Parliamentary veto proceedings for statutory appointments

The independence of statutory officers from the government of the day is a very important concept. This paper examines the involvement of parliaments in the appointment of statutory officers through veto proceedings. Jurisdictions around the world have adopted variations of veto processes to enhance parliamentary control over certain appointments with the aim of reducing government control. There are great variations as to the nature of the veto proceedings and their success in providing independence from the government.

Many Australian jurisdictions have instituted parliamentary veto processes over different positions. The veto processes surrounding the appointment of the heads of integrity agencies around Australia provide an instructive sample. This paper describes the differences in process and legislative provisions and compares them in terms of their levels of transparency and government control. Based on the type of veto powers and the constitution of the committee, some jurisdictions have lessened the extent to which the government controls the selection, while others have not effectively achieved this aim. The parliamentary veto process does not add transparency to the appointment process in any of the jurisdictions examined. To the contrary, some have strict confidentiality provisions.

Each jurisdiction has specific characteristics and problems, depending on the provisions surrounding the veto process. An in-depth analysis of each jurisdiction is well beyond the scope of this paper. A closer look at the New South Wales system shows how its secrecy provisions have unintended consequences and how this and other problems could be remedied.

The UK pre-appointment hearing process provides an effective counterpoint to the veto processes in operation around Australia. It operates from the premise that transparency is paramount, rather than restricting government control. House of Commons committees are empowered to hold public hearings with proposed appointees to certain positions and publish a recommendation, but do not have formal veto powers. This paper compares this model to the systems in place in Australia.

Purpose of veto proceedings

The appointment of statutory officers is traditionally a ministerial decision. This can lead to the perception that the appointee is affiliated with the minister's party and might therefore not be truly independent.

Many statutory offices have been created as a check on the government and bureaucracy, such as the Auditor-General or the head of an integrity body. In those cases, it would damage the office if an appointee had or was suspected of having been appointed on political grounds. It is important for such office holders to have the confidence of all.

For those reasons, jurisdictions around the globe have instituted versions of parliamentary veto proceedings. These proceedings aim to reduce the level of government control and give more power

to the parliament[1] and/or to make the appointment process more transparent[2]. The actual powers of the parliament in the selection and appointment process and the way parliaments go about exercising these powers vary widely.

Comparison of veto proceedings around Australia – Integrity bodies

Around Australia, parliaments are involved in the appointment of some statutory officers through veto proceedings. The specific requirements, powers and conditions vary greatly. There is no consistency across jurisdictions as to which offices are subject to a parliamentary veto, what manner of veto powers the committee can exercise or the transparency with which the veto process occurs.

This paper compares the operation of vetos concerning the heads of integrity bodies around Australia. This choice is arbitrary, but it allows the comparison of different approaches to what are similar appointments across six jurisdictions. The sample illustrates the wide variety of approaches in Australia. The integrity officers subject to a parliamentary veto are:

- Chief Commissioner and certain positions on the Board of the Integrity Commission, Tasmania;
- Commissioner of the Independent Broad-based Anti-corruption Commission [IBAC], Victoria;
- Commissioner of the Independent Commission Against Corruption, South Australia;
- CEO, chairperson or commissioner of Crime and Corruption Commission, Queensland;
- Corruption and Crime Commissioner and Parliamentary Inspector, Western Australia; and
- Chief Commissioner and two further Commissioners of the Independent Commission Against Corruption [ICAC], and Inspector of the ICAC, New South Wales.

The table in Appendix 1 illustrates the information on which the following analysis is based.

This analysis focuses on two aspects: The potential level of overall government control and the possible level of transparency. Both are essential factors in analysing the potential for a politically motivated appointment.

Transparency

Transparency is an important concept in parliamentary proceedings and underpins the work of parliamentary committees. Hearings are held in public and reports and recommendations are based on publicly available evidence. It is not only important to do the right thing, but to be seen to be doing the right thing. In terms of statutory appointments, an open and transparent process can remove the impression that a candidate has been or could have been appointed for political reasons.

Much of the legislation surveyed for this paper does not mandate such transparency. On the contrary, the South Australian and New South Welsh committees are actively prohibited from publishing their considerations on veto proceedings.

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[1] For example, the Explanatory Note for the Statutory Appointments Legislation (Parliamentary Veto) Amendment Act 1992 (NSW) expressly states its aim as increasing parliamentary control over the appointment process. UK pre-appointment hearings have resulted from the *Governance of Britain* Green Paper, which expressly aimed to limit the power of the executive (Maer 2015, p 3).

[2] For example, UK pre-appointment hearings are held in public.

There are good reasons for limiting transparency on veto proceedings. When the veto system was introduced in the first Australian jurisdiction, New South Wales, it included strict confidentiality provisions. While committees were to hold hearings, they were to be held in-camera (LA Debates 9 April 1992, pp 2470-2472). The aim was to allow applicants the opportunity to 'obtain a fair and honest hearing' (p 2471) and to ensure that in case of a rejection, their career would not be tarnished. In addition, these provisions were to afford protection to committee members in that they could have frank discussions about a candidate without having to fear that their views might be made known to the public or indeed to the candidates themselves. An amendment to the bill, introduced on behalf of the Government in the Legislative Council debate, extended those confidentiality provisions to whether a committee or any of its members had vetoed, or proposed to veto the appointment (LC Debates 6 May 1992, p 3598).

Those strict privacy conditions stem from a fear that public hearings would lead to the kind of public spectacle and political harassment of candidates as came about in the US Senate confirmation hearings. One year prior to the passage of the Statutory Appointments Veto Bill, the confirmation hearing of Supreme Court judge Clarence Thomas made headlines around the world.[3]

While the concerns around protecting a candidate's reputation are valid, the privacy provisions reduce the transparency of the appointment and veto process. Given this lack of transparency, robust built-in mechanisms minimising government control are needed to reduce the possibility of a political appointment.

Level of government control

The potential level of government control describes how much decisions made under each model can in theory be controlled by the government of the day. The question is whether it would be possible for a government to appoint a candidate regardless of concerns of opposition or other MPs. This can be analysed by looking at three factors:

1. Who controls the initial selection;
2. The type of the committee's veto powers; and
3. The composition of the committee.

1. Candidate selection

In all cases considered, a Minister or Premier is charged with selecting a single candidate about whom the committee is then consulted. In no case is a committee required to be involved in the actual selection process.

In every case, the legislation sets out minimum levels of competency for a candidate to be considered, such as being a former judge of a certain level in an Australian jurisdiction. While this ensures a minimum level of competency, it does not exclude the possibility of political appointments.

[3] Appendix 2 provides further details on US Senate confirmation hearings in general and the Clarence Thomas appointment in particular.

The absence of the committees from the selection process can result in an information imbalance, whereby all the information about the candidate is available to the selecting Minster, and only minimal information is provided to the committee. The legislation surveyed is silent on this issue.

2. Type of veto powers

The manner in which a committee can influence a Minister's decision to appoint a candidate appears to indicate much about the overall power of the committee in the appointment. Listed in weakest to strongest, the modes are

- Mandatory consultation: in Tasmania, the Minister is only required to consult with the Joint Standing Committee on Integrity before proposing a Chief Commissioner for appointment. The legislation does not require the committee's agreement in any form.
- Veto power: in Victoria, South Australia and New South Wales, committees have the power to reject a candidate outright with a majority vote. The provisions are formulated in the negative rather than requiring support.
- Bi-partisan support: Ministers in Queensland and Western Australia have to find bi-partisan support for their candidate within the relevant committee; in Western Australia, majority support is required in addition.[4]

3. Constitution of the committee

There are currently three models according to which the committees are constituted:

- with uneven numbers and government-dominated, as in New South Wales and Queensland,
- with uneven numbers and not government-dominated (the Victorian IBAC Committee currently has an even number of government and opposition members plus a Greens member)
- with even numbers and with no clear government majority / many cross-bench members (Tasmania, South Australia, Western Australia)

The composition of the committee is rarely legislated and often depends on the composition of the parliament after an election. Most Acts constituting the committees refer only to the number of members. As they are often joint committees, legislation in bicameral jurisdiction usually also specifies the ratio of members between the Houses. The South Australian Statutory Officers Committee is the exception, with a legislated equal number of members drawn from government, opposition and independent or cross-bench MPs.

Analysis: Which model provides the greatest parliamentary control?

Government control is strongest in Tasmania, where the committee is only required to be consulted and any disagreement from the committee could be of no consequence.

New South Wales and Victoria are not much further removed from government control. Despite having formal veto powers, the composition of the committees is not legislated, which makes them susceptible to strong government control. Committees that are dominated by the governing party

[4] The Western Australian provisions in essence give the committee veto powers while also mandating bi-partisan support.

are highly unlikely, to say the least, to vote against a government minister on any issue, including appointments to statutory offices.[5]

Arguably, appointments in Queensland and Western Australia are more independent of the government of the day. Queensland requires consultation with the government-dominated committee as well as bi-partisan support for any candidate proposed to be appointed chairperson of the Crime and Corruption Commission. In Western Australia, the Corruption and Crime Commissioner can only be appointed with majority support and bi-partisan support from the committee.

South Australia has the strongest parliamentary control legislated in the appointment of the Commissioner of the South Australian Independent Commission Against Corruption. The Statutory Officers Committee possesses outright veto powers and the committee consists in equal parts of members of the government, opposition and the cross-bench.

Case Study: parliamentary vetos in New South Wales

New South Wales was the first state to introduce veto proceedings and the process has not been reviewed since its inception in 1992. The *Statutory Appointments Legislation (Parliamentary Veto) Amendment Bill* [Statutory Appointments Veto Bill] was a result of negotiations during the hung parliament at that time.

The veto landscape in NSW

There are currently 17 statutory officers in New South Wales whose appointment requires a parliamentary veto process. Below is a list of the positions by committee:

- Public Accounts Committee:
  - Auditor General (under *Public Finance and Audit Act 1983*, ss 28A, 57A)
- Joint Committee on the Health Care Complaints Commission:
  - Health Care Complaints Commissioner (under *Health Care Complaints Act 1993*, ss 66, 78)
- Joint Committee on the Independent Commission Against Corruption [ICAC]:
  - ICAC Chief Commissioner and two other Commissioners (under *Independent Commission Against Corruption Act 1988* [*ICAC Act*], ss 5, 64A)
  - Inspector of the ICAC (under *ICAC Act*, s 64A and Schedule 1A, s 10)
- Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission:
  - NSW Ombudsman
  - Chief Commissioner and two other Commissioners of the Law Enforcement Conduct Commission
  - NSW Crime Commissioner
  - Information Commissioner
  - Privacy Commissioner

[5] This is a simplification as it does not take into account political considerations, such as whether the government really would want to appoint a candidate without support from other parties. This paper investigates only whether this would be possible.

- Inspector of the Law Enforcement Conduct Commisison
- Inspector of the Crime Commission
  (all under *Ombudsman Act 1974*, s 31BA; with the relevant acts establishing the offices referring to this section regarding the Committee's veto)
- Inspector of Custodial Services (under Inspector of Custodial Services Act 2012, s 4)
- and Director of Public Prosecutions (under *Director of Public Prosecutions Act 1986*, s 4A, referring to *Ombudsman Act 1974*, s 31BA)

The veto process and legislative requirements of that process are the same for all committees and positions.

When the veto process was instated in 1992, it affected only four positions: the Ombudsman, the Commissioner of the ICAC, the Auditor-General and the Director of Public Prosecutions. With the creation of further statutory officers, the list has grown longer.

Based on the explanatory note, the second reading speech and subsequent debate on the bill, it is clear that the primary aim in introducing the veto powers was to strengthen parliamentary oversight of statutory bodies by giving committees a voice in the appointment of candidates. At the same time, it was seen as imperative to keep the process under the utmost confidentiality to protect applicants and committee members alike.

Considering that all committee records regarding statutory appointment vetos are strictly confidential, it is far from a simple matter to investigate if these goals are achieved.

Judging by the change in process, there is indeed a greater level of parliamentary control compared to that of the procedure followed before. Prior to the amendment through the Statutory Appointments Veto Act, the process was entirely controlled by the appointing Minister with no parliamentary involvement whatsoever.

The confidentiality provisions can currently only be judged by the absence of any scandals surrounding proposed candidates such as that experienced by Judge Thomas in the US. Viewed from this perspective, they appear to have worked well. There is, however, a question as to whether these provisions are appropriate in light of the fact that Premiers have taken to publicly announcing their preferred candidate prior to committee approval.

Having been in operation for 25 years, it becomes clear that the NSW veto process is fraught with some interconnected problems. These are a high level of government control, an information gap between the appointing Minister and the committee, and pre-announcements.

High level of Government control

As observed above, the institution of veto proceedings has brought about greater parliamentary involvement in the appointment of statutory officers in NSW. The process, however, is still government driven and controlled, in several aspects.

Firstly, the relevant Minister conducts or at least oversees the recruitment and selects a preferred candidate who is then presented to the committee for veto. The committee is not involved in the

selection process at all. Secondly, all statutory committees in New South Wales have a majority of government members. The legislation does not mandate bi-partisan support for a candidate.

Combined, these points mean that a candidate preferred by a government minister is put before a government-controlled committee for a veto, with only a simple majority necessary for approval.

This can create a problem of perception: Even if there is in practice an understanding and respectful consultation with the non-government committee members, the process risks being seen as a fig-leaf behind which the government makes the decision and the committee rubber-stamps this decision. The strict confidentiality surrounding the veto proceedings can only exacerbate this perception.

Information disparity between government and committee

Current practice around veto hearings means that the committee has much less information to base a veto on than the recruiting Minister has to select a candidate. With the referral of a candidate for veto, the committee is provided with the candidate's CV and usually no further information. The confidentiality provisions make it difficult for members to make informal inquiries about a proposed candidate.

This undermines the committee's ability to make an informed, independent decision and is much more of a practical problem than a problem of perception.

Pre-announcements undermine candidate protection and put pressure on the committee

Premiers have become increasingly comfortable with publicly announcing their intent to propose a candidate to a committee.

The first time such an announcement occurred was in August 2009, when Premier Nathan Rees stated to the press that he intended to suggest David Ipp QC for appointment as ICAC Commissioner. Outrage in parliament ensued, with the Liberal MP Jonathan O'Dea, a member of the overseeing Committee on the ICAC, threatening to initiate contempt proceedings in parliament against the Premier for divulging confidential information (Clennell 2009). O'Dea placed a Notice of Motion to that effect on the Legislative Assembly Business Paper on Friday 25 September 2009 (no. 991). The matter lapsed and ended there. Clennell's article gives an indication as to why no action was taken: The premier's office had received legal advice that the confidentiality clauses in the legislation apply only to the committee's work, not to the appointing Minister.

So far, pre-veto announcements have been rare, considering the number of statutory officers subject to a committee veto in New South Wales. They are mostly limited to the high-profile appointment of ICAC Commissioners in recent times. In addition to David Ipp, the nomination of his immediate successor, Megan Latham, was announced by Premier Barry O'Farrell during Question Time on 24 October 2013. The pattern continues with a media release by Premier Gladys Berejiklian announcing the nomination of Justice Peter Hall QC as new Chief Commissioner of the ICAC (Berejiklian 2017). The only other case on record is the announcement of the nomination of Grant Hehir for the position of Attorney-General by Premier O'Farrell on 22 July 2013.

All early announcements have come from Premiers, from both sides of politics, and have been restricted to very high-profile positions with strong media interest. Arguably, these are also the cases in which concerns about a candidate's reputation would be the highest.

The high-profile nature of the appointments suggests that it would have been politically damaging and damaging to the candidate's standing and their office if the government had tried to appoint a person without bi-partisan support.

Nevertheless, those early announcements subvert the point of placing the veto procedures under such strict confidentiality provisions. If anything, they exacerbate the possible negative effects of a rejection. If a candidate is known and the committee decides to veto the appointment, there is no possibility for the committee to explain its decision to the public. The rejection would remain as a stain on the applicant's reputation, in complete contradiction to what was originally intended.

Solutions

In combination, the problems outlined above can lead to the perception that the veto process in NSW is merely a bureaucratic exercise with a pre-determined outcome. While it may be the case that ministers strive to achieve bi-partisan support for a candidate, they are not required to do so. The solutions presented here aim at removing this perception.

Reduced government control

The perception of a process completely under government control could be reduced in several ways. Firstly, the composition of the committee could be changed to allow for an equal number of government and opposition members and possibly also cross-bench members. As this would affect committee work beyond the appointment of commissioners, this solution is unlikely to be considered.

Secondly, the appointment of a statutory officer could require bi-partisan support. This would guarantee opposition support – and responsibility – for the appointment, but would not affect any other aspect of the committee's work. Such a requirement would significantly offset the lack of transparency that is produced by the confidentiality provisions. Every appointee would have to have support from more than one side of politics, which would drastically reduce the possibility of political appointments.

Provide more information to committees

It is possible that a committee could ask the government for the information concerning the candidate gained during the initial recruitment process.

Going further, lifting the secrecy provisions surrounding veto proceedings would allow the committee to conduct its own inquiries into the person and to call for information, most likely through targeted inquiries with relevant stakeholders. Such a reform would have to be carefully considered, given the reasons the provisions were put in place in the first instance were to protect the reputation of the candidate.

Reduce pre-announcements

The only guaranteed way of stopping pre-announcements is to legislate further confidentiality provisions to make the announcement of a candidate unlawful prior to their confirmation by the committee. This would need to be weighed up against the value of transparency, as the veto process in NSW is already shrouded in heavily legislated secrecy.

As discussed, pre-announcements are rare and limited to high-profile appointees. While it may be irksome for a committee to have its role publicly undermined through a pre-announcement, there is

also a real potential for damage to the candidate and their office if they are perceived to have been appointed based on political considerations rather than on merit. Pre-announcements can have this effect because they predetermine the committee's response. In the first instance, it may therefore be enough for committees to proactively contact Ministers when a new statutory officer is due to be appointed and to draw attention to these circumstances.

Comparison – UK Pre-appointment hearings

In the United Kingdom, pre-appointment hearings follow a reverse logic from that employed in Australia. There, committees hold public hearings with a Minister's preferred candidate for a senior public sector position. Instead of having a formal veto, committees can only advise the Minister on the appointment with a public report. The Minister may choose to go ahead with an appointment despite a negative report.

It is a unique approach that clearly prioritises transparency over outright parliamentary control through formal veto powers.

Pre-appointment hearings are a relatively new institution in the United Kingdom, resulting from a 2007 Green Paper released by the government under Gordon Brown, entitled *The Governance of Britain*. In it, the hearings were promoted as a measure to increase parliamentary control during the appointment of senior public officials. The first pre-appointment hearing took place in June 2008 (Maer 2015, pp 3-7). The House of Commons Liaison Committee published a guidance document regarding the conduct of the hearings in 2013 (Liaison Committee 2013). It sets limits regarding the appropriateness of questioning while stating that, as the hearings are testing a candidate's performance under public scrutiny, questioning may be robust.

A list of posts subject to those hearings is published as Annex A to the *Cabinet Office Guidance on pre-appointment scrutiny by House of Commons select committees* (Cabinet Office 2013). It currently comprises over 50 positions. The list is not definitive and can be altered by agreement between the Government and Parliament, while committees can choose not to hold hearings if they wish (Maer 2015, p 6-7).

The Liaison Committee publishes a list of the outcomes of all pre-appointment hearings, which is available on its webpage (Liaison Committee 2017). By March 2017, out of 94 candidates, six have not been supported by committees, with three still having been appointed (Children's Commissioner 2009, Director of Office for Fair Access 2012, Chief Inspector of Office for Standards in Education 2016). The relevant Ministers gave written or oral statements as to their reasons for not heeding the committee's advice, as detailed by Maer (2015, pp 12-13, 15).[6] In one case, the Minister followed the advice and decided not to appoint (Chief Inspector of Probation 2011), and in two cases the nominee withdrew after a hearing (Chair of Statistics Authority 2011) or after a negative report (Chair of Health Monitor 2013).

[6] The Minister's correspondence outlining the reasoning in appointing Amanda Spielman as Chief Inspector of Office for Standards in Education against the advice of the committee is published on the Education Committee's website: http://www.parliament.uk/business/committees/committees-a-z/commons-select/education-committee/inquiries/parliament-2015/ofsted-chief-inspector-pre-appointment-16-17/, accessed 7 September 2017.

The Constitution Unit of the University College London conducted a review of the pre-appointment hearings in 2009 and published its evaluation report in 2010 (Waller & Chalmers 2010). The researchers interviewed people who had been involved in the process up to that date. The interviews were carried out on a confidential basis. While the report uses quotes extensively, they are anonymised.

Preferred candidates appeared to be the group most supportive of the hearings in that they felt they added democratic legitimacy to their appointment. Departmental officials' responses were more neutral to negative, stating that the appointment process now took longer, and that there was not much added value through the hearings. Recruitment consultants thought that, while there appeared not to have been any deterring effects on current candidates, this could still be the case in the future. Members of Parliament and clerical staff were overall the most disappointed group, in that they thought Government did not take negative recommendations seriously, and recommended more substantial parliamentary involvement in the process.

The strong support shown by candidates for the process is surprising, especially when compared to the reasons given for the strong confidentiality provisions in NSW. The anonymised testimonials make it clear that candidates appreciate the legitimacy that comes with a public endorsement and would have taken a rejection by a committee seriously, to the point of not taking up the position against a committee recommendation. The group divides on this point, with some taking the view that rejection would have seen them turn the position down, while others would have taken the committee's reasons for rejecting them into account before making a decision. The reputational risk of a public pre-appointment hearing is clearly on candidates' minds, but as one candidate states: 'if you are going to do jobs at this sort of level, you do have to take some risks.' (Waller and Chalmers 2010, p26)

Waller and Chalmers (2010) conclude that the public nature of the hearings adds a level of transparency to the appointments process. The candidates' performance during the public hearing could give an indication of how comfortable and capable they are acting under public scrutiny, which is, after all, an essential part of the position they aspire to hold.

The continued success of the approach hinges on two things. Firstly, committees have to continue to resist the temptation to politicise the hearings. So far, there have been few rejections and, compared to the number of appointments, little controversy. Still, the potential for ugly politics to intrude on the process remains.

Secondly, Ministers have to be seen to take committee recommendations seriously, especially negative recommendations. So far, the score is even on whether a candidate was appointed after a negative committee recommendation, and in all cases where the appointment went ahead, the choice was explained. For example, the first candidate who received a negative committee report, was Maggie Atkinson, who was put forward as Children's Commissioner in 2009. The appointment was still made, but only after the Department (DCSF) had published a detailed response in favour of the candidate. The Minister therefore did not ignore the negative report but justified the decision in public.

Conclusion

Parliamentary involvement in the appointment of certain statutory officers is now an accepted concept around Australia. There are, however, very different levels of involvement and parliamentary control. They range from simple consultation to the requirement for bi-partisan support of a candidate.

None of the Australian jurisdictions espouses transparency in the process as a guiding principle. That means that mandated bi-partisan support could serve as a guarantee against purely political appointments. As demonstrated above, the systems vary greatly in this respect.

Each Australian jurisdiction has unique challenges, depending on the details of how the veto process is set up. The specific problems of the New South Wales system are a high level of government control and an information deficit on the part of the committee as compared to the government. The system can also be undermined by ministers announcing the nomination of a candidate before the parliamentary veto process has been completed. Government control could be reduced by requiring bi-partisan support, not just a simple committee majority, while lifting the secrecy provisions surrounding the veto could allow the committee to gather more information and make a more informed decision. Legislating against pre-announcements provides the only guaranteed way of avoiding them. With these improvements in place, New South Wales veto proceedings would guarantee a very high level of independence to the appointment of statutory officers.

There are valid reasons to limit transparency to protect a candidate's reputation, especially when considering the sometimes extremely damaging US Senate confirmation hearings. The UK pre-appointment hearings are based on the premise that transparency in the form of public hearings with candidates enhances their democratic legitimacy. Reputational risk is seen as something that candidates take when they apply for high-level public sector positions and is reduced by the fact that committees can merely advise rather than veto.

While transparency is an important concept, the protection of candidates from purely political play is equally important. The UK process is wide open to politicisation through committee members to the detriment of candidates. Compared to that, the versions available in Australia appear more viable in the long term, provided they demonstrate strong parliamentary control to offset the lack of transparency.

Appendix 1 – Parliamentary involvement in appointments to integrity bodies around Australia

Jurisdiction	Office	Committee	Manner of veto power	Constitution of Committee	Recruiter	Transparency	Legislation
Tasmania	Chief Commissioner and certain positions on the Board of the Integrity Commission	Joint Standing Committee on Integrity	Mandatory consultation, no veto	6 members (1 ALP, 1 LP, 1 Green, 3 Independent MLCs) s 23	Minister		*Integrity Commission Act 2009* (TAS) ss14, 15, 23
Victoria	Commissioner of the Independent Broad-based Anti-corruption Commission [IBAC]	IBAC Committee	Veto, 30 days (no response taken as assent) (s 21)	Currently 7 (3 ALP, 2 Lib, 1 Nat, 1 Green)	Minister		*Independent Broad-based Anti-corruption Commission Act 2011* (Vic)
South Australia	Commissioner of the South Australian Independent Commission Against Corruption	Statutory Officers Committee	Veto, 7 days (ICAC Act s8)	Equal (3 LA, 3 LC; two each of Gov, Opp, Crossbench); Parl Comms Act s 15H	Attorney-General	ICAC Act s 8(6): Committee may not publish / report on veto except allowed by AG	*Parliamentary Committees Act 1991* (SA), ss15G – I; *Independent Commissioner Against Corruption Act 2012* (SA), s 8
Queensland	CEO, chairperson or commissioner of Crime and Corruption Commission	Parliamentary Crime and Corruption Committee	consultation with bi-partisan support (as of 2016 Act 19 s23)	7 members (4 government, 3 opposition; Chair: non-government); Government-dominated (s300)	Minister	Meetings to be held in public unless against public interest (s302A)	*Crime and Corruption Act 2001* (QLD)

Western Australia	Corruption and Crime Commissioner, Parliamentary Inspector (s189)	Standing Committee overseeing the Corruption and Crime Commission	Majority support and bi-partisan support (s9(3a))	Equal number either House (s216A)	Nominating Committee (Chief Justice, Chief Judge of District Court, community representative) def s3		*Corruption Crime and Misconduct Act 2003* (WA)
New South Wales	Chief Commissioner and two further Commissioners of the Independent Commission Against Corruption [ICAC]; Inspector of the ICAC	Committee on the Independent Commission Against Corruption	Veto (14 days, plus 30 days extension agreed by committee if required)	Govt controlled (currently 11 members)	Minister	Confidentiality (s 70(1C))	*Independent Commission Against Corruption Act 1988* (NSW), ss5, 64A; Schedule 1A, s 10

Appendix 2: US Senate confirmation hearings

In the United States of America, the President nominates candidates for a vast number of federal offices. The Senate Historical Office states that during every 2-year session of Congress, 4,000 civilian and 65,000 military nominations are submitted to the Senate. The majority of these appointments go unchallenged and widely unnoticed (Senate Historical Office, Introduction). There are, however, high-profile appointments – mainly to the Supreme Court, the cabinet and heads of agencies – that attract great media attention and immense political struggles.

According to Article 2, Section 2 of the United States constitution, the President suggests candidates for federal offices to the Senate, whose members then vote on whether or not to agree. This process takes place in full view of the public in every aspect.[7]

After a high-profile presidential nomination, the matter is referred to the committee that deals with the subject matter or oversees the particular branch of government (Senate Historical Office, Introduction). Committees can take one of four actions with regard to a nomination: they can report favourably, unfavourably, without recommendation or take no action at all (Tong 2003, p 2). In case there is no action, the nomination will languish in limbo until the next Congressional recess, when the initiative goes back to the President, who can either appoint a nominee in the recess (who will still have to be confirmed in the next session), re-submit the candidate in the next session, or nominate a new candidate. The committee is entitled to hold a hearing with the candidate, which is open to the public, and to also hear witnesses other than the nominee. The first such hearing involving a Supreme Court judge was held in 1925, and since the middle of the century all Supreme Court judges have undergone a public hearing (Senate Historical Office, Twentieth Century).

This increase in public hearings coincides with a fundamental change in the possibilities for public participation. While the first hearing might have been covered in newspaper reports the next day, nowadays confirmation hearings of important positions or controversial appointments are televised live to the population of the United States and can potentially attract global interest.

Most candidates fare reasonably well even though they might have to respond to highly political questions from Senators. The most thorough deconstruction of a nominee to date befell aspiring Supreme Court Judge Clarence Thomas in 1991, the year before confidential veto hearings were introduced in New South Wales.

According to the Senate webpage, the first Bush administration tried to smooth Thomas' way through the hearing, coaching him to avoid contentious topics and making sure the hearing only went ahead after he had ostensibly found sufficient support. Initially, the Judiciary Committee divided evenly and returned the nomination to the Senate without a recommendation. At this point, confidential information from the FBI background check on Thomas containing allegations of sexual harassment was leaked to the press. The ensuing public outcry prompted the Senate to refer the matter back to the committee for further investigation (Senate Historical Office, Twentieth Century).

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[7] Initially, the process was designed to be confidential, but after the first ever rejection of a candidate in August 1789, the Senate decided to require a voice vote, which would be published in the Senate's executive journal. The sessions themselves would remain closed to the public until 1929 (Senate Historical Office, Setting Precedents - 1789).

The resultant public hearings were televised live. Anita Hill, Thomas' former colleague and the person who had levelled the allegations, was invited to appear before the committee. Over three days, Hill and Thomas gave evidence. Both imparted the strong impression of telling the truth, with Hill calmly describing years of sexual harassment in a marathon 8-hour statement and interrogation and Thomas adamantly denying the veracity of any of these allegations. Questioning from Senators was vicious (Smolowe 1991). In the end, Thomas was confirmed with 52 to 48 votes, the closest margin recorded for a Supreme Court judge (Senate Historical Office, Twentieth Century).[8]

Regardless of the truth of the allegations, there is no doubt that the whole process in its full public ugliness damaged the candidate, the witness and the Senate committee alike. The affair had repercussions far beyond the United States and discredited the process of public confirmation hearings in the eyes of the NSW legislature. Against this backdrop, it is hardly surprising that the Statutory Appointments Veto Act incorporates the strict confidentiality provisions that it does.

[8] This confirmation hearing truly captivated its audience. It is such good entertainment – and still highly controversial – that, finally, it has been made into a miniseries, produced by HBO and aired on 16 April 2016 (Wikipedia, 'Confirmation' (film), accessed 7 September 2017, https://en.wikipedia.org/wiki/Confirmation_(film)).

Bibliography

Legislation

Corruption Crime and Misconduct Act 2003 (WA)

Crime and Corruption Act 2001 (QLD)

Director of Public Prosecutions Act 1986 (NSW)

Health Care Complaints Act 1993 (NSW)

Independent Broad-based Anti-corruption Commission Act 2011 (Vic)

Independent Commission Against Corruption Act 1988 (NSW)

Independent Commissioner Against Corruption Act 2012 (SA)

Integrity Commission Act 2009 (TAS)

Ombudsman Act 1974 (NSW)

Parliamentary Committees Act 1991 (SA)

Public Finance and Audit Act 1983 (NSW)

Statutory Appointments Legislation (Parliamentary Veto) Amendment Act 1992 (NSW)

Online Resources

Berejiklian, The Hon G MP 2017 (Premier of NSW), *Media release: Chief Commissioner of the ICAC*, 20 April 2017, viewed 8 September 2017: https://www.nsw.gov.au/your-government/the-premier/media-releases-from-the-premier/chief-commissioner-of-the-icac/

Cabinet Office 2013, *Cabinet Office Guidance: pre-appointment scrutiny by House of Commons select committees*, viewed 7 September 2017: https://www.gov.uk/government/publications/pre-appointment-scrutiny-by-house-of-commons-select-committees

Clennell, A 2009, *Premier accused of ICAC Breach*, Sydney Morning Herald, 24 August 2009, viewed 7 September 2017: http://www.smh.com.au/national/premier-accused-of-icac-breach-20090823-ev4w.html

Liaison Committee 2013 (UK Commons), *Liaison Committee guidelines for select committees holding pre-appointment hearings*, viewed 7 September 2017: http://www.parliament.uk/business/committees/committees-a-z/commons-select/liaison-committee/role/pre-appointment-guidelines/

Liaison Committee 2017 (UK Commons), *Pre-appointment hearings held by select committees of the House of Commons July 2007 – March 2017*, viewed 8 September 2017: http://www.parliament.uk/business/committees/committees-a-z/commons-select/liaison-committee/core-tasks/pre-appointment-hearing-data/

Maer L 2015, *Pre-appointment hearings*, Standard Note SN/PC/04387, House of Commons Library Research Briefings, last updated 19 February 2015, viewed 7 September 2017: http://researchbriefings.files.parliament.uk/documents/SN04387/SN04387.pdf

Senate Historical Office, *Senate History: Nominations*, viewed 7 September 2017: http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm#10

O'Farrell, The Hon B MP 2013 (Premier of NSW, Minister for Western Sydney), *Media release: Auditor-General Appointment*, 22 July 2013, viewed 7 September 2017: http://www.premier.nsw.gov.au/sites/default/files/AUDITOR-GENERAL%20APPOINTMENT_0.pdf

Smolowe, J 1991, *Sex, Lies and Politics: He Said, She Said*, Time Magazine, 21 October 1991, viewed 7 September 2017: http://content.time.com/time/magazine/article/0,9171,974096-1,00.html

Tong, LH 2003, *Senate Confirmation Process: An Overview*, Congressional Research Service, updated 4 April 2003, viewed 7 September 2017: https://digital.library.unt.edu/ark:/67531/metadc795777/m1/1/high_res_d/RS20986_2003Apr04.pdf

Waller P & Chalmers M 2010, *An Evaluation of Pre-Appointment Scrutiny Hearings: Prepared for the House of Commons Liaison Committee and the Cabinet Office*, The Constitution Unit, University College London, viewed 7 September 2017: https://www.ucl.ac.uk/constitution-unit/research/consultancy/consultancy-projects/PASreport