and meet or transact business in public or private session.[6] Committees fulfil their remits by: receiving and analysing written submissions and correspondence from organisations and individuals; conducting public and in camera hearings to take oral evidence; undertaking site visits and inspections at relevant locations; and, less commonly, holding briefings or other informal meetings with stakeholders.

Committee proceedings are protected by parliamentary privilege, meaning that evidence can be given freely by witnesses, without the fear of being prosecuted or otherwise

2 Philip A Joseph, *Constitutional & Administrative Law in New Zealand*, 3rd Edition, pp. 299-301 (with equal application to Australia).

3 See: *House of Representatives Practice*, 6th Edition (B.C. Wright Ed.), 2012, p. 39; *Odgers Australian Senate Practice*, 13th Edition (Evans and Laing Eds.), 2012, p. 25.

4 *Odgers Australian Senate Practice*, 13th Edition (Evans and Laing Eds.), 2012, pp. 25-26.

5 Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?', *Australasian Parliamentary Review*, Spring 2002, Vol. 17(2), p. 132. In the Commonwealth context, this inquiry power is explicitly conferred on the two Houses, inherited from the British House of Commons via section 49 of the Constitution; in some jurisdictions without expressly enumerated inquiry powers, an inherent power has been found. See: *Odgers* (13th Ed.), p. 75.

6 Senate Standing Order25(14).

disadvantaged as a result of participating in committee processes. Senate committees also offer procedural protections for those giving evidence, for example by ensuring that individuals who have been adversely referred to in evidence are given an opportunity to respond to any negative comments.[7]

The power to send for persons and documents enables committees to compel written information and oral evidence from reluctant parties; this power is undergirded by the enforcement power of the House to punish contempts committed against it.[8] These powers make parliamentary committee inquiries a powerful vehicle through which legislation and public policy can be examined, and malfeasance in the public and private sectors exposed.

COMMITTEE INQUIRIES WITH AN INTERNATIONAL DIMENSION

The parliamentary power of inquiry exercised by the Senate through its committees is extensive, with very few potential limitations on its application in Australia.[9] Matters become more complicated, however, when the parliament chooses to inquire into matters involving activities occurring outside Australia. This is because the powers and immunities that comprise parliamentary privilege have no extraterritorial application. The nonapplication of parliamentary privilege outside of Australia has several implications that significantly constrain committees attempting to gather evidence.

Inability of committees to meet or take evidence overseas[10]

A lack of jurisdiction means that a committee's formal powers cannot be exercised outside of Australia. Consequently, an Australian parliamentary committee could not hold formal meetings (such as public hearings) or transact formal committee business while overseas, significantly curtailing the capacity of committees to function in any meaningful capacity for the purposes of an inquiry if they have travelled overseas.

Even if committees wish only to travel overseas to conduct informal meetings or site visits, rather than formal meetings or hearings, significant additional barriers must be overcome. If a Senate committee wishes to conduct overseas travel for the purposes of a current inquiry, it must gain the approval of the President of the Senate for this additional travel.[11] In practice, support may also be required from the executive

7 Australian Senate, *Parliamentary Privilege Resolution No. 1: Procedures to be observed by Senate Committees for the protection of witnesses*, agreed to by the Senate on 25 February 1988.

8 *Odgers* (13th Ed.), p. 80.

9 See: Evans, 'The Parliamentary Power of Inquiry: any limitations?', *Australasian Parliamentary Review*, pp. 131-139.

10 The following two sections draw on written advice provided to the Senate to the Senate Legal and Constitutional Affairs References Committee: Dr Rosemary Laing, Clerk of the Senate, *Advice sought by the Legal and Constitutional Affairs References Committee in relation to evidence from witnesses overseas*, 21 March 2014.

11 The President holds responsibility under the *Public Governance, Performance and Accountability Act 2013* for approving any additional expenditure incurred by the Senate and its committees.

government, through the Department of Foreign Affairs and Trade, as well as from the government of the host country, in order to facilitate a visit.

For these reasons, Australian parliamentary committees do not have a history of travelling overseas in relation to specific inquiry work.[12] Senators and MPs may still, of course, travel overseas of their own accord (as any other private citizen) and inform themselves of issues relating to their work, but no official support from the parliament is offered in such circumstances.

Problems with evidence taken from individuals located outside Australia

Committees in Australia wishing to take evidence from individuals located overseas can do so by inviting witnesses to give evidence via teleconference or videoconference.[13] While any evidence given in this way is fully protected by parliamentary privilege *in Australia*, Australian law (including the law of parliamentary privilege) cannot protect individuals located outside of Australia who give such evidence. There is nothing to prevent, for example, evidence given by an individual in another country from being subsequently used in legal proceedings in that country.[14]

The Senate cannot enforce protections for witnesses giving evidence outside of Australia, meaning there would be nothing the committee could do if witnesses were subject to any penalty or adverse action as a result of the evidence they gave to the Australian committee. Additionally, if a witness giving evidence from overseas breached the rules of the Senate (for example, by giving false or misleading evidence) the committee and the Senate could not take any action against them unless they subsequently came to Australia. These same issues also arise in relation to individuals who provide written submissions or correspondence to committees from outside Australia.

COMMITTEE CASE STUDIES

In relation to the area of interest to this paper, immigration detention policy, the architecture of committee oversight in the Parliament of Australia comprises a number of elements, including the following:

12 Committees do undertake some overseas travel, however this occurs as part of a committee delegation program rather than as part of individual committee inquiries. Regular committee delegations are undertaken to, for example, New Zealand, China, and the Asia-Pacific. Committees wishing to conduct these delegations lodge proposals with the Presiding Officers, who then select the successful committee for each delegation.

13 Senate committees have taken evidence in this way, see for example: Senate Economics References Committee, Inquiry into Finance for the not for profit sector, *Committee Hansard*, 1 August 2011, pp. 64-69.

14 This is technically true of all evidence given to Australian parliamentary committees, insofar as witnesses who give evidence in Australia and subsequently travel outside of Australia are not protected in respect of their evidence while overseas.

- The Senate Legal and Constitutional Affairs Legislation Committee inquires into the annual estimates of expenditure for the Immigration and Border Protection portfolio, generally conducts three rounds of estimates hearings each year.
- The Senate Legal and Constitutional Affairs References Committee conducts inquiries into matters referred to it by the Senate relating to the Immigration and Border Protection portfolio.[15]
- Select committees are established from time to time by either House (or jointly by both Houses) in order to inquire into specific matters.

Several committee case studies are considered here to illustrate how the procedural and jurisdictional issues identified earlier can play out in practice.

JOINT SELECT COMMITTEE ON AUSTRALIA'S IMMIGRATION DETENTION NETWORK (2011-2012)

The first example under consideration shows what committees can ordinarily accomplish when operating in an Australian context, even when dealing with events in Australia's external territories.

The Joint Select Committee on Australia's Immigration Detention Network was established in June 2011 to examine the operations of a network of facilities in Australia involved in the detention and processing arrangements for asylum seekers and other visa holders.[16] At that time the Immigration Detention Network consisted of eight Immigration Detention Centres on the Australian mainland, an Immigration Detention Centre on Christmas Island, an external territory of Australia located in the Indian Ocean, as well as several other forms of smaller-scale immigration accommodation within the Australian community.[17] The committee's inquiry occurred shortly after a series of riots and disturbances in early 2011 at the Christmas Island detention centre and the Villawood detention centre in NSW. The inquiry was undertaken in the context of a significant increase in the number of asylum seekers arriving by boat between 2008 and 2011, which resulted in the upscaling of Australia's immigration detention network.[18]

Over the course of its inquiry the Joint Select Committee was able to gather extensive relevant evidence, culminating in a final report containing 31 recommendations. This committee's processes included holding public hearings in various locations and conducting site inspections at immigration detention facilities in five Australian

15 These references inquiries may be into a broad policy topic within the committee's remit, or into a specific incident or aspect of government administration.

16 Joint Select Committee on Australia's Immigration Detention Network (JSCIDN), *Final Report*, March 2012. Full terms of reference at pp. 1-2.

17 JSCIDN, *Final Report*, pp. 20-21.

18 JSCIDN, *Final Report*, pp. 22-23 and 201-202.

mainland states and on Christmas Island.[19] Conducting site visits on Christmas Island and at the Villawood detention centre in the months after disturbances at those facilities meant that the committee was able to observe the remnants of the destruction to property that had occurred.[20]

During its site visits to Christmas Island, Darwin, Curtin (WA) and Villawood facilities, the committee held in camera hearings directly with detainees from a variety of language groups. The committee also received as in camera evidence more than one hundred written submissions from individuals in immigration detention, with arrangements made to translate submissions that had been made in a language other than English. The committee resolved to make sections of this in camera evidence public, to the extent necessary for referring to it in the committee's report, provided the identity of detainees was protected.[21]

SENATE SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT (2002)

The first attempt of an Australian committee to elicit evidence relating to offshore processing centres came during the earlier iteration of Australia's offshore detention policy. Known as the 'Pacific Solution', the policy was instigated in late 2001 following several incidents including the infamous 'children overboard' affair.[22] In February 2002 the Senate Select Committee into a Certain Maritime Incident was established to investigate these matters, including the operation of the newly established processing centres on Nauru and Manus Island.

During its inquiry the committee heard contrasting evidence about the conditions at the Nauru and Manus Island processing centres. The committee noted in its report that it had been limited in its ability to assess conditions at both Nauru and Manus 'by the isolation of the centres, restrictions on access by third parties including NGOs, and a scarcity of eyewitness accounts',[23] and that it was unable to make any independent determination about conditions at the Manus facility.[24]

The location of the asylum seekers also made it difficult for the committee to fully determine the course of events relating to SIEV 4, the boat at the centre of the 'children overboard' scandal. More than 200 asylum seekers who had been present

19 JSCIDN, *Final Report*, p. 10.

20 JSCIDN, *Final Report*, p. 217.

21 JSCIDN, *Final Report*, pp. 10-11.

22 For a brief overview of the Howard-era 'Pacific Solution', see: Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia', *Parliamentary Library*, 20 March 2013. The 'children overboard' incident refers to events in October 2001, when it was announced during a federal election campaign by government ministers that a number of children had been thrown overboard from a vessel suspected of being an illegal entry vessel intercepted by the Australian Defence Force. This allegation was subsequently retracted. For a thorough canvassing of these issues see: Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002.

23 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002, p. 308.

24 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002, p. 310.

on that vessel had subsequently been detained at the Manus Island processing centre and were still there at all relevant times during the committee's inquiry. The committee received correspondence from some of those individuals, and wrote to all SIEV 4 asylum seekers at the Manus facility inviting them to give evidence via a telephone link-up with the committee. Ultimately, however, those who received the invitations were unwilling to provide evidence for fear of adversely affecting the outcome of their applications for refugee status.[25]

Aware of the fact that the protections of parliamentary privilege would not extend to witnesses while they were located outside of Australia (including any recourse if they were to be treated adversely as a result of giving evidence), the committee had sought a guarantee from the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) that anything said to the committee by the SIEV 4 asylum seekers would not be taken into consideration for the purpose of assessing their refugee claims. This guarantee was not forthcoming, as the committee outlined in its final report:

> DIMIA declared that no such guarantee could be given because third parties might bring to DIMIA's attention matters aired by people before the committee, and that officials determining the outcomes of applications would be obliged to take these reports into account.
>
> DIMIA's approach was challenged at some length during the appearance of DIMIA officials before the committee. The committee considers it a matter of grave regret that DIMIA insisted on its view that it could not provide the necessary guarantee, thereby impeding the effective examination of important aspects of the Senate inquiry's remit.[26]

The Committee Chair stated in his foreword to the report that given the limitations, it was not surprising that the asylum seekers declined to participate in the telephone link-up; however it nevertheless "seemed to be onesided that the asylum seekers as key players in the event could not have their evidence heard and tested by the inquiry".[27]

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO 2014 INCIDENT AT THE MANUS ISLAND DETENTION CENTRE

Since the reestablishment of offshore processing arrangements with Papua New Guinea and Nauru in 2012, and the subsequent toughening of Australia's offshore processing policies in August 2013, several Senate committee inquiries have investigated general conditions and specific incidents at the regional processing centres.

25 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002, pp. xv-xvi and 310.

26 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002, p. 310.

27 Senate Select Committee on a Certain Maritime Incident, *Report*, October 2002, p. xvi. The Chair also acknowledged that some committee members questioned the value of any information obtained by telephone link, stating that this was an important consideration in assessing the matter.

The first of these inquiries occurred following the disturbing series of protests and violent clashes at the Manus Island Regional Processing Centre (RPC) from 16 to 18 February 2014, during which more than seventy asylum seekers and staff were injured and one asylum seeker was killed. In the wake of these events, the Senate referred the matter to its Legal and Constitutional Affairs References Committee, to examine the events that had occurred, their causes and the relevant agencies' responses to them, as well as broader issues relating to the resettlement arrangements in PNG.[28]

Early in its inquiry the committee formed the view that conducting a site visit at the Manus Island RPC would greatly benefit the inquiry, as it would enable senators to inspect the centre and 'gain a firsthand appreciation for conditions and other factors that may have contributed to the incident in February 2014'.[29]

Given the non-application of parliamentary privilege extraterritorially, the committee sought advice from the Clerk of the Senate about how it might proceed. The Clerk's advice noted that the committee's powers 'may not be exercised outside the territory of Australia, including the power to meet and transact business'. Further, it stated that the committee could not travel outside of Australia as a committee except with the approval of the President of the Senate.[30]The committee decided to seek support from the government to conduct a site visit notwithstanding these limitations, as detailed in its final report:

> *On account of the committee's inability to make a site visit to the centre under its own powers, the committee sought the support and assistance of the Commonwealth Government to do so. On 28 April 2014, the committee wrote to the Prime Minister, the Hon Tony Abbott MP, as well as the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, and the Minister for Foreign Affairs, the Hon Julie Bishop MP, seeking the government's approval and assistance.*
>
> *The committee did not receive any response.*[31]

In the absence of any support to undertake a site visit, the committee proceeded in taking evidence via written submissions, receiving material from service providers working at the Manus RPC, non-government organisations, academics, and individual employees who had formerly worked at the centre. The committee held five public hearings in Canberra hearing evidence from these stakeholders, but did not hear any evidence directly from those detained at the Manus RPC.

28 Senate Legal and Constitutional Affairs References Committee (L&CA Committee), *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, December 2014, p. 1.

29 L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p. 2.

30 Dr Rosemary Laing, Clerk of the Senate, *Advice sought by the Legal and Constitutional Affairs References Committee in relation to evidence from witnesses overseas*, 21 March 2014, p. 1.

31 L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p. 2.

Utilising evidence from the 'Cornall Review'

Shortly after the February 2014 disturbances at the Manus Island RPC, an independent review into the incident was commissioned by the Department of Immigration and Border Protection and undertaken by Mr Robert Cornall AO.[32] In the course of this review Mr Cornall travelled to PNG and met with senior officials and ministers in Port Moresby, as well as visiting the RPC itself and gathering evidence directly from transferees and employees at the centre.

[33]Mr Cornall's review was published during the committee's inquiry in May 2014, and was subsequently drawn on by the committee in its report, particularly in assisting it to piece together a timeline of events of the disturbances.[34] The committee also invited Mr Cornall to appear at a public hearing in June 2016, where he gave evidence at length in relation to the methodology and findings of his review.[35]

SELECT COMMITTEE ON THE RECENT ALLEGATIONS RELATING TO CONDITIONS AND CIRCUMSTANCES AT THE REGIONAL PROCESSING CENTRE IN NAURU (2015)

In March 2015 the Senate established a Select Committee on recent allegations relating to conditions and circumstances at the regional processing centre in Nauru. The select committee was established following the release of a report of the Australian Human Rights Commission commenting on the detention of children on Nauru, and a review into allegations of sexual and physical assaults and employee misconduct at the Nauru RPC conducted by Mr Philip Moss (the Moss Review).[36] The Select Committee inquiry was instigated 'reflecting the belief of the Senate that the evidence uncovered in those reports was important but not complete', and that the

32 Mr Robert Cornall AO, *Review into the events of 16-18 February 2014 at the Manus Regional Processing Centre*, 23 May 2014, p. 2.

33 This evidence gathering at the RPC included: conducting interviews with a range of service provider personnel; reviewing documentation including intelligence reports, incident reports and daily reports; conducting interviews with four asylum seekers in the presence of an interpreter; conducting several two-hour question-and-answer meetings with asylum seekers who Mr Cornall 'was told were leaders of their communities in each compound; obtaining information from asylum seekers provided via 270 'feedback forms'; and conducting a walkthrough of one compound at the RPC with transferees in order to examine 'bullet marks and so forth in the buildings' which the transferees said had occurred on the night of 17 February 2014. See: L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p. 17.

34 L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, pp. 77-82.

35 L&CA Committee, *Committee Hansard*, 12 June 2016, pp. 1-19.

36 The Moss Review was conducted between October 2014 and February 2015, and travelled to gather evidence directly from detainees at the centre on Nauru as well as service providers and senior government officials (using similar methodology to the Cornall Review). The review made various conclusions in relation to the allegations it examined, and made 19 recommendations aimed at the ongoing operations of the centre. See: Mr Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, 6 February 2015, pp. 15-18.

situation at the RPC, as well as the implementation of the recommendations of the Moss Review, required further scrutiny.[37]

The committee received written submissions from a range of stakeholders, including service provider organisations engaged at the Nauru RPC, current and former staff of those organisations, and asylum seekers themselves directly involved with circumstances and events at the centre.[38] The committee also held four public hearings in Canberra. Many of the submission to the committee were received confidentially, or published with the names of the submitters withheld. The committee did not publish any submissions it received directly from asylum seekers, although it did publish letters from asylum seekers at the Nauru RPC given to another organisation that subsequently made a submission.[39] The committee stated that evidence received confidentially informed its report but was not directly reflected in it.[40]

The committee stated that the evidence it received corroborated the findings of the Moss Review, but also went beyond it, raising "a range of issues of concern in relation to the conditions and circumstances prevailing at the RPC, and the adequacy of efforts by the Australian Government to fulfil its responsibilities to the people detained there".[41] These views of the committee majority were disputed by government members serving on the committee in a dissenting report, discussed later in this paper.

Provision of information to the inquiry

The committee noted in its final report that it had encountered difficulties obtaining information relevant to the inquiry from the Department of Immigration and Border Protection. In particular, the department declined to provide substantive responses to information requested by the committee without adequate explanation, and declined to provide some information on the basis that some matters were the responsibility of the Government of Nauru, or subject to consultation with the Government of Nauru, although it "seemed clear that the department should have had access to information that could have been provided to the committee".[42]

37 Senate Select Committee on the recent allegations relating to conditions and circumstances at the regional processing centre in Nauru, *Final Report*, August 2015, p. 119.

38 Senate Select Committee on the recent allegations relating to conditions and circumstances at the regional processing centre in Nauru (Nauru Select Committee), *Final Report*, August 2015, pp. 2 and 119.

39 Nauru Select Committee, *Final Report*, August 2015, p. 110.

40 Nauru Select Committee, *Final Report*, August 2015, p. 119. The committee did refer in general terms to evidence received confidentially at several points in its report, for example at p. 98: " The committee received a substantial amount of evidence in submissions and correspondence relating to safety and security concerns [at the Nauru RPC], which was accepted on a confidential basis".

41 Nauru Select Committee, *Final Report*, August 2015, p. 119.

42 Nauru Select Committee, *Final Report*, p. 121.

The committee was critical of what it saw as attempts to avoid scrutiny in relation to the centre:

> *The committee wishes to record its concern that in the conduct of the inquiry it was not afforded full and transparent access to the information it requested from key stakeholders in relation to the management of the RPC. The committee remains of the view that the government in particular has sought to avoid the full accountability to which the Senate is entitled.*
>
> *…the committee wishes to emphasise the importance of departments meeting their accountability obligations to the Senate and its committees, including the requirement for officials to provide full and accurate information to the parliament about the factual and technical background to policies and their administration.*[43]

The committee also commented at length on difficulties it encountered ascertaining the cost paid by the Australian Government to maintain the Nauru RPC. The committee stated this was due to public spending information not differentiating between the costs of the Nauru and Manus Island RPCs, and information not distinguishing between direct RPC and settlement costs, related assistance provided to the Government of Nauru, and other spending including overseas development assistance.[44] Significant confusion also arose in relation to whether capital works being undertaken on Nauru had gained appropriate approval through the Parliamentary Standing Committee on Public Works.[45]

In expressing concern that there is minimal oversight of expenditure on Nauru, the committee recommended that all expenditure associated with centre on Nauru, including expenditure considered to be assistance to a foreign government, should be specifically reported to the Senate Legal and Constitutional Affairs Legislation Committee before each round of Senate Estimates.[46]

The committee also recommended that a further inquiry be undertaken by the Legal and Constitutional Affairs References Committee to continue investigating issues

43 Nauru Select Committee, *Final Report*, pp. 121-122. Similar comments were made by the L&CA Committee in its 2017 report into the Nauru and Manus Island RPCs. See: Senate L&CA Committee, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, April 2017, pp. 87 and 101-103.

44 Nauru Select Committee, *Final Report*, August 2015, p. 127. The Department of Immigration and Border Protection advised a subsequent committee inquiry that it is funded to expend approximately $1 billion per year to provide services at the RPCs. See: Senate L&CA Committee, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, April 2017, p. 131.

45 Any public works of a value of $15 million or greater to be paid by the Commonwealth must be approved by the Public Works Committee before, unless an exemption applies. In this instance the department gave evidence to the select committee that was later contradicted by officials from the Department of Foreign Affairs and Trade at a Senate Estimates hearing about whether public works on Nauru had been completed in contravention of this requirement, or whether the works constituted overseas development assistance that falls outside of the scope of the requirement for approval by the Public Works Committee. See: Nauru Select Committee, *Final Report*, August 2015, pp. 55-56.

46 Nauru Select Committee, *Final Report*, pp. 128-129.

relating to the centre, a measure that was opposed by Coalition Government senators on the committee.[47] This recommendation was subsequently taken up by the Senate, which referred a new inquiry to the Legal and Constitutional Affairs References Committee, with a broader terms of reference covering conditions and treatment of transferee at both the Nauru and Manus Island RPCs.[48] This inquiry covered many similar issues to those canvassed by the previous committee inquiries, and the final report presented in April 2017 noted that the committee had encountered similar challenges in terms of jurisdiction and procedural limitations.[49]

Difficulties with evidence obtained by the Nauru Select Committee and subsequent Privileges Committee inquiry

The Nauru Select Committee also encountered several difficulties relating to evidence given by Wilson Security, a subcontracted service provider at the Nauru centre, relating to discrepancies in the evidence given by Wilson. These discrepancies were serious enough that, following the completion of that committee's work, they were referred to the Senate Privileges Committee to determine whether false or misleading evidence had been provided to the Select Committee that constituted a contempt of the Senate.[50]

While the Privileges Committee ultimately made no findings of contempt in relation to the matters referred to it, one matter considered by the Privileges Committee was itself of significant procedural interest. It had been established during the Select Committee inquiry that during a personal visit in December 2013 to inspect the Nauru RPC, Australian Greens Senator Sarah Hanson-Young had been subject to surveillance by staff members of Wilson Security. Two submissions from former Wilson staff claimed that the surveillance was pre-planned and authorised by Wilson Security management, and extended to spying on the senator's activities both within and outside the detention centre. Wilson Security rejected that assessment and stated that the surveillance was unauthorised, limited in scope, and was stopped immediately after being discovered, with the staff member responsible disciplined for acting beyond their brief.[51]

Following a further investigation into the facts, the Privileges Committee was ultimately not able to ascertain sufficient evidence to corroborate either account and finally determine the matter. It reported that it had no basis to conclude that Wilson Security representatives knowingly gave false or misleading evidence to the Select Committee,

47 Nauru Select Committee, *Final Report*, August 2015, pp. 134-135

48 Senate L&CA Committee, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea*, Interim Report, May 2016.

49 Senate L&CA Committee, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, April 2017, p. 165.

50 Senate Committee of Privileges, *162nd Report: Possible false or misleading evidence given to the former Nauru select committee*, May 2016.

51 Nauru Select Committee, *Final Report*, August 2015, p. 40; Senate Committee of Privileges, *162nd Report: Possible false or misleading evidence given to the former Nauru select committee*, May 2016, p. 5.

and made no finding of contempt.[52] It did find that both Wilson and its parent contractor at the centre, Transfield Services, failed in their duty to report the matter to the department, and should have also informed the Select Committee prior to the issue being raised at a public hearing.[53]

The Privileges Committee also commented more broadly on the issue of whether the surveillance of Senator Hanson-Young on Nauru itself could have amounted to an improper interference with the ability of the senator to freely perform her duties, constituting a contempt offence against the Senate. The Privileges Committee stated that it 'is not difficult to imagine' a situation in which the covert surveillance of a senator may amount to a contempt. It noted, however, that in this instance significant jurisdictional problems arise from the incident having occurred outside of Australia:

> *Parliamentary privilege operates within the jurisdiction of the Commonwealth of Australia to protect the work of the Australian Parliament, its committees and members. It is not generally understood to have any extraterritorial application… Although it has not been conclusively determined, it is likely that the same jurisdictional limits would apply in relation to the investigation of the surveillance in this matter.*[54]

This highlights the fact that committee members seeking to conduct activities overseas cannot operate with the same protections they are afforded by the Senate within Australia.

THEMES EMERGING FROM THESE CASE STUDIES

These examples show the procedural difficulties that arise for committees seeking to extract relevant information for inquiries examining Australian government policies being implemented offshore. Several observations are worth making about how some common issues have played out across these inquiries.

Firstly, each of the inquiries examined here was characterised by a high level of political partisanship, in keeping with the contested and at times hostile atmosphere associated with this policy area in the broader public debate. In each case, the committees in question were chaired by Labor or Greens members, with Coalition members in the minority, and Coalition senators lodged dissenting reports in opposition to the views of the committee majorities. In the case of the Senate committee inquiries examining the

52 Senate Committee of Privileges, *162nd Report: Possible false or misleading evidence given to the former Nauru select committee*, May 2016, pp. 11-12.

53 Senate Committee of Privileges, *162nd Report: Possible false or misleading evidence given to the former Nauru select committee*, May 2016, pp. 16-17.

54 Senate Committee of Privileges, *162nd Report: Possible false or misleading evidence given to the former Nauru select committee*, May 2016, p. 26.

Manus Island and Nauru RPCs, the value of the very existence of these inquiries was at times questioned by Coalition members.[55]

Two criticisms in particular were levelled at the inquiry process: that committees were not able to sufficiently test the integrity and completeness of the evidence presented to them; and that other bodies than Senate committees were better placed to conduct any necessary investigations in relation to the offshore processing centres.[56] These points are examined here in turn.

INABILITY TO THOROUGHLY TEST EVIDENCE

Government committee members on the Nauru Select Committee highlighted the fact that it was difficult to assess specific allegations contained in submissions about the conduct of individuals at the Nauru centre, and accused the committee majority of "being willing to accept untested and unsubstantiated submissions as fact".[57] They stated further in their dissenting report:

> *All members of the committee appreciate the seriousness of the allegations put to the committee; however it is important to note that the veracity of many of the allegations made was not able to be tested. In fact, a number of witnesses and submitters had spent very little time actually on Nauru and therefore were only able to provide limited anecdotal evidence. Some provided no time line of their visit at all, and others did not provide first-hand evidence, instead relying on unsubstantiated hearsay.*[58]

The difficulty in being able to test the veracity and currency of some evidence received is a key and probably unresolvable consequence of the jurisdictional limitations encountered during these committee inquiries. While the process of determining what weight to attribute to evidence received is common to all committee inquiries, this task is unquestionably more challenging in these circumstances.

For the Legal and Constitutional Affairs Committee's examination of the 2014 riots at the Manus Island centre, the state of the physical conditions and service provision at the centre was a key issue for the inquiry, particularly in assessing whether those conditions were a contributing factor to the violent incidents that occurred. The committee commented on the contrasting nature of evidence provided on these issues during the inquiry in its report:

> *In examining the evidence presented to this inquiry, one consistent conclusion drawn by the committee is that there is a striking difference between the official statements*

55 See, for example: L&CA Committee, *Conditions and treatment of asylum seekers and refugees at the regional processing centres in the Republic of Nauru and Papua New Guinea: Interim Report*, May 2016, p. 21.

56 See: L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, pp. 158-159; Nauru Select Committee, *Final Report*, pp. 137 and 140.

57 Nauru Select Committee, *Final Report*, p. 137.

58 Nauru Select Committee, *Final Report*, p. 140.

> *and evidence provided by the department and service providers running the centre, and the first-hand testimony of individuals who have worked at and observed the centre. On issues including the provision of healthcare services to transferees, the adequacy of accommodation and facilities, and access to legal advice and other assistance for transferees, there are massive contradictions between the 'official' evidence given by the Australian Government and its contractors, and the evidence of other observers.*[59]

Having been unable to gain the support necessary to travel and inspect the facility itself, the committee was could not form a first-hand view on these matters, potentially weakening its ability to draw definitive conclusions.[60]

While there are valid procedural and practical considerations weighing against such visits, it does perhaps seem incongruous that officials from other agencies of the Commonwealth, including the Australian National Audit Office, the Commonwealth Ombudsman and Comcare, have all visited both offshore processing centres over the last several years as part of their work, while committees of the parliament have thus far been unable to garner the necessary support to facilitate a visit.[61] Australian authorities were even reportedly willing to help facilitate a visit to Nauru from a Danish parliamentary committee delegation in 2016, prior to the delegation being cancelled due to some committee members' visas not being granted by the Nauruan government.[62]

One example from another Australian committee provides a further contrast on this point. In May 2003, the Senate Foreign Affairs, Defence and Trade References Committee successfully conducted a ten day 'fact-finding mission' to several countries including PNG, as part of its inquiry into Australia's relations with PNG and the islands of the southwest Pacific. This trip was organised as a parliamentary delegation, and proceeded following the agreement of both Presiding Officers, the Prime Minister

59 L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, p. 154.

60 In its most recent inquiry into the RPCs, the Senate L&CA Committee also approached the President of the Senate requesting approval to visit the centres, an initiative opposed by government members of the committee. The committee again was ultimately unable to make a visit to the centres. See: Senator the Hon Ian Macdonald, *Senate Hansard*, 8 November 2016, p. 2163; Senate L&CA Committee, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*, April 2017, p. 165.

61 For details of some of these visits see: 'Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services', *ANAO Report No. 16 2016-17 Performance Audit*, September 2016; Australian Government, *Response to the report of the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, August 2016; L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, pp. 120-122.

62 Nicole Hasham, 'Nauru bans unsympathetic Danish MPs from detention centre visit', *Fairfax Media*, 30 August 2016.

and Foreign Minister.[63] The trip was organised on the basis that it had been made abundantly clear to the committee by key stakeholders that if its report was to have any credibility, it would be essential for the committee to visit the region.[64]

Thus, while Senate practice does not readily permit overseas committee travel related to inquiry work, it is clear that the level of political support available will ultimately dictate whether such initiatives gain enough traction to proceed.

ROLE OF PARLIAMENTARY AND EXECUTIVE INQUIRIES

Government committee members involved in the Legal and Constitutional Affairs Committee's inquiry into the 2014 riots at the Manus Island centre argued as follows in a dissenting report attached to the committee majority's report:

> *Evidence presented to the committee detailed that a number of investigations have been conducted into the events that occurred on Manus Island from 16 to 18 February 2014.*
>
> *Government members understand that the agencies that have conducted, and are conducting, these investigations are in a good position to effectively investigate and draw conclusions regarding conditions and events at the MIRPC. By contrast, a committee of the Australian Senate is limited by distance (physical and temporal) and by the completeness or otherwise of the evidence before it.*[65]

As noted earlier, the Nauru Select Committee and Legal and Constitutional Affairs Committee examining events in PNG both drew upon the findings of independent reviews initiated by the government (the Moss and Cornall reviews respectively). These reviews operated with the support of the Australian Government and that of the relevant host country, and in many respects were conducted with a much more significant degree of freedom in gathering evidence than the parliamentary inquiries.[66] The question raised here is whether the committee inquiries represented, in effect, an unnecessary duplication of work that had already been done by other independent reviews.

Without seeking to conduct a full analysis here of the respective roles played by parliamentary, executive and other oversight mechanisms in policy areas such as

63 Senate Foreign Affairs, Defence and Trade References Committee (FADT Committee), *A Pacific engaged: Australia's relations with Papua New Guinea and the island states of the southwest Pacific*, August 2003, pp. 2-3 and Appendix 3. The committee held informal meetings, briefings and site visits during its trip, meeting with a wide variety of groups across four countries, including senior ministers and government officials, business groups and NGOs. In its report, the committee thanked the Government for its support and for facilitating the travel of the committee, including by providing an RAAF aircraft for travel to more remote areas.

64 FADT Committee, *A Pacific engaged: Australia's relations with Papua New Guinea and the island states of the southwest Pacific*, p. 2.

65 L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, pp. 158-159.

66 Both reviews, for example, were able to travel to the offshore processing centres and speak in person with staff and asylum seekers at the centres, as well as senior ministers and government officials in PNG and Nauru.

these, it is sufficient to note that the parliament is entitled to instigate its own inquiries into issues relating to government expenditure and administration, irrespective of any other investigations that may be occurring.

It is also clear that committees inquiring into offshore processing centres in recent years have given considerable thought to the scope and role of their inquiries, in the context of other investigations that had already occurred or were ongoing. The Nauru Select Committee was established specifically reflecting the view of the Senate that the evidence uncovered in the Moss Review was 'important but not complete', and that further scrutiny was required.[67]

Both the Nauru Select Committee and Legal and Constitutional Affairs Committees also chose to focus primarily on the broad policy issues relating to the legal and administrative operations of the centres during their inquiries, using the evidence of individuals as being illustrative of systemic issues rather than seeking to examine or resolve the cases of individuals in the manner of a judicial or law enforcement body.[68] This is in keeping with the core strengths of parliamentary committees in focussing on systemic policy issues, while drawing in evidence from other investigative reviews and bodies such as the Audit Office and Ombudsman.[69]

CONCLUSIONS

The success of parliamentary committees in properly exercising their oversight role in relation to the administration of government policy is dependent on various factors, including:

- the ability of a committee to obtain formal evidence (both written and oral) relevant to its inquiry;
- the ability of a committee to undertake relevant hearings and site inspections;
- the procedural and practical protections available for those providing evidence to a committee; and
- any practical or logistical impediments to a committee being able to undertake its work.

67 Nauru Select Committee, *Final Report*, August 2015, p. 119.

68 During its 2014 inquiry into the riots at the Manus Island facility, the L&CA Committee determined that its role was not to seek to identify the perpetrators of the specific assaults carried out during the disturbances. The committee went to significant lengths to avoid any interference with the investigation and prosecution of the criminal offences associated with these events, which were the responsibility of the PNG police and Papua New Guinean courts, and the committee stated that while it had received evidence regarding the criminal culpability of individuals, it had deliberately avoided discussion of those issues in its report. See L&CA Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, pp. 77 and 145.

69 A similar view of the role of parliamentary oversight committees is articulated by Gareth Griffith, who places parliament "at the apex of the accountability pyramid, using its committee system as the principal means at its disposal for scrutinising the…other accountability mechanisms relevant to government agencies". See: Gareth Griffith, 'Parliament and Accountability: The role of parliamentary oversight committees', *Australasian Parliamentary Review*, Autumn 2006, Vol. 21(1), p. 46.

The examples studied in this paper have shown that on each of the above measures, parliamentary committees have faced significant difficulties in attempting to scrutinise government policy implemented outside of Australia. Committees have not always been able to elicit evidence from the closest sources to relevant events, nor fully test or verify evidence they have received, and committees have not had the same access to facilities and persons that they ordinarily would for inquiries based in Australia.

Despite the limitations encountered during these inquiries, the committees in question have still had success in attracting a broad range of evidence that is now on the public record under the protection of parliamentary privilege, including much material from executive agencies that was previously unreleased. This has undoubtedly furthered the public debate into this policy area.

Some of the issues encountered in this space are essentially unresolvable; the limits around jurisdiction and parliamentary privilege mean that when dealing with international matters, the parliament will always be more reliant on the cooperation of the executive, as well as the governments of other countries, in undertaking its investigative functions than when it is dealing with matters in Australia. At the same time, the apparent lack of cooperation towards committees displayed by the executive government and its agencies during the inquiries examined here has been a matter of concern to the Senate over a number of years.

Parliamentary scrutiny of Australia's immigration detention policies will undoubtedly be ongoing. Whether these processes achieve outcomes substantially different to those of the completed committee inquiries remains to be seen. Nevertheless, the significant investment of taxpayers' money in implementing these policies means that the Senate is likely to continue to exercise its oversight function to the fullest extent it is able.

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Language and the Law: A Samoan Case Study

Eline Salevao

Eline Salevao is in The Research Service of the Office of the Clerk of the Legislative Assembly, Samoa.

This paper was written for the Parliamentary Law, Practice and Procedure Course undertaken by staff of the Office of the Clerk of the Legislative Assembly, Samoa, in 2015.

ABSTRACT

"Every language is a temple, in which the soul of those who speak it is enshrined"

Justice Oliver Wendell Holmes

Language plays a major role in our everyday lives; its use or lack thereof can impart both private and public responsibilities. Language is the medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour. When Parliament enacts laws, it does so for the benefit of its people in order to ensure the protection and upholding of personal rights, freedoms and just governance of the nation as a whole. For these laws to be effective, they must be properly drafted, translated and interpreted. In bilingual countries such as Samoa, the issue of legal translation arises when the meaning of specific legislative provisions is questioned. This paper attempts to briefly overview the essential nature of legal language and the consequent issues posed when the translation of legal texts are necessary. A brief overview of specific translation issues aides a later analysis of the practical implications of Samoa's *Acts Interpretation Amendment Bill 2015*. The major objective of this paper is to further my thesis that drafting carried out in the indigenous language of bilingual countries (such as Samoa), is superior in both meaning and effect once translated into English. This is in contrast to the current Samoan practice wherein legislation is drafted in English first, and then translated into Samoan.

INTRODUCTION

Without language, today's society would cease to function effectively. The mere fact that we must co-exist as a people (and as much as practicably possible, "harmoniously") necessitates the use of language in order to facilitate effective communication. Suffice it to say that it is widely accepted that communication is a critical component of human survival.[1] Insight therefore, into the use of legal language is necessary as laws, regardless of one's geographical location, social or individual condition, financial situation or cultural background govern major parts of our everyday lives. Language is the fundamental building block used to create national legal frameworks. Words collated, arranged and codified into law, influence and direct our actions as members of specific societies. When the words used in laws are incapable of comprehension or interpretation, this makes for numerous problems for laypersons (in abiding by laws) and legal actors (enforcing and interpreting laws). For this reason, laws must be properly drafted to permit accurate and fair judicial interpretation for a piece of legislation to achieve its purpose as envisioned by Parliament.

Why the study of legal language is important

An array of literature has been written on legal language due to its inherent peculiarity (in terms of lexicon and structure), complexity and fundamental importance in our everyday lives. Despite linguists and legal actors acknowledging the importance of legal language, specific research into the field is a relatively recent phenomenon, with much of the work dating from the 1980s.[2] Much of the literature I have reviewed focuses on the development of theories to explain the nature of legal language itself. Other authors have devoted their efforts to underscoring the difficulties faced by interpreters of law (legal actors and laypersons alike) in terms of comprehension and translation. Notwithstanding this, the major commonality between available literary works in this field is the overwhelming acknowledgement and acceptance of the inherent importance of legal language, despite its shortcomings. Many writers appear to agree that for the law to be properly enacted and understood, the language employed must be both precise and logical, with the end-user in mind. Above all, the understanding that legal language in its variant forms is critically important to assist professional actors of the legal system (and as a consequence, the overall concordant functioning of society) has not been and is not, ignored. Sanford Schane noted that:

> [t]he legal implications of language continue to extend far beyond the courtroom – to interactions between police and suspects, to conversations between lawyers

1 Communication theorists attempt to elucidate human communication through their rhetorical and relational uses with further categorization into, for example, interpersonal, group dynamics, organization and cross-cultural communication. See for example Judee K. Burgoon & Jerold L. Hale, 'The fundamental topoi of relational communication' pp. 193–214 in *Communication Mongraphs, Vol 51, September 1984,* Routlege, 2009 and Charles Conrad 'Rhetorical/Communication Theory as an Ontology for Structural Research', in Stanley A. Deetz (ed), *Communication Yearbook, Issue 16,* pp. 197-208, Routlege, 2012.

2 Schane, Sanford. *Language and the Law: With a Foreword by Roger W. Shuy.* Bloomsbury Publishing, 2006.

and their clients, to law enforcements' use of surreptitious recordings, and to such unlawful speech acts as offering a bribe, or issuing a threat, or making a defamatory statement. A little reflection suffices to reveal just how essential language is to the legal enterprise.[3]

Issues in Legal Translation

The numerous approaches to legal translation highlight the issues faced by bilingual and multilingual countries in their attempts at producing comprehensive and intelligible secondary text sources. The major issues applicable to this paper are differences in culture and national legal systems, both of which are underpinned by issues of linguistic differences.

CULTURAL DIFFERENCES

Radegundis Stolze emphasised the importance of culture in discerning the interpretation and use of legal language by stating that cultural aspects are embedded within the law: "[c]ultural elements appear in the texts on all levels – from the form of words for concepts, to the sentences and stylistic text structure, up to pragmatics in its social function. Culture, as the background of every human communication, is a dynamic phenomenon based on historical tradition including the individual's personal development."[4] The interdependence of language and culture within societies was defined by Michael Halliday as being a "semiotic system of meanings or information encoded in the behaviour [of its citizens]."[5] Therefore it is necessary that in legal translation, language should not be viewed in isolation but considered against its specific socio-cultural background.[6] Goodrich supports this interdependence of language and culture by stating that legal language is essentially a "social practice", therefore its texts should reflect those practices particular to its specific national background.[7] This bears great importance on the issue of translation in bilingual Samoa, as it has a unique political system which encompasses customs and traditions and Westminster based governance principles. Its specific legal language should therefore be an expression of these three things, for as Susan Sarcevic noted, "[e]ach country has its own language representing the social reality of its specific legal order".[8] To draft Samoan legislation in English and then translate it into Samoa, in my opinion, results in a secondary text, which does not accurately reflect the fundamental components that make up Samoa's social and political "reality" or "legal order".

3 Schane, Sanford. *Language and the Law: With a Foreword by Roger W. Shuy*. Bloomsbury Publishing, 2006.

4 Stolze, Radegundis. "Dealing with cultural elements in technical texts for translation." The Journal of Specialised Translation 11 (2009): 124-142.

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NATIONAL LEGAL SYSTEMS AND LAWS

Legal language is tied to a country's specific legal system, as writers such as Deborah

Cao and Walter Weisflog[9] have stated, they are "system-bound" and reflect a country's specific history, evolution, culture and legal system.[10] This was reiterated by Justice Oliver Wendell Holmes:

> [t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematic.[11]

This notion of system-bound legal language poses many challenges to the translation of legal texts, in that the translator must not only account for what is oftentimes a foreign language but also accurately portray the source text's country specific "[v]ocabulary... its rules...techniques for expressing [those] rules and interpreting them".[12] The main difficulty has thus been expressed by many legal language authors as being the "incongruency of legal systems in the source language and the translated language."[13]

LINGUISTIC DIFFERENCES

A more obvious difficulty, which presents itself in the translation of legal texts, is that of fundamental linguistic differences between the source and the language to be used for translation. Taking into account that legal language is inherently a "sub-language", which is "subject to special syntactic, semantic and pragmatic rules";[14] the translation task becomes yet even more difficult when balancing the linguistic rules of two separate languages. For example, rules which may be easily expressed in a few words in English, may not find their equivalence in the Samoan language due to lack of equivalent terminology or expression. To emphasise this point, David and Brierly noted that:

> [t]he absence of an exact correspondence between legal concepts and categories in different legal systems is one of the greatest difficulties encountered in comparative legal analysis…categories and concepts which appear so elementary, so much a

9 Weisflog, Walter E. Problems of legal translation. 1987, p.203.

10 Cao, Deborah. "Legal translation." *The Encyclopaedia of Applied Linguistics*"(2013).

11 Holmes, Oliver Wendell. *The common law*. Harvard University Press, 2009.

12 Cao, Deborah. *Translating law*. Vol. 33. Multilingual Matters, 2007.

13 Šarčević, Susan. *New approach to legal translation*. Kluwer Law International, 1997.

14 Gunnarsson, Britt-Louise. "Studies of language for specific purposes: a biased view of a rich reality1." *International Journal of Applied Linguistics* 5, no. 1 (1995): 111-134.

> part of the natural order of things, to a jurist of one family may be wholly strange to another.[15]

De Groot categorised the different levels of difficulty in translation as being dependent on the commonality of languages used in various legal systems. For example, translation such as that between Spanish and French is relatively easy owing to the fact that both language and political systems are similar. Translation between Dutch, Netherland and French laws is more difficult for the reason that despite having similar legal systems, the languages are vastly dissimilar. When there are no similarities to be found in either, the task is rendered extremely difficult, as is the case in translating Common Law in English to Chinese.[16]

The formulation outlined by de Groot is comparable to a degree to the Samoan situation; however, the issue that is predominant in the Pacific context is how to address differences between local customs and traditions and the adopted (generally, English) legal and political system utilised in various Pacific nations. Are translations from English legislation drafts to Samoan language sensitive to Samoa's local customs and traditions? Are the English words and expressions properly encapsulated and interpreted by the drafters so as to reflect the very much "Samoan" legislative intent upon which it is based? There is not a great deal of literature on this issue but the theories explained above offer a sufficient starting point for further analysis. Despite the various views on translation approaches, there appears to be widespread agreement that the translated text, while not necessarily bound to literal interpretation of the source text, must be a text, which is equal in legal effect.[17]

A SAMOAN CASE STUDY

Authenticity of text language with regard to the Constitution of Samoa and the Standing Orders of Parliament has not been a major issue since Independence in 1962. The Constitution clearly recognises the use of both the English and Samoan languages, stipulating in Article 54 that all debates and discussions in the Legislative Assembly may be conducted in both languages. It further provides that all minutes, debates, bills, parliamentary papers and reports are to be in both languages. Similarly, the Standing Orders state that proceedings of the Assembly are to be conducted in Samoan and English.[18] If, in the event there is an issue as to the interpretation of the Constitution's two language texts, the framers of the Constitution made clear their intention in Article 112 that the English text will prevail.[19] The issue of authenticity or prevailing language text has escaped polemic scrutiny in Samoa, perhaps due in part to the

15 Frankenberg, Gunter. "Critical comparisons: Re-thinking comparative law." *Harv. Int'l. LJ* 26 (1985): 411.

16 De Groot, Gerard-Rene. "38 Legal translation." *Elgar encyclopaedia of comparative law* (2006):

17 Šarčević, Susan. *New approach to legal translation*. Kluwer Law International, 1997.

18 S.O 19, "Language", Standing Orders of the Parliament of Samoa (2010).

19 Art. 112: "The Samoan and English texts of this Constitution are equally authoritative but, in case of difference, the English text shall prevail.", Constitution of the Independent State of Samoa.

fact that despite their being provisions for the use of the English language, it is rarely utilised.[20] Samoan is the predominant language used by the Parliament of Samoa in its proceedings, debates and amongst its Members.

The issue with which this paper is concerned however is not with any ambiguity of language in the Constitution or Standing Orders, but rather in statute. Where the judiciary is presented with two conflicting versions of an Act's provisions, which text should direct statutory interpretation, the English or the Samoan version? The *Acts Interpretation Act 1974* has, until recently, been silent on this issue for 41 years; an issue that was not raised until 2001.

The Supreme Court heard the case *In re Electoral Act, Pita v Liuga*[21] after the official results of the 2001 general elections were released, wherein Faumuina Liuga was declared the elected Member of Parliament for the territorial constituency of Palauli le Falefa. An unsuccessful candidate, Le Tagaloa Pita, petitioned that Liuga's election should be voided, based on an allegation that Liuga did not did not satisfy the candidacy requirements under the *Electoral Act 1963*. The Supreme Court held that in determining the issue of Membership eligibility for candidacy pursuant to s.5 of the Act, the Samoan text prevailed as it accurately reflected the legislative intent for the provision as a whole.

Based on the findings of the *Liuga* case, and in addressing three major translation issues (cultural differences, national legal systems and laws and linguistic differences), this paper posits that a receiver oriented approach to legal translation best suits the pluralist bilingual nature of Samoa's parliamentary and legal framework. This in turn supports the overarching thesis that in cases where there is a discrepancy between the English and Samoan versions of an act, the Samoan version should prevail as a means of fulfilling the legislature's intentions at the time of enactment.

Although a discussion of language as it pertains to legislation inevitably raises the issue of legal drafting, this paper does not attempt to pursue an in-depth analysis of the drafting styles and processes utilised in Samoa. The theories outlined above were merely posed to emphasise the inherent difficulties confronting by bilingual and multilingual countries when faced with legal translation and interpretation. Through a comparative study of statutes and case law in similar jurisdictions, an attempt is made to illustrate that even when two or more languages are the official languages, oftentimes the indigenous language is preferred in cases of text differences. This is generally because it supports a purposive approach to statutory interpretation, which takes into account legislative intent. The following attempts to reconcile research findings with the new *Acts Interpretation Bill 2015* which amended Clause 11, and highlight a possible way forward for statutory interpretation in Samoa in light of the recently passed 2015 Bill.

20 All proceedings, debates and Committee hearings are conducted in Samoan. Members converse in Samoan both within and outside the Chamber.

21 [2001] WSSC 20 (19 July 2001).

The Acts Interpretation Act 1975 & an Election Petition

The results of Samoa's 2001 general elections saw Faumuina Liuga being elected to represent the Territorial Constituency of Palauli Le Falefa. An election petition was filed by an opposing candidate, Tagaloa Pita against Faumuina's election on the premise that he was not qualified to be a candidate pursuant to s.5 of the *Electoral Act 1963* (hereafter the Electoral Act).[22] The case between Tagaloa Pita and Faumuina was the first time in Samoa's judicial history that the Courts were tasked with deciding which text, Samoan or English, should be considered as encapsulating the primary intention of Parliament in enacting the law.[23] Sapolu CJ stated that:

> [the] case raises issues of wider importance for the purpose of Samoan law with which the Court has to deal. The first is where there is conflict or difference between the English text and the Samoan text of a statutory provision which is to prevail... This is the first time a Samoan Court has been directly confronted with these questions and has to make a determination thereon: careful rather than hasty consideration is therefore called for.[24]

Section 5 of the Electoral Act provides for the criteria in which a candidate may qualify for parliamentary membership, and in turn the circumstances that may call for one's disqualification as a candidate or a Member of Parliament.[25] Included in section 5 is a residential qualification requirement of 3 years[26] and the requisite formula to be used to calculate that residential requirement.[27] In the Court's opinion, the provision on which the case turned was s.5(6)(c), which states in Samoan and in English:

> "*se tagata e tofia e galue i se faalapotopotoga faava-o-malo i fafo e lagolagoina pe filifilia e le Malo*"; and
>
> "a person, who is appointed to a post in an international organisation overseas under government sponsorship or nomination."

In its analysis, the Court held that these two provisions did not convey the same meaning. It stated that the English text was "precise" and "restrictive" exempting only those candidates who were appointed under a government sponsorship or nomination to a post in an overseas international organization.[28] Furthermore, "[t]he use of the preposition 'under' in the English provision links the making of an appointment to such

22 (Unreported)In re the Electoral Act, Pita v Liuga [2001] WSSC 20 (19 July 2001) at

23 Ibid.

24 Ibid.

25 s5. "Who may be candidates for election as Members", *Electoral Act 1963*, Samoa.

26 s5(3)A person is disqualified from being a candidate for, or from election as a Member representing a constituency, if he or she (b) has not resided in Samoa for a period equalling or exceeding 3 years ending with the day on which the Nomination paper is lodged with the Commissioner.

27 s5(7) In this section, "resided in Samoa for a period equalling or exceeding 3 years" means a person has been in Samoa for at least 240 days in each year for a consecutive 3 year period ending on nomination day.

28 Above n 7.

a post a prerequisite for the application of the exemption in s.5(6)(c)."[29] On the other hand, they stated that the Samoan provision was ambiguous in that it was capable of more than one interpretation:

> The preposition 'under' in the English text of the provision means '*i lalo*' in Samoan. Those words however, do not appear in the Samoan text. But it is the word 'under' in the English text which provides the link between the making of an appointment to a post in an international organization overseas and government sponsorship. It makes it clear that such an appointment must be made with or pursuant to a government sponsorship. That link does not appear in express terms in the Samoan text because of the absence of the words 'i lalo'. As it stands, the Samoan text of s.5(6)(c) is open to three possible interpretations.[30]

According to the principles of statutory interpretation, as a general rule Courts are not permitted to refer to parliamentary material as an aid to statutory construction, referred to as the "exclusionary rule" as was noted by Lord Browne-Wilkinson in the case of *Pepper v Hart*.[31] Lord Browne-Wilkinson in that case, went on to extend the exception to the exclusionary rule by stating that not only may parliamentary material be referred to in cases of ambiguous or absurd text, Hansard may also be referenced.[32] As the Samoan Supreme Court had ruled the Samoan text of s.5(6)(c) to be ambiguous, they referred to Hansard records which revealed the responsible Minister (the Prime Minster at the time) made clear intentions regarding the meaning of the words in s.5(6)(c) when the Bill was introduced. That is, that the exemption in s.5(6)(c) "[w]as to apply to those people working in an international organization overseas and had been given support by the government as well as those people whose appointment to a post in an international organization overseas was supported by the government."[33] On this ground, the Court ruled that the Samoan text should prevail as the English text was in fact a translation of the source text which was prepared by the Clerk in Samoan, as instructed by the Prime Minister.[34] The Court held that:

> [i]n such a case if there is a difference or conflict in meaning between the original Samoan text of a statutory provision and its English translation, the Samoan text should prevail. It is the traditional task of the Courts when construing a statutory provision to ascertain the intention of the legislation from the words used by the

29 Ibid.

30 Above n 7.

31 *Pepper v Hart* [1993] 1 All ER 42 per Lord Browne-Wilkinson at p.64.

32 Ibid. Lord Browne-Wilkinson stated that "[s]ubject to any question of parliamentary privilege, that the exclusionary rule should be relaxed as to permit reference to parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to absurdity; (b) the material relied on consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear."

33 Above n 7.

34 Ibid.

> legislature in statutory provision. Here, the words used by the legislature in s.5(6)(c) are in the Samoan text of the provision; the English text being a translation.[35]

The petition brought against Liuga by Tagaloa Pita was subsequently dismissed on the ground that Liuga was qualified for candidacy as he fulfilled the criteria for residency under the Act. The significance of the ruling in this case is clear; where there was a difference in meaning within the English and Samoan versions of the Electoral Act, the Court upheld the meaning of the Samoan text as it reflected the true intention of Parliament as to the appropriate application of the exemption in s.5.

Translation Issues: Lessons from the Supreme Court

The Court in the *Liuga* case emphasised the importance of the legislature's intent as to the exception in s.5(6)(c), and held that the Samoan version was authoritative as the English text was a translation.[36]The facts of the case stated that the Prime Minister at the time instructed the Clerk of the Legislative Assembly as to the construction of the relevant amendment, which the Clerk then drafted in Samoan and translated into English.[37] As noted by the Court, the Prime Minister's instructions were given in Samoan, as was his clarification of the relevant provisions (as responsible Minister) to the House, upon introduction of the Bill. The primary intention therefore was encapsulated in the Samoan version of the text. This supports the assertion that, despite legislative drafting in Samoa being carried out in English, the true intent of individual legislation is to be found in the Samoan provisions. The difficulties which lie in adopting as of right and without qualification, the English versions of Samoan statute can be seen when addressing three translation issues; namely, cultural differences, national legal systems and laws and linguistic differences.[38]

CULTURAL DIFFERENCES

To draft Samoan legislation in English with subsequent translation into Samoan, in my opinion, results in a secondary text, which does not accurately reflect the fundamental components that make up Samoa's unique social and political "reality" or "legal order". The Preamble of the Constitution states that Samoa is an "Independent State based on Christian principles and Samoan custom and traditions."[39] Despite its adoption of a Westminster styled legislative framework, each facet of the separate arms of Government are heavily influenced by Samoan culture, customs and traditions. Furthermore, the principles of Christianity remain at the forefront of everyday Samoan

35 Ibid.

36 Above n 7.

37 Ibid.

38 For a full discussion on these common translation issues in bilingual and multilingual countries, refer to the previous literature review: *Language and Law*, 2015.

39 Preamble, Constitution of the Independent State of Samoa, p.4.

life; all of these factors in unison, are the crux of Samoan's identity. Each of the above in its own way influences a Samoan's perspective on life, and in turn governs one's thoughts, decisions and actions. This too can be said of Parliament, in that when they enact laws, there is a conscious reference to Samoan customs of *faa-Samoa* (the Samoan way) during deliberations. Culture and law are inextricably linked and therefore should also be taken into account in statutory interpretation.

In *Liuga*, the Court stated that there are instances where the English text will prevail over the Samoan text, particularly if a "statute or statutory provision [was] borrowed or copied from a foreign statute."[40] The Constitution provides that if there is a difference in the English and Samoan texts, the English version will prevail. This, when juxtaposed against the Court's view in *Liuga* is justifiable in that the Constitution is not substantially a Samoan document, but rather a collective effort between Samoa and it's foreign partners at the time. Note again the Court's statements in *Liuga*, that where legislation is a replication of a foreign document, "the Samoan text will clearly be a translation of the English text, the original text will be the English text."[41] Again, the emphasis here is on the source document in that it essentially contains the most accurate construction of the intention of the legislature. A Samoan text will most likely contain the most accurate reflection of the legislator's intention, backed against Samoa's social and political "reality" or "legal order".

As illustrated in *Liuga* this was the case when the original amendment was drafted in Samoan. Upon translation into English however, its meaning was ultimately altered. This is one difficulty that will continue to plague Samoan drafters in that it is unavoidable for meaning to be lost in translation as the original draft is in English. The tone, details and true meaning during construction of a Bill are initially weakened upon transferral onto paper in English. The final translation into Samoan therefore poses very real risks for further loss of meaning. To address such an issue, Samoa could possibly consider a provision similar to s.9 of Hong Kong's Interpretation and General Clauses Ordinance (Cap.1)1987, which provides that "Chinese words and expressions in the English text should be construed according to Chinese language and custom. Reciprocally, English words and expressions in the Chinese text should be construed according to English language and custom."[42]

NATIONAL LEGAL SYSTEMS AND LINGUISTIC DIFFERENCES

Samoa's legal system and the linguistic differences in English and Samoan pose similar translation issues and therefore may be considered simultaneously. The fundamental issue here is the ability to capture the true essence of Samoa's legal system and linguistic rules in a foreign language. As was stated by David and Brierly

40 Above n 7.

41 Above n 7.

42 s.9 *Interpretation and General Clauses Ordinance (Cap.1)*1987.

"the translator must not only account for what is oftentimes a foreign language but also accurately portray the source text's country specific vocabulary."[43] In linguistic terms, it is generally difficult to find appropriate English expressions for the Samoan language due to a lack of equivalent terminology and expression.[44]

As has constantly been emphasised, the Samoan language is complex in meaning, syntax and lexicon; it is a language which is not as straight-forward as the English language. A simple example is the sentence "*e tusa ma le tala*". Without knowing the context the in which the words are used, the sentence becomes ambiguous. If it is used in a conversation between a shop keeper and a customer, it could mean "It is worth a dollar"; however, in another context, it could mean "it is the same as the story". The ambiguous word here is "*tala*", which means dollar and story or word. This simple example cannot fully illustrate the richness of the Samoan language; however, it does underscore how translation from English into Samoan may lead to ambiguous statutes.

In *Liuga*, the Samoan text of s.5(6)(c) stated that government sponsorship or nomination was to be "by" the Government ("*e le Malo*"), whereas it was necessary (in the Court's opinion) for the words "*i lalo*" (under) to be present to coincide with the English translation.[45] Although the translation may have been in the Clerk's opinion, accurate, the Court's analysis shows that even the slightest linguistic variation can result in different interpretations. The English and Samoan languages do not correlate outright; careful consideration must therefore be taken by the translator to ensure that the English encapsulation of the "Samoan" instructions is accurately transposed into statutory provisions.

A Possible Theoretical Framework for Legal Translation in Samoa

Legal translation theories emphasise various components of language in their discussions of suitable translation methods for bilingual and multilingual countries. As previously stated, this article asserts that theories which emphasise "sense" and "legal effect" (as opposed to form or substance) are more suited to bilingual countries such as Samoa. Such an approach will encourage the translator to discern and thus replicate in the secondary text, the true sense of the source document.[46] The Samoan language is perforated with cultural undertones, subtleties, presumptions and nuances, which cannot at times be fully encapsulated in the English language. For laws to reflect a Samoan legislative intent, the Samoan text of statutes should prevail over the English where there is an obvious discrepancy. To promote adherence to legislative intent is to ensure that a statute's provisions has the requisite legal effect. Based on this preliminary view, an appropriate theory to guide analysis of legal translation in Samoa's pluralist and bilingual context would be the receiver-oriented approach; an

43 David and Brierly 1985.

44 See Sager 1990b.

45 Above n 7.

46 See also Pescatore (1999).

approach which takes into account that what is translated, will later be interpreted upon enactment.[47]

The receiver-oriented approach focuses on the recipient of the translation, in terms of statutory provisions, this will include those to whom laws apply and those who interpret the law. It does not emphasis equivalence at the "word or sentence level, but at the level of the message"[48] the pragmatic notion of language.[49] Such an approach can be evidenced in countries that, unlike Samoa, provide for an official language or languages. For example, in multilingual Vanuatu, all of its languages are equally authentic under the *Interpretation Act 1988*.[50] In cases of difference between two or more texts, the Act states that the versions which accords to the "[t]rue spirit, intent and meaning of the enactment, best ensures the attainment of its objects" shall be preferred;[51] a rule which is applicable to statute, orders, rules, regulations, notices, proclamations and any other instrument issued by an Act of Parliament. Similarly, in Hong Kong, the *Interpretation and General Clauses Ordinance (Cap.1) 1987* (s.10B) provides that both language texts of an Ordinance are equally authentic, which means the "Chinese text is neither subordinate to, nor a mere translation of, its English counterpart."[52]

Despite Vanuatu and Hong Kong explicitly stating in statute their official languages, the "true spirit" (of enactment) of said laws is still emphasised. In this sense, interpretation is carried out not via a dissection of individual words or sentences, but with the receiver in mind requiring a teleological and contextual approach to statutory interpretation.

In the case of *The Queen v Tam Yuk-ha*[53] the lexical difference between the Chinese and English texts of the Food Business (Urban Council) Bylaws (Cap.132. sub leg) led to an appeal to the Court of Appeal by the defendant.[54] The bylaw restricted the building of "additional construction or building works" for businesses, and the defendant had placed a table outside her store which lead to her prosecution.[55] The Court overturned the Magistrate's decision stating that the Chinese version did not prohibit "additions in general", which included placing tables outside one's place of business; the Chinese text was held to prevail.[56] *Tam Yuk-ha* illustrates a general judicial inclination to determine the "legal meaning" or essence of an enactment as it exemplifies

47 Glanert, Simone. 'Comparative Law – Engaging Translation' p.107.

48 Nida, 1964 p. 123

49 Lawrence Venuti, 2012 pp. 5-6. See also Sarcevic 1997: 7, 55; Chroma 2004: 38-39; Trosborg 1997: 153.

50 s.17 *Interpretation Act 1988*, Vanuatu.

51 Ibid.

52 "A Paper Discussing Cases Where the Two Languages of an Enactment are Alleged to be Different", Department of Justice, Bilingual Laws Information System at 1.1, Accessed at http://www.legislation.gov.hk/blis/eng/inpr.html.

53 Ma No.933 of 1996, Hong Kong cf. *HSKAR v Tam Yuk HA* MA No.1385 of 1996, Hong Kong.

54 For various discussions on case law involving legal bilingualism in Hong Kong see Ee-Ling Low and Azirah Hashim (eds), "English in Southeast Asia, Features, policy and language in use" 2012, Chapter 14. John Benjamins Publishing Co, Amsterdam.

55 Above n 37.

56 Ibid.

legislative intent, and therefore the statute's accurate application to the recipients of such laws.[57] It should however be noted that Hong Kong has seemingly enshrined the purposive approach in section 19 of the *Interpretation and General Clauses Ordinance (Cap.1) 1987* which provides regulated direction for judges on statutory interpretation in this regard.[58]

The receiver-oriented approach requires "equivalence between the legal consequence of, on the one hand, the source text on recipients in the legal system or culture and, on the other hand, the legal consequences on recipients of the translation in the target legal system or culture."[59] It is an appropriate model for Samoa in that it requires additional emphasis on "cultural and other extra-lingual factors."[60] The immediate issue is then, how such an approach can be used in light of Clause 11 of Samoa's Acts Interpretation Bill 2015? This paper posits that upon deconstruction, Clause 11 provides the necessary gateway to the prevalence of Samoan statutory provisions in the future; moreover, it essentially adheres to the principles of the receiver-oriented model as outlined above.

The Acts Interpretation Bill 2015: implications & reconciliation with the receiver oriented approach to legal translation

The Acts Interpretation Bill was introduced in the Samoan Assembly on 20th March 2015. Its purpose was to repeal and replace the 1974 Act and to provide guidelines and rules for statutory interpretation; define commonly used words to avoid repetition;

57 Above n 37 at 3.2.

58 s.19 *Interpretation and General Clauses Ordinance (Cap.1)*1987. This however, should be distinguished from cases where the difference between texts is the result of an obvious technical drafting error. See *Chang Fung Lan v Lai WaiChuen* MP. No.4210 if 1996, Hong Kong, where the text in one language was ruled to be authoritative because of a drafting error in the other language version. See also (for further applicable receiver oriented theory) Nida, 166, 194, 159, 241-45 and Nida and Table 1060, p.12. Nida, in commenting on Bible translations, stated that the translation language should have the same effect on its recipient as the source text. This means that whatever the texts state explicitly in words, the ideal result is that they should both have the same legal effect. According to Nida, translators should seek to achieve 'dynamic equivalence' as opposed to mere syntactical equivalence.. Sarcevic stated that translators, in addition to predicting the effects of translated texts in cultural terms, should also attempt to predict how "courts in the target legal culture would interpret and apply the terms of a particular text to concrete fact situations." Susan Sarcevic 1997: 72, 229, 235-37; Chroma 2004: 50. In the Samoan context, and in relation to the posited thesis, an ideal translation process would be one whereby the translators attempt to foresee how their translated words would be interpreted by the Courts. This means the translator would be required to step back from the words before him or her and contextualise the bill and its provisions; noting any possible discrepancies that may arise from chosen words/language. This again is an additional positive aspect of choosing to draft first in Samoan as there would be limited chances of confusing the legislator's intent, as the instructions are received in Samoan, the translator's indigenous language.

59 Sarcevic 1997, pp. 48, 73, 234-35.

60 For the purpose of effective and fluent cross-lingual communication, the target text should appear as natural and comprehensible as it would be if it were an original text. The legal translator should filter out any idiosyncrasies pertaining to the source language that would make the target text less intelligible for its recipients in the target legal culture. Whenever necessary, the legal translator should modify the cultural elements to make them fit the target culture.": Sarcevic 1997 p. 18. See also Gentzler 2001 pp. 70, 73; Obenaus 1995 p.245; Snell-Hornby 1998 p. 34)"

provide rules for the regulation of the operation of Acts and provide standard provisions commonly used in Acts.[61] The responsible Minister, the Hon Prime Minister Tuilaepa

Faitalofa Lupesoliai Aiono Neioti Sailele Malielegaoi moved a motion for the Bill's second reading and delivered an explanatory speech to the House on 20th March 2015.[62] The second reading debates did not raise any specific issue in regards to Clause 11 but rather focused on the interpretation of specific words and, after a short debate, was referred to the Justice, Police and Prisons, Land and Titles Committee for scrutiny.[63]

The Committee reported that concerns were raised during stakeholder submissions over possible contextual changes upon translation from English to Samoa and the belief that the Samoan language should be given preference in Samoan laws in light of Clause 11.[64] Parliamentary Counsel, Dr Teleiai Lalotoa S. Mulitalo raised similar concerns when asked by the Committee to submit a review on the Bill. In her report to the Committee dated 14 July 201, she highlighted various reasons why the proposed clause would be detrimental and contrary to Government initiatives. She also noted the apparent conflict with the purpose of the *Samoa Language Commission Act 2014*. Dr Teleiai then went on to propose an amendment to Clause 11 as follows:[65] "[i]n sub clause 11(2), insert between 'an Act' and 'the English version' the following: 'unless there is evidence of the intention of Parliament to the contrary'",[66] so that the Clause would read as:[67]

> **11. English and Samoan versions of Acts** (1) The English and Samoan versions of Acts are equally authoritative. (2) If there is a difference between the English version and the Samoan version of an Act, *unless there is evidence of the intention of Parliament to the contrary*, the English version prevails. (emphases added)

61 Explanatory Memorandum, Acts Interpretation Bill 2015, p.2.

62 Parliamentary Sitting Summary, 20th March 2015, p.5. Accessed at http://www.palemene.ws. The Hon Prime Minister stated that after 40 years of Parliament continually introducing and passing acts, the act which governs the interpretation of statutes had yet to be revised. He noted that the act is the essential guideline which servers to clarify the meaning of statutory words as well as other issues such as the date of assent and commencement of all legislation.

63 Ibid. For example, Member for Faleata East Aveau Tuala Nikotemo Palamo raised concerns in regards to the interpretation of singular and plural words in Clause 5 (words used refer to all its grammatical forms and roots) comparison to their use in Clause 42 (powers of a body corporate).

64 Justice, Police and Prisons, Lands and Titles Select Committee Report, 2015, p.2. Clause 11 states that the English and Samoan versions of an act are equally authoritative but in the case of discrepancies the English version will prevail.

65 Dr Teleiai Lalotoa S. Mulitalo, Parliamentary Counsel Report to the Justice, Police and Prisons, Land and Titles Committee on the Acts Interpretation Bill 2015, 14 July 2015, p.5. Dr Teleiai noted that the proposed amendment was contrary recent government initiatives to promote the Samoan language as a sacred and integral part of our culture. She noted that the Government has initiated traditional oratory speech competitions and traditional dance competitions amongst the Youth in an effort to preserve the Samoan culture and customs for future generations.

66 Ibid.

67 Ibid.

The Committee purported to take note of the submissions made by various stakeholders and continued to table its report on 20th October 2015 for Assembly consideration.[68] In its final Report, the Committee acknowledged the need to amend Clause 11 but declined to assert that the Samoan text should prevail in cases of differences with the English text. Instead it was proposed that the clause be amended as follows: [69]

> **11. English and Samoan versions of Acts**-(1) The English and Samoan versions of Acts are equally authoritative. (2) If there is a difference between the English version and the Samoan version of an Act, *unless the original draft was in the Samoan language*, the English version prevails. (emphases added)

At the consideration in detail stage, the member for Aana Alofi No.3, Toeolesulusulu Cedric Pose Salesa, noted that the provision did not specifically clarify at which point in the drafting process the "Samoan exception" could be invoked.[70] This was supposedly on the understanding that legislation in Samoa is not drafted in Samoan, but rather in English. The Hon Chairman, Tuisa Tasi Patea avoided directly answering the question and simply reiterated the fact that in the case of a discrepancy between texts, the English text will prevail under the Act.[71] Upon further inquiry from the Member for Aana Alofi No.3, the Hon Chairman stated that the provision was drafted in such a way as to reflect the holding in a particular Samoan case, which had addressed this very issue.[72] The responsible Minister, the Hon Prime Minister further stated that in the relevant case, the Court noted that discrepancies will always exist between texts, as Samoan words by their very nature are capable of possessing more than one meaning.[73] Clause 11 was approved as amended and the Assembly subsequently passed the Bill after third reading.[74]

The case in which the Hon Chairman and responsible Minister were referring to is the case of *Liuga*. According to the rationale behind the Court's ruling, the responses given as to the exception in Clause 11 are plausible. The Courts emphasised that the Samoan text of the Electoral Act should prevail as it was the source text, meaning it replicated the intention of the responsible Minister in proposing the amendment. It is also true that the Court delved into the apparent difficulties of reconciling the English and Samoan languages. However, it is difficult to assert that the amendment provided by the Committee is what the Courts had envisioned as a remedy for the reconciliation of the two languages.

At first glance, Clause 11 as it now stands appears to be feeble attempt at authenticating the Samoan language as the authoritative text in statute. It makes the

68 Justice, Police and Prisons, Lands and Titles Select Committee Report, 2015, p. 4.

69 Ibid.

70 Parliamentary Sitting Summary for 20 October 2015, p.2. Accessed at http://www.palemene.ws.

71 Ibid.

72 Above n 77, p.3.

73 Ibid.

74 Above n 77, pp.3-4.

Samoan text authoritative via an "exception" and is therefore essentially secondary to the English text. This presumption is given weight by the mere fact that the drafting process in Samoa begins with an English text. Instructions are given to a respective Ministry or the Attorney General, whose drafters then proceed to draft a Bill in English. The only stage in which a Bill is developed in Samoan is when the Cabinet Directive (F.K) copy has been received by the Office of the Clerk of the Legislature from the Attorney General's office for translation by the Translation Division.[75] It should also be noted that under s.4(2) of the *Revision and Publication of Laws Act 2008*, the official language of consolidated and revised Statutes of Samoa is English. This is qualified only by the Attorney General's ability to approve an official version in Samoan if necessary. However, this does not happen in practice. Once Acts are revised under the Revision Act, they automatically become the "official versions of those Acts".[76] As evidenced by the above, there has been a tendency to prefer the English texts of statute over the Samoan versions. This is most probably due to the drafting process utilised in Samoa, in addition to English being the language of the common law. However, this should not rule out an authoritative Samoan text as a matter of common law tradition.

The 2014 Legislative Drafting Manual prepared by the Office of the Attorney General acknowledges the predominant use of the Samoan language and states that "it must be noted that all laws are translated into the Samoan language and are considered, debated and enacted in the Samoan language".[77] They are published and sold in both the Samoan and English languages, with the Samoan language containing the signature of the Head of State (assenting Act) and appearing first in each publication.'[78] Given the predominant use of the Samoan language and its importance, the inclusion of the exception in Clause 11 can only be construed as being an empty promise of recognition of the authority of the Samoan text, which is in fact conditional.

In terms of cultural argument presented above, Clause 11 appears contrary to an attempt to reconcile culture and language in statutory instruments. To emphasise the importance of culture to language generally, Parliament enacted the *Samoa Language Commission Act 2014* which commenced on 1st June 2014.[79] Its purpose is stated as being "to ensure the Samoan language is and remains a vibrant language, to declare the Samoan language as an official language, and to establish the Samoan Language Commission to provide its functions, duties and powers, and for related purposes." [80] Section 4 states that amongst the Acts objectives are the promotion of respect for the Samoan language as an official language, and to ensure it is accorded the status, right

75 In the case of amendments made before third reading, the same process applies whereby translation will be undertaken once the English provisions are received from the Attorney General's Office.

76 Legislative Drafting Manual 2014, 10.4 "Translation and Language" pp. 33, Office of the Attorney General, Samoa.

77 Legislative Drafting Manual 2014, 10.4 "Translation and Language" pp. 33, Office of the Attorney General, Samoa.

78 Ibid.

79 Preamble, Samoa Language Commission Act No.5, 2014 p.;3, Samoa.

80 Preamble, Samoa Language Commission Act No.5, 2014 p.;3, Samoa.

and privilege to its use in all government institutions or State institutions, in particular respect to its use in parliamentary proceedings, legislative and other instruments and to generally advance the status and use of the Samoan language within Samoan society.[81] These objectives, as will be shown below, seem defeated by the enactment of Clause 11.

At this juncture, it is worth addressing the possible amendment proposed by Parliamentary Counsel, Dr Teleiai; namely that the English text will continue to prevail, "*unless there is evidence of the intention of Parliament to the* ***contrary***" [emphasis added]. The strength of Dr Teleiai's proposed exception, in my opinion is threefold. It provides an appropriate means for the Courts to reference Parliamentary materials such as Hansard to determine the true meaning of provisions. At the same time, it permits recognition of the Samoan text as authoritative, when the exception is invoked. In turn, the authority of the English text is not lost generally, as the exception will only be invoked when a difference in texts arises. It is in short, a win-win situation. Dr Teleiai's proposal would ensure that the Samoan text is not downgraded to a secondary source, but rather revered as a safeguard to erroneous statutory interpretation. When there is doubt, the Samoan provision would provide the answer, as it is the most probable reflection of parliamentary intent. It provides a means for parliamentary intent, the Samoan language and the language of the Common Law to find common ground.

Despite Samoa's reluctance to codify the authenticity of Samoan statutory texts over their English counterparts, it appears that many Pacific countries share the same preference for the English versions of legislative and statutory texts. The *Solomon Islands Constitution, 1978* and s.62 of the Standing Orders provide that proceedings and debates of Parliament shall be in English or pidgin; written parliamentary papers are to be in English also. It should be noted however, that the laws of the Solomon Islands are only written in English, therefore there are no cases where provisions of different languages may arise.[82] In Fiji, there is no express legislation which provides which text should prevail in case of differences; however, s.74 of the *Constitution of the Republic of Fiji, 1998* provides that "the Official language of Parliament shall be English but any member of either House may address the Chair in the House of which he is a Member in Fijian or Hindustani."[83] English was also declared to be the official language of the Courts in *Lagan v Reginam* (1966).[84]

In contrast, Tonga not only drafts their laws in Tongan but also provide for the superior authority of the Tongan text in statute. Before amendment in 2009 via s.8 of the *Law Revision (Miscellaneous Amendments) Act 2009*, s.21 of the Interpretation Act provided that clarification as to prevailing language text be for criminal trials only.[85] If there was

81 s4 (a)(i), (ii) and (c), Samoa Language Commission Act No.5 2014, pp. 4-5, Samoa.

82 Standing Orders of the National Parliament of Solomon Islands, Solomon Islands.

83 The Constitution of the Republic of Fiji, 1998.

84 (1966) FJCA 8; (1966) FLR 15 (16 September 1966).

85 s.21 'Application of English or Tongan versions in criminal trials', Interpretation Act 1988, Tonga.

a discrepancy between the English and Tongan texts of the section under which the accused is charged, the Court shall determine the guilt or innocence by what appears to be the true meaning and intent of the Tongan text.[86] A revision in 2009 repealed and replaced the provision for interpretation of laws generally, stating in s.21(b) that "the court shall treat the Tongan language version of that provision as giving the true meaning of the law if it considers that the difference in meaning goes beyond a simple clerical error or error in translation."[87] Section.21(b) clearly provides which text is to prevail, without the need for an "exception" as is displayed in Samoa's Clause 11. Tonga is quite similar to Samoa, in that it upholds its culture and customs alongside an adopted parliamentary system, with parliamentary debates and proceedings conducted in their indigenous language. Hence, it seems plausible to assume that Samoa could also draft in Samoan and provide that its indigenous texts be authoritative. However, failing that a bilingual or multilingual country provides via statute a prevailing text, the thesis of this article relies on adherence to statutory interpretation based on legislative intent.

In support of this assertion, take for example the European Union, which has 24 official and working languages all of which are considered to be equally authoritative.[88] According to Advocate General Francis Jacobs, the EU approach to statutory interpretation is teleological, the emphasis being on legislative intent. He further stated that "[its approach] is contextual, taking into account the scheme of the legislation and its place in the framework constituted by the Treaties and European law in general."[89] When there are differences in language versions, the "interpretations should be chosen which best reconciles the text and the purpose."[90] Also, the Canadian case *R v Daoust*

86 Ibid.

87 s.8 'Interpretation Act amended – Tongan language version of laws', *Law Revision (Miscellaneous Amendments) Act* 2009 No.7, Tonga. In her article regarding the debate on which text prevails in the Tongan Constitution, it was noted of the revision "In sum, in the event of a difference between the Tongan text and the English text of an Act, Section 21 requires that the Tongan text prevail if the court considers that the difference in meaning goes beyond a simple clerical error or error in translation. If a court considers that there was a simple clerical error in the translation, the court may give the provisions of that Act its correct meaning; in other words, it has a choice of versions. In the case of interpreting the *Constitution*, Section 21 is silent on the question of which text is to prevail when there is a difference or conflict between the Tongan and English texts. Arguably, based on Section 21 of the *Interpretation Act*, in the event of difference or conflict between the Tongan and English texts of the *Constitution*, the Tongan text should prevail. This may not be acceptable as a general statement of principle." In The Language of the Laws of Tonga – Which Text Prevails?" Mele Tupou, Journal of South Pacific Law, pp.1-13, 2014.

88 The official languages are Bulgarian, French, Maltese, Croatian, German, Polish, Czech, Greek, Portuguese, Danish, Hungarian, Romanian, Dutch, Irish, Slovak, English, Italian, Slovenian, Estonian, Latvian, Spanish, Finnish, Lithuanian and Swedish. European Union, "Facts and Figures", accessed at http://europa.eu/about-eu/facts-figures/administration/index_en.htm.

89 Advocate General Francis Jacobs, "Seminars on Quality of Legislation – How to interpret legislation which is equally authentic in twenty languages", European Commission, Legal Service, Legal Revisers Group, Brussels, 26 November 2003.

90 Ibid, Advocate General Francis Jacobs went on to say that "Linguistic discrepancies can rarely be resolved just by comparison of different versions. National courts would be better advised to apply ECJ's approach to interpretation and to seek an effective and appropriate solution having regard to the context and the purpose of the provision."

2004[91] provides insight into how bilingual legislation is interpreted by the judiciary in Canada. In the *Daoust* case, s.462.31 of the Criminal Code[92] was held to have different meanings in regards to the *mens rea* of the offence of laundering proceeds of crime and was held by the Court to represent the true intention of Parliament. The French version "*utilise, enlève, envoie, livre à une personne ou à un endroit, transporte, modifie ou aliène des biens ou leurs produits — ou en transfère la possession —*" is said to simply list the acts which constitute the *actus reus* of money laundering.[93] The English version on the other hand, included the words "'or otherwise deal with' which broadly covered other acts of laundering not explicitly listed in the provision."[94] Upon determining the issue of which version was to prevail, the Court of Appeal set aside the conviction on the grounds that under the French version, the *actus reus* of the offence had not been made out.[95] In its analysis of the case, the Supreme Court stated that it had considered "[if] there [was] discordance" between the two versions of the statute; [and] if the discordance [was] "irreconcilable", the Court stated that "reference to other statutory interpretation principles such as purposive and contextual interpretation should be used."[96]

Clause 11 cannot be completely faulted as a useless provision which does nothing more than act as a cleverly worded "place holder" for Samoan statutory texts. If we take a more positive approach to the "exception"' it can be deconstructed as an initial token of good faith by the legislature to acknowledge Samoan statutory texts. If this provision was in place during the *Liuga* case, the Court would have been immediately directed to adopt the Samoan provision, because it had been drafted in Samoan. This can be viewed as a doorway to a possible movement towards Samoan drafting in the future, upon collective realisation that statutes drafted in Samoan most accurately reflect legislative intent. To supplement this initial step, the legislature could also codify instructions for the judiciary on how to interpret bilingual statutes generally, with an enshrined provision as to an overall purposive, contextual and teleological approach to statutory provision. Once these factors are in place, it would open the doors of possibility to legal drafting in the Samoan language, with subsequent translation into English.

91 [2004] 1 S.C.R. 217, 2004 SCC 6 at 27 – 30.

92 Criminal Code R.S.C, 1985, c. C-46, Canada.

93 Above n 69.

94 [2004] 1 S.C.R. 217, 2004 SCC 6 at 27 – 30; s 462.31(1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

95 Above n 69.

96 Ibid. See also *Sandoz Canada Inc v Canada (Attorney General)* 2014 FC 501 and *Ratiopharm Inc v Canada (Attorney General)* 2014 FC 502.

CONCLUSIONS

Laws are effectively a form of communication, which are an inescapable element of human society. In bilingual countries such as Samoa, the translation of laws becomes an issue when differences such as culture, mixed legal system (foreign and local) and linguistic incompatibility are properly accounted for in legal drafting. The case of *Liuga* showed that despite there being no statutory provision at the time to guide the Supreme Court, the Court was able to determine the Samoan text as authoritative. This was based on empirical evidence obtained through Hansard records showing concordance between the Samoan text and Parliament's intention as to the application of s5(6)(c) of the Electoral Act. This landmark case lends support to the thesis of this article that for laws to be "good laws" in pluralist bilingual Samoa; the language of the people, the language of Parliament must be used by drafters and upheld as superior when discrepancies in statutory text arise.

Clause 11 of the *Acts Interpretation Bill* now provides an exception for Samoan provisions to prevail over their English counterpart (in cases of differences) if they had been drafted in Samoan. Despite Clause 11 dissipating hopes as to imminent Samoan drafting, it has provided an initial step towards the realisation of that goal. This in turn will further the realisation of a true and accurate reflection of legislative intent, via the Samoan language in all statutes of Samoa. In the interim, Samoa could take heed of the Tongan practice of drafting in their indigenous language and look to a future whereby Samoan is codified as the official language of Samoa. In contrast, an approach similar to that employed by the European Commission and Canada could be utilised in that explicit provisions are made to ensure statutory interpretation is enacted in a purposive and contextual manner. These are all possible steps that the Parliament of Samoa can investigate leading towards a political and legal framework that facilitates a receiver-oriented approach to legal translation. The people of Samoa are made to abide by the laws enacted by Parliament; Parliament enacts laws which protect and benefit its citizens. The true realisation of such intentions are found in the Samoan language. It takes into account Samoa's unique culture, custom, traditions and Christian values. In sum, these equal the *faa-Samoa* which Samoan citizens, proudly live and breathe each day.

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Reflections on the Origins of the Australasian Study of Parliament Group: In Defence of Parochialism

Roger Scott

Emeritus Professor Roger Scott is Chairman of the Board of the TJ Ryan Foundation, a Queensland think tank, and an Honorary Professor in the School of Political Science and International Studies, University of Queensland.

OEPNING REMARK

I have lived half my life in Brisbane, often seen as on the parochial fringe of Australian political life. I was invited to address the Brisbane Chapter of the Australasian Study of Parliament Group's (ASPG) last meeting of 2016 to record my impressions of ASPG and I chose to concentrate on the early history of the Group. (My co-speaker, Dr Paul Reynolds, dealt with Queensland). Two locations feature strongly in this history, both dear to my heart: Tasmania and Canberra.

THE TASMANIAN CONNECTION

I will start with an explanation of my own involvement with parliamentary studies. Back in 1957 I enrolled in a generalist Arts degree at the University of Tasmania. Living near the Domain campus meant that the first of the Hodgman dynasty was my local MP (and the second Hodgman was a flamboyant law student among my circle of friends and the third is of course now Premier).

As you know, Tasmania is a peculiar place in all sorts of ways, and I studied two of its most peculiar and significant institutions in my majors in political science and public administration – the Hydro-Electricity Commission (of which I will say no more) and the State Parliament. Within that parliament was a third peculiarity of which I was unaware for several years until it rose up and bit me. On that, more later.

Hobart's tiny department had no courses in international relations at that time, so budding diplomats among my fellow students like Stephen Fitzgerald, Dennis Rose and Allan Taylor and older people like Geoff Miller and Neal Blewitt were mainly located in History. My only exposure to international relations came via my third major, "Ancient Civilisations".

There were meagre choices for an honours thesis topic beyond our celebrated Hare-Clark Parliament. Enter George Howatt, arriving from Trumpland as a mono-maniacal but engaging enthusiast for all systems of proportional representation. And I was away: under George's guidance, my thesis reviewed the ages and occupations of each of the members of the Tasmanian lower house between 1906 and 1956[1].

1 The thesis was entitled "The ages and occupations of members of the Tasmanian House of Assembly, 1906-1956", (University of Tasmania Library). An abbreviated and updated version was later published in the inaugural issue of *Politics*. (volume 1, number 1, 1967). (now *AusJPS*).

I also assisted George with reviewing the impact of the location of names on the ballot paper, which with PR was altogether more complicated than "the donkey vote". I established that Tasmania had few donkeys and that locals did remember the names of relatives. The understanding of canny locals was demonstrated in the results in Tasmania of the last Senate election.

At the end of 1961, I left "to go home" as many Tasmanians still regarded Britain, even fourth-generation natives like my parents. George Howatt stayed on and on. He badgered the somewhat bemused parliamentary and electoral officials into adopting the present complex system that now randomizes the positions on the ballot paper for state elections. What George actually wanted was a circular ballot paper.

Richard Herr joined the Tasmanian department in 1973. Apart from his very long contribution to Tasmanian political commentary since then, Richard has a powerful claim to be the father of ASPG, as is recorded in the history on the national ASPG web-site. (http://www.aspg.org.au/history.php)

THE CANBERRA CONNECTION

Richard was not of course the first scholar to study parliament as an Australian institution. Apart from Colin Hughes and Rufus Davis, most of those already established in the field were in Canberra. Finn Crisp and Geoffrey Sawer and Bruce Miller were writing textbooks with chapters on parliament but Finn's stronger interests were in the party system and ideological issues, Geoffrey's in constitutional and federal issues and Bruce's in international dimensions.

But none of these luminaries were specially interested in parliament in the way Gordon Reid was, one of their ANU colleagues. It was Gordon who added gravitas and credibility to the study of parliament and then to the ASPG as its senior patron. He sustained this interest from the ANU all the way to the Governorship of Western Australia.

Also in Canberra was the progenitor of the ASPG who was not even inside a "real" university at all. David Solomon was managing to publish a book and a mountain of scholarly analysis on parliament alongside working as a journalist inside and outside government and remaining engaged as a legal scholar. He also taught part-time at the Canberra College of Advanced Education (CCAE), assisting my colleague Jenny Hutchison who later played an important role in interpreting the national parliament to a wider media audience.

It was during the Whitlam years that the study of Australian domestic politics gained ground in scholarly interest, replacing the focus for students and many staff on international issues like Vietnam and conscription. Whitlam's Canberra became a magnet for political scientists and the ANU was able to service the Coombs Commission with names like Hawker, Smith, Weller, Wettenhall and Nethercote.

APSA AS MIDWIFE FOR THE GROUP

While working in Sydney under Henry Mayer and Dick Spann, I had been in on the ground floor of the establishment of APSA – an acronym which for a period meant Australasian not Australian Political Studies Association. (It takes a while for the naturally expansionist tendencies of most associations to come to terms with the ambivalent attitudes that New Zealander have towards Australia. Using the adjective "Australasian" is seen as demeaning and an affront to their sense of independent identity).

In 1975, I was the first non-Professor to be President of APSA as well the first to come from outside the university sector. Given this eccentric lineage, I felt emboldened to take the radical (and never-repeated) step of mandating that ***all*** conference papers that year would relate to Australian government and public policy and consequently there were extended sessions on different aspects of the role of parliament.

The resultant two-volume publication that I edited with Roger Wettenhall was called "The First Thousand Days of Labor". [2] This kept the fires burning for Australian parliamentary studies, even if Gough perished in the flames so soon after those first thousand days.

Down in Tasmania, Richard Herr was building on his interest in parliamentary institutions in the emerging states of the Pacific as well as in Canada and in places closer to home. He convened an ad hoc "special interest group" inside the APSA conference held in Adelaide in 1978. In 1979, as conference organizer of the Hobart APSA conference, he was able to establish ASPG with a quasi-permanent identity within APSA. Using the Canadian group as a model, he envisaged the distinctive mix of membership that has persisted to the current day.

In 1980, with the APSA conference back in Canberra, major contributions were made by local enthusiasts for parliamentary studies. In a seminal contribution, David Solomon drafted an elegant official constitution for the ASPG, drawing on his combination of skills in law and political science. Geoffrey Hawker, by then at the CCAE, was writing a newsletter that ultimately morphed into the Australasian Parliamentary Review. As conference organizer, Richard Herr included both PNG and New Zealand participants. PNG participation could not be maintained but ASPG funds were expended to maintain New Zealand attendance for five years until the conference received legitimation by the New Zealand government.

Before then, I had moved from CCAE myself (in 1977) to Queensland, to occupy a chair narrowly circumscribed as the J.D.Story Chair of Public Administration.

The department – then called Government – was already a leader in Australian studies, with a reputation based on luminaries such as Colin Hughes, John Western, and in my time Roy Forward, Margaret Cribb, Peter Boyce, Rosemary Whip – and the redoubtable Paul Reynolds. There was also a bevy of talented junior staff and higher degree students who went on to academic careers, to the benefit of southern universities – Rodney Smith, Brian Costar, Paul Rodan, Ian Cook and a host of others.

2 Roger Scott and Roger Wettenhall (eds) *The First Thousand Days of Labor*, CCAE, 1975.

PAROCHIALISM AND STUDYING QUEENSLAND GOVERNMENT

When I left the Department of Government in 1987 to create mischief further afield, it was clearly the received wisdom that all our students, whatever their career aspirations, needed a grounding in understanding the Westminster model of parliamentary government.

This could best be understood by studying a mandated first year course on the national system of government. Canberra after all had a federal constitution, an upper house and – even in 1987 – exercised significant power over state aspirations, notwithstanding the contemporary views of Premier Joh Bjelke-Petersen.

In addition, most of those students would end up working as lawyers, social workers, economists, journalists, teachers, party apparatchiks or public servants in Queensland, all dealing with state or local as well as national governments. To support them, a vigorous well-taught advanced course on Queensland government was delivered to significant student numbers by senior and capable academics, committed to teaching careers and often themselves engaged with the local media as commentators. Our seminars were enlivened and strengthened by regular contributions from politicians and senior bureaucrats in "the real world".

It is a sad contrast to consider the situation thirty years on, even if the career paths of the bulk of our graduates remain little changed. There is now no expectation about students needing an understanding of the Westminster model by studying Australia. An able but non-tenured part-time staff member is now in charge of a small cohort of first year students. Most students do not bother with Australia, when international relations or conflict studies beckon, with their galaxy of superstars in what is now a world class school overshadowing the ANU.

And there is even less interest in studying about state government. At the University of Queensland only a handful of undergraduates enrol each time the course is offered (biennially at best); they are taught by sessional staff battling for a income often while completing a higher degree. Access to research topics is similarly truncated.

I mourn the loss of such parochialism. (The problem seems widespread nationally but Griffith University offers a striking contrast in staffing, curriculum and local political engagement). This sense of regret is a motivating force for the work that I did with Professor Peter Spearritt on the oral history project "Queensland Speaks"[3]and the work that Ann and I have done on the TJRyan Foundation. [4] Our web-site is self-consciously filling a gap in scholarly resources relevant to Queensland.

3 "Queensland Speaks – A Progress Report" (with Peter Spearritt), paper at the 2009 annual conference of the Australian Study of Parliament Group, published in *Australasian Parliamentary Review*, 25, 1, Autumn. 2010

4 https://www.google.com.au/search?client=safari&rls=en&q=tj+ryan+foundation&ie=UTF-8&oe=UTF-8&gfe_rd=cr&ei=P8rgVo2CGsHu8wfxzbCgBw

The ASPG and its journal continue to wave the flag and deserve all the help they can get from official sources, in both staffing and finance. They are important bricks in the foundation of parliamentary democracy. But the lack of connection with the increasingly multi-national concerns of political scientists meant that the nexus with the APSA conference was broken long ago. Gatherings now rely more on the availability and interest of parliamentary staff to organize the date and venue of meetings, for which academic enthusiasts for Australian studies remain eternally grateful.

POST-SCRIPT: THE DANGER OF PAROCHIALISM

The big danger in parochialism is a lack of comparative context. So I do not wish to idealise the virtue of my parochial experience in Tasmania. Ancient History apart, my studies were replete with acquiring relatively non-transferable skills and understandings – like the policy dominance of the Hydro-Electric Commission or the minutiae of Hare-Clark.

My honours work in 1960 required a close analysis of newspaper files because there was no official parliamentary record kept and never had been – only a clippings collection. Until 1979, it must have been felt that Tasmania and its parliament were so small and intimate that there was no need for something equivalent to Britain's Hansard – on a cost-benefit basis, word of mouth would suffice, with the role of town criers performed for specialist regional audiences by an *Advocate* in Devonport and an *Examiner* in Launceston.

It was another "Examiner" who exposed my parochialism. My dark past includes an unlikely claim to be one of the "greatest –of-all-time" experts on the development of trade unions in colonial Uganda[5]. (I still get occasional requests via Google for my more esoteric and embarrassingly immature African publications. Thankfully, none is as popular as my 2005 article on Pericles published ironically in an international relations journal[6]).

My bumpy road to expert status as an Africanist was an Oxford doctorate completed without local supervision in Kampala. This was in an era when modern technology had moved from message sticks only as far as manual typewriters. I used the same research "methodology" as I had in Tasmania, relying on interviews and the files of the local newspaper, the *Uganda Argus*. I made the colonial-racist assumption that if Tasmania had no Hansard in the 1960's then Uganda in the same era wouldn't either. I was wrong. I was required to re-submit my thesis after a disastrous oral examination exposed this weakness. There is always a price to be paid for blinkered parochialism.

5 *The Development of Trade Unions in Uganda*, East African Publishing House, 1965, available on line via Makerere University.

6 "Democratic imperialism: ancient Athenians and the Americans in Iraq", *Australian Journal of International Affairs*," 59, 3, 2005.

Chronicles

From the Tables – July to December 2016

Tim Bryant

Tim Bryant is Clerk Assistant (Committees), Senate

AUSTRALIAN HOUSE OF REPRESENTATIVES

Opening of parliament

Following the general election on 2 July 2016, in accordance with the Governor-General's proclamation, Senators and Members assembled in Parliament House at 10.30 a.m. on 30 August 2016. As Deputy of the Governor-General, the Chief Justice of the High Court (the Hon. Robert Shenton French AC) declared open the Parliament in the Senate Chamber, Members having proceeded there on request delivered by the Usher of the Black Rod. Members returned to the House of Representatives Chamber after being instructed to elect a Speaker.

As there had been a dissolution of, and election for, the full membership of both Houses, the Chief Justice remained in the Senate Chamber to swear in Senators, and Members were sworn in by the Hon. Justice Susan Kiefel AC as a Deputy to the Governor-General attending in the House of Representatives Chamber. After Members had been sworn in, the Clerk called for nominations for the office of Speaker. One proposal was received, for the incumbent Speaker, the Hon Tony Smith, who was duly declared elected as Speaker. A number of Members, led by the Prime Minister and the Leader of the Opposition made congratulatory remarks and Mr Smith thanked the House for re-electing him as Speaker.

First occasion of a ruling being sought under the Australian Federal Police Guideline for Execution of Search Warrants

On 23 August, in accordance with the AFP National Guideline for Execution of Search Warrants where parliamentary privilege may be involved, the Speaker was notified by the Australian Federal Police that it was intending to execute a search warrant on the Department of Parliamentary Services at Parliament House on 24 August in relation to an investigation into the unauthorised disclosure of Commonwealth information.

In a statement to the House on 13 September, the Speaker informed Members that he understood the search warrant was executed on 24 August and a range of material was seized. The Member for Blaxland (Mr Clare) had made a claim that material that had been seized was protected by parliamentary privilege. This material was therefore

being held securely in the office of the Clerk of the House. The Speaker stated that the Member for Blaxland was seeking a ruling from the House in relation to his claim of parliamentary privilege as provided under the AFP Guideline, and it would now be a matter for the House as to how it would determine its position on the documents. This was the first occasion on which a ruling had been sought from the House under the AFP Guideline for Execution of Search Warrants. The Speaker stated that he would undertake consultations to determine the way in which the matter would be dealt with.

Having undertaken those consultations, the Speaker made a further statement on 11 October and presented for the information of Members a paper prepared by the Clerk's Office on the process to determine claims of privilege in matters such as the one in question. The paper proposed that the House Committee of Privileges and Members' Interests be tasked with considering the claim by the Member for Blaxland and making a recommendation to the House about its ruling on the claim.

On 28 November, the Chair of the Privileges and Members' Interests Committee presented the Committee's report. The report found that in all circumstances of the matter, the material seized under the search warrant was held by the Member for Blaxland in connection with his parliamentary responsibilities as a Member and that the material related to 'proceedings in Parliament' as defined in the *Parliamentary Privileges Act 1987*. As a result, the Committee found that the material was subject to parliamentary privilege and need not be produced under the search warrant. Accordingly, the Committee recommended that the House rule to uphold the claim of privilege by the Member for Blaxland and further that the AFP be advised of the House's ruling on the matter and that the seized material be returned by the Clerk to the Member for Blaxland.

On 1 December, the Chair of the Privileges and Members' Interests Committee, pursuant to notice, moved that the House agree with the Committee's recommendation and rule to uphold the claim of parliamentary privilege by the Member for Blaxland. The motion also provided for the AFP to be advised of the House's ruling on the matter and that the seized material in the custody of the Clerk be returned to the Member for Blaxland. The motion was seconded by the Deputy Chair of the Committee, was not debated and was carried on the voices.

THE SENATE

The general election for both Houses of the Commonwealth Parliament, held on 2 July 2016, heralded the start of a very interesting 6 months in the Senate. While the Turnbull Government was returned with a one seat majority in the House of Representatives, any thought that a double dissolution election would produce a more manageable Senate was misplaced.

The quota for a Senate seat is halved in a double dissolution election, from just over 14% to just over 7%. The result was that the cross bench grew to a record 20 senators

(out of 76), with 9 Greens and 11 senators representing 6 other political parties. The last places in each State took some time to be determined but with the Government's narrow majority in the House and its loss of seats in the Senate, speculation began quickly about the prospects of the double dissolution trigger bills being resolved at a joint sitting. Section 57 of the Constitution provides that a joint sitting is only possible if, after the election, the trigger bills are again passed by the House of Representatives and rejected, unacceptably amended or not passed by the Senate.

The three trigger bills were reintroduced into the House at the commencement of the new Parliament and passed in October. They were extensively amended by the Senate in late November but all amendments were agreed to by the House of Representatives and the bills therefore passed without the need for a joint sitting.

Qualifications of senators challenged

On 7 November 2016, the Senate referred two matters to the Court of Disputed Returns under section 376 of the *Commonwealth Electoral Act 1918*. Section 47 of the Constitution provides for each House to determine any question relating to the qualification of a senator or member or respecting a vacancy in either House, until the Parliament otherwise provides. Difficulties with early cases led to legislation to establish the Court of Disputed Returns and to procedures for such matters to be determined by the courts. Questions were raised about whether two senators were eligible to have been chosen as senators at the July election and both sets of questions were referred to the High Court sitting as the Court of Disputed Returns. In one case, it was claimed that the senator had been convicted of an offence punishable by a term of imprisonment of one year or more and was awaiting sentence and therefore incapable of being chosen because of section 44(ii) of the Constitution (although the conviction was later annulled). In the second case, it was alleged that the senator had an indirect pecuniary interest in an agreement with the public service of the Commonwealth because of a complicated leasing arrangement with the Department of Finance for his electorate office in a building that he owned and had recently sold on vendor finance to an associate, contrary to section 44(v) of the Constitution.

On 3 February 2017, the Court of Disputed Returns held that the first senator was incapable of being chosen as a senator in the 2016 federal election and ordered that the resulting vacancy be filled by way of a special count of the ballot papers, under the supervision of a single justice. Orders providing directions for the count were made on 2 March, and it was undertaken by the Australian Electoral Officer for Western Australia on 7 March, who reported to the court. On 10 March, the court made a final order, declaring the second Pauline Hanson's One Nation candidate, Peter Georgiou, elected to the vacant position. The President tabled copies of the various orders on 20 March 2017, and Senator Georgiou took his place the following Monday.

In the second matter, the Court of Disputed Returns held, on 5 April 2017, that the former senator was incapable of being chosen as a senator in the 2016 federal election and ordered that the resulting vacancy be filled by way of a special count of the

ballot papers, under the court's supervision. On 19 April the court declared the second Family First candidate on the ballot, Lucy Gichuhi, elected to the vacant position. At the hearing the court rejected a challenge to her eligibility under section 44(i) of the Constitution relating to citizenship requirements. The President tabled copies of the various orders and Senator Gichuhi was sworn in at the start of proceedings on 9 May. With her original party's arrangements having shifted around her, Senator Gichuhi informed the Senate that she would take her place as an independent.

The Senate has now returned to its full complement of 76 senators for the first time since 1 November 2016.

Parliamentary privilege

The protocol for dealing with parliamentary privilege in relation to the execution of search warrants was dealt with for the first time by the Senate Privileges Committee in its 164th report, tabled on 28 March 2017.

Odger's Australian Senate Practice

The 14th edition of this authoritative work on Senate practice and procedure went to the printers in December 2016 and was distributed early in 2017. It is the first edition to be produced since the death of former Clerk, Harry Evans, in 2014 and will bear as its subtitle, "As revised by Harry Evans".

AUSTRALIAN CAPITAL TERRITORY

Election of oldest MLA

A Member's resignation in August 2016 required a count back under the Hare Clark electoral system that applies in the Territory to fill the vacant Member's seat. The new MLA elected was sworn in before a Judge of the Supreme Court on 2 August, and immediately made his inaugural speech. At 81 years the Member was the oldest person elected to the Assembly. As the 8th Assembly was drawing to a close, the Member was only able to attend 6 sitting days.

Code of conduct matter

The Standing Committee on Administration and Procedure reported on an allegation that an MLA had breached the Code of Conduct. A Member had alleged that the Chief Minister breached the Members' code of conduct by endorsing a local company.

The Committee recommended that no further action be taken in relation to this matter. It also recommended that all MLAs take into account the comments made by the Commissioner for Standards about endorsements when they are approached

to support a business or organisation, as well as making sure they are aware of how any endorsement or support for a business or organisation is going to be used and/or disseminated before it is given. It further recommended that the Code of Conduct for all Members of the Legislative Assembly be reviewed prior to it being re-endorsed, in accordance with the recommendation of the Ethics and Integrity Adviser.

NEW SOUTH WALES JOINT HOUSE REPORT

Proposed Parliamentary Ethics / Standards Commissioner and review of the Members' Code of Conduct and the pecuniary interest disclosure framework

On 1 June 2016, the Premier wrote to the Speaker and the President indicating the Government's broad agreement with the directions for reform contained in two recent reports of the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council's Privileges Committee. The reports examined a number of matters, including a proposed Parliamentary Ethics/Standards Commissioner, the Members Code of Conduct, and the pecuniary interest disclosure framework. The Premier expressed a preference for uniform agreements across both Houses and requested that the Parliament develop a single approach for reform.

On 21 June 2016 the Speaker and the President responded to the Premier noting that some legislation will be required to give effect to the recommendations of the committees, and that this represents an opportunity to progress a number of integrity-based measures as well as certain administrative reforms, including parliamentary privilege legislation, modernisation of the *Parliamentary Evidence Act 1901* as it relates to the operation of committees, and parliamentary service legislation providing a legislative basis for the employment of the staff of the three parliamentary departments.

As part of the same program of reforms the Legislative Assembly Committee on Parliamentary Privilege and Ethics commenced a review of the Members' Code of Conduct, with the intention of developing a more robust model for managing Members' conduct, focussing on ethics, clarity, independent oversight and transparency.

Independent Commission Against Corruption Bill

On 15 November 2016 the Premier introduced the *Independent Commission Against Corruption Amendment Bill 2016* in the Legislative Assembly.

The object of the bill is to change the structure, management and procedures of the Independent Commission Against Corruption (ICAC), the most notable change being the establishment of a panel of three Commissioners (a Chief Commissioner and two other Commissioners) to constitute the Commission. Under the new structure any decision

of the ICAC to conduct an inquiry will have to be authorised by the Chief Commissioner and at least one other Commissioner.

Opposition amendments were moved and negatived on division, and the bill was passed by the Assembly and forwarded to the Legislative Council for concurrence.

The next day the bill was introduced in the Legislative Council. Opposition amendments, with the same terms as those that were moved in the Legislative Assembly the previous day, were then moved and negatived on successive divisions, and the bill was passed by the Council.

The bill, having passed both Houses, was assented to on 23 November 2016.

NEW ZEALAND HOUSE OF REPRESENTATIVES

New Prime Minister and new Governor-General

On 5 December 2017, Prime Minister, the Rt Hon John Key, announced his resignation as the Leader of the New Zealand National Party. Mr Key had led the National Party since 2006 and became Prime Minister following the 2008 general election. Mr Key said he would resign as an MP in the 6 months preceding the 2017 general election to prevent the expense of a by-election in his electorate of Helensville. The Electoral Act 1993 provides that a vacancy arising within 6 months of a general election or expiration of a Parliament can be left vacant with the agreement of 75 per cent or more of the House of Representatives.

The Rt Hon Bill English was sworn in as Prime Minister on the afternoon of 12 December after serving as Mr Key's deputy since 2008. The process for this appointment was relatively straightforward as the National Party's constitution states that the party's leader is chosen by National MPs. Different, and sometimes more lengthy, processes are used by various parties for electing their leaders, such as the electoral college format used by the New Zealand Labour Party.

Dame Patsy Reddy, was sworn in as the 21st Governor-General of New Zealand on 28 September. Her predecessor, Sir Jerry Mateparae, was farewelled in August following his 5-year term. In her new role, Dame Patsy is commander-in-chief of New Zealand's armed forces and is the Queen's representative in the Realm of New Zealand, which includes Niue, Tokelau, the Cook Islands and the Ross Dependency in Antarctica.

Hurunui/Kaikoura earthquakes and the House's response

In response to the 14 November magnitude 7.8 earthquake, based in Kaikoura but felt throughout much of New Zealand, Parliament passed three pieces of legislation, some stages under urgency.

- *The Civil Defence Emergency Management Amendment Act 2016* had received its third reading just prior to the earthquake on 10 November. It legislated for emergency roles and responsibilities, and the creation of an authority to allocate Crown funding for response and recovery costs. *The Civil Defence Emergency Management Amendment Act 2016* brought forward the commencement of many of the provisions in the Act. It passed through all stages on 29 November and came into force at the time it received Royal Assent—9.59 p.m. that evening.
- *The Hurunui/Kaikoura Earthquakes Emergency Relief Act*, passed 1 December, made provision for emergency works to be undertaken in the Kaikoura region. The Local Government and Environment Committee were given one day to consider the bill, and recommended minor amendments.
- *The Hurunui/Kaikoura Earthquakes Recovery Act*, passed 8 December, enabled the longer-term recovery efforts, with a focus on local government and communities.

The truncated consideration periods for the latter two emergency Acts required some flexibility from the select committee process, resulting in more collaboration with the Acting Minister of Civil Defence and greater scope for the committee secretariat to make corrections.

The Regulations Review Committee released the *Inquiry into Parliament's legislative response to future national emergencies* on 1 December, reviewing Parliament's response to the 2010/11 Canterbury earthquake sequence that resulted in the deaths of over 180 people. The committee found that executive powers to override enactments should extend only as far as is necessary to deal with the emergency itself, that emergency legislation should include safeguards, and that any legislative response to a national emergency should be designed to ensure that recovery from the emergency begins on day one. The committee suggested that the emergency legislation introduced following the earthquake would provide the opportunity to debate the principles and recommendations in the report.

VICTORIAN LEGISLATIVE ASSEMBLY

Tobacco Amendment Bill — financial privilege issue

A continuing issue in the Victorian Parliament is disagreement between the Houses on the interpretation of the Assembly's financial privilege — particularly what constitutes an appropriation. This has been demonstrated recently through Victoria's infringement penalty scheme.

Victoria's *Infringements Act 2006* requires any refunds for withdrawn infringements to be paid from the consolidated fund (if that's where the penalty was paid into). The Assembly has historically interpreted new infringement offences in bills as appropriating on the basis that they would increase refund payments from the consolidated fund and requires messages from the Governor authorising the appropriation.

The most recent example of this disagreement involved the Council amending a bill to include a new infringement offence. The Speaker, following previous Assembly practice, advised the Assembly that he believed the amendments infringed on the Assembly's financial privileges, and the Assembly passed a motion refusing to entertain the amendments. The Assembly did not oppose the content of the amendments, and so made its own amendments with the same effect before sending the bill back to the Council.

The Council agreed to the Assembly's amendments, but also resolved not to insist on the amendments it had originally made — in effect refusing to accept that the Assembly had the power to refuse to entertain the Council's amendments. Debate in the Council and comments from the President expounded the view that the Assembly was wrong not to entertain the Council's amendments.

Throughout this process Assembly clerks faced a challenge in communicating the concept that it was the House and its body of practice, and not its clerks, that was expressing a view on the appropriating nature of the Council's amendments. The Assembly had made an identical decision a few years ago, and this helped somewhat, but was countered by the fact that the cause of appropriation through infringement penalty and refund was somewhat complicated.

For now, the Houses remain in disagreement on the interpretation of appropriation, but in this particular case, that disagreement did not prevent Parliament from agreeing and passing the policy proposals contained in the bill and amendments in question.

VICTORIAN LEGISLATIVE COUNCIL

Leader of the Government's suspension

On 9 March 2016 the Opposition introduced a motion seeking to suspend the Leader of the Government for a period of up to six months for the Government's failure to produce certain documents, arguing that failure to provide these documents constituted an obstruction of a request of the Council. After considerable debate on the motion the Opposition moved a closure of debate motion on 25 May to end debate and put the question. The closure motion and suspension motions were passed and the Leader of the Government was suspended from the House for 6 months.

Despite the motion including a provision allowing the Leader of the Government to return to the House earlier if all documents were provided, a member moved that the suspension be lifted if these provisions were not able to be used successfully. The Leader of the Government returned to the House on the last sitting day of the year – 8 December 2016 – after completing the full six-month suspension.

The suspension of the Leader of the Government for the full six months created associated problems for the House, including who would respond to questions asked of his portfolio during question time and whether he was permitted to attend Joint Sittings.

e-petitions

On 8 June 2016 the Council agreed to a resolution committing itself to the implementation of e-petitions in 2017. The terms of the resolution acknowledged the importance of petitions as a means for citizens to raise issues and grievances with their elected representatives and noted that e-petitions, already common across many comparable jurisdictions, would be an important advancement in allowing more Victorians to participate in the democratic process. The Procedure Committee was charged with developing an appropriate system and creating the necessary procedures to govern the framework in which it will exist.

WESTERN AUSTRALIAN PARLIAMENT

Bills ruled out of order by the Speaker of the Assembly

In a somewhat controversial end to the Parliament, in the final sitting weeks the Speaker of the Legislative Assembly ruled out of order two bills that had been introduced in and passed by the Legislative Council. One of these bills, the School Boarding Facilities Legislation Amendment and Repeal Bill 2015, was a high profile Government bill, whilst the other bill (the Constitution and Electoral Amendment Bill 2016) was a Private Member's Bill promoted by a Member of the National Party, which had the Government's support.

Both bills were ruled out of order on the grounds that they involved an appropriation of public funds and, as such, should have received a certificate from the Governor and been introduced in the Legislative Assembly, pursuant to s 46 of the *Constitution Acts Amendment Act 1899*. The President of the Legislative Council tabled a legal opinion from a senior counsel which stated that, as a matter of law, the School Boarding Facilities Legislation Amendment and Repeal Bill 2015 did not involve any appropriation from the Consolidated Account. The senior counsel also suggested that, despite the previously understood wording of s 46, the matter was capable of determination by a court. The prospect of court action attracted some media attention, although the President of the Legislative Council publicly stated that legal action was unlikely to be resorted to in order to resolve the impasse.

The School Boarding Facilities Legislation Amendment and Repeal Bill 2015 was renamed the School Boarding Facilities Legislation Amendment and Repeal Bill 2016 and introduced in the Assembly with a Governor's certificate. The new bill was passed in the Council on 18 August 2016 by means of a suspension of those standing orders relating to the *"same question"* law.

SOUTH AUSTRALIAN HOUSE OF ASSEMBLY

Children and Young People (Oversight and Advocacy Bodies) Bill 2016

The protection of children has become a controversial topic in recent years. In order to address this issue, the Government has been introducing legislative reforms to implement recommendations made by the *Child Protection Systems Royal Commission Report*, published in August 2016.

On 20 September 2016, the Attorney-General moved to suspend Standing and Sessional Orders to introduce two Bills including the Children and Young People (Oversight and Advocacy Bodies) Bill 2016 to establish a Commissioner for Children and Young People and establish the Child Development Council.

The question on the suspension was put and agreed to. The Bill was read a first time and the second reading was then moved by the Attorney-General. Pursuant to Standing Orders, the debate had to be adjourned to a future day, however at the conclusion of the Attorney-General's contribution, the Deputy Leader of the Opposition moved to further suspend Standing Orders to enable the passage of the Bill through all stages without delay. The motion was agreed to with an absolute majority of the whole number of Members of the House.

The urgency with which this legislation was dealt with indicates the desire of the House to move as quickly as possible to provide better protection to children and young people.

Power Outage on Wednesday 28 September 2016

The House of Assembly was in session on 28 September 2016 when, at 3.48 pm, a power outage occurred due to extreme weather causing the State to have an unprecedented State wide outage. After a short blackout, the Parliament's power returned through backup generators to enable the building to continue to operate. At the time of the blackout Government Ministers were introducing four Government Bills listed on the Notice Paper. Once the magnitude of the State wide power outage was realised and at the conclusion of the introduction of the fourth Government Bill, the House was adjourned at 4.05 pm until the next sitting day.

QUEENSLAND LEGISLATIVE ASSEMBLY

Motion to separate Queensland into two states

On 15 September 2016, the member for Mount Isa gave notice of a motion for debate that the House support the separation of Queensland into two states in accordance with section 124 of the *Commonwealth Constitution*, with the boundaries to be determined by an independent body such as the Redistribution Commission.

In considering whether the motion was out of order, the Speaker was of the view that the proposed motion, if agreed to, would not be effective consent by the Queensland Parliament within the meaning of section 124 because the territory to be separated from the state was not identified with any precision. The motion, if agreed to, would simply express an opinion of the House on the issue and was a matter for the House to determine. The motion was debated that evening and was not agreed to.

Absence of message from the Governor

The Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 was introduced on 13 September 2016 and referred to a committee for examination. The committee reported on the bill on 1 November 2016.

The bill proposed amendments to implement heavy vehicle policy initiatives relating to the chain of responsibility and heavy vehicle roadworthiness, as well as amendments related to the regulation of personalised transport services (ie. Uber).

In August 2016, the government announced a $100M Industry Adjustment Assistance Package to support the industry to adjust to the regulation of personalised transport services. The bill proposed an amendment to the *Transport Operations (Passenger Transport) Act 1994* to enable a regulation to be made to provide the scheme for the payment of financial assistance.

On 3 November 2016, the Speaker made a ruling in relation to the absence of a message from the Governor for the bill, which is required under section 68 of the Constitution of Queensland. The ruling noted that the Minister for Transport and the Commonwealth Games had been advised by the Office of the Queensland Parliamentary Counsel that no message was required as the assistance package was being funded by existing appropriations and the bill did not appropriate new funds from the consolidated fund.

Following the introduction of the bill, the Clerk raised with Parliamentary Counsel the absence of a message and it was agreed that the Clerk and Parliamentary Counsel would seek joint legal advice about the application of section 68 generally, and its application in respect of the bill specifically. The Clerk and Parliamentary Counsel later sought further advice from the Solicitor General.

In short, the advice stated that generally, an appropriation for the purposes of section 68 is any conferral of authority upon the executive to pay an amount from the consolidated fund. An amendment that would potentially increase an existing appropriation, extend the objects and purposes of an existing appropriation or alter the destination of an existing appropriation will itself amount to an appropriation. Specifically, the bill was an appropriation for the purposes of section 68.

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

2016 Northern Territory General Election

The Northern Territory Annual General Election was held on 27 August 2016. The Australian Labor Party won 18 seats and the Country Liberals won 2, with 5 independent Members also elected. Of the 25 Members of the 13th Assembly, 12 are women. Additionally, the new Labor Government appointed the largest female majority Cabinet in Australian history, with 5 women appointed to an 8 person Ministry.

The Northern Territory Legislative Assembly continues a trend of strong Indigenous representation – in every election since the Assembly's establishment in 1974, at least one Indigenous member has been elected – with 6 Indigenous Members elected in 2016.

Book Reviews

Party Rules? Dilemmas of political party regulation in Australia

Edited by Anika Gaula and Marian Sawer, ANU Press, Acton, Canberra, 222 pp. RRP $38.

Colleen Lewis

Colleen Lewis is an Adjunct Professor in the National Centre for Australian Studies, Monash University.

The major political parties have much to be worried about including declining levels of trust by the broader community, brought about in part by a perceived lowest common denominator 'whatever it takes' approach to their role, and what many in the community perceive to be a needlessly combative approach to politics. Corruption scandals involving senior and less senior members of political parties and the perception that party-based parliamentarians always place party interests before the public interest fuel community disenchantment with these long established Australian institutions. But as the issues discussed, analysed and evaluated in this book demonstrate, other issues arise that have the potential to further fuel the declining reputation of political parties: the current rules and regulations or lack thereof surrounding Australia's political parties.

The editors have brought together eminent scholars in the political science field and emerging scholars all of who offer a detailed analysis of the quandaries associated with regulating political parties. Even though the focus is on Australia's federal system and specific Australian states, the collection offers the basis for a comparative analysis with countries grappling with issues surrounding the regulating and funding of political parties.

Chapter 1, authored Marian Sawer and Anika Gaula offers an excellent analysis of the 'promises and pitfalls', associated with party rules. Among other things, the authors highlight the principal regulatory challenges surrounding the place occupied by political parties in Australia's representative democracy. They also present a useful overview of the literature on more recent developments in this space. Sawer and Gaula identify four main aspects to the debates surrounding party regulation: public funding of political parties; regulation and restrictions on private sources of funding; expenditure limits; and the degree to which 'internal' party matters should be regulated by law. It is pleasing to see that the structure of the book only occupies two pages of this very informative 35-page chapter. The first 33 pages focus on the tensions inherent in regulating political parties in the Australian context.

Sarah John's chapter, Resisting Legal Recognition and Regulation: Australian Parties as Rational Actors?' notes the somewhat unusual place occupied by political parties

in the Australian political landscape. They started life as private organisations, however today parties are regulated by law and to varying degrees are classified as 'quasi-state agencies'. At the same time they retain some private rights. Political parities also have somewhat unusual powers in that they largely determine 'their own destiny'. They do this through parliamentary party members' ability to formulate and approve laws that regulate their parties. While analyzing Australian efforts to 'legally recognise political parties', John presents two models that usefully assist in understating these interesting and at times perplexing institutions and their journey from private to public (or quasi-public) entities. In an effort to try to understand them better, the author sometimes uses the lens of rational choice theory and Lindblom's 'muddling through'. The chapter concludes by arguing that Australian political parties transitioned from being unregulated by law to attaining 'legal recognition with regulation and reward, without any serious regulation of party affairs'.

Norman Kelly's chapter focuses on minor and micro political parties and examines and explains their increase at the state and federal level in Australia. It includes informative figures, tables and useful appendices which readers will find interesting and scholars a valuable source for their own research. The chapter presents a typology of federal micro parties and an analysis of party registration trends dating back to 1983, the commencement of the 'regulatory era'. The 'two-tiered' threshold for recognition as a party is discussed, as is the role regulation plays in facilitating internal party democracy. Aspects of the reform process, ranging from 1983 to the 2014 recommendations of the Joint Standing Committee on Electoral Matters, are analysed here. Kelly addresses two recent and significant reforms to the voting system. One relates to the discontinuation of voting tickets, which 'removed the ability for parties to direct' voters' preferences. The other is the introduction of partial optional preferential voting for the Australian Senate. The changes have been viewed as fairer by Australia's leading psephologist and the Australian Broadcasting Corporation's acclaimed election analysis, Anthony Green, who Kelly quotes as arguing that these reforms have placed '…the power of preferences into the hands of voters'.

Chapter 4 by Yvonne Murphy examines who gets what and how in the context of resources allocated to parliamentary parties. This includes the staff, office space and information and communication equipment provided to qualifying parliamentary parties to assist them in organising and supporting their members. These resources are also required to enable political parties to work with government and other political parties in order to coordinate parliamentary business. Murphy argues that the resourcing of political parties is under-researched and her chapter addresses this gap by shining a spotlight on how these facilities and resources effect the ability of parliamentarians and political parties to meaningfully engage in the functions and processes of parliament and hence the democratic process. The chapter outlines the history surrounding the provision of parliamentary resources in Australia and situates that history in an international context, thereby allowing for a comparative analysis. The chapter then distinguishes between 'tools of trade' and other resources before moving on to analyse the system for granting allowances, the accountability processes that attach to their

use and the impact discretion and bargaining play in the process. Murphy concludes by offering an evidence-based opinion on the 'democratic implications' of the current system of 'parliamentary party resource allocation'. The spotlight Murphy turns on this neglected area has revealed 'an aspect of parliamentary life ruled by conventions rather than formal regulation, discretion rather than certainty and backroom negotiations rather than transparency'. She concludes her chapter by arguing that reform to this aspect of resourcing political parties requires reform if 'transparency, certainty and consistency' is to be achieved.

While Graeme Orr's chapter focuses on Queensland, it covers the important and very topical issue of public funding of political parties and does so within the 'cartel thesis' as it relates to the behaviour of major political parties. Orr's examination of Queensland begins by noting that it does not have an upper house. This means that governments do not need to negotiate with other political parties when crafting legislation. This allows them to 'legislate with impunity' and exercise their 'incumbency advantage' to great effect. Orr's Queensland case study highlights a number of 'drivers' of the political finance system. They include 'liberal or social democratic ideology', 'self-interest' by political parties and parliamentarians and a series of scandals that resulted in some reforms. The author comes to the conclusion that in Queensland cartel behaviour is evident in regulation that is unfair to minor parties and Independents and results in the 'featherbedding' of public funding to suit the aspirations of the major parties. This chapter also discusses the nature of pubic funding in Australia and the major reasons for its introduction, which was to inject 'clean money' into the political system and to ensure that political parties were adequately resourced. It was also suggested that adequate public funding could help to alleviate political parties need to over rely on donors. Theory has not always translated into practice. A reason for the gap between the two is the laissez-faire approach to public funding by some Queensland governments and the Federal government, made possible because taxpayers' financing of political parties did not come with sufficient regulation, such as caps on electoral expenditure in exchange for money from the public purse.

Chapter 6 by Jennifer Rayner analyses the impact of spending and donation caps on elections in Australian states. More specifically it examines whether the imposition of spending caps on electoral spending and donations can achieve what it is designed to do, which is deliver a 'more equal electoral competition'. Rayner questions whether such a policy results in a more 'level playing field between political actors'. She argues that those who support reforms in order to achieve such outcomes often fail to support their propositions with empirical research. Rayner's research, as documented in this chapter, uses 'original empirical research' to evaluate the impact or otherwise of financial caps in Australian elections, in particular the states of New South Wales and Queensland. Her chapter explains the affect increased financial regulation has on political party behaviour. The article also examines published disclosures in relation to campaign donations and spending to ascertain the extent of financial disparity between major and minor parties prior to reforms that placed caps on spending and donations.

Rayner finds that these reforms have 'done little' to address the discrepancy that exists between major and minor parties' financial situation.

Anika Gaula's sole authored chapter examines the self-interested approach to regulating political parties in Australia and the 'disconnect' it reflects between the crucial place parties occupy in representative government and the status they occupy in law. This, she explains, is compounded and complicated by the role parliamentary party members play in determining the nature and extent of laws that regulate political parties. It often results in regulations designed to advantage major parties and disadvantage minor parties. Gaula notes that the 'partisan nature of regulation', coupled with the 'ambivalent distinction between the public and private activities of political parties' highlights the need to address two issues: 'should political parties be regulated at all' and 'if so, who should regulate them'? Attempting to answer these important questions is the focus of Gaula's chapter. It canvass matters to do with autonomy vs. regulation, debates for and against regulation in the context of the reason parties exist, the matter of how parties regulate themselves and whether this should be made more public, judicial developments in relation to the regulation of political parties, the often contested area of candidate selection and how the somewhat limited governance arrangements in relation to political parties are best addressed.

The final chapter, authored by the two editors Anika Gauja and Marian Sawer consider the 'regulatory gap' identified by contributors to the edited collection and consider its 'nature and causes'. The authors draw on the evidence and arguments presented in the preceding seven chapters to arrive at explanations and place those explanations in an international context. They also explore 'regulation as a normative exercise'; the need to balance competing principles, the role political parities play in representative democracies and the evidence based partisan approach to party regulation.

Party Rules? Dilemmas of political party regulation in Australia is a highly topical, well-researched and well-written book and one that I enjoyed reading. I am certainly more informed about Australian political parties from having done so. The book is a must read for anyone interested in better understanding political parties; their role and function in Australia's democratic political system; the role political parties play in the trust deficit between the electorate and those they elect to represent them; whether political parties should receive funding from taxpayers and whether there should be caps placed on the amount of money political parties can spend on elections campaigns.

A particular strength of the book is the evidence-based spotlight it places on political parties and the dilemmas faced when financing them and implementing appropriate accountability measures that can ensure taxpayers' money is used appropriately and in a transparent manner. I have no hesitation in recommending this book to all who are interested in political parties and related issues.

Parliament Legislation and Accountability

Edited by Alexander Horne and Andrew Le Sueur, Hart Publishing, Oxford 2016, 317 pp. RRP $65.99 (US).

Colleen Lewis

Colleen Lewis is an Adjunct Professor in the National Centre for Australian Studies, Monash University.

This edited collection presents a critical analysis of the two primary constitutional roles of the United Kingdom (UK) Parliament: legislation and holding government to account. Its thirteen chapters are divided into two sections. Part 1 addresses legislation and Part 2 accountability.

The foreword, written by Lord Lisvane, formerly Sir Robert Rogers, Clerk of the House of Commons, highlights a particular strength of the book, namely that contributors are a mix of 'outsiders' and 'insiders'. Their different perspectives combine the 'pragmatic and practical' viewpoints of expert practitioners with the research-based knowledge of academics scholars in the field.

The Breaking News bulletin, which comes before the introductory chapter, alerts readers to five relevant developments that occurred as the book was going to print. Since then, the referendum to decide if the UK would stay a member of the European Union (EU) or leave it, has taken place with the leave vote being victorious. 'Brexit' negotiations commenced recently and while the outcome is very uncertain there will be implications for some of the issues raised in particular chapters in this book. The impact on UK institutions, including Parliament, will lead to legislative and accountability changes and publications that discuss, analyse and evaluate those changes will abound. It is hoped that several will adopt the very sensible and informative outsider-insider perspective found in this edited collection.

The book's introductory chapter, authored by editors Alexander Horne and Andrew Le Sueur, identifies two key questions discussed throughout the edited collection. The first asks 'against what measure should the effectiveness of Parliament be measured'? The second explores 'how Parliament's effectiveness in its roles could be improved'. As is often the case with edited collections, the introductory chapter goes on to outline the main points addressed in each chapter.

Chapter 2, authored by insider Sir Stephen Laws addresses the effectiveness of Parliament's scrutiny of legislation and how it might be improved. The insights Sir Stephen offers are based solely on his 37-year career in the Parliament, more specifically on his involvement in the legislative process. Sir Stephen readily admits that his chapter does not draw on other empirical research. This does not detract

from the valuable insights and opinions expressed by the author, which make an important contribution to the debate on legislative scrutiny. The chapter concludes by noting that, 'it is the government not Parliament that is legislating'. Therefore, 'it is the government's responsibility to ensure the quality of legislation and Parliament's function to call it to account for fulfilling that duty'.

Chapter 3, written by two insiders Jessica Mulley and Helen Kinghorn, examines the pre-legislative scrutiny process in Parliament. The authors maintain that elements of the legislative process and the quality of its 'final product', statute laws, raises concerns for some experts in the field. Nevertheless, their chapter makes the point that with nearly 20 years experience with the pre-legislative scrutiny process, the consensus seems to be that it is a 'welcome and valuable addition to Parliament's options for scrutinizing legislation'.

Parliament's constitutional standards are the focus of the chapter by outsiders Jack Simpson Caird and Dawn Oliver. They address how parliamentary scrutiny of government bills could be improved and suggest that, 'Parliament's own constitutional standards could and should provide a potentially vital, normative focal point for all parliamentarians' involved in scrutinising provisions that have constitutional implications. Caird and Oliver argue that parliamentarians' engagement with constitutional values is a highly desirable feature of constitutional systems, as 'constitutional values represent a political mechanism' for making governments accountable for the substance of their legislative proposals and the legislative process. The authors recommend the development of a parliamentary code of constitutional standards, that the task of developing one be undertaken by Parliament, in particular by the House of Commons and that the process should be independent of government.

Paul Hardy authors chapter 5, European Scrutiny. It covers several issues that will be affected by the Brexit decision and negotiated outcomes. Nevertheless, the author's analysis of pre-Brexit matters in relation to scrutiny procedures, including the role and effectiveness or otherwise of the European Scrutiny Committee of the House of Commons and the 1973 Select Committee on European Community Secondary Legislation will make a valuable contribution to debates on scrutiny that will follow post-Brexit negotiations. Some other topics addressed in this chapter include scrutiny features of European Union laws, the European Communities Act 1972, proposed reforms in the Commons and the UK Government's compliance with its scrutiny obligations.

Philip Norton's (Lord Norton of Louth) chapter is concerned with legislative scrutiny in the House of Lords. It offers an insider-outside perspective, as Lord Norton is an acclaimed academic and a member of the House of Lords. He writes that the House of Lords' approach to dealing with legislation is shaped by the fact that its members are appointed not elected. Lord Norton identifies two features of this phenomenon. The first relates to the House of Lords relationship to the elected House of Commons and the second to the changing membership of the House of Lords. The introduction of the *House of Lords Act 1999* resulted in the removal of most hereditary peers. An outcome of this change was that the House of Lords 'reinvented itself as a chamber of legislative

scrutiny'. While acknowledging research that points to weaknesses in the House of Lords new approach to its role, Norton points to strengths in the House's approach to scrutinizing legislation. He concludes his chapter by arguing that the pressure on the House of Lords is 'to do better what it already does well'. This is the final chapter in the section of the book dealing with legislation.

Two insiders, Richard Kelly and Lucinda Maer, author chapter 7, the first in the accountability section of the book. It is concerned with a series of reforms designed to modernize the House of Commons and to make government more accountable to the House. The authors offer a detailed analysis of the Wright Committee (Select Committee on Reform of the House of Commons), its recommendations and reactions to those recommendations by the House of Commons. The authors make the point that while the Wright Committee 'may not have directly increased accountability' it has 'empowered backbenchers'. In so doing, it has allowed backbenchers 'to better hold the government to account'.

Regulating lobbyists is the focus of Oonagh Gay's chapter. She presents an insider's account and one that is based on 30-years experience working for the House of Commons. Gay has also written many articles and book chapters on Parliament and related matters and coedited a book on the behaviour of parliamentarians. Given the debates about the need to overhaul regulation surrounding lobbyists in many democratic countries around the world, this chapter makes a strong contribution to the debate on whether lobbyists' activities result in disproportionate and undue influence on governments, the decisions they make and on policy outcomes. Gay's chapter highlights the self-serving nature of many accountability reforms and warns that failure to act in a meaningful way, and in a manner that is acceptable to the electorate, may have a negative effect on members of parliament in the future.

Chapter 9, authored by Andrew Le Sueur is titled Robot Government: Automated Decision-Making and its Implications for Parliament. The focus of this chapter is highly relevant to the future of governance, government and Parliament and touches on issues that should be at the forefront of all parliamentarians' thinking. Le Sueur explores important issues including 'how automation provides some fresh impetus to long-running debates in constitutional and administrative law' and the benefits or otherwise of 'rules vs. discretion'. He acknowledges the challenges automated decision-making presents for Parliaments and argues that. 'Creative thinking and action by parliamentarians can help strike a balance between its benefits and risk'.

National security is a priority for most governments and Parliaments around the world today. This shared concern spans countries with varied political systems. However, national security in democratic societies raises particular dilemmas in relation to civil and political rights. Chapter 10 by Alexander Horne, an insider, and Clive Walker, an outsider, focuses on Parliament and the thorny issues of national security. It offers an overview of Parliaments and parliamentary committees' interest in national security issues before presenting three case studies. The first covers 'War making powers and a new convention' the second 'Parliaments intelligence and security committee' and

the third 'Parliament's scrutiny of counter-terrorism legislation'. The authors of this well-structured chapter suggest strategies that may well result in 'the best possible outcomes' being achieved.

Insider, Arabella Lang writes about Parliament and international treaties. She poses three questions: 'How is Parliament involved with treaties in practice?'; Has the constitutional *Reform and Governance Act* made much difference?'; and 'Should there be more reform?' In addressing these questions, Lang draws on examples from Australia, France, Germany, South Africa and the USA and concludes by suggesting certain measures that, if implemented, could help to improve 'genuine accountability over treaties'.

Insider Alexander Horne and outsider Helene Tyrrell author chapter 12, Sovereignty, Privilege and the European Convention of Human Rights. Their focus is on the United Kingdom's duties under international law and the obligation to 'abide by judgments of the European Court of Human Rights' (ECHR). It also examines the effect of that obligation on the doctrine of parliamentary sovereignty. The chapter finds that the doctrine is not changed by the United Kingdom's membership of the Council of Europe and the convention system, insofar as the doctrine relates to 'the relationship between the legislature and the courts'. The chapter concludes by asking what should happen if a government finds that it is unable to abide by a judgment of the ECHR. The authors offer three options that might usefully assist governments in resolving such a dilemma.

The book's final chapter examines Euroscepticism and Parliamentary Sovereignty. Authored by outsider Gavin Drewry, it was written as the United Kingdom prepared to conduct the referendum to decide if it should stay or leave the EU. As mentioned previously, the decision was to leave. Drewry discusses parliamentary sovereignty and European law; parliamentary sovereignty and judicial disempowerment, the primacy of EU law prior to 'Factortame'; the Factortame saga, 'the Metric Martyrs'; the EU charter of fundamental rights in the context of 'another cue for Eurosceptic outrange and the high-speed rail network (HS2)'. The outcome of the referendum means that many of the issues raised here are likely to become redundant. However, this does not in any way lessen their historical importance. The chapter makes a valuable contribution to debates that are and will continue to swirl around the Brexit decision and its outcomes.

This edited collection will be of great interest to those engaged in the study of Parliament and associated matters. The editors have brought together eminent scholars and highly professional and experienced parliamentary officers and staff to offer a detailed analysis of matters that relates to the health of Parliaments and hence the health of democratic political systems.

Scholars, parliamentarians, officers and staff of Parliaments and students at the undergraduate and post-graduate level should read this book. It is a well-edited collection and one I recommend. Even though its focus is on the United Kingdom, it provides lessons and suggestions for those interested in strengthening democracy through the parliamentary processes that accompany it.

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