Australasian Parliamentary Review

JOURNAL OF THE AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Editor - Professor Rodney Smith

Bougainville's Peacemaking Referendum

Populist Parties in Germany and Australia

Assessing the Commonwealth Parliamentary Joint Committee on Human Rights

Australasian Study of Parliament Group

AUTUMN/WINTER 2018 • VOL 33 NO 1 • RRP $A35

AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Established in 1978, the Australasian Study of Parliament Group (ASPG) is a politically nonpartisan body, focused on encouraging and stimulating research, writing, teaching and discussion about parliamentary institutions, particularly those of Australia, New Zealand and the South Pacific. The ASPG has a main Executive body and has established Chapters in all States and Territories of Australia and in New Zealand. These Chapters are supported by the institutions providing secretariat services to the respective legislatures in Australia and New Zealand. ASPG membership consists of parliamentarians, parliamentary officers, academics, teachers, journalists, students and other interested individuals. For more information about the ASPG and its membership go to www.aspg.org.au.

The Australasian Parliamentary Review (APR) is the official journal of the ASPG.

ISSN 1447-9125

AUSTRALASIAN PARLIAMENTARY REVIEW

Editor: Professor Rodney Smith, University of Sydney. Email: Rodney.smith@sydney.edu.au

EDITORIAL BOARD

Australasian Parliamentary Review
AUTUMN/WINTER 2018 • VOL 33 NO 1

Table of Contents

* Indicates that the article has been double-blind reviewed.

From the Editor

Rodney Smith

Professor of Australian Politics, University of Sydney

Welcome to the second online issue of the *Australasian Parliamentary Review*. The first online issue was made available to Australasian Study of Parliament Group members in March. The feedback on the switch to an electronic format has overwhelmingly been positive and we are confident that the new format will only improve over time. The online journal format allows for easier article searches, as well as the inclusion of electronic links and graphical material that is difficult to reproduce in a paper-based journal. Individual articles can be printed by members who want to keep them to hand in paper form. The online production of this issue has once again been led by ASPG Vice President Lesley Ferguson. I would like to thank her for the skills and hard work she has again put into in ensuring that the transition to an online journal has been smooth.

This issue of the *Australasian Parliamentary Review* meets the journal's editorial goals of disseminating research about parliamentary politics in Australasia and the South Pacific, as well as trends in wider international politics of relevance to our region. In the first article, Ron Levy and his co-authors draw on deliberative democratic theory, a range of comparative cases and an understanding of local contextual factors to make a case for adopting a deliberative approach to the 2019 peacemaking referendum in Bougainville. Rebecca Burton assesses recent trends in petitions to the Parliament of Western Australian, arguing that petitions have not 'had their day' but that the petitions process might need to be reformed if they are to stay a relevant way for citizens to communicate with parliamentarians. Zoe Hutchinson provides a detailed five-year review of the work of the Commonwealth Parliamentary Joint Committee on Human Rights, challenging the view that it is ineffective and suggesting some measures to enhance its role.

The next two articles deal with populist parties. Readers of both will be able to draw conclusions about similarities and differences in the electoral and parliamentary trajectories of populist parties in Germany and Australia. Charlie Lees provides an insightful account of the early impact of the Alternative for Germany party (AfD) on the politics of the German Bundestag, while Nick Economou and Zareh Ghazarian explain the comparative weakness of populist parties in Australia.

The final article is based on a presentation by David Solomon to the 2018 Australasian Study of Parliament Group National Conference held in Brisbane in July. In this article, he traces a recent revival in the use of 'public trust' and 'public interest' as

measures by which public officials, including parliamentarians, should be assessed. I hope to publish more papers from the 2018 Conference in future issues of the journal.

I would like again to thank the helpful experts who refereed five of the papers for this issue. The authors found the comments of the referees constructive and the papers were improved as a result.

This issue is rounded off with three reviews of significant recent books in Australian politics and public policy: Catherine Althouse et al's *Australian Policy Handbook*, Peter Chen's *Animal Welfare in Australia*, and Clive Hamilton's *Silent Invasion*. If you have a relevant book that you would like reviewed in the *Australasian Parliamentary Review*, please contact me.

Articles

Designing Referendums for Peacemaking: The Case of Bougainville*

Ron Levy, Amelia Simpson, Ian O'Flynn and Georgina Flaherty[1]

Associate Professor, ANU Law School, Australian National University

Associate Professor, ANU Law School, Australian National University

Senior Lecturer, School of Geography, Politics and Sociology, Newcastle University (UK)

Research Associate (2017-2018), ANU Law School, Australian National University

* Double-blind reviewed article.

INTRODUCTION: THE PROSPECTS AND RISKS OF PEACEMAKING REFERENDUMS

In 1975 the Bougainville Interim Provisional Government announced its intention to secede from Papua New Guinea ('PNG'). Tensions escalated and took a dramatic turn in 1987-88 with the launch of an armed uprising by a group calling itself the Bougainville Revolutionary Army. The PNG government deployed its armed forces to quell the unrest and Bougainville erupted into a civil war that has been called the largest conflict in the region since the Second World War.[2] The war was finally brought to a close in 1998, followed by the signing of the Bougainville Peace Agreement (BPA) in 2001.

The BPA in turn led to the creation of the Autonomous Region of Bougainville ('ARB'). Under Part XIV of the PNG Constitution (amended as a result of the BPA), the 'two governments' of PNG and the ARB must together negotiate the details around the

[1] We are grateful to Satish Chand, Anna Dziedzic, Bal Kama and Anthony Regan for discussion of and insights on this article.

[2] Volker Boege, 'Peacebuilding and State Formation', *Peace Review* 21 2009: 30.

conduct of a referendum to resolve the region's future political status. Negotiations are well underway, with an agreement having been reached on many procedural matters and 15 June 2019 set as the current target referendum date.

Globally, the use of referendums in conflict societies has increased significantly in recent decades. They are normally held in the hope that ordinary people will give their consent to a new constitutional settlement and so pave the way for peace.[3] Referendums have featured in efforts to settle conflicts in Colombia, Cyprus, the Democratic Republic of the Congo, East Timor, Eritrea, Iraq, Kenya, Montenegro, Northern Ireland, Somalia, South Sudan, Spain, Zanzibar and elsewhere. Referendums potentially help a conflict society to progress towards a peaceful resolution of its conflict even in the face of entrenched opposition by disgruntled elites (including governmental, social, media, business, religious, ethnic and tribal leaders who may judge that they have much to lose by handing power of decision over to ordinary people). And, because they can enjoy broad social perceptions of democratic legitimacy, referendums may also help to ensure against subsequent breach of any settlement reached.

These idealised assumptions help to explain the referendum's global appeal as a tool of conflict settlement. Yet, in practice referendums have not always been beneficial. Some have even delayed settlement (as in Iraq since 2007 and in Colombia more recently). A host of risks arise. Most conflict-settlement referendums are still designed to be no more than rudimentary democratic exercises. While in theory they are meant to serve as a principled mechanism of democracy, 'history suggests that short- and long-term political calculations have been the main motivations for holding them'.[4] Consequently, in past cases, little institutional effort has gone toward improving the popular discourse leading up to the final vote. Standard referendum campaigns often merely amplify the voices of contending and entrenched political parties and elites. In a conflict society, where social polarisation is pronounced,

[3] Fernando Mendez and Micha Germann, 'Contested Sovereignty: Mapping Referendums on Sovereignty over Time and Space', *British Journal of Political Science* 48(1) 2018: 156-158; see also Matt Qvortrup, 'The History of Ethno-National Referendums 1791-2011', *Nationalism and Ethic Conflict* 18(1) 2012: 129-150.

[4] Qvortrup, 'History of Ethno-National Referendums', 129; Matt Qvortrup, 'Introduction: Referendums, Democracy and Nationalism', *Nationalism and Ethnic Politics* 18(1): 6.

referendums thus risk aggravating, rather than ameliorating, tensions.[5] This risk should raise alarms as Bougainville proceeds toward its referendum.[6] As the Bougainville Referendum Communications Committee itself notes, 'violent conflict has occurred after independence referendums – for example in East Timor and South Sudan'.[7] Even if violence does not occur, the spirit in which a referendum is conducted can have an important bearing on the spirit in which it is implemented.

Our purpose in writing this article, however, is not to argue against the utility of the referendum, but to rescue the mechanism from its habitually poor design in conflict settings.[8] Research in deliberative democracy has yielded intriguing insights relevant to violent communal conflict. In broad terms, the objective of deliberative democracy here is to increase the likelihood that decisions will be based on a free and open exchange of reasons rather than on mere numerical superiority or the threat of force. Deliberative theorists take different views on what counts as an adequate reason.[9] On one influential approach, the reasons that people give should be couched in terms of public values, that is, values that any reasonable person might reasonably be expected to endorse (e.g., freedom, equality, fairness, inclusion, respect etc.).[10] This 'public reason' approach is not without its detractors. In particular, 'difference democrats' have criticised it for excluding private values (e.g., values associated with

[5] Roger MacGinty, 'Constitutional Referendums and Ethnonational Conflict: The Case of Northern Ireland', *Nationalism and Ethnic Politics* 9(1) 2003: 3.

[6] For instance, the referendum results could be 'dishonoured' by PNG, which would 'heighten a sense of betrayal': John Braithwaite, Hilary Charlesworth, Peter Reddy and Leah Dunn, *Reconciliation and Architectures of Commitment: Sequencing Peace in Bougainville*, Canberra, ANU Press, 2010: 2.

[7] Bougainville Referendum Communications Committee, *Joint Key Messages*, No 2 Fact Sheet – June 2016, 3.

[8] The Committee evidently shares this objective, being committed to learn from the 'experience of other countries, and [to] do everything possible to minimise the chance of serious problems occurring'. Bougainville Referendum Communications Committee, *Joint Key Messages*: 3.

[9] Dennis Thompson, 'Deliberative Democratic Theory and Empirical Political Science', *Annual Review of Political Science* 11 2008: 497-520.

[10] Proponents of this 'public reason' approach include Joshua Cohen, 'Deliberation and Democratic Legitimacy', in Alan Hamlin and Philip Pettit (eds.), *The Good Polity*, Oxford, Blackwell, 1989: 17-34; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided and What Should be Done about It*, Cambridge, Belknap Press, 1996; John Rawls, *Political Liberalism*, New York, Columbia University Press, 1996; John Rawls, 'The Idea of Public Reason Revisited', *University of Chicago Law Review* 94 1997: 765-807.

a specific religion, ideology or worldview) from the political domain.[11] Yet, as far as conflict societies are concerned, there is at least one good reason why the approach should nevertheless be preferred. Reasons cast in terms of private values are likely to exacerbate conflict rather than reduce it. By contrast, reasons cast in terms of public values proceed from common ground. The public reason approach reminds people of what they share rather than of what divides them. Crucially, it can therefore facilitate the achievement of an 'overlapping consensus' in areas of law and public policy where people can reach agreement, differing worldviews notwithstanding.[12]

Given its concern for channelling disagreement into reasoned forms of persuasion, it is clear why deliberative democratic theory has forcefully entered the field of conflict research. By reworking institutions of decision-making we might incrementally improve the quality of deliberation, which in turn might improve prospects for the successful settlement of conflicts. 'Deliberative referendums' are referendums designed specifically to improve the quality of public deliberation in the lead-up to popular voting.[13] A recent work by one of the present authors explores the rationales and key design features of conflict-society deliberative referendums.[14] In the ideal case, such referendums may help warring parties to reach the common ground (as described above) required for an enduring settlement—one that therefore is based on more than opportunism.

Whether this optimistic view can be realised remains uncertain. In particular, the pathologies of standard referendums (ie, referendums in which deliberation is not expressly pursued and instituted as part of the overall process) are well-recognised, and in our view these must be explicitly addressed if any referendum is to be useful – and especially if a referendum is to avoid derailing efforts at subsequent settlement. The specific question we explore in this article is therefore what can be done to

[11] For example, Iris Young, *Inclusion and Democracy*, Oxford, Oxford University Press, 2000; Jane Mansbridge, 'Everyday Talk in the Deliberative System', in Stephen Macedo (ed.), *Deliberative Politics*, Oxford, Oxford University Press, 1999; Lynn Sanders, 'Against Deliberation', *Political Theory* 25(3) 1997: 347-376.

[12] John Rawls, *A Theory of Justice*, Cambeidge, Harvard University Press, 1971: 340; Rawls, *Political Liberalism*: 134-149.

[13] See, for example, Ron Levy, '"Deliberative Voting": Realising Constitutional Referendum Democracy', *Public Law* 2013: 555; Stephen Tierney, 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox', *Election Law Journal* 12(4) 2013: 508.

[14] Ron Levy, '"Shotgun Referendums": Popular Deliberation and Constitutional Settlement in Conflict Societies', *Melbourne University Law Review* (forthcoming 41[3] 2018).

improve deliberation in the course of the Bougainville referendum. Even a marginal improvement in its deliberative quality may help to reconstruct the referendum from a potential destabilising factor (deepening rather than ameliorating divisions) to an effective peacebuilding tool (encouraging the search for common ground, final settlement, etc.). We explore here how a deliberative referendum might help to impel the Bougainville peace process toward successful resolution. We also consider the referendum's hazards.

In Part II we introduce the background to the Bougainville conflict, including specifics that make resolving this conflict particularly urgent. Here we also cover points of contention among the parties that may need to be addressed in any peace initiative. In Part III we outline the key impediments to deliberation in conflict societies generally, and in Bougainville more particularly. Then we turn to the role that a deliberative referendum could play in a process of conflict settlement by addressing such deliberative deficiencies: in Parts IV to VII, we describe the deliberative referendum model's objectives and design features, and also suggest how the model could be deployed in the Bougainville case. If designed carefully, a deliberative referendum could potentially improve the upcoming referendum's prospects of achieving a sustainable peace settlement.

THE BOUGAINVILLE REFERENDUM: BACKGROUND

Brief History

The Autonomous Region of Bougainville, situated in the Melanesian Pacific, is a small archipelago dominated by the largest island of Bougainville – though its provincial capital of Buka is situated on the smaller Buka Island.[15] Today the ARB is formally a part of PNG. From 1920, Australia was granted post-war international mandates to administer PNG, drawn to include Bougainville, and did so until PNG became independent in 1975. Bougainville was assigned the status of a province within the newly independent PNG.

[15] Joanne Wallis, Constitution Making During State Building, Cambridge, Cambridge University Press, 2014; Braithwaite et al, Reconciliation and Architectures of Commitment: 9.

Coinciding with PNG's independence, a secessionist movement arose on Bougainville. The history of this movement is interwoven with the history of mining on the island. Mining began on Bougainville in 1972, when Australian company Rio Tinto subsidiary Bougainville Copper Limited began extracting copper and gold at the Panguna Mine. Mining provoked a great deal of local unrest.[16]

In 1975 the Bougainville Interim Provisional Government announced that it was seceding from PNG. This claimed secession did not garner international support or recognition and so the relationship to PNG underwent no major change.[17] Tensions escalated with the noted launch of the Bougainville Revolutionary Army ('BRA') uprising and the intervention of the PNG armed forces.[18] The BRA's stated aim was to halt mining at Panguna. There is widespread agreement that the commencement of mining at Panguna, in 1972, disrupted the social foundations of the island almost as deeply as had colonisation.[19]

In 1994 the PNG government lifted its blockade after a peace conference, though civil unrest persisted on Bougainville until a ceasefire agreement was reached in 1997. Media attention returned to the region with the 1997 'Sandline affair', when it emerged that the PNG government was negotiating with a British private military company to supply mercenaries to assist in restoring PNG's authority on Bougainville.[20] Following pressure from Australia and other neighbouring countries, PNG abandoned the plan and the incumbent Prime Minister was ousted.

---

[16] Anthony Regan, 'Identities among Bougainvilleans', in Anthony Regan and Helga Griffin (eds.), *Bougainville Before the Conflict*, Canberra: Pandanus Books, 2005: 440; Eliza Ginnivan, 'Mining, Law and War: Bougainville's Legislative Gamble,' *Asia Pacific* 41: 60.

[17] 'Separatists in PNG,' *The Canberra Times*, 24 March 1975: 2; 'Bougainville to Secede "on Sept 1"', *The Canberra Times*, 4 August 1975: 1; 'Secession in PNG', *The Canberra Times*, 5 August 1975: 2; International Peace Academy, *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Boulder, Lynne Rienner Publishers, 2003: 142.

[18] Braithwaite et al, *Reconciliation and Architectures of Commitment*: 23; Regan, 'Identities among Bougainvilleans': 484.

[19] While Bougainville's referendum is not due to take place until next year, Mendez and Germann's recent analysis suggests that it nevertheless ought to be viewed as belonging to a *cluster* of referendums that reached its peak during the decolonisation period that immediately followed the Second World War. See Mendez and Germann, 'Contested Sovereignty': 150-156.

[20] Mary Louise O'Callaghan, 'PNG Hires Mercenaries to Blast Rebels', *The Weekend Australian*, 22 February 1997: 1, 8.

Steps Towards Peace

Also in 1997, and partly in response to the Sandline affair, New Zealand hosted a series of peace negotiations. The outcome of these talks was PNG's agreement to an autonomous status for what would henceforth be called the ARB. The process culminated in the 2001 signing of the Bougainville Peace Agreement. The Agreement rests on 'three pillars': autonomous government, weapons disposal, and a commitment to a referendum on 'Bougainville's future political status' to be held no later than mid-2020.[21] The generous time window allowed for the conduct of the referendum reflects the considered need for peacebuilding and weapons disposal ahead of the event, to maximise the chances of a peaceful transition.[22]

In line with the Agreement, a new *Constitution of the Autonomous Region of Bougainville* was drafted between 2002 and 2004 by a representative Commission and adopted by the representative Bougainville Constituent Assembly in November 2004.[23] Key elements of the Agreement were also incorporated into the PNG Constitution.[24] The people of Bougainville elected the first President of the ARB in 2005, pursuant to their new Constitution.[25]

[21] *Bougainville Peace Agreement,* Government of the Independent State of Papua New Guinea–Bougainville Representatives, signed 30 August 2001.

[22] Braithwaite et al, Reconciliation and Architectures of Commitment: 57-63; Anthony Regan, Light Interventions: Lessons from Bougainville, Washington, United States Institute of Peace Press, 2010: 93. See also Constitution of the Autonomous Region of Bougainville 2004, s 15. As we know from other cases, there are dangers here as well. For example, article 140 of the 2005 Iraqi Constitution mandates a referendum on the administrative status of 'disputed territories' such as Kirkuk. The referendum was meant to be held in 2007 after the situation on the ground was 'normalised' and a census had been held. But Iraqi Shia politicians have, for reasons of their own, dragged their feet on normalization and census so that the referendum cannot be held. For an extended discussion, see Liam Anderson and Gareth Stansfield, Crisis in Kirkuk: The Ethnopolitics of Conflict and Compromise, Philadelphia, University of Pennsylvania Press, 2009.

[23] *Constitution of the Autonomous Region of Bougainville 2004* <http://www.abg.gov.pg/uploads/documents/BOUGAINVILLE_CONSTITUTION_2004.pdf>.

[24] *Constitution of the Independent State of Papua New Guinea*, PART XIV <http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>.

[25] Constitution of the Independent State of Papua New Guinea, Part 25, ss 227-240.

Legal Provisions Governing the Referendum

Part XIV of the PNG Constitution enshrines key terms of the BPA. Negotiations on the conduct of the referendum have involved the two governments of PNG and Bougainville, and the Joint Supervisory Body ('JSB'), a constitutionally mandated forum comprising representatives of both governments.[26] Negotiations are well underway, with agreement on many procedural matters having taken place, including a 'Work-plan' to guide progress towards the referendum. The JSB has set 15 June 2019 as a 'target' referendum date towards which all parties are working. The final date has not yet been settled, though, and unforeseen circumstances may require that an alternate date be chosen.[27]

The Bougainville Constitution, while a lengthy and comprehensive blueprint for government, addresses the planned referendum only in providing for the possibility of a decision to abandon it. Such a decision would need to be taken within a specified time, endorsed by a supermajority within Bougainville's legislature and then made the subject of 'widespread consultation with the people'.[28]

The provisions in the PNG Constitution dealing specifically with the conduct of the referendum, found in Division 7 of Part XIV, are quite general and leave much to future negotiation. The largely symbolic nature of this part of the Constitution is evident in, among others, s 341, which provides simply that '[t]he National Government and the Bougainville Government shall co-operate to ensure that the referendum is free and fair'. One of the few direct constraints imposed within Division 7 is a stipulation that one option presented at the referendum must be full independence for Bougainville.[29] There is no stated limit to the number of options that may be presented (more on which later), but merely a requirement that the options be agreed between the two governments and be framed clearly so as to 'avoid a disputed or unclear result'.[30]

[26] Constitution of the Independent State of Papua New Guinea, s 332.

[27] Bougainville Referendum Communications Committee, *Joint Key Messages*.

[28] Constitution of the Autonomous Region of Bougainville 2004, s 194.

[29] Constitution of the Independent State of Papua New Guinea, s 339(c).

[30] Constitution of the Independent State of Papua New Guinea, s 399(a)-(b).

Division 7 provides very limited guidance as to what should happen in the aftermath of the referendum. It says simply that the two governments 'shall consult over the results of the Referendum', and that the National Parliament shall 'take' these results and inform the Bougainville Executive of its deliberations about 'any decision made in the National Parliament regarding the Referendum'.[31] A little less vague is the provision for the resolution of disputes arising between the two governments at any stage, with mandated mediation and/or arbitration in the first instance and only limited recourse to judicial review.[32] During the Bougainville Peace Agreement negotiations, Bougainville advocated for the referendum to be binding. However, the referendum (strictly speaking a 'plebiscite') is not formally binding on PNG.[33] Despite this, the international community might strongly object if PNG disregarded the results, similar to East Timor's 1999 independence referendum.[34]

Section 340 of the PNG Constitution anticipates that an 'Organic Law' – a PNG statute with a quasi-constitutional status – will make detailed provision for the referendum in relation to such things as polling places, the composition of electoral rolls, security and offences, and scrutiny and international observers.[35] As this section of the Constitution dates from 2002, it in fact amounts to a post hoc recognition of the already existing *Organic Law on Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum* 2002 ('the Organic Law').

The Organic Law is concerned with many different aspects of the administration of Bougainville, with the conduct of the Referendum being the focus of Part 4. It provides an additional layer of detail in relation to several key issues. For instance, it forbids the formalising of a referendum date until the two governments have agreed on 'detailed criteria' by which non-resident Bougainvillean eligible voters will be

[31] Constitution of the Independent State of Papua New Guinea, s 342(1)-(2).

[32] Constitution of the Independent State of Papua New Guinea, ss 343, 333-336.

[33] Regan, *Light Interventions*: 89-90. In this respect, much may depend on how the vote is organised and, more especially, on the popular legitimacy that the process and outcome garners. If the referendum were to be explicitly organised along deliberative lines, it might take on a binding character just for that very reason. Ordinarily, referendums tend to be highly partisan and also highly flawed (more on which later), especially in terms of their deliberative quality, which in turn makes it possible for governments to reject their results when it does not serve their interests. A deliberative referendum, by contrast, reflects citizens' reasoned views and should, for that reason, be harder to ignore.

[34] Braithwaite et al, Reconciliation and Architectures of Commitment: 57.

[35] Constitution of the Independent State of Papua New Guinea, s 340.

identified, the in-principle entitlement of such a category of voters having proven central to securing the Peace Agreement.[36] Part 4 also presents options for administering the referendum. From among a menu of options – including sole carriage by the PNG Electoral Commission, and sole carriage by the Bougainville Electoral authority – the JSB has, in consultation with those existing agencies, chosen the course of establishing a new independent agency with a mandate to 'carry out its duties in an impartial manner'.[37]

Considerations in Shaping the Referendum Process

There are a number of obvious, and doubtless many less obvious, socio-political challenges facing the planners of the Bougainville referendum. Commentators who have undertaken grass-roots research into the prospects for enduring peace in Bougainville seem to be in broad agreement about many of the key challenges. These challenges, which are in many ways intertwined, include: overcoming fear and mistrust of government authority as the legacy of colonial exploitation; the experience of mining and prospects for its return; ethnic divisions and resentment of immigrants; and the potential for elite interests to distort the debate around independence.

Elite resistance to peacemaking is, as elsewhere, a distinct possibility in PNG and Bougainville. PNG's Prime Minister, Peter O'Neill, has opted to defer key meetings with ARB leaders in 2017 and again in 2018, slowing progress towards the referendum.[38] His government has also been slow to release promised funds to support the operations of the JSB, as well as more general funding committed to the ARB under the terms of the BPA.[39] Without those funds, the ARB is hamstrung in its ability to meet the BRA preconditions for a referendum of weapons disposal and restoration of stable law and order.

---

[36] Bougainville Peace Agreement, Government of the Independent State of Papua New Guinea–Bougainville Representatives, signed 30 August 2001, cl 315; Organic Law on Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum 2002, s 55(1).

[37] Organic Law on Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum 2002, ss 56-60.

[38] John Momis, 'ABC on Joint Supervisory Body Deferrals', Press Release by ARB President Chief Dr John Momis, 23 November 2017.

[39] Momis, 'ABC on Joint Supervisory Body Deferrals'.

The Prime Minister's rhetoric in public statements concerning the Bougainville referendum is far from accepting and encouraging. While attempting to put down secessionist rumblings in other provinces, Prime Minister Peter O'Neill has repeatedly emphasised that the ultimate decision on Bougainville's independence rests with the PNG Parliament and should not be considered a direct function of any referendum result.[40] He has also made clear that, in exercising that ultimate power to decide, PNG will hold Bougainville strictly to its end of the bargain as framed in the BPA (ie, weapons disposal and good governance). O'Neill has also said that 'we worry about the unity of our country. We can't have every resource-rich province secede from Papua New Guinea.'[41] Similarly non-committal statements have been made in other settings, provoking anger that the national government is discussing Bougainville's future openly with third parties while lacking commitment to engaging with Bougainville directly.[42]

In addition, historical experience has given Bougainvilleans many reasons to distrust outsiders and doubt their proposals and initiatives. The 'blackbirding' of Bougainvilleans – the recruitment of indentured plantation labour by force or through trickery – affected many generations during the 19th Century. While Germany established the first colonial government outpost in 1905, Bougainville soon after came under Australian control. The island's experience of the Second World War was horrific and served to deepen local resentment towards the colonial overlords who had drawn the island into their conflict. That resentment is compounded by the grouping (dating back to German colonisation) of Bougainville with PNG for administrative purposes, rather than the locally preferred Solomon Islands.[43]

---

[40] See, for example, *The National*, 'Parliament to make final decision in the result of B'ville referendum', *The National*, 5 March 2018 <https://www.thenational.com.pg/parliament-make-final-decision-result-bville-referendum>; 'Bougainville independence referendum 'may not be possible' with key conditions not met: PNG PM', ABC news online, <http://www.abc.net.au/news/2017-09-27/png-pm-casts-doubt-over-bougainville-independence-referendum/8990692>.

[41] Addressing the PNG leaders' summit in March 2018, O'Neill said that 'before a referendum [on Bougainville's future] is held, weapons disposal must take place. Nobody has proven to me that it has been done. Secondly, is the rule of law well established? Again, there are some parts [of the ARB] where the rule of law is non-existent. We all know that.' *The National*, 'Parliament to make final decision'.

[42] 'Leaders condemn O'Neill comments', *PNG Post Courier*, 21 March 2018 <https://postcourier.com.pg/leaders-condemn-oneill-comments/. Accessed 27 March 2018.

[43] Regan, Light Interventions: 418-421; Braithwaite et al, Reconciliation and Architectures of Commitment: 9.

Mining saw an influx of workers from mainland PNG and beyond, new money distributed in ways that undermined social structures, internal displacement and migration, and new problems including alcoholism and prostitution.[44] These tensions and strains were primary drivers of the descent into armed conflict, with the most notorious armed faction – Francis Ona's BRA – nominating the mine's closure as its overriding demand.[45] Even though no large scale mining has been permitted since Panguna's forced closure in 1989,[46] there remains a great deal of sensitivity around the subject and attitudes towards mining are likely to be critical determinants of voting patterns at referendum. Some commentators, along with many among Bougainville's elite, believe that independence for Bougainville is unlikely to be financially sustainable without a return to large-scale mining on the island.[47]

Another factor that will inevitably bear upon the design and conduct of a Bougainville referendum is the manner in which peacebuilding efforts have unfolded to date. The detailed study by Braithwaite et al. refers to this factor as the 'architecture' of peacebuilding and observes that, in Bougainville, a predominately 'bottom up' process has ensued, of village-by-village brokering of truces and informing and educating.[48] Especially influential in this process have been faith-based organisations – a long-standing and central pillar of Bougainvillian society and source of ongoing coordinated efforts to scaffold peace-building at the local level.[49] Braithwaite et al, however, bemoan the relative absence of complimentary 'top down' peacebuilding efforts, in the form of regional multilateral dialogue about the conflict, its causes and contributors.[50] They contend, further, that the PNG Government has done little to articulate the possible benefits for Bougainvilleans of remaining within PNG and that

[44] Boege, 'Peacebuilding and State Formation': 30.

[45] Timothy G Hammond, 'Resolving Hybrid Conflicts: the Bougainville Story', *Foreign Policy Journal*, 4 2012.

[46] Eliza Ginnivan, 'Asia Pacific Mining, Law and War: Bougainville's Legislative Gamble', *Alternative Law Journal* 41 2016: 60-62.

[47] Ginnivan, 'Asia Pacific Mining, Law and War'; Braithwaite et al, *Reconciliation and Architectures of Commitment*: 128-9; Don Vernon, 'The Panguna Mine' in Anthony Regan and Helga Griffin (eds.), *Bougainville before the Conflict,* Canberra, Pandanus Books, 2005: 270-1; Hammond, 'Resolving Hybrid Conflicts': 8.

[48] Braithwaite et al, Reconciliation and Architectures of Commitment: 133.

[49] See, for example, 'Churches meet for peace-building workshop', *PNG Post Courier*, 8 March 2018 <https://postcourier.com.pg/churches-meet-peace-building-workshop/> accessed 25 March 2018; Braithwaite et al, above n 2, 69-71; Joanna Wallis, *Constitution-making during State Building* (CUP, 2014), 259-60.

[50] Above n 3, bid 133, 139.

other regional governments have not applied any pressure for it to undertake this advocacy.[51]

While those factors provide important background to inform the design of the referendum process, another source of valuable inputs may, we contend, be the existing literature on referendum design that has been produced by political scientists and lawyers.

Impediments to Deliberation in Bougainville

At least five characteristics of conflict societies can diminish the quality of popular and elite deliberation (and the interactions between the two). These characteristics, all of which manifest in Bougainville, might intensify during a referendum process.

Social Division and Polarisation

Anthropological studies of Bougainvillean society show that there is a shared sense of identity – a 'pan-Bougainville identity' – among ethnic descendants of the original peoples of Bougainville.[52] This shared identity has arisen in spite of some enduring cultural and linguistic distinctions from sub-region to sub-region.[53] And it has also been reinforced by a shared sense of having been collectively wronged by colonialism and by forced political integration into PNG. However, the danger remains that divisions within this identity bloc will surface and crystallise as the possibility of independence nears. This danger will be heightened if public debate is allowed to fracture along sub-group lines. Under such conditions, '[d]ebate leads only to the group position becoming more extreme, as individuals only get their prejudices confirmed and strengthened as they talk with like-minded others'.[54] As positions become more extreme, a society becomes more polarised, which in turn erodes the society's sense of shared destiny. It also makes it harder for those on the losing side of a referendum to accept the decision as legitimate.

---

[51] Ibid 128.

[52] Regan, Light Interventions: 418.

[53] Regan, *Light Interventions*: 423-424.

[54] John Dryzek, 'Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia' *Political Theory* 33(2) 2005: 223, 231.

Group Targeting

There is potential for resentment of 'others' to surface amid the Bougainville referendum. Most especially, non-ethnic Bougainvilleans who have chosen to settle there – notably the locally derided 'redskins' who migrated from the Highlands of PNG to take work at or connected with the mine[55] – might be particularly vulnerable to identity-based exclusion, discrimination or even violence.[56] In conflict societies, popular discourse is often characterised more by coercion of opposing groups through violence or threats of violence, than by reasoned argument and deliberation. The referendum planning process needs to be attentive to multiple possible fracture lines, working consciously towards mutual understanding and respect so as to minimise the risk of downstream discord.

Violence and Reaction

The recent history of violence provides much of the context for the upcoming referendum in Bougainville. However, violence inspires visceral responses that may cut short good faith attempts to engage in deliberation.[57] In particular, violent responses to past wrongs, perpetrated by citizens who might at other times be open to deliberating, is common in conflict societies.[58]

While, as noted above, weapons disposal is ideally set to occur ahead of the Bougainville referendum, it is uncertain whether this process can be completed in

[55] Migrants from the mainland of PNG typically have lighter skin than ethnic Bougainvilleans. This visibility leaves them vulnerable where, as in much of Bougainville, they have been collectively typecast as violent and anti-social. See, for example, Jill Nash, 'The Red and the Black: Bougainvillean Perceptions of other Papua New Guineans', *Pacific Studies* 13 1990: 1; John Braithwaite, 'Rape, Shame and Pride', *Journal of Scandinavian Studies in Criminology and Crime Prevention* 7 2006: 2, 6.

[56] Braithwaite et al, *Reconciliation and Architectures of Commitment*: 27-8, estimate that 'hundreds' of people from PNG who had married Bougainvilleans stayed in Bougainville. Yet, through marriage, these people are deemed to be Bougainvilleans under cl 7(1)(b) of the Bougainville Constitution. Most non-Bougainvilleans left Bougainville due to the conflict; however, it is unclear how many returned.

[57] See, for example, Rajat Ganguly, 'Sri Lanka's Ethnic Conflict: At a Crossroad between Peace and War', *Third World Quarterly* 25 2004: 903.

[58] See, for example, Brian Blankenship, 'When do States Take the Bait? State Capacity and the Provocation Logic of Terrorism', (*Journal of Conflict Resolution* 43(1) 2016: 1.

time; indeed, progress on this has been halting.[59] By the Bougainville government's estimate, weapons disposal should be complete by the end of 2018.[60] But a number of armed gangs still operating in south and central Bougainville, such as the Me'ekamui Defence Force, have previously refused to participate in the BPA and weapons disposal and continue to rebuff the ARB government's efforts to engage them.[61] They could hold up to 2,500 weapons.[62] Compounding this risk factor are the large numbers of young men with limited or no formal education and few economic opportunities, carrying the burdens of displacement and social dislocation, who may be easily exploited by these minor warlords and other willing spoilers in the lead up to, or aftermath of, a referendum.[63]

Low Information and Misinformation

Conflict societies are often characterised by information deficits. Conflict may coincide with low general rates of education. Information vacuums can in turn be relatively easily filled with elite propaganda and oversimplification.[64] There is potential for elites in Bougainville and PNG to distort the debate around independence to suit their own ends. In the extreme, disinformation can involve the control of media outlets in order to silence critics and valorise 'desirable' voices.[65]

---

[59] Anthony Regan, 'Bougainville: Conflict Deferred?', in Edward Aspinall, Robin Jeffrey and Anthony Regan (eds.), *Diminishing Conflicts in Asia and the Pacific: Why Some Subside and Others Don't*, Abingdon, Routledge, 2013: 130.

[60] James Tanis, 'Bougainville: Planning for a Peaceful Referendum and a Stable Post-Referendum Situation'. Speech delivered at the ANU, Canberra, 31 October 2017.

[61] Tanis, 'Bougainville: Planning for a Peaceful Referendum'; Braithwaite et al, *Reconciliation and Architectures of Commitment*: 63; Oren Ipp and Iian Cooper, *Bougainville Stability Desk Study*, Washington, US Agency for International Development, 10 October 2013: 14.

[62] Regan, Light Interventions: 96.

[63] Jo Woodbury, 'The Bougainville Independence Referendum: Assessing the Risks and Challenges Before, During and After the Referendum', Indo-Pacific Strategic Papers series, Canberra, Strategic & Defence Studies Centre, January 2015: 17.

[64] Mohammed Bakari and Alexander Makulilo, 'Beyond Polarity in Zanzibar? The 'Silent' Referendum and the Government of National Unity', *Journal of Contemporary African Studies* 30 2012: 195, 205.

[65] Carolyn Hamilton, 'Uncertain Citizenship and Public Deliberation in Post-Apartheid South Africa', *Social Dynamics* 35 2009: 355, 359–362.

Many schools closed down during the Bougainville crisis.[66] It is estimated that up to 50 per-cent of Bougainvilleans in urban areas have not attended formal schools.[67] The literacy rate in Bougainville is relatively robust at 79.72 per-cent.[68] But gaps in literacy and formal education in Bougainville are factors likely to impact on the process of a referendum vote and hence on its legitimacy. The Bougainville Audience Study 2017 notes the frequency of 'expressions like "mipela stap long tudak" ("we are in the dark") and "mipela olsem aipas man" ("we are like blind people")'.[69] 74 per-cent of respondents indicated they were 'unsure' about the referendum processes in particular.[70] There are evident communication barriers in Bougainville with issues regarding access to media platforms in some regions and concerns that the government is not effectively communicating information.

The published material produced to inform Bougainvilleans about the referendum and the issues it addresses acknowledges the problem of misinformation and misunderstandings. Some of the specific confusions that this material sets out to expose and correct include beliefs that: Bougainville must prove itself to be economically self-sufficient before the referendum can occur; achieving good governance and the elimination of weapons are preconditions to a referendum; the BRA and implementing provisions in the PNG Constitution will lapse as at June 2020; and a vote for independence will trigger an immediate legal entitlement to Bougainville independence which the PNG Government is bound to grant.[71] The uncovering and rectification of these and other potentially damaging misconceptions will be an important element in ensuring the integrity of the referendum process and maximising the chances for peaceful transition or continuity (either way, settlement) in its aftermath.

---

[66] Bacre Waly N'diaye, Report on the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc E/CN.4/1996/4/Add.2 (27 February 1996) para 56.

[67] Brigadier Justin Ellwood, 'Understanding the Neighbourhood: Bougainville's Referendum for Independence', Report, Canberra, Australian Defence College, 2014: 17; Satish Chand, 'Building Peace in Bougainville: Measuring Recovery Post-Conflict', Working Paper, Canberra, ANU Research Publications, 2013: 3.

[68] Wallis, Constitution Making During State Building: 281.

[69] Verna Thomas, Catherine Levy, Cynthia Vetunawa and Patrick Rawstorne, 'Bougainville Audience Study', Report, Goroka, University of Goroka, 2017: 32.

[70] Thomas et al, 'Bougainville Audience Study': 32.

[71] Bougainville Referendum Communications Committee, *Joint Key Messages*.

Lurking behind many of these erroneous beliefs may be vested interests with the potential to distort or even derail progress to towards a referendum. Members of the political classes who control the official dissemination of information and other procedural aspects of the process might be expected to have their own preferences and interests in terms of the spectrum of possible referendum outcomes. Some could stand to gain personally, in power and/or wealth, from either independence or ongoing membership of the PNG polity. Some may anticipate personal or familial gain, aside from wider societal gain, from the return of mining to Bougainville, the prospects for which may be tied to the referendum outcome.[72] Design of the process ought ideally be alive to these probable elite interests and their distorting potential.

Uneven Deliberative Commitments

A related worry is that the members of a conflict society will struggle to view each other as reasonable people engaging in reasonable disagreements.[73] The crucial point is not that the members of such societies are likely to lack the capacity to deliberate; rather, it is that it is difficult to create conditions or institutions in which they feel safe to do so.[74]

Of course, some people – for example, so-called 'spoilers'[75] – may simply refuse to deliberate, no matter how propitious the institution. They may do so because they calculate that it will serve their interests or, more dramatically, because they are fanatics and hence impervious to the reasons others put to them, no matter how rationally compelling. In Bougainville, as elsewhere, a core of individuals will view deliberation as neither plausible nor desirable. The institutional design problem,

[72] Braithwaite et al, Reconciliation and Architectures of Commitment: 128.

[73] Rawls, Political Liberalism: 54-58.

[74] Cf. John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations,* Oxford, Oxford University Press, 2000: 219. Relatedly, one might be tempted to assume that some people are better at deliberating than others, for example, because they have more years in formal education. See, for example, Hamilton, 'Uncertain Citizenship and Public Deliberation': 359. However, this assumption is not clearly supported by the empirical evidence; see, for example, Ian O'Flynn and Gaurav Sood, 'What Would Dahl Say? An Appraisal of the Democratic Credentials of Deliberative Polls and Other Mini-Publics', in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds.), *Deliberative Mini-Publics: Practices, Promises, Pitfalls*, ECPR Press, 2014: 46-47.

[75] On 'spoiler' problems in peace processes, see Stephen John Stedman, 'Spoiler Problems in Peace Processes', *International Security* 22(2) 1997: 5-53.

therefore, becomes how to accommodate people who hold markedly different ideas about the sources of legitimacy in collective decision-making.

Referendums and Deliberation

Finally, referendums raise distinct challenges for deliberation. The impediments canvassed thus far show the uncertain prospects of relying on public deliberation to settle conflict. Indeed, one might conclude that the prospects for deliberation are even lower in the case of referendums. For example, one might assume that the traditional 'yes' or 'no' structure of the ballot must be particularly inimical since it precludes the sort of flexibility or mutual responsiveness on which deliberation necessarily depends. If the choice is 'either/or', then it is, on the face of it, hard to see where people might go from there or what incentive they might have to approach the issue with an open mind.

Conflict scholars tend to conclude that popular participation – particularly in a referendum – only aggravates problems of deliberation; many therefore prefer elite leadership.[76] However, and importantly, social psychologists have shown that division and polarisation are especially acute in decision-making among elites. Highly educated citizens are well equipped to choose and bend information to match pre-existing assumptions that align with polarised positions.[77] These 'motivated reasoners' are driven to fit new knowledge into existing polarised categories.[78] This is an important point because it suggests that, by some key criteria, deliberation might be better conducted by non-elites. Motivated reasoning by elites frustrates deliberative pursuits of overlapping consensus. This modest degree of consensus (i.e., consensus about some, but not all, matters) was one of the deliberative qualities noted in our introduction to this paper. In general, such consensus is only feasible if deliberators remain somewhat flexible in their positions – for example, in their negotiating positions and understandings of what is in their own best interests.

---

[76] See, for example, Arend Lijpahrt, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (2nd edition), Berkeley, University of California Press, 1975: 111; Brendan O'Leary, 'Debating Consociational Politics: Normative and Explanatory Arguments' in Sidney John Roderick Noel (ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, Kingston, McGill-Queen's Press, 2005) 10.

[77] Dan M Kahan, 'Ideology, Motivated Reasoning, and Cognitive Reflection', *Judgment and Decision Making* 8 2013: 407, 417-18.

[78] Kahan, 'Ideology': 408.

High-quality deliberation may, then, be more plausible among non-elite individuals in key respects. However, a caveat is that this may be so only when deliberation is robustly supported by institutional design. While it is often the case that such individuals lack relevant knowledge or deliberative habits, these deficiencies might be partly answered by institutional methods.[79] As noted, the deliberative referendums literature outlines institutional means for improving on the relatively crude voting models of most referendums. Some deliberative referendum features have even been trialled to some degree, though mostly in non-conflict societies.

Our focus in the next several parts is on whether, in a conflict setting too, a deliberative referendum can mitigate the deliberative problems that we have canvassed. In those parts we examine more specific design options for the deliberative referendum. We canvass four key features and their rationales, in each case relating our general comments to the imminent Bougainville referendum. Some features are intended to improve deliberation during the referendum campaign as a way of making successful settlement more likely. Additionally, some features confer greater legitimacy on the settlement process and thus potentially ensure against subsequent breach, after a settlement is reached.[80] Supporting deliberation in a process of constitutional change may thus have the effect of increasing both the prospects and the sustainability of settlement.

PRELIMINARY GENERALISED VALUE VOTING

A conflict-society deliberative referendum should be constructed as a *public-values voting* exercise. That is, most of the questions voted upon in the referendum, and official information disseminated in the referendum campaign, should (to the degree possible) be cast in the language of values that are broadly shared. Hence voters should be asked to express their opinions about an array of public values arising in the conflict, which are set out clearly and pithily on the ballot. Specific detail should

[79] Janette Hartz-Karp and Michael K Briand, 'Institutionalising Deliberative Democracy: Theoretical and Practical Challenges', *Australasian Parliamentary Review* 24 2009: 167.

[80] Legitimacy is broadly seen as a key determinant of the subsequent durability of peacemaking agreements: see, for example, Edward Aspinall, Robin Jeffrey and Anthony Regan (eds.), *Diminishing Conflicts in Asia and the Pacific: Why Some Subside and Others Don't,* Abingdon, Routledge, 2013: 265.

not be the main subject of referendum deliberation, though what detail there is should be sufficient to stimulate meaningful deliberation – and, more especially, deliberation from common ground.

In principle, framing deliberation in public-value terms can improve opportunities for engaging in public reason and achieving overlapping consensus which, in turn, can be essential for conflict settlement. As we noted earlier, public reason requires that participants couch their reasons in terms of public values, that is, values that all reasonable people can reasonably be expect to endorse. In practice, that will entail couching their claims in the (public) language of equality, freedom, inclusion, respect and so forth rather than in the (private) language of particular religious, ideological or moral codes (which those who do not share those codes are unlikely to accept as reasons for a *collective* choice). It thus requires opponents to give reasons for the claims that are both accessible and acceptable to each other.[81]

To give an example, the 1998 Belfast Agreement[82] is sometimes cast as a strategic bargain. In this mould, Brendan O'Leary claims that Irish nationalists 'endorsed it because it promises them political, legal, and economic equality now, plus institutions in which they have a strong stake, with the possibility of Irish unification later'[83], while British unionists endorsed it because 'only by being generous now could they reconcile nationalists to the Union, and protect themselves against possibly seismic shifts in the balance of demographic power'.[84] Yet, what analyses of this sort overlook is that the document that ordinary people were asked to ratify or legitimise was expressly framed in terms of public values. In particular, the 'Declaration of Support' with which the Agreement begins is couched in the language of (*inter alia*) 'reconciliation', 'tolerance', 'mutual trust', 'human rights', 'partnership', 'equality', 'mutual respect' and 'exclusively democratic and peaceful means'.[85] Of course, one might snort that values of this sort are simply far too general or underspecified to seriously guide deliberation. But principles of equality and mutual respect did, in fact, shape the concrete details of what was finally agreed. For example, the principle of

[81] Rawls, *Political Liberalism*: 132-172.

[82] *Belfast Agreement*, Britain-Northern Ireland-Government of Ireland, signed 10 April 1998, No. 50 (2000) Cm 4705 (entered into force 2 December 1999).

[83] Brendan O'Leary, 'The Nature of the Agreement', *Fordham International Law Journal* 22(4) 1998: 1655.

[84] O'Leary, 'The Nature of the Agreement': 1656.

[85] '*Belfast Agreement*, Preamble paras 1-6.

'parity of esteem' is reflected in its dual premiership, communal designation, proportionality rules and mutual vetoes.[86]

Public-values deliberation, therefore, can represent a step away from the parties' partisan positions. It can also avoid the need for difficult social learning about technical details. In the Colombian case, for instance, the draft agreement buried broad principles inside 297 pages of provisions and implementation details. A public discourse at this level of detail is unrealistic. Moreover, a settlement campaign focused too much on institutional specifics can mire the referendum in debate over a potentially infinite range of contingent claims and counter-claims.

Accordingly, the deliberative referendum ballot should ask voters not about their own interests, but about what general values, applying to all sides, should drive a final settlement. This condition is intended to help voters transcend their own narrow perspectives, and to engage instead in broader forms of reasoning conducive to overlapping consensus. The ballot should thus present voters with options such as whether 'all communities should enjoy security against violence' or 'all communities should enjoy equitable political representation'. Generalised propositions of this sort apply to everyone. Voting 'against' another community would thus require voting against one's own community. Voting machines or online voting should prevent write-in answers and partial responses. Each value proposition should be individually endorsed or rejected by a majority vote.

A final proviso is that the referendum ballot should *begin* with public-value based questions such as: 'rank the following values in order of your preference'. The options should be determined by an inclusive, representative mini-public (see below). Only after value questions have been posed should the voter then be presented with a menu of general institutional options such as 'full independence' or 'state autonomy within a federation'. Together these features can encourage purposive deliberation among voters by asking them to consider and weigh the competing objectives behind reform proposals before they cast votes on specific proposals.

[86] Ian O'Flynn, 'Pulling Together: Shared Intentions, Deliberative Democracy and Deeply Divided Societies', *British Journal of Political Science* 47(1) 2017: 187, 198. See also Thomas Hennessey, *The Northern Ireland Peace Process*, Dublin, Gill & Macmillan, 2001: 7-9. On the role of justice in negotiation, see Ira William Zartman, *Negotiation and Conflict Management: Essay on Theory and Practice*, London, Routledge, 2008.

The ballot questions ideally should present an array of options, both for preliminary questions about values and for later questions regarding Bougainville's final political/institutional status. By contrast, binary yes/no questions are often 'divisive and inaccurate' and should be avoided if possible, as they might not reflect the diversity of options that voters favour.[87] The simplest multi-option approach is to ask voters to choose just one of several preferences presented on the ballot. This is compatible with the current plan for ballot counting in Bougainville: ballots are to be organised into piles based on the options they endorse, and the prevalence of each option will then be counted.[88]

However, an amended – and slightly more complex – 'preferential' system would be ideal for a multi-option referendum. A preferential ballot asks voters to rank, from highest to lowest, their preferences among several options; thus voters could select more than one option in order of their preferences. This model would be useful for the final set of questions regarding political/institutional options, as under a preferential 'instant runoff' system, lowest-ranked preferences are progressively eliminated until a single option achieves a majority.[89] This can give greater perceived legitimacy to the single winning option. It improves on standard systems where it is possible that no single option will gain majority support. However, a preferential system would require amendments to existing law, and presupposes numeracy among voters.

The deliberative referendum might play two other crucial roles. First, in cases where a preferential ballot structure is utilised, political elites may have reason to broaden their appeal (which, again, would require the use of public reason). Knowing that lower-order preference may make a difference to the eventual outcome, they have an incentive to moderate their approach.[90] Secondly, the deliberative referendum

[87] Peter Emerson, Defining Democracy: Voting Procedures in Decision-making, Elections and Governance, Berlin, Springer, 2011: 49.

[88] Organic Law on Peace-Building in Bougainville-Autonomous Bougainville Government and Bougainville Referendum 2002, Sch.1.103.

[89] Graeme Orr, 'Preferenda: the Constitutionality of Multiple Option Referenda', *Constitutional Law and Policy Review* 3(4) 2001: 68. There is there is no similar benefit from identifying, earlier in the ballot, a single value as dominant; in reality multiple values will likely drive voters' choices.

[90] Donald Horowitz, *Ethnic Groups in Conflict*, Berkeley, University of California Press, 2001; Donald Horowitz, 'Electoral Systems: A Primer for Decision Makers', *Journal of Democracy* 14(4) 2003: 118-119. Of particular

could give impetus to elites (especially leaders of parties in conflict) to negotiate and conclude a final agreement. Such elites can use the results of specific value-preference questions to constrain and give direction to their negotiations. That is, answers to preliminary generalised value questions could subsequently guide leaders charged with implementing referendum outcomes by providing them with a clear understanding of voters' value preferences. It would also make it harder for them simply to pursue their own partisan or sectional interests.

Generalised Value Options in the Bougainville Referendum:

The following is an indicative set of values that might be put to voters in Bougainville. To be democratically robust, the task of defining the actual set put to voters should fall to a mini-public. These proposals are thus merely illustrative. They include that 'all peoples and individuals should enjoy':

- 'Security against violence'
- 'A fair share of natural resources'
- 'A right to economic support and development' and
- 'A right to support and protection of distinctive cultures'

Mini-Publics

A deliberative referendum should be preceded by a mini-public randomly chosen from the voting population. A mini-public's small membership (e.g., 20-200) permits more sustained and extensive deliberation than is possible amongst an entire public. Mini-publics learn at length from diverse experts before tackling a contentious problem and proposing the content to be placed on the referendum ballot (such as the value and institutional options outlined above). Amongst their own members, mini-publics prompt better-informed deliberation, mutual recognition and learning, preference change and even value change. These conclusions have often been empirically confirmed – even in conflict societies such as Colombia, Israel/Palestine

---

relevance to the case at hand, see Donald Horowitz, 'Where Have all the Parties Gone? Fraenkel and Grofman on the Alternative Vote – Yet Again', *Public Choice* 133(1-2) 2007: 13-23.

and Northern Ireland.[91] For instance, O'Flynn and Caluwaerts explain that a focused deliberative setting can 'foster more positive inter-group attitudes' among participants, including 'mutual respect and the acknowledgement of the validity of others' claims, indicating that ordinary citizens' views on divisive issues may be less intractably conflicting than expected'.[92]

One reason why citizens in conflict societies can deliberate effectively in mini-publics may be that these institutions generally exclude partisan political elites.[93] Mini-publics sideline elites who may favour the status quo of conflict. As noted, elites of various kinds are relatively able, through specious logic and factual cherry-picking, to deploy arguments that reconfirm what they already believe. Moreover, conflict settlements threaten the power arrangements of elite political and military leaders. Often elite figures' careers, ideologies and identities are tied to the struggle with the 'other side'. At the same time, elite leaders are often insulated from the violent consequences of conflict. Non-elite citizens may lack their leaders' intensity of in-group feeling, and be better able to reconsider their own positions, and more eager to see an end to the struggle and its attendant disruptions. Mini-publics also tend to be more widely trusted than other forms of representation. There is evidence that mini-publics can inform both the substance and the style of public deliberation in the broader referendum campaign,[94] though such evidence is still lacking in conflict societies.

---

[91] Margarita Orozco and Juan Ugarriza, 'The Citizens, the Politicians and the Courts: A Preliminary Assessment of Deliberative Capacity in Colombia', in Juan Ugarriza and Didier Caluwaerts (eds.) *Democratic Deliberation in Deeply Divided Societies: From Conflict to Common Ground*, London, Palgrave, 2014: 73–88; A. Norman, 'The Use of the Group and Group Work Techniques in Resolving Interethnic Conflict', *Social Work with Groups* 14(3/4) 1992: 175; M Lydia Khuri, 'Facilitating Arab-Jewish Intergroup Dialogue in the College Setting', *Race, Ethnicity and Education* 7(3) 2004: 229, 244; Robert Luskin, Ian O'Flynn, James Fishkin and David Russell, 'Deliberating across Deep Divides' *Political Studies* 62(1) 2014: 116.

[92] Ian O'Flynn and Didier Caluwaerts, 'Deliberation in Deeply Divided Societies', in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), *Oxford Handbook of Deliberative Democracy* Oxford, Oxford University Press, forthcoming 2018.

[93] O'Flynn and Caluwaerts, 'Deliberation in Deeply Divided Societies'.

[94] Fred Cutler, Richard Johnston, R. Kenneth Carty, André Blais and Patrick Fournier, 'Deliberation, Information and Trust: The British Columbia Citizens' Assembly as Agenda-Setter', in Mark E. Warren and Hilary Pearse (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, Cambridge, Cambridge University Press, 2008: 168–170.

A Mini-Public in the Bougainville Referendum Campaign

A mini-public's 'bottom-up' approach has the potential to catalyse deliberation and enable the Bougainville community to take 'ownership of the process'.[95] For instance, one Bougainville Audience Study respondent said 'all ideas must start from inside the community and go upwards'.[96] The Study also noted feelings of 'powerlessness' and vulnerability in the communities, with respondents expressing 'little faith in the government's approach'.[97] This may further reinforce the need for a mini-public in Bougainville.

A Bougainville mini-public should have members randomly selected yet stratified demographically in at least the following ways:

- Equal numbers from each tribal, ethnic or linguistic group – including non-ethnic-Bougainvilleans,
- Equal numbers of male and female members,
- Equal numbers from various age groups,
- A majority drawn from populations with low (including lowest-quintile) socioeconomic status,
- Some former combatants (but not so many as to constitute a dominant bloc), and
- No members holding 'elite' positions or status (ie, those holding elected, hereditary, spiritual or other recognised authority to make decisions on behalf of substantial numbers of people).

A mini-public does not deliberately select participants who have diverse points of view, but incidentally tends to include many points of view due to its demographic diversity (usually via some form of random sampling). Equal rather than proportionate representation of tribal, ethnic, age and linguistic groups particularly aims to ensure that mini-public deliberations do not merely reflect dominant opinions in the broader society, but instead air and consider both dominant and minority

[95] Thomas et al, 'Bougainville Audience Study': 39; see also Braithwaite et al, *Reconciliation and Architectures of Commitment:* 119.

[96] Thomas et al, 'Bougainville Audience Study': 40.

[97] Thomas et al, 'Bougainville Audience Study': 39.

points of view. An ideal mini-public or other deliberative democratic process places these views on equal footing in order to consider them on the basis of merit, rather than in proportion to their support among the population. Hence, the stipulation that most members should be drawn from low socioeconomic status populations reflects the need to counter the political dominance of high-socioeconomic status individuals by ensuring that they have a sufficient 'critical mass' to get their points across.[98] Young people, too, are excluded from many traditional decision-making processes.

A similar concern drives the stipulation for equal numbers of men and women, especially since this feature encounters complex and changing gender dynamics in Bougainville. There is a concern that women may not feel comfortable expressing their opinions in a mini-public. The Bougainville Audience Study 2017 suggests that women feel more comfortable raising their concerns in women's groups or through their church network.[99] Men now dominate the political debate and in some instances traditional matrilineal structures have been 'disregarded'.[100] For example, in the 2005 Bougainville election three women and thirty-eight men were elected; these three seats were specifically reserved for women.[101] Regan indicates that while women were involved with peace-making process in Bougainville, their role was considered complete 'once the violence had ended'.[102] Despite this, Regan suggests women in Bougainville are challenging male-dominated politics.[103]

The ban on elites participating within the mini-public is a particularly important proviso, which reflects one of the essential rationales for mini-publics previously discussed. (However, elite experts, such as economists or medics, and discussion group facilitators are necessary; these should be chosen for their ability and

[98] It is commonly assumed that people from disadvantaged backgrounds are less capable of deliberating (for example, that they are likely to speak less) than those who are not. Yet, while the evidence does not support this assumption, '[r]andom assignment to small groups generally produces a fair amount of 'variation in variation' – some groups are more internally diverse than others. So, while certain minorities are well represented in some small groups, they are not well represented in others. Consequently, in some cases they may lack the 'critical mass' and hence the confidence to voice their own concerns': O'Flynn and Sood, 'What Would Dahl Say?': 47.

[99] O'Flynn and Sood, 'What Would Dahl Say?': 48.

[100] O'Flynn and Sood, 'What Would Dahl Say?': 48. See also Regan, *Light Interventions*: 11.

[101] Braithwaite et al, Reconciliation and Architectures of Commitment: 120.

[102] Regan, Light Interventions: 41.

[103] Despite this, Regan suggests women in Bougainville are challenging male-dominated politics. Regan, *Light Interventions*: 41.

neutrality.) Eliminating elite roles and limiting high-socioeconomic status members (though, again, only insofar as this is necessary to ensure that all points of view receive a fair hearing) also may widen perceptions among non-members of the mini-public's legitimacy. It also might exclude elite motivated-reasoners who, as already noted, frequently oppose open and flexible deliberative processes.

A potential critique is that Bougainvilleans are significantly influenced by powerful men (and, at least historically, women), such that a wholly non-elite process could be culturally unsuitable. However, an entirely non-elite peacemaking process is in any event not possible or necessary. Elites must be reintroduced at the final stages, after the mini-public's conclusion, to conduct detailed negotiations. Moreover, note than many leaders may welcome the advice and assistance, as well as the popular legitimacy, deriving from a significantly non-elite process such as a mini-public.[104] In practice, as with all mini-publics, formal or tacit approval by elites for running the process will be crucial in Bougainville if the body is to run smoothly and achieve influence. Relevant elites might include parliamentarians, local chiefs, veteran leaders of the armed conflict (some particularly respected as 'liberators') and the Council of Elders (traditional leadership groups that assist the government).[105]

Preliminary Instruction

Beyond mini-publics, additional deliberative referendum design features might also influence the quality of deliberation in the referendum campaign. Referendum campaigns involve inevitably wider and more chaotic deliberation than that of mini-publics alone. Yet, in comparison with many other forms of popular debate,

[104] We are grateful to Bal Kama for this insight.

[105] Ellwood, 'Understanding the Neighbourhood': 7. Note as well that, as mentioned above, a Constituent Assembly–in some ways comparable to a mini-public–ran in 2004. By many accounts the Assembly was an effective body. However, there remains a need for a mini-public. This is firstly because distinctive decisions (for example, ballot design) are required of the prospective mini-public. Secondly, and more fundamentally, relying on mini-publics to bring greater deliberation and legitimacy to a referendum generally requires that the mini-public run just prior to the referendum. Most citizens will otherwise be unaware of institutional processes that ran years earlier. For instance, following the celebrated mini-public on electoral reform held in British Columbia 2004, the body helped to improve deliberation and persuade voters in a referendum held that year. However, another referendum five years later enjoyed a less deliberatively robust discourse and a far more negative substantive outcome. A key factor was that the province did not convene a new mini-public prior to the 2009 referendum: Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation*, Cambridge, Cambridge University Press, 2009: 72-73.

referendum campaigns are time-constrained and substantively limited to just a handful of topics. This may help to make them more amenable to the targeted provision of information to enhance deliberation and protect against the machinations of vested interests. *Preliminary instruction* can involve voting (either online or at voting stations) that requires the voter first to engage with an interactive informational tutorial.[106] To promote balance and neutrality, the noted mini-public would design the tutorial materials.

Preliminary Instruction in the Bougainville Referendum:

Illiteracy and the marked pluralism of language and dialect groups in Bougainville pose challenges for standard models of preliminary instruction. Information cannot be in purely textual form, but must also be aural and visual. The mini-public should be tasked with producing clear information, covering a range of arguments about the pros and cons of independence in Bougainville, and doing so in both Tok Pisin and a variety of languages.[107] Expert facilitation could aid the mini-public in presenting such information in a compelling audio-visual format. This recorded tutorial could last approximately fifteen minutes – neither too brief nor too lengthy, in recognition that not all voters have time or inclination to engage in a more involved process.

The technological challenges raised by these requirements are significant. Bougainville lacks highly developed technological infrastructure. As in a number of developing regions globally, mobile phone coverage in Bougainville is generally more extensive than road coverage. Mobile phones have thus become key platforms for communication (including by social media) and even economic transactions. (Considerable popular trust in the technology's security is required for the latter.) Phones can similarly be relied upon as platforms for preliminary instruction. This could involve text messaging, which at current count is available to 3 in 4 Bougainvilleans.[108] However, text messaging is a limited and inflexible format. Radio

[106] Levy, '"Deliberative Voting"'.

[107] On the face of it, one might object that the members of the mini-public will also struggle to communicate with one another. However, evidence from mini-publics suggests that the quality of deliberation may actually be higher in linguistically mixed groups than in linguistically homogeneous groups: Didier Caluwaerts and Kris Deschouwer, 'Building Bridges Across Political Divides: Experiments on Deliberative Democracy in Deeply Divided Belgium', *European Political Science Review* 6(3) 2014: 427-450.

[108] Thomas et al, 'Bougainville Audience Study': 11.

broadcasting is an alternative. Yet, though widely trusted, radio is not spread across all regions.[109]

Most useful would be a web-based *interactive* video. This would be difficult to support, given the internet's relatively low local availability – currently 27 per-cent, as most phones are 2G with no internet access – and high costs.[110] These statistics raise clear 'digital divide' concerns: that internet communication will benefit only the relatively wealthy. However, and importantly, access fees could be selectively waived on given days or for particular websites – a modest cost that foreign governments might wish to bear. And a more onerous foreign contribution (albeit one useful for the long term) could be to install mobile phone towers and signal amplifying 'repeaters'. Australia has historically made similar infrastructure contributions.[111] Ultimately, lower-tech approaches also are likely to be necessary. Churches and schools in Bougainville could disseminate information, either in the form of interactive videos viewable on-site, or in more traditional forms (e.g., pamphlets, and speeches given by mini-public participants).

Popular Legitimacy

The deliberative referendum design features outlined above use institutional design to improve the deliberative capacities of ordinary people for the duration of the referendum campaign and vote. There is no expectation in the short term that a deliberative referendum will eliminate all of the causes of conflict. However, it may lend any resulting agreement legitimacy and assist the agreement to endure. Hence the referendum can both stabilise an agreement and help to avoid backsliding later on.[112]

---

[109] Thomas et al, 'Bougainville Audience Study': 20.

[110] Thomas et al, 'Bougainville Audience Study': 11.

[111] In 1999, AusAID contributed to the upgrade of facilities for Radio Bougainville: Commonwealth of Australia, Bougainville: The Peace Process and Beyond: Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliamentary Paper No 193, 1999, Appendix L.

[112] John M Carey, 'Does It Matter How a Constitution is Created?', in Zoltan Barany and Robert G Moser (eds.), *Is Democracy Exportable?,* Cambridge, Cambridge University Press, 2009: 172.

According to Tierney, 'the referendum can take on moral force' – more than a declaration by an elected legislature ever could.[113] Referendums can establish the ceremony and solemnity befitting an enduring constitutional settlement. They may signal that norms emerging from the process should be viewed as foundational and enduring. Just as importantly, as noted above, citizens who find themselves on the losing side of a deliberative referendum vote may be more likely to accept the outcomes as legitimate insofar as they see it as emerging from a process that is impartial, fair and democratic.[114] More specifically, public-values voting should enable them to see why the outcome amounts to more than an exercise in naked power, even as they continue to disagree with it. Social backlash or outright reversal are less likely under such conditions.[115]

A deliberative referendum therefore potentially helps to answer the problem noted above of uneven commitments to deliberation. As an institution with robust democratic (majority rule) and deliberative (free and open exchange of reasons) features,[116] its legitimacy could be agreed to by a wide cross-section of people, including both those who value majoritarian process and those who value deliberation. A decision-making model such as this, which robustly adopts both democratic and deliberative features, can perhaps attract the broadest perceptions of legitimacy – and in turn underpin a more enduring settlement.

A related issue is the thresholds that should be set for a referendum proposal to be considered to be passed. A simple 50 per-cent plus one vote standard has the downside that in a close result (e.g., Brexit's 51.9 per-cent 'yes', and the bare majority 50.6 per-cent 'no' in Quebec's 1995 secession referendum) the winning option may

---

[113] Stephen Tierney, 'Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies', *German* Law *Journal* 16 2015: 523, 529, 536.

[114] Philip Pettit, 'Republican Theory and Political Trust', in Valerie Braithwaite and Margaret Levi (eds.), *Trust and Governance* (Russell Sage Foundation, 1998) 296-99; Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge, Cambridge University Press, 1991: 23–24.

[115] This is, admittedly, an empirical claim. Yet while it has not, to the best of our knowledge been systemically tested, it pervades the literature on deliberative democracy. See, for example, Bernard Manin, 'On Legitimacy and Political Deliberation', *Political Theory* 15(3) 1987: 338-368.

[116] The two are not wholly distinct: 'deliberation reinforces democracy, and democracy in turn reinforces deliberation'; for example, better informed voters can express more sincere preferences in a referendum, based on a more genuine knowledge of the subject: Ron Levy and Graeme Orr, *The Law of Deliberative Democracy*, London, Routledge, 2016: 26-27, 50.

be in doubt. For instance, at these close margins any voting irregularities, and the vagaries of turn-out (e.g., fewer than half of eligible voters participating), can encourage the view that the vote was illegitimate. Perhaps it was not accurately indicative of popular will or, if indicative, reflected only fleeting popular preference, which is not itself sufficient to legitimate a long-term constitutional reform. Some referendum designers respond to this problem with supermajority requirements (e.g., 55 or 60 per-cent to pass). A related approach would be to require, as a prerequisite for constitutional change, that at least 50 per-cent of all *eligible* voters vote 'yes'; in practice, in terms of actual votes cast, this would almost always amount to a supermajority requirement.

Supermajority methods raise their own problems for democratic legitimacy, as a clear majority of voters might be denied their preferred option by a supermajority set arbitrarily high. (The British Columbian electoral reform of 2004 provides an example; the vote achieved 57.7 per-cent support, but fell short of the high 60 per-cent threshold.) A more palatable approach is one we call a 'timed double-majority'. This approach requires a second referendum vote to be held within one year of the first vote, if and only if the first vote falls short of a clear majority (e.g., the result is between 50.0 plus one vote, and 52.9 per-cent).[117] In addition, there should be a 'voter quorum' set at 50 per-cent turn out among eligible voters.[118] This guarantees that wide-reaching constitutional change cannot take place if fewer than a majority of eligible voters participate in the referendum. On the other hand, it does not simply privilege the status quo.

Democratic Design in Bougainville

In addition to the deliberative institutions and supports canvassed thus far, the referendum should ensure best practices in democratic design. This should firstly include the timed double majority and 50 per-cent voter quorum requirements just

[117] Other options include the approach in Canada, where federal legislation requires a clear majority on a clear question in any future secession referendum: *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference* (aka Clarity Act) S.C. 2000, c. 26. However, this option would raise serious risks in conflict areas, given (ironically) the vagueness as to what counts as 'clear', and about who should be empowered to decide the matter.

[118] Zoltán Tibor Pállinger, Bruno Kaufmann, Wilfried Marxer and Theo Schiller (eds.), *Direct Democracy in Europe: Developments and Prospects*, Berlin, Springer, 2007.

outlined. In addition, the referendum should have standard democratic guarantees set out in law, such as:

- universal adult franchise,
- anonymous balloting,
- fair access to public airwaves and other modes of publicity and discussion, and
- legal safeguards against partisan criminal prosecution.

Such provisions can reduce the capacity of self-interested political elites and partisan factions to capture a referendum for their own purposes, particularly by 'playing the ethnic card'.[119] It is partly for this reason that public-values referendum deliberation might be characterised as having a circuit-breaking function. As we noted in Part II, the colonial experience in Bougainville left a legacy of distrust in governmental elites – including foreign elites. While international agents (e.g., NGOs, UN bodies and neutral foreign governments[120]) might be more impartial, popular legitimacy considerations and distrust of elites of various descriptions help to explain the modern popularity of referendums in conflict societies. Elites cannot be sidelined; nor, as we noted earlier, should they be. But, if properly conducted, referendums can change the incentive structure of elites in ways that are settlement supporting.[121] Deliberative democracy, particularly its public reason variety, can guide the way.

Popular perceptions of the legitimacy of a decision-making process are not dependent only on the majoritarian democratic *bona fides* of the process. Robust deliberation also importantly contributes to these perceptions. Evidence suggests that public trust in referendums depends partly on deliberative supports to mitigate

[119] In the ethnic conflict literature, this phenomenon is usually discussed under the heading of 'outbidding'. See, for example, Cathy Gormley-Heenan and Roger MacGinty, 'Ethnic Outbidding and Party Modernization: Understanding the Democratic Unionist Party's Electoral Success in the Post-Agreement Environment', *Ethnopolitics* 7(1) 2008: 43–61; Gavin Moore, Neophytos Loizides, Nukhet Sandal and Alexandros Lordos, 'Winning Peace Frames: Intra-Ethnic Outbidding in Northern Ireland and Cyprus', *West European Politics* 37(1) 2014: 159-181.

[120] Note that the Melanesian Spearhead Group, a regional intergovernmental organization, would likely not qualify as 'neutral' for this purpose given that PNG is one of the five member states and PNG Prime Minister Peter O'Neill recently assumed the role of Chair.

[121] See Jon Elster, 'Deliberation and Constitution Making', in Jon Elster (ed.), *Deliberative Democracy* (Cambridge University Press, 1988) 100-105.

ordinary citizens' deliberative weaknesses.[122] That is, as noted in part II, non-elites tasked with deciding complex problems may encounter informational and other difficulties. A process that is not merely democratic, but *deliberative* democratic, is especially likely to attract public trust (a useful marker for perceptions of legitimacy). A deliberative referendum therefore potentially helps to answer the problem noted above of uneven commitments to deliberation. As an institution with robust democratic and deliberative features,[123] its legitimacy could be agreed to by a wide cross-section of people, including those who value majoritarian process and those who value deliberation. A decision-making model such as this, which robustly adopts both democratic and deliberative features, can perhaps attract the broadest perception of legitimacy – and in turn a more enduring settlement.

A final consideration is when to hold the referendum. As noted, the deliberative referendum we propose should run prior to elite-led negotiations on a final settlement. This means, formally, the vote must be a non-binding plebiscite, since leeway must be given to elites to finalise settlement details. This is consistent with the planned approach for the Bougainville referendum, which is intended to be non-binding. Section 342 of the PNG constitution provides that the referendum's results will be subject to consultations later on between the two governments. While the referendum campaign is running, and until voting results are revealed, elites should nevertheless be largely sidelined.[124]

When settlement negotiations run in advance of a referendum and are presented to voters for endorsement post-hoc, the result can be disappointing. As in Colombia, the pre-negotiated settlement may not attract widespread popular support; voters may hesitate to defer to elite experts about a complex settlement.[125] Non-elites may not

[122] Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change', *Melbourne University Law Review* 34 2010: 805, 834-837.

[123] The two are not wholly distinct: 'deliberation reinforces democracy, and democracy in turn reinforces deliberation'; for example, better informed voters can express more sincere preferences in a referendum, based on a more genuine knowledge of the subject: Ron Levy and Graeme Orr, *The Law of Deliberative Democracy*, London, Routledge, 2016: 26-27, 50.

[124] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* Oxford: Oxford University Press, 2012: 249-252. See similarly, in a non-conflict setting, John Parkinson, 'Ideas of Constitutions and Deliberative Democracy and How They Interact' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge, Cambridge University Press, 2018.

[125] Levy, 'Breaking the Constitutional Deadlock': 807; Tierney, *Constitutional Referendums*: 247.

understand nor defer to the complex compromises negotiated by elites. By contrast, running a prior referendum in which non-elite opinions take precedence can allow the vote to influence the more detailed negotiations held later on. Negotiating elites will be able (indeed, if the process is properly conducted, may be morally obliged) to draw upon the results of the public value-voting portion of the ballot to guide their interactions (or, at the very least, to explain in public-value terms why they did not do so). Broader engagement, especially at an early stage, may help to increase popular, long-term support for settlement.[126] Of course the risk is that voters will view the legitimacy of the process as undermined if elites retain the final word on settlement details. However, running an initial referendum may allow it to proceed without becoming bogged down in technical details, and may also help to impel elites to reach a settlement: there are political downsides to rejecting the express, considered preferences of constituents.

CONCLUSION

The conflict-society deliberative referendum should be understood as minimalist in its aims: it does not require wholesale changes to individual value commitments. The referendum is a discrete moment in time focused on a specific set of matters. The challenge of popular deliberation in a referendum is in this sense relatively modest. There need be no requirement, in the first instance, to mend deep social differences. Neither is there a need for individuals to move closer to each other in identity or to be more willing to deliberate as a general rule. The aim should be instead for a focused airing, generalisation and liberalisation of commonly held public values. Deliberative referendums are not intended to be 'schools for democracy', but of course there is nothing to preclude such an outcome either.

Approached in this way, the referendum in Bougainville may avoid merely aggravating conflict, as in past cases, and may be more likely to mitigate it. A deliberative referendum aims first to scaffold a tenuous agreement – a circumscribed opportunity to deliberate from common ground – and thereafter to concretise the settlement by way of a legitimising deliberative referendum – a circumscribed opportunity to case an informed vote. Of course, the standard caveat applies: nothing

[126] Tierney, Constitutional Referendums: 251-252.

can guarantee successful settlement in practice. Yet current approaches to conflict society referendums have often been often markedly ineffective—even counterproductive—in part due to their habitual neglect of deliberative design.

The People's Parliament: Have Petitions Had Their Day?*

Rebecca Burton[1]

Executive Assistant to the Clerk of the Legislative Council of Western Australia

* Double-blind reviewed article.

INTRODUCTION

Since ancient times, individuals have been able to seek direct action from their rulers through the means of a petition process. They may raise personal grievances or seek policy reform by writing directly to the government and demonstrating public support for their position by gathering as many signatures as possible. Petitions continue to give the people a voice in Parliament and have been explicitly enshrined in the Westminster system since the Bill of Rights *1689*.[2] However, with so many forms of instant communication now available between the people and the government, are petitions still relevant?

Recent studies undertaken of the petitions process in various jurisdictions suggest that petitions play an important role in linking the public with the Parliament. This paper will begin with a review of some of these studies and their conclusions. It will then focus on petitions in the Western Australian context and explore the petitions process in the Legislative Council and the Legislative Assembly. Data available on petitions in both Houses will be analysed to assess whether petitions have had their day in the Western Australian Parliament. The period reviewed covers the commencement of the 38th Parliament in November 2008 to the last sitting day of the 39th Parliament in November 2016. During this period, the Liberal-National alliance formed the government.

[1] The views in this article are those of the author and do not reflect the views of the Legislative Council of Western Australia.

[2] Article 5, *Bill of Rights 1689*: Right to Petition.

This article compiles the following data for each House:

- the number of petitions tabled over the identified period;
- the type of request in the petition;
- the subject matter of the petition; and
- the number of signatures for each petition.

The analysis demonstrates that petitions remain a popular and valuable method for the people to have their views and calls for action heard directly by the Parliament. However, the data also indicate that the number of petitions tabled and the number of signatories to petitions are declining both in real terms and when compared to the significant increases to the adult population in Western Australia during the same period. The challenge for Parliament is to transform the petition process to ensure petitions remain relevant in our increasingly tech-savvy society. Valuable lessons may be learned from international experiences.

COMPARATIVE STUDIES OF PETITIONS

There have been various studies about the role and purpose of petitions and their effectiveness over the past ten years. Perhaps the most notable recent contribution to understanding petitions was made by Carmen in establishing the link between transparency of petition systems and enhanced confidence in the institution. He reviewed the Scottish Parliament's petitioning system, which was introduced in 1999, to understand how petitions connect the citizen with Parliament and the outcomes of the petition system. He found that that the petitioning system allowed for a direct link between citizens and the Parliament; however, petitioners had no influence over the decision making processes of the Parliament. Petitioning was thus a form of advocacy democracy in which an issue could be raised but the process and decision-making was made by another party.[3]

[3] C. Carman, 'The Process is the Reality: Perceptions of Procedural Fairness and Participatory Democracy', *Political Studies* 58 2010: 731-751.

In addressing their roles in the democratic process, Hough reviewed the petitions processes in a number of jurisdictions.[4] He found that petitions provide a mechanism for citizens to engage with the Parliament and that the outcome of specific petitions was not as important as the petition process itself in improving the relationship between citizens and parliament. Hough thus confirmed Carmen's findings that the transparency and perception of fairness in the petitions system was directly correlated with improved support and confidence for the institution. Hough and Carmen both suggest that this correlation has led to legislatures reviewing their petitions systems to re-engage citizens in the democratic process and revitalise trust in Parliament.[5]

Bochel conducted a similar review of the petitions process in the Scottish Parliament and the National Assembly for Wales to understand how petitioning enables citizens to be heard and the extent of influence petitions have on policies. He noted the goal of the petition system was to provide a direct link to Parliament and to enable citizens to participate and influence policy outcomes. The dedicated Petitions Committee in both Parliaments that reviewed all admissible petitions increased the level of participation available to the petitioner and the level of influence the petitioner had on the outcome of the petition. The decision making process and outcome were entirely the purview of the Petitions Committee but at a minimum, petitioners could raise the profile of their issue and have it considered by the Committee.[6]

E-petitons have also been the subject of comparative research. Lindner and Riehm note the progress made by information communication technology, enabling the introduction of formal e-petition systems.[7] They reviewed the e-petitions systems introduced in the Scottish Parliament in 2000, the Parliament of Queensland in 2002, the German Bundestag in 2005 and Norwegian municipalities in 2005 to better understand the attractiveness of this form of petitioning. Their main finding was that the early contact with the administration required of an e-petitioner positively

[4] R. Hough, 'Do Legislative Petitions Systems Enhance the Relationship between Parliament and Citizen?', *The Journal of Legislative Studies* 18(3-4) 2012: 479-495.

[5] Carman, 'Process is the Reality'; Hough, 'Legislative Petitions Systems'.

[6] C. Bochel, 'Petitions: Different Dimensions of Voice and Influence in the Scottish Parliament and the National Assembly for Wales', *Social Policy and Administration* 46(2) 2012: 142-160.

[7] R. Lindner and U. Riehm, 'Electronic Petitions and Institutional Modernization', *Journal of eDemocracy* 1 2009: 1-11.

impacted on petitioners' assessments of the e-petition system, regardless of the petition outcome, because the administration could assist in framing the petition and managing expectations of the petition process. This is in direct contrast with the traditional method of petitioning, in which the first contact a petitioner has with a Member of Parliament or the Parliament's administration occurs when all signatures have been collected. This research suggests e-petition systems can improve petitioner experience by increasing transparency and providing a way to manage expectations of the process.

Lindner and Riehm noted that petitions were treated differently in the jurisdictions, ranging from simply being tabled in Queensland with the option for a Minister to respond, to actively being considered by a dedicated Petitions Committee in Scotland. Even with these different levels of political responsiveness across jurisdictions, Lindner and Riehm found that e-petitions afforded more transparency than traditional petitions for the petitioner.[8]

In comparing the numbers of petitions presented in Germany and Queensland, Lindner and Riehm found that e-petitioning had not significantly contributed to an increase in the number of petitions submitted or the number of signatories to petitions. One unexpected outcome of their study was that principal petitioners found collecting signatures online to be more challenging than using traditional methods. By contrast, the Queensland Parliament's submission to the House of Representatives Standing Committee on Petitions reports that the introduction of e-petitioning led to increases in the number of petitions presented overall and in the number of signatories to petitions.[9]

While Lindner and Riehm focused on technical and institutional perspectives, Cruickshank and Smith reviewed a study into EuroPetition conducted in 2009 and proposed an evaluation model drawn from social cognitive theory in an effort to understand the e-petitioner.[10] They suggest that the technology acceptance model

[8] Lindner and Riehm, 'Electronic Petitions'.

[9] House of Representatives. Standing Committee on Petitions, *Electronic petitioning to the House of Representatives*. House of Representatives, 2009. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=petitions/epetitioning/report.htm

[10] P. Cruickshank and C. Smith, 'Understanding the "E-Petitioner". Transforming Government', *People, Process and Policy* 5(4) 2011: 319-329.

may be used to assess a person's decision to use e-petitions technology by measuring perceived usefulness and ease of use, while social cognitive theory adds a further dimension by considering uptake in terms of self-efficacy.

Cruickshank and Smith assess the common assumption that e-petitioning would attract a wider pool of participants in the petitions process. In fact, they found that the demographic profile of e-petitioners further exacerbated the inequalities of participation evident in the traditional petitioning system; that of white males, better educated and older than the average population, and that e-petitioners were simply younger than the traditional petitioner.[11] This demographic profile was also found by Carmen[12] and by Lindner and Riehm[13] in their studies of petition systems in the Scottish Parliament and German Bundestag respectively.

Bochel also noted that the e-petition system allowed for a high degree of transparency and participation; allowing a petitioner to lodge a petition online, provide background information and hold a discussion forum on the online site.[14] However, rather than appeal to a broader range of citizens as had been the aim, Ipsos MORI and Carman found that access to the internet and the relationship between internet access and social grade may reduce accessibility. Citizens from a lower social grade were less likely to be aware of the petitions systems available in both jurisdictions.[15] Bochel also looked at the gender of petitioners in both Parliaments and found that of the 67 percent of petitions submitted by individuals to the National Assembly for Wales, 61 percent were submitted by men. Of the 62 percent of petitions submitted by individuals to the Scottish Parliament, 78 percent were

[11] Cruickshank and Smith, 'Understanding the "E-Petitioner"'.

[12] C. Carman, *The Assessment of the Scottish Parliament's Public Petitions System 1999-2006,* Commissioned by the Scottish Parliament Information Centre for the Public Petitions Committee, Edinburgh, 2006. Accessed at: http://archive.scottish.parliament.uk/business/committees/petitions/reports-06/pur06-PPS-assessment-04.htm#7p2

[13] Lindner and Riehm, 'Electronic Petitions'.

[14] Bochel. 'Petitions: Different Dimensions'.

[15] Ipsos MORI and C. Carman, Engaging the Public in the Scottish Parliament's Petitions Process: Research Study Conducted for the Scottish Parliament's Public Petitions Committee. Edinburgh: Scottish Parliament, 2009. Accessed at: http://archive.scottish.parliament.uk/s3/committees/petitions/inquiries/petitionsProcess/Engagingthepublicinthepetitionsprocess.pdf

submitted by men.[16] This supports the findings of Cruickshank and Smith, Carmen, and Lindner and Riehm, that the majority of petitioners are men.[17] For these reasons, Bochel suggests that educating the public about the existence of petitions systems may be needed to produce a more diverse range of petitioners.[18]

THE CONTRIBUTION OF THIS STUDY

There has been a lack of research into the petition systems of the Western Australian Parliament along the lines of the studies summarised above. This article addresses this gap. Since different petition systems operate in the Western Australian Legislative Council and the Legislative Assembly, the review of the two systems presented here provides valuable insights into what effects, if any, these differences have on the use of system. Like the Scottish Parliament, the Legislative Council has a dedicated petitions committee that reviews all admissible petitions, undertakes further investigations and makes recommendations as appropriate. By contrast, the Legislative Assembly only provides for a petition to be tabled, with no automatic follow-up procedures. In terms of Bochel's analysis,[19] the Legislative Council has a more participatory style petition process than the Legislative Assembly.

A review into the respective systems will show if the existence of a dedicated Committee in the Legislative Council impacts on the number of petitions presented. It will also show whether the number of petitions has increased or declined over the period of review, and consider the effectiveness of petitions in the Western Australian context. To address these issues, this article draws on data collected from the Parliament of Western Australia website for petitions tabled in the Legislative Council and Legislative Assembly from the commencement of the 38th Parliament in November 2008 to the last sitting day of the 39th Parliament in November 2016. Petitions tabled on the same subject in the same House during the same Parliament

[16] Ipsos MORI and Carman, *Engaging the Public*.

[17] Carman, *Assessment of the Scottish Parliament*; Cruickshank and Smith, 'Understanding the "E-Petitioner"; R. Lindner and U. Riehm, 'Broadening Participation Through E-Petitions? An Empirical Study of Petitions to the German Parliament', *Policy and Internet* 3(1) 2011: Article 4.

[18] Bochel, 'Petitions: Different Dimensions'.

[19] Bochel, 'Petitions: Different Dimensions'.

are treated by the Committee, and for the purposes of this paper, as a single petition with a single set of signatures.

OVERVIEW OF THE PETITIONS PROCESS IN WA

Petitions are treated differently in the Legislative Council and the Legislative Assembly. In each House, petitions must be addressed to the relevant House, comply with Standing Orders and be certified as such by the relevant Clerk. E-petitions are not accepted in either House, however both Houses have considered e-petitions in the past (see Appendices A and B for information relating to the method of petitioning and accepted form of petition in each House).[20] A petition with just one signature may be tabled in either House, although petitions typically have more than one signature. In each House, the petition is read aloud by the tabling Member. From that point on, the process is different.

The Legislative Council Process

Every conforming petition that does not relate to a matter of privilege is referred to the five member Standing Committee on Environment and Public Affairs for consideration. [21] During the 38th and 39th Parliaments, five petitions did not comply with the standing orders, for reasons including a principal petitioner not being identified and the prayer being omitted. The Committee reviews the nature of the petition and if it is regarding a matter that is already before the House—for example, a Bill—the Committee may resolve not to inquire any further into the petition on the basis that the subject matter will be debated in the House and Members will be able to raise issues put to them by their constituents during the debate. For other

[20] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 40 Standing Committee on Procedure and Privileges E-Petitions*, June 2016. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914241c06d95798b9a918d648257fe1000663f3/$file/tp-4241.pdf; Legislative Assembly of Western Australia, Procedure and Privileges Committee. (2008). *Review of e-petitions.* Accessed at: http://libstream.parliament.wa.gov.au/e-docs/0003406.pdf

[21] Legislative Council of Western Australia, Standing Committee on Environment and Public Affairs, *Report 46 Standing Committee on Environment and Public Affairs Overview of Petitions 1 January 2016 to 30 September 2016*, 2016. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914850c05d601f9252f17a7482580670008038e/$file/tp-4850.pdf

matters, the Committee will seek to understand more about the issues raised in the petition by asking the principal petitioner to provide a submission that gives further detail about the terms of the petition. On occasion the requested submission is not provided and the Committee closes its inquiry into the petition at that point.

Once a submission is received from the principal petitioner, the Committee seeks a response to the petition from the relevant Minister, government department, local government or private body. Occasionally the Committee conducts further inquiries and public hearings in an effort to obtain more detailed information. The inquiry process concludes with the Committee responding directly to the petitioner or less commonly tabling a report making recommendations for the government to consider.

Standing Order 191 of the Legislative Council requires the government to formally respond to any Committee report that recommends government action.[22] This is one means by which the Council brings the government to account for its actions, or inaction. Although a petition does not always achieve the change that the petitioner is seeking, the Legislative Council process for petitions promotes transparency and ensures that the petitioner at least receives a response from the responsible minister(s).

This Committee process is unique across the Australian state parliaments. While the federal House of Representatives has a Petitions Committee, it is focused on receiving and processing petitions and reporting to the House on petition matters. The Petitions Committee facilitates the provision of Ministerial responses to petitions and occasionally conducts hearings with petitioners and government officials to enhance public dialogue on a matter raised in a petition. However it does not make recommendations about any matters raised in a petition.[23]

[22] Legislative Council of Western Australia, *Standing Orders*, November 2016. Accessed at: http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-lc-standing-orders/$file/LC%20Standing%20Orders%2001032017.pdf

[23] The Parliament of the Commonwealth of Australia, Standing Committee on Petitions, *The Work of the Petitions Committee: 2013-2016*, 2016. Accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Petitions/Completed_inquiries

The Legislative Assembly Process

After reading the petition aloud in the Legislative Assembly, the tabling Member may choose to give a Notice of a Motion for debate on a petition or move to refer a petition to a Committee.[24] There is no formal mechanism for a petitioner to receive any response in relation to their petition. However, Legislative Assembly Standing Order 146 provides for grievances to be raised by up to four Members each Thursday, with the relevant Minister having a right of reply.[25] Between 2008 and 2016, 22 petitions were mentioned in grievances raised by Members.

THE NUMBER OF PETITIONS TABLED

Excluding 2008, which contains data for a part year due to the September state general election, the number of petitions tabled in one or other House ranges from 86 in 2013 to 120 in 2011, with the median number of petitions from 2009 to 2016 being 104. Figure 1 provides a breakdown of the number of petitions tabled in the Legislative Council and Legislative Assembly for the 38th and 39th Parliaments compared with the estimated population of Western Australia over 18 years of age.[26]

While there is no requirement for principal petitioners to be over 18 in Western Australia, comparing the number of petitions tabled with the estimated resident adult population represents one method for gauging the popularity of petitions. This analysis shows that the population is increasing over the period, while the number of petitions is declining.

The total number of petitions presented in both Houses is notably higher in 2010, 2011 and 2012. One of the factors contributing to the spike in petitions may be the political environment and consequent level of legislative activity. Prior to the period in question, the Labor Party had been in Government for two terms. The Labor

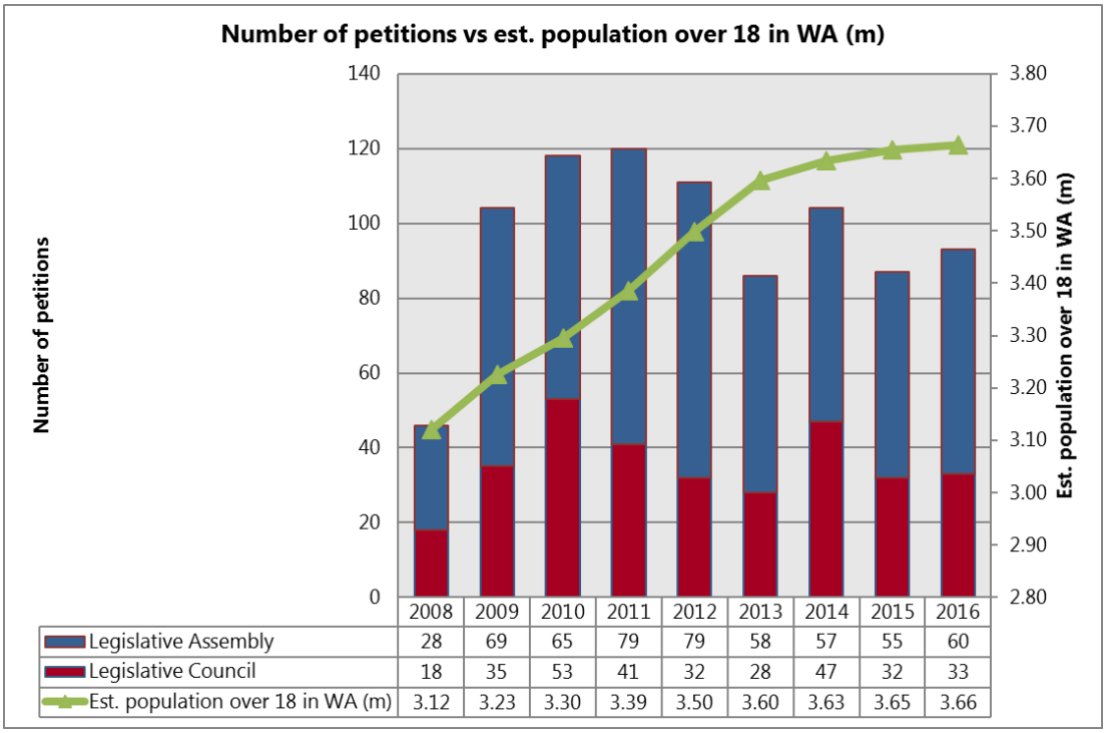
[24] Legislative Assembly of Western Australia, *Standing Orders of the Legislative Assembly of the Parliament of Western Australia*, June 2014. Accessed at: http://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/resources/file-assembly-standing-orders/$file/Assembly%20Standing%20Orders%2007042016.pdf

[25] Legislative Assembly of Western Australia, *Standing Orders*.

[26] Australian Bureau of Statistics, *Australian Demographic Statistics, Dec 2016* (Cat. No. 3101.0). Accessed at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3101.0Main+Features1Dec%202016?OpenDocument

Government called an election in 2008, the first election since a major redistribution of electoral boundaries took place in 2007, bringing Western Australia into line with the rest of Australia on a 'one vote, one value' principle for the Legislative Assembly. The redistribution led to an additional two seats being formed in the Legislative Assembly; which went from 57 to 59 seats.[27]

Figure 1. Number of Petitions Tabled in the Legislative Council and Legislative Assembly



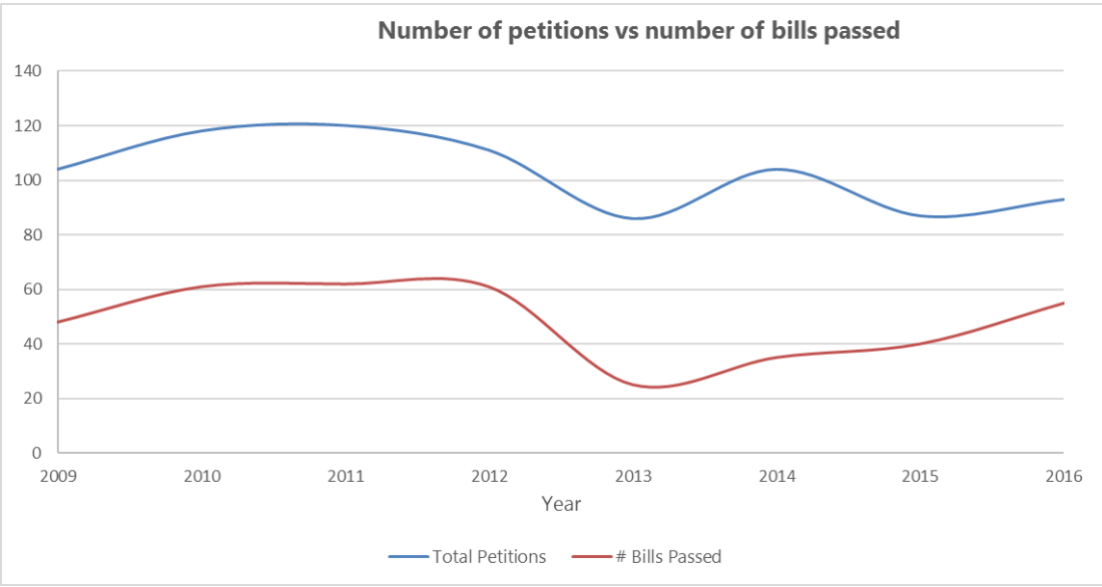
	2008	2009	2010	2011	2012	2013	2014	2015	2016
Legislative Assembly	28	69	65	79	79	58	57	55	60
Legislative Council	18	35	53	41	32	28	47	32	33
Est. population over 18 in WA (m)	3.12	3.23	3.30	3.39	3.50	3.60	3.63	3.65	3.66

The 2008 election resulted in a hung Legislative Assembly, with the Liberal Party and National Party ultimately forming a coalition government with a majority in both

[27] A. Green, *2008 Western Australian State Election: Analysis of Results*. Election Papers Series No. 1. Parliament Library, Western Australia, March 2009. Accessed at: http://www.abc.net.au/elections/archive/wa/WA2008_Results.pdf#page=28

Houses. This majority was maintained for a second term; the entire period of analysis for this petitions paper. The start of the period in question saw a major shift in political power, with the coalition Government having virtually free rein for a new policy agenda. This is reflected in increased legislative activity during its first term of government, which may have impacted on the number of petitions presented. Figure 2 demonstrates that there is a correlation between the rise in legislative activity evidenced by number of bills passed per annum and the high level of petitions activity from 2010 to 2012.

Figure 2. Number of Petitions and Number of Bills Passed

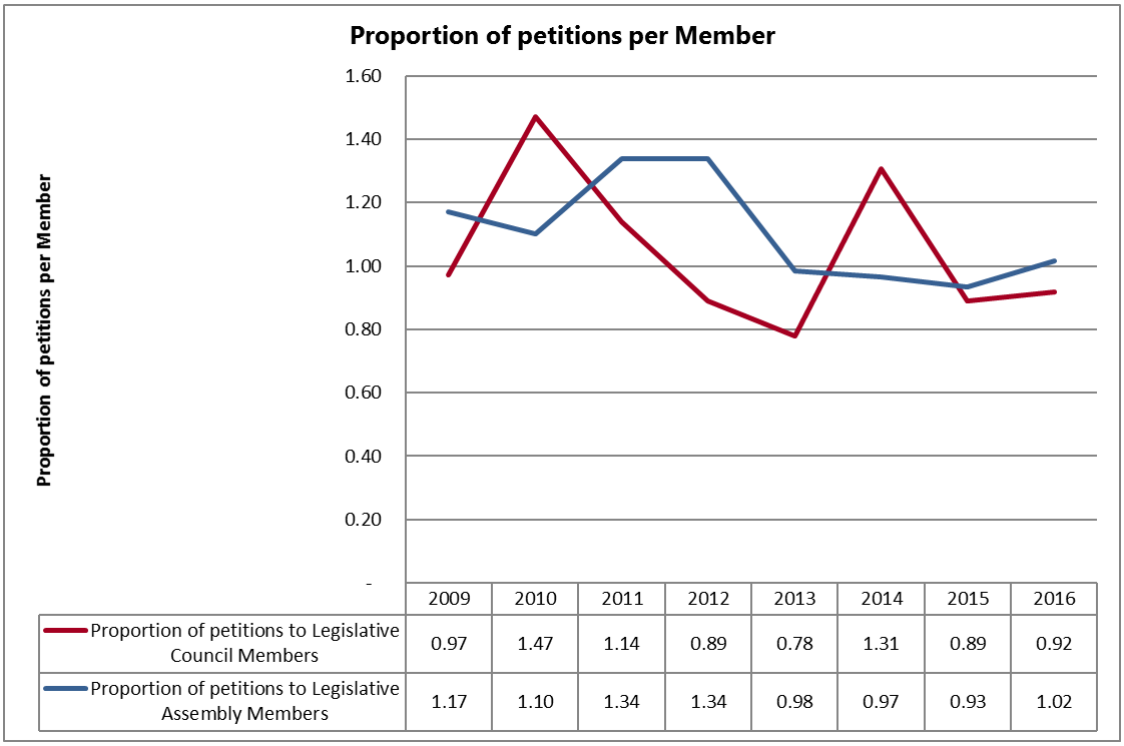


Given the Legislative Council has a process for dealing with petitions, including an active Committee capable of inquiring into petitions, one would expect a higher number of petitions to be tabled in the Legislative Council. Surprisingly, the majority of petitions were presented in the Legislative Assembly, which had from 10 to 47 more petitions tabled per annum than the Legislative Council (see Figure 1).

This may be attributed to a number of factors which require further research, including increased awareness of the Legislative Assembly, since this is the House that forms government, and petitions being promoted through electorate offices as a means for constituents to communicate directly their concerns with the 'House of Government'. There may also be a desire for petitions to be heard by the Premier

and most government Ministers, who are Members of the Legislative Assembly. The difference in the number of petitions tabled in each House seems also to be due to the different number of Members in each House. There are 59 Members of the Legislative Assembly and 36 Members of the Legislative Council, so it may be more likely that a petitioner will approach a Legislative Assembly Member (see Figure 3).

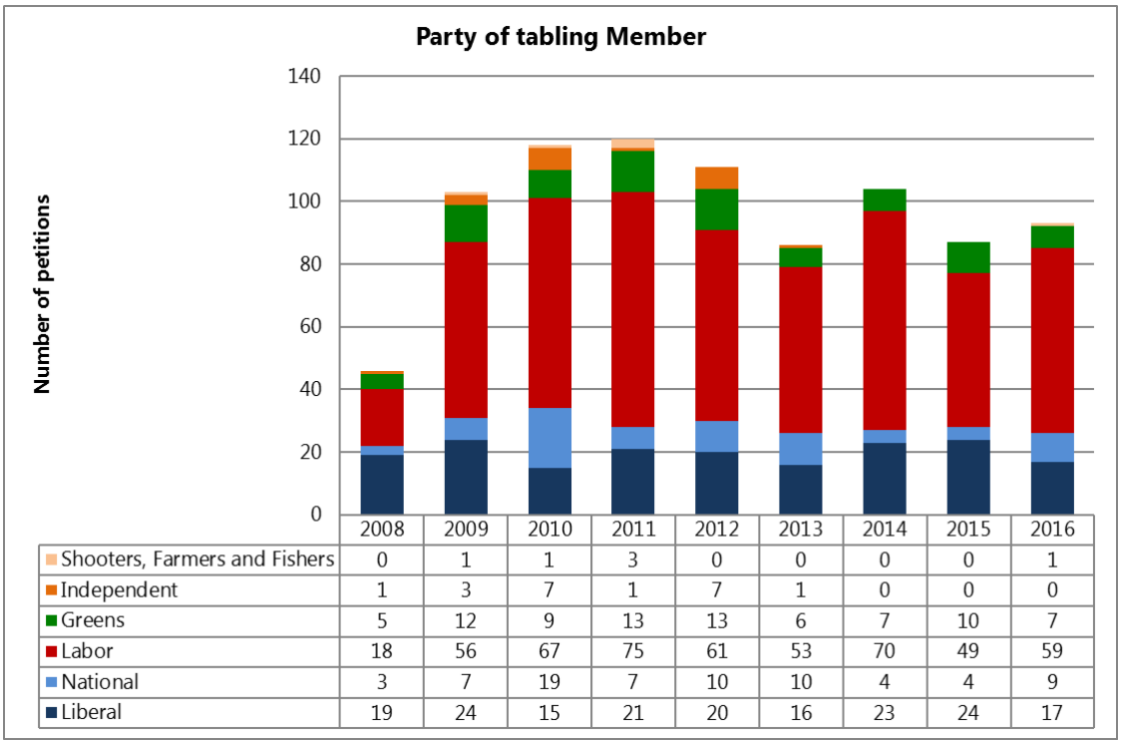
Figure 3. Petitions per Member, Legislative Assembly and Legislative Council



	2009	2010	2011	2012	2013	2014	2015	2016
Proportion of petitions to Legislative Council Members	0.97	1.47	1.14	0.89	0.78	1.31	0.89	0.92
Proportion of petitions to Legislative Assembly Members	1.17	1.10	1.34	1.34	0.98	0.97	0.93	1.02

Petitions may also be promoted differently by political parties and their popularity may depend on whether or not the party is in Government or Opposition. An analysis of the number of petitions by party of the tabling Member is shown in Figure 4. Labor Party members were the most active in tabling petitions during the period, followed by the Liberal Party. For a party in the minority in both Houses, with little control over the business program of the House, petitions may be an appealing method of raising issues in Parliament. Petitions may be a way of demonstrating to members of the public that a political party is actively pursuing their issues in Parliament and may help a party crystallise their agenda going into an election.

Figure 4. Petitions Tabled by Party



	2008	2009	2010	2011	2012	2013	2014	2015	2016
Shooters, Farmers and Fishers	0	1	1	3	0	0	0	0	1
Independent	1	3	7	1	7	1	0	0	0
Greens	5	12	9	13	13	6	7	10	7
Labor	18	56	67	75	61	53	70	49	59
National	3	7	19	7	10	10	4	4	9
Liberal	19	24	15	21	20	16	23	24	17

With an election looming in 2013, the Labor Party Opposition may have been mobilising its support base to lobby heavily on issues through the petition process between 2010 and 2012. Likewise, the incumbent coalition Government may have been pushing their policy agenda whilst they still enjoyed a majority in both Houses. This would lead to more polarising issues in the community and an increase in the demand for petitions in order for the public to express their concerns.

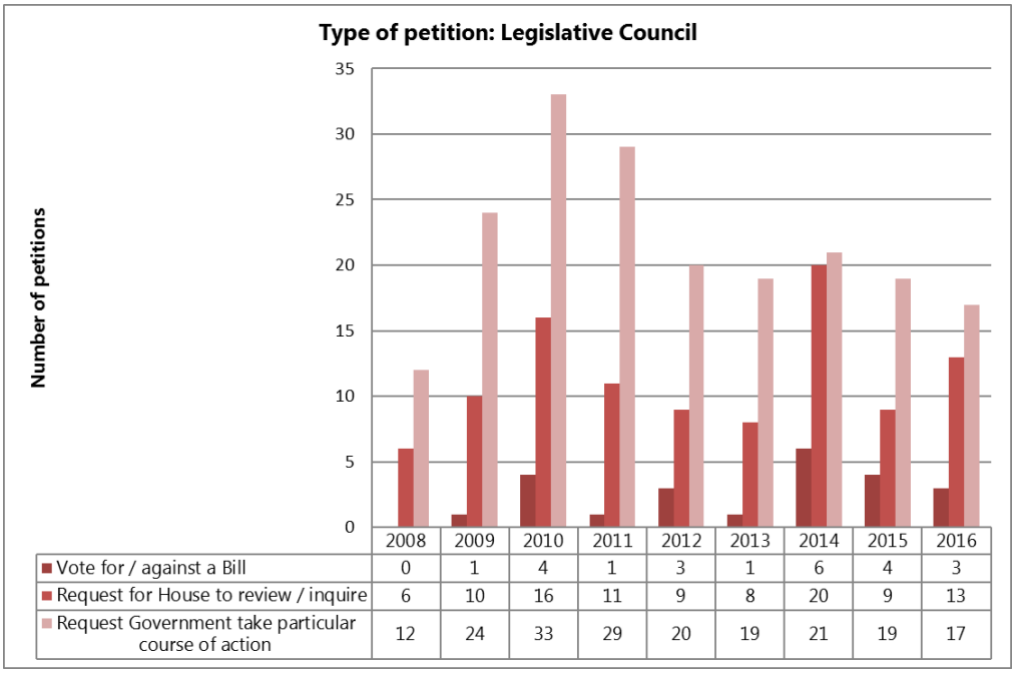
THE TYPES OF PETITION TABLED

The petitions tabled were reviewed and categorised according to the following types of request that they contained:

1. Requests to vote for or against a Bill. Petitions in this category requested that the House vote for or against a Bill, for example, Breast Feeding Legislation, Skilled Local Jobs Bill 2011 and the Biodiversity Conservation Bill 2015.

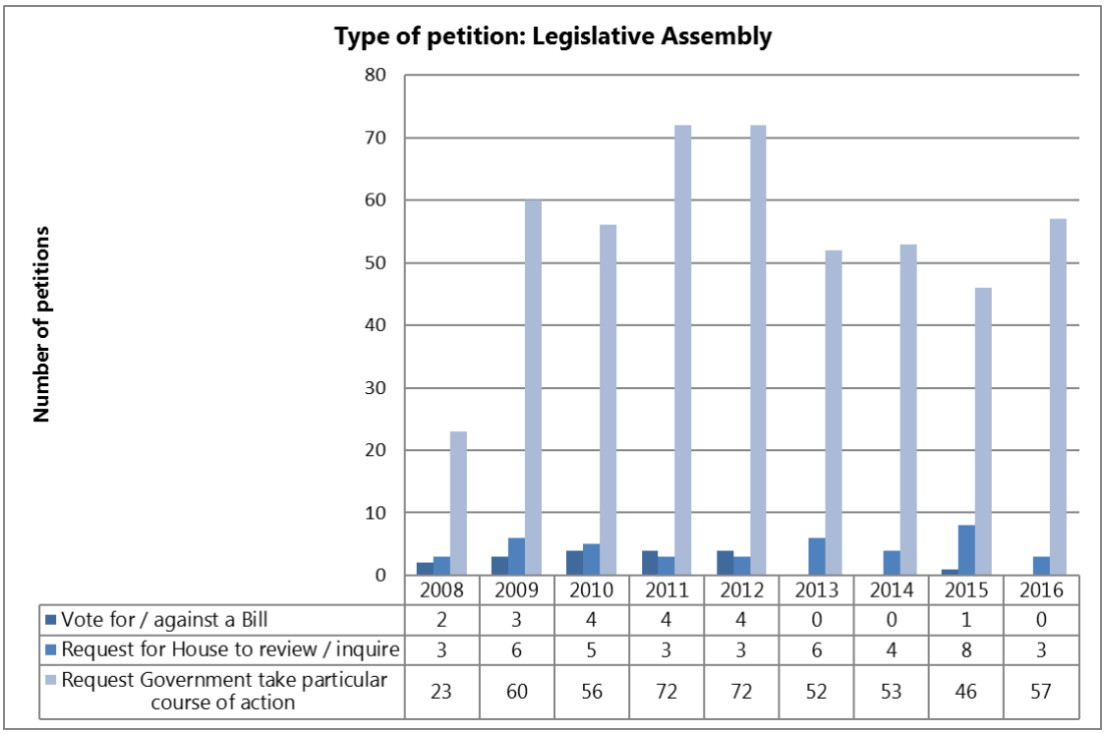
2. Requests for the House to review or inquire into a matter. For example, petitions were presented requesting a review or inquiry into shack site communities, water to energy incinerators and the use of Australian labour and local suppliers on the Gorgon Project.
3. Requests for the Government to take a particular course of action. Petitions in this category requested the House or government to do something, such as replacing the Boorara Road Bridge, banning plastic shopping bags, and opposing the closure of the ACTIV business service centre in Busselton.

Figure 5. Type of petition Tabled in the Legislative Council



	2008	2009	2010	2011	2012	2013	2014	2015	2016
Vote for / against a Bill	0	1	4	1	3	1	6	4	3
Request for House to review / inquire	6	10	16	11	9	8	20	9	13
Request Government take particular course of action	12	24	33	29	20	19	21	19	17

Figure 6. Type of Petition Tabled in the Legislative Assembly



	2008	2009	2010	2011	2012	2013	2014	2015	2016
Vote for / against a Bill	2	3	4	4	4	0	0	1	0
Request for House to review / inquire	3	6	5	3	3	6	4	8	3
Request Government take particular course of action	23	60	56	72	72	52	53	46	57

Figures 5 and 6 present a breakdown of the type of petitions tabled in the Legislative Council and Legislative Assembly. The majority of petitions in both Houses requested that the government take a particular course of action. This included requests for the House to recommend action by the government in relation to policy and outcomes. Another common request of petitions was for the House to review or inquire into a particular matter.

Most petitions of this nature were tabled in the Legislative Council, indicating that the principal petitioners were aware that these types of petitions would be better directed to the Legislative Council, where a process of review and inquiry is available. It may also indicate that the principal petitioners obtained advice or assistance from a Member of Parliament (perhaps the Member proposing to table it), the Parliament of Western Australia website or the relevant House's administration about what they could request in a petition and the capacities of each House to achieve their desired outcomes.

THE SUBJECT MATTER OF PETITIONS

The subject matter of petitions across both Houses was reviewed and each petition was categorised by subject. Some petitions referred to more than one subject, and on these occasions, the primary subject of the petition was selected. The subject matter of the petitions, from the most common to least common topic, is summarised in Table 1 below.

Interestingly, there does not seem to be a correlation between the House where the relevant Minister was based and the House in which the petition was tabled. The top five subjects for petitions in the Parliament as a whole were planning and zoning, roads, health, public transport and legislation. In the Legislative Council, the number of petitions covering planning and zoning was more than double that of the next highest subject (legislation). Legislation did not feature in the top five topics for the Legislative Assembly.

The dominance of planning and zoning as subject matter for petitions presented in both Houses may reflect increased development activity in Western Australia from 2010 to 2012. These petitions related primarily to redevelopment and rezoning proposals, including residential, commercial, mining and recreational proposals. Similarly, the strong number of petitions relating to roads peaked in 2011 and 2012, with a majority of petitions relating to heavy haulage routes, school crossings and school speed zones. This demonstrates a strong community interest in these matters.

Further analysis shows that seven of the 36 petitions presented to the Legislative Council regarding Legislation requested that the House review or inquire into a piece of legislation, compared to only one request for a review or inquiry out of the 38 petitions presented to the Legislative Assembly on this subject. This indicates that the principal petitioners in this subject area were aware of the existence and functions of the Committee inquiring into petitions and targeted the Legislative Council accordingly.

The same numbers of petitions regarding the environment were tabled in both Houses during the period (23 petitions in each), which resulted in this subject matter being in the top five categories for the Legislative Council. Eleven of these petitions to the Legislative Council, or 48 percent, requested that the House review or inquire into a particular matter, compared with only four of the petitions, or 17 percent, in the Legislative Assembly. Again, this indicates that the petitioners were aware of the existence and functions of the Committee.

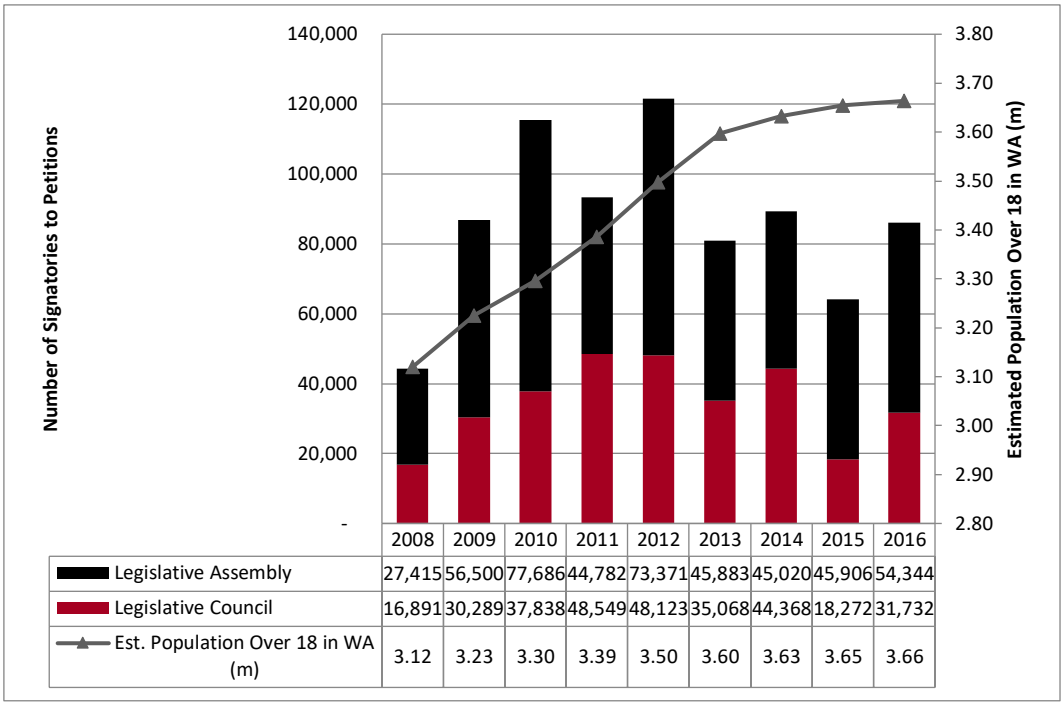
Table 1. Primary Subject of Petitions to the WA Parliament and Each House (%)

Subject Matter of Petitions					
Parliament		Legislative Council		Legislative Assembly	
Planning and Zoning	20.4	Planning and Zoning	26.0	Planning and Zoning	17.1
Roads	11.2	Legislation	11.3	Roads	13.8
Health	9.6	Health	8.8	Public Transport	11.5
Public Transport	8.9	Environment	7.2	Health	10.0
Legislation	8.5	Roads	6.6	Education	9.3
Education	7.9	Police and Justice	6.3	Legislation	6.9
Social Welfare	5.8	Education	5.6	Social Welfare	6.2
Environment	5.3	Social Welfare	5.0	Police and Justice	4.7
Police and Justice	5.3	Public Transport	4.4	Environment	4.2
Animal Welfare	3.6	Commerce	4.1	Animal Welfare	3.5
Local Government	3.2	Animal Welfare	3.8	Local Government	3.5
Commerce	2.9	Agriculture	2.8	Sport and Recreation	3.1
Sport and Recreation	2.9	Local Government	2.8	Commerce	2.2
Employment	2.0	Sport and Recreation	2.5	Employment	2.2
Agriculture	1.8	Employment	1.6	Agriculture	1.3
Department of Child Protection	0.6	Department of Child Protection	0.9	Department of Child Protection	0.4
International Affairs	0.2	Prayer for Relief	0.3	International Affairs	0.4
Prayer for Relief	0.1	International Affairs	0.0		

THE NUMBER OF SIGNATORIES TO PETITIONS

There were approximately 782,000 signatories to petitions during the 38th and 39th Parliament. Figure 7 provides a breakdown of the number of signatories to petitions tabled in the Legislative Council and Legislative Assembly during this period, compared with the estimated population over 18 in Western Australia.

Figure 7. Signatories to Petitions and the WA Adult Population, 2008-2016



	2008	2009	2010	2011	2012	2013	2014	2015	2016
Legislative Assembly	27,415	56,500	77,686	44,782	73,371	45,883	45,020	45,906	54,344
Legislative Council	16,891	30,289	37,838	48,549	48,123	35,068	44,368	18,272	31,732
Est. Population Over 18 in WA (m)	3.12	3.23	3.30	3.39	3.50	3.60	3.63	3.65	3.66

The number of signatories to petitions declined during the period from a high of over 120,000 in 2012 to around 80,000 in 2016, while the WA population has continued to increase. There is no requirement for signatories to petitions to be over 18 in Western Australia, however the adult population is probably the best measure for gauging the degree of public support for petitioning Parliament during this period.

The number of signatories by petition subject matter across both Houses during the period is summarised in Table 2 below. Petitions regarding legislation attracted the third highest number of signatures overall, which indicates that the public is aware of the legislation being introduced into the Parliament. While outside the scope of this

paper, it would be interesting to understand the drivers for awareness of legislation. For example, does awareness occur through interactions with a local Member, the media, or interest groups like unions, chambers of commerce, environmental or welfare organisations and religious lobby groups?

Table 2. Number of Signatures by Petition Subject Matter

Number of Signatures (Largest to Smallest)					
Both Houses		Legislative Council		Legislative Assembly	
Planning/Zoning	185,615	Planning/Zoning	85,612	Planning/Zoning	100,003
Health	94,046	Health	50,717	Legislation	52,097
Legislation	85,475	Legislation	33,378	Health	43,329
Police and Justice	50,492	Environment	18,658	Roads	39,394
Roads	50,338	Animal Welfare	18,586	Public Transport	36,213
Education	40,363	Social Welfare	17,050	Police and Justice	34,481
Environment	38,236	Police and Justice	16,011	Employment	27,619
Public Transport	37,876	Education	15,497	Education	24,866
Commerce	34,696	Commerce	15,330	Sport and Recreation	22,764
Employment	33,658	Roads	10,944	Environment	19,578
Social Welfare	33,188	Agriculture	10,451	Commerce	19,366
Animal Welfare	29,829	Local Government	6,437	Local Government	19,120
Sport and Recreation	26,228	Employment	6,039	Social Welfare	16,138
Local Government	25,557	Sport and Recreation	3,464	Animal Welfare	11,243
Agriculture	14,078	Public Transport	1,663	Agriculture	3,627
Department of Child Protection	1,537	Department of Child Protection	1,292	International Affairs	824
International Affairs	824	Prayer for Relief	1	Department of Child Protection	245
Prayer for Relief	1	International Affairs	-		

The highest number of signatures on an individual petition during the period, with over 23,000 signatories, related to the 'No Privatisation of Hospitals and Schools Bill 2010', a Private Member's Bill that was tabled on 17 November 2010 in the Legislative Assembly. The next highest numbers of signatures were on a petition concerning the Cottesloe Local Planning Scheme 3. This petition was tabled on 5 April 2011 in the Legislative Council with nearly 13,500 signatures. Petitions with over 10,000 signatures during the period are listed in Table 3.

Table 3. Petitions with Over 10,000 Signatures

Parliament	House	Date Tabled	Number of Signatures	Subject
38th	Legislative Assembly	17 Nov 10	23,401	No Privatisation of Hospitals and Schools Bill 2010
38th	Legislative Council	5 Apr 11	13,436	Cottesloe Local Planning Scheme 3
38th	Legislative Assembly	24 Nov 09	12,720	Low Paid Workers
38th	Legislative Assembly	8 Nov 12	12,392	Uranium Mining in Western Australia
38th	Legislative Council	6 Mar 12	11,696	Perth Waterfront Project
39th	Legislative Assembly	24 Mar 16	11,333	Preservation of South Beach
38th	Legislative Assembly	25 May 10	11,172	Shack Site Communities
39th	Legislative Assembly	11 Mar 14	10,687	Restricted Dog Breed Regulations in Western Australian Laws
38th	Legislative Assembly	17 May 12	10,152	New 24 Hour Police Station for Armadale

HOW THE COMMITTEE RESOLVED PETITIONS TABLED IN THE LEGISLATIVE COUNCIL

Petitions tabled in the Legislative Council that conform to Standing Orders are referred to the Committee for consideration. Petitions referred to the Committee are resolved immediately under the following circumstances:

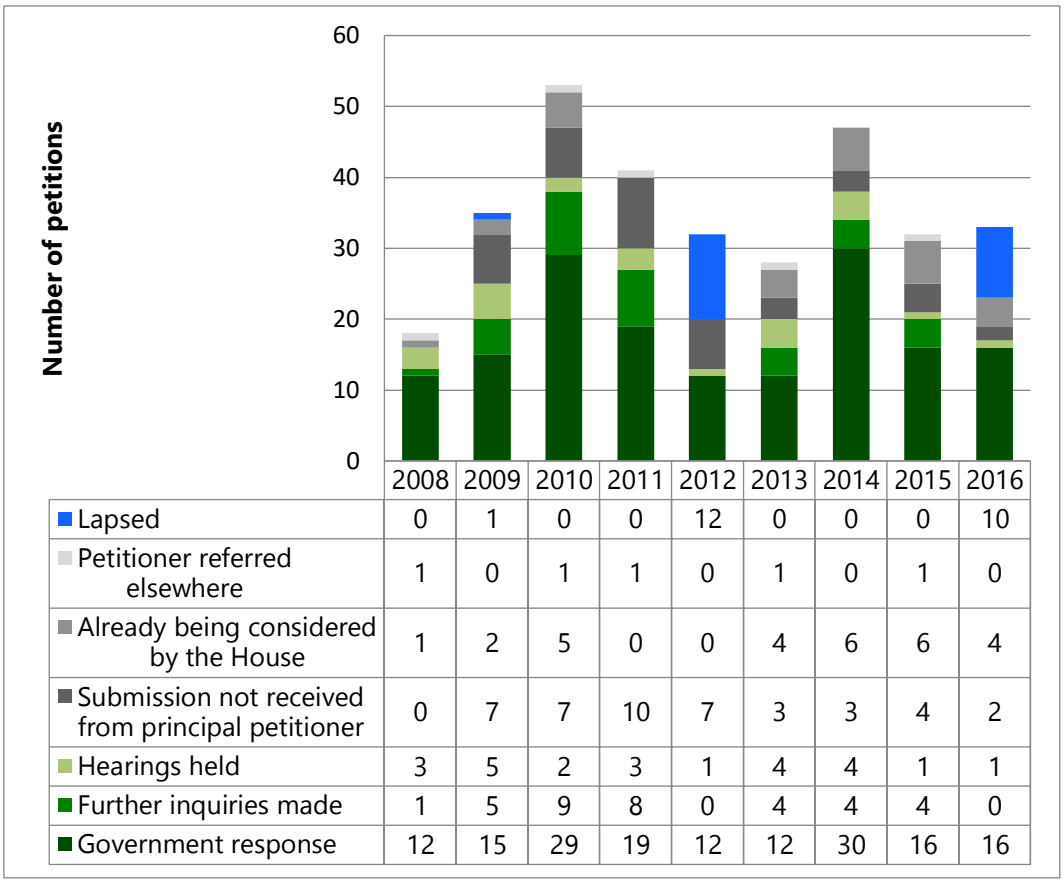
- Lapsed – if the Committee is still considering a petition when Parliament prorogues, the petition lapses and must be resubmitted to Parliament when Parliament resumes.
- Petitioner referred elsewhere – if the Committee determines that a petitioner should direct their matter to a more appropriate body, for example to a Coroner's Court, Ombudsman, Corruption and Crime Commission, State Administrative Tribunal or the WA Electoral Commissioner, then the Committee will resolve the petition by referring the petitioner to the relevant body.
- Already being considered by the House – often, petitions relating to Bills are already before the House and on that basis, the Committee deems that the subject matter of the petition is already being adequately debated and considered.

Occasionally, principal petitioners do not provide a submission on request by the Committee and, on that basis, the Committee resolves the petition by taking no further action.

Most petitions are resolved by way of government response or occasionally the response of a private body that provides an explanation for the matters raised in the petition and the Committee concludes its inquiries. A small proportion of petitions lead to further inquiries being made by the Committee and on occasion, hearings are held to obtain more detailed information to clarify the issues or form the basis for recommendations to the government. The breakdown of how the Committee resolved the petitions during the period is shown in Figure 8.

The number of signatories to a petition has no bearing on the Committee's decision to conduct further inquiries or proceed to holding hearings. For example, of the 35 occasions when further inquiries were made during the period, the number of signatories to the petitions ranged from 5 to 5,144, with a median of 257 signatures. Of the 24 occasions where petitions led to hearings being held by the Committee, the number of signatories to these petitions ranged from 1 to 4,940 with a median of 630 signatures.

Figure 8. Resolution of Petitions Referred to Committee



	2008	2009	2010	2011	2012	2013	2014	2015	2016
Lapsed	0	1	0	0	12	0	0	0	10
Petitioner referred elsewhere	1	0	1	1	0	1	0	1	0
Already being considered by the House	1	2	5	0	0	4	6	6	4
Submission not received from principal petitioner	0	7	7	10	7	3	3	4	2
Hearings held	3	5	2	3	1	4	4	1	1
Further inquiries made	1	5	9	8	0	4	4	4	0
Government response	12	15	29	19	12	12	30	16	16

ARE PETITIONS EFFECTIVE?

The effectiveness of petitions is difficult to measure. Petitions raise awareness of issues and the number of signatories to a petition demonstrates public support. However, even significant public support does not always generate the desired outcome. For example, the petition that demonstrated the most public support by number of signatories was the petition tabled in the Legislative Assembly requesting the House pass the *No Privatisation of Hospitals and Schools Bill 2010*. This Bill had been tabled by a Member of the Opposition and was not passed by the House.

The petitions process may be used for ostensibly party political purposes that may not properly reflect genuine community concern. This is indicated by the

disproportionate number of Opposition Members tabling petitions over the period compared to Members from other parties.

Matters raised in some petitions became the subject of election promises in the 2017 State Election. For example, petitions regarding halting works on Roe 8, a controversial road infrastructure project in Perth's south, were tabled in the Legislative Assembly in 2009, 2010 and 2016. Petitions on the same topic were also tabled in the Legislative Council in 2009, 2013 and 2015. Following the 2017 State election, the new Labor Government halted works on the project.[28] Similarly, a petition requesting a ban on uranium mining was tabled in the Legislative Assembly in 2010, 2012 and 2015 and was also tabled in the Legislative Council in 2010. Following the 2017 State election, the new Labor government banned uranium mining on all future mining leases.[29] These petitions arguably played a role in raising awareness of these issues and demonstrated the extent of public support for a particular position. They also provided a useful political tool to promote a clear distinction between the policies of the incumbent government and the opposition as the alternative government.

The unique function of the Legislative Council Committee tasked with inquiring into petitions demonstrates that petitions can provide a mechanism for achieving community objectives through Committee inquiry. A petition may raise awareness about a matter that has not otherwise been addressed, such as maladministration in a government agency. An example of the Committee's effectiveness in this way was its inquiry into environmental contamination by a company operating a composting facility in Oakford, an outer suburb of Perth. The inquiry was prompted by a petition containing 569 signatures and tabled in the Legislative Council on 16 September 2014.[30] After considering the matter, the Committee proceeded to make further

[28] AAP, 'Perth Freight Link: Main Roads WA Agrees to Suspend Roe 8 Project'. *PerthNow*, 13 March 2017. Accessed at: http://www.perthnow.com.au/news/western-australia/perth-freight-link-main-roads-wa-agrees-to-suspend-roe-8-project/news-story/0bdc76893796a894a257c00a6493951d

[29] B. Creagh, 'WA Government Bans Future Uranium Mines'. *Australian Mining*, 21 June 2017. Accessed at: https://www.australianmining.com.au/news/wa-government-bans-future-uranium-mines/

[30] Legislative Council of Western Australia, Standing Committee on Environment and Public Affairs, *Report 45 Standing Committee on Environment and Public Affairs Petition Number 59-Bio-Organics Composting Facility,* Oakford, 2016. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914528c27abe63111416bd448258030000527c5/$file/tp-4528.pdf

inquiries and progress to formal hearings. The Committee's inquiry uncovered serious deficiencies in the Department of Environment Regulation's monitoring and regulation of Bio-Organics' compliance with legislative and licensing requirements.

This petition resulted in regulatory and administrative improvements within the Department of Environment Regulation and stronger regulatory oversight for all composting facilities in Western Australia. Bio-Organics had their licence to operate on the site revoked in June 2014, and there was an increased regulatory presence on the site. The inquiry maintained pressure on the Department to understand the extent of contamination on the site and the required remediation. Since the inquiry, the Department has released a draft Environmental Standard for Composting, which stipulates the location and standards for composting facilities. The Department has also audited other sites and improved processes for compliance and regulation of similar facilities.

Sometimes a petition inquiry alone can prompt action by the Government of the day. For example, a petition concerning shack site communities was tabled in the Legislative Council in 2009 and led to a public hearing and formal inquiry by the Committee. The Government was considering a shack policy at the time and undertook to consider the Committee's findings in formulating any policy.[31] Government action may also occur at a remarkably similar time to an inquiry being undertaken by a Committee. However, the Government may not acknowledge that its action was linked to these Committee inquiries. For example, in 2010 and 2011 petitions were tabled in the Legislative Council regarding the proposed closure of privatised Tier 3 rail lines in the Wheatbelt. These rail lines were predominately used by farmers to transport their grain harvest. The Committee inquiry recommended that any proposed closure be delayed until such time as the commercial viability of maintaining the lines or alternatively making new freight arrangements could be reviewed.[32] During the inquiry, the federal government provided funding to upgrade the rail lines and the issue raised by the petition was resolved.

---

[31] Legislative Council of Western Australia, Standing Committee on Environment and Public Affairs, *Report 21 Standing Committee on Environment and Public Affairs Shack Sites in Western Australia*, 2011. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3813248cd0587361e06f5049482578730011a632/$file/3248-14.04.11.pdf

[32] Legislative Council of Western Australia, Standing Committee on Environment and Public Affairs, Report 26 Standing Committee on Environment and Public Affairs Petition No. 145 – Closure of Tier 3 Rail Lines in the Central

Similarly, in 2009 a petition was tabled in the Legislative Council regarding the transportation of detained persons following the death in custody of Mr Ward, who was being transported in a prison vehicle in the North West. The Committee inquired further into the matter and held hearings. During the inquiry, the Committee noted that there were significant improvements in the vehicle fleet used to transport detained persons since the incident occurred.[33] On that basis, the Committee held a hearing after the new vehicles were rolled out to assess their effectiveness in addressing the issues raised in the petition. While the petition inquiry may not be directly linked to the improvement of the fleet, the petition and Committee review process assisted in creating political pressure to resolve quickly community concerns arising from the tragic death.

REFORMING THE PETITION PROCESS?

The right of the people to submit a petition to Parliament was legislated in the *Bill of Rights 1689*. While the focus in this article is on recent petitions, it should be noted that petitions have long been used in the Western Australian Parliament as a method for the people to communicate with Parliament. For the period 1890 to 1989, the number of petitions tabled in Parliament per annum ranged from nil to 245.[34] During this time, there was a famous and ultimately effective petition in 1979 that drew over 106,000 signatures to stop the abolition of the Perth-Fremantle railway line.

The methods of communication available to the people have increased dramatically in recent years. If citizens have an issue with government today, they have a myriad of ways to communicate their concerns, including emailing, tweeting, facebooking,

---

Wheatbelt, 2012. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3814667cc4aa9ac2a6f8f13b48257a25000f9c69/$file/4667.pdf

[33] Legislative Council of Western Australia, Standing Committee on Environment and Public Affairs, Report 23 Standing Committee on Environment and Public Affairs Inquiry into the Transportation of Detained Persons: The implementation of the Coroner's recommendations in relation to the death of Mr Ward and related matters, 2011. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3813475c77db6a0fc90d5abd482578e80005ed6a/$file/3475-09.08.11.pdf

[34] Black, D., The House on the Hill: A History of the Parliament of Western Australia 1832 to 1990. Perth: Parliament of Western Australia, 1991.

calling their local Member or the Minister responsible for their area of concern, or visiting electorate offices. By contrast, raising an issue by way of petitioning the Legislative Assembly or Legislative Council requires the person to comply with the petition requirements of either House. The requirements are stipulated on the Parliament of Western Australia website and include rules around the procedure for lodgement, presentation and content of submissions. A petition template is also available for use. Aside from compliance hurdles, the paper format of these petitions is a challenge for petitioners. It reduces their ability to secure public support for their petition by promoting it through social media channels and other modern forms of communication. The more complex or esoteric the process, the more likely it is that only the politically sophisticated can use it effectively.

At the same time, there has been a proliferation of e-petitioning platforms such as Change.org and GoPetition. The popularity of e-petitions continues to increase as they are more accessible for the people, easier to circulate to generate public awareness and support for an issue, and present lower hurdles for compliance, with pre-fillable form fields.

Arguably if Parliament does not occupy the e-petitions space, the existing petitioning process is at risk of becoming irrelevant over time. The House of Representatives of the Australian Federal Parliament has recognised this risk and moved to complement their petition process with an e-petition system in 2016. Likewise, the Queensland Parliament introduced an e-petitions system in 2002, the Legislative Council of Tasmania followed suit in 2004, the Legislative Assembly of the Australian Capital Territory adopted a system in 2013 and recently the Legislative Council of Victoria implemented an e-petition system.

Both Houses of the Western Australian Parliament have considered introducing e-petitioning in the past. The major concern expressed by the Legislative Council Standing Committee on Environment and Public Affairs in 2016 was the potential for an e-petition system to be abused.[35] The Legislative Assembly argued against e-petitions in 2008 on the basis that they may detract from face-to-face consultation and that the cost of implementing a system outweighed the possible uptake. In its

[35] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 40 Standing Committee on Procedure and Privileges E-Petitions*, June 2016. Accessed at: http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914241c06d95798b9a918d648257fe1000663f3/$file/tp-4241.pdf

considerations, the Legislative Assembly referred to the relatively modest uptake of e-petitions in Australian jurisdictions where e-petitions systems existed.[36] Considering the dated nature of the Legislative Assembly review, and the potential for ameliorating technological abuses, it may be worthwhile revisiting introducing e-petitioning in Western Australia.

The introduction of e-petitioning represents an opportunity to revitalise the petitioning process for the Western Australian Parliament. Research noted earlier suggests that introducing an e-petitions system leads to increased engagement with Parliament and can also lead to increased support and confidence in the institution.

CONCLUSION

This review of petitions during the 38th and 39th Parliaments demonstrates that petitions are still a popular method of raising concerns with government. Petitioners are able to show the level of public support for an issue or position through the number of signatures from other individuals who share their views. However, it is clear that both the number of petitions tabled and the number of signatories to petitions are declining when compared to the adult population of Western Australia.

If the method of petitioning does not evolve to meet the requirements of the people, petitioning Parliament runs the risk of becoming irrelevant, other than perhaps to political elites. If Parliaments fail to keep up with the community's realistic expectations for access, are not willing to embrace new methods of modern communication and allow others to fill the petitioning space, they will likely contribute to the growing discontent and malaise affecting modern politics. Given the increasing popularity of e-petition platforms, it may be well worth reconsidering the introduction of an e-petition platform in the Western Australian Parliament to reinvigorate the petitions process and ensure petitions remain relevant in an increasingly tech-savvy society.

[36] Legislative Assembly of Western Australia, Procedure and Privileges Committee. *Review of e-petitions*, 2008. Accessed at: http://libstream.parliament.wa.gov.au/e-docs/0003406.pdf

APPENDIX A: ACCEPTABLE FORM OF PETITION FOR THE LEGISLATIVE COUNCIL

Standing Order 101: Form and Contents of Petitions

1) A petition shall –
   a) be addressed to the President and Members of the Council;
   b) state the action or remedy sought from the Council, which must be repeated at the top of every page of the petition;
   c) be legible and unamended whether by insertion or deletion or inter-lineation;
   d) be couched in reasonable language;
   e) be in the English language, or be accompanied by a certified English translation;
   f) contain the name, address, and original signature or mark of the petitioners;
   g) be signed by the person or persons promoting the petition, who must reside in Western Australia or, if a corporation, have its registered office in Western Australia; and
   h) if from a corporation, be made under its common seal or, if the corporation does not have a common seal, a copy of the corporation's articles of incorporation must be attached to the petition.

2) A petition shall not –
   a) have any documents attached to it;
   b) be presented by a Member who has signed the petition as a petitioner;
   c) reflect upon a vote of the Council in the same calendar year;
   d) seek a direct grant of public money from the Council;
   e) contain statements adverse to, or make allegations of improper, corrupt or illegal conduct against, a person whether by name or office; or
   f) contain or disclose a matter in breach of a secrecy provision of, or order imposed or made under the authority of, a written law.

3) The Member presenting the petition shall sign the petition at the top of the front page of the petition.

4) The total number of petitioners shall be stated at the top of the front page of the petition.

5) The petition must be certified to conform with the Standing Orders by the Clerk before it may be presented to the Council.

APPENDIX B: ACCEPTABLE FORM OF PETITION FOR THE LEGISLATIVE ASSEMBLY

Standing Orders

Contents of petitions:

64. A petition will –

1) Be legible.

2) Be addressed to the Speaker and the Assembly.

3) State the action or remedy sought from the Assembly.

4) Be in English or be accompanied by a translation certified to be correct by the lodging member.

5) Contain at least one signature.

6) Contain the action or remedy sought on the top of every sheet.

7) Contain the names and addresses of the petitioners and their own signatures or marks, except in case of incapacity or sickness where someone else may sign on their behalf.

8) Not contain signatures pasted or otherwise transferred to the petition.

9) Be respectful and temperate in its language.

10) If from a corporation, be made under its common seal.

Petitions will not contain:

65. A petition will not –

1) Have letters, affidavits, or other documents attached to it.

2) Be lodged by a member who has signed the petition as a petitioner.

3) Make an application for direct grant of public money to be paid to an individual.

Procedure for lodgement and presentation

66. The procedure for the lodging and presentation of a petition will be -

1) The member must write the number of signatures contained in the petition on the front sheet and sign the front sheet.

2) The Clerk will certify on the petition that it is in conformity with the Standing Orders.

3) The member presenting the petition will read the prayer, announce the subject matter of the petition and the number of signatures attached to it unless the Speaker determines otherwise.

4) The petition will be received unless the Assembly or the Speaker determine otherwise.

5) No discussion of the subject matter is allowed.

Petition referred to committee

67. A petition may be referred by motion to a committee.

The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years*

Zoe Hutchinson[1]

Principal Research Officer for the Parliamentary Joint Committee on Human Rights Secretariat

* Double-blind reviewed article.

INTRODUCTION

Australia has voluntarily accepted binding obligations under a number of international human rights treaties.[2] While it is the case that many of these obligations have not been directly incorporated into Australian domestic law and Australia does not have a legislative or constitutional bill of rights at the national level to protect human rights, there is a Federal parliamentary mechanism which engages with these obligations: the Parliamentary Joint Committee on Human Rights (the PJCHR).[3] In 2011 the requirement for a PJCHR was established by statute with a

[1] The views expressed in this article are entirely those of the author and do not represent the views of the Parliamentary Joint Committee on Human Rights.

[2] See, for example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) [1980] ATS 23 ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976) [1976] ATS 5 ('ICESCR'); *Convention on the Elimination of all forms of Racial Discrimination,* opened for signature 21 December 1965 (entered into force 4 January 1969) [1975] ATS 40 ('CERD'); *Convention on the Elimination of all Forms of Discrimination against Women,* opened for signature 18 December 1979 (entered into force 3 September 1981) [1983] ATS 9 ('CEDAW'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984 (entered into force 26 June 1987) [1989] ATS 21 ('CAT'); *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990) [1991] ATS 4 ('CRC'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008) [2008] ATS 12.

[3] See National Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009, xxv; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the fifth periodic*

mandate to assess legislation for compatibility with seven core human rights treaties to which Australia is a party and report to parliament.[4] The PJCHR has now been in operation for over five years, having commenced in March 2012 and tabled its first report in August 2012.[5] Additionally, a number of United Nations (UN) treaty monitoring bodies have recently reported on Australia's compliance with its human rights obligations under these treaties including on the role of the PJCHR.[6]

This article contextualises the role of the PJCHR as a mechanism for parliament to engage with human rights, and from this foundation examines the role, operation and contribution of the PJCHR after over five years of operation. It does so by drawing on existing literature, and exploring the extent to which the PJCHR's working methods and operation achieve identified policy and statutory goals.

The article explores claims that the PJCHR is ineffective. In so doing, the article argues that, from an empirical perspective, it is essential to develop and apply criteria of effectiveness that are capable of taking the parliamentary context sufficiently into account.

CREATION, GOALS AND MANDATE OF THE PJCHR

The creation of the PJCHR followed an extensive National Human Rights Consultation (Consultation) that sought the views of the Australian community on human rights in Australia. Many participants in the Consultation raised concerns about the inadequacy of human rights protection and institutional failures to give systemic

report of Australia, UN Doc E/C.12/AUS/CO/5, 11 July 2017; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights', *European Human Rights Law Review* 70(1) 2012: 58.

[4] Human Rights (Parliamentary Scrutiny) Act 2011 (Parliamentary Scrutiny Act) ss 3, 4, 7.

[5] See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012-2013*, December 2013 [1.7]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights, (Parliamentary Scrutiny) Act 2011 First Report of 2012*, 22 August 2012.

[6] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20, 8 December 2017 [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5, 23 June 2017 [5]-[6].

consideration to human rights issues in Australia.[7] The Consultation culminated in a number of recommendations intended to contribute to creating a 'culture of human rights'.[8] While the Federal government did not adopt the more sweeping recommendation that there be a legislative Human Rights Act at the national level, in April 2010 it launched the National Human Rights Framework that adopted a number of the Consultation's more modest recommendations. This included the creation of the PJCHR and a requirement for all legislation (both government and non-government) to be accompanied by a statement of compatibility with human rights prepared by the legislation proponent (usually the minister with portfolio responsibility for the specific item of legislation).[9] These mechanisms were created through the passage of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Parliamentary Scrutiny Act) in November 2011.

Submissions to the Senate Committee inquiry into the bill to establish the PJCHR showed significant support for both its creation and the requirement for statements of compatibility.[10] The purpose of the PJCHR was described by the then Attorney-General as improving 'parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.[11] It was also intended to establish 'a dialogue between the executive, the parliament and ultimately the citizens they represent'.[12]

The 'dialogue model' under the Parliamentary Scrutiny Act shares some similarities with models of human rights protection in the United Kingdom (UK), the Australian

[7] National Human Rights Consultation Committee, *National Human Rights Consultation Report*: 343-379.

[8] National Human Rights Consultation Committee, *National Human Rights Consultation Report*: 343-379.

[9] Explanatory Memorandum, Human Rights Parliamentary Scrutiny Bill 2010 (Cth): 1; Parliamentary Scrutiny Act ss 8-9. A statement of compatibility provides an assessment of whether the proposed legislation is compatible with human rights.

[10] Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, *Submissions received by the Committee*. <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/human_rights_bills/submissions>.

[11] Robert McClelland, Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, *Parliamentary Debates*, House of Representatives, 30 September 2010: 271.

[12] McClelland, Second Reading Speech.

Capital Territory (ACT) and Victoria.[13] Each of these other systems has a parliamentary committee with a mandate to examine legislation for human rights compatibility, coupled with a requirement for the preparation of statements of compatibility (at least in relation to government bills). As with these jurisdictions, a finding by the PJCHR that a measure may be incompatible with human rights is informative but does not directly affect the validity of the legislation or the capacity for a bill to pass parliament notwithstanding human rights concerns.[14]

However, there are also significant differences. The institutional context of the human rights 'dialogue model' in these other jurisdictions is that they also have legislative human rights Acts that impose obligations on public authorities to comply with human rights and mechanisms for judicial review of human rights in addition to parliamentary human rights committees and requirements for statements of compatibility.[15] Models such as these are often put forward as alternatives to constitutionally entrenched human rights protections.[16] Reflecting on the model legislated under the Parliamentary Scrutiny Act, Williams and Burton describe it as unique in that unlike similar systems it provides no role for the courts and, accordingly, gives parliament the exclusive role in ensuring human rights protection.[17] More specifically, it is not the creation of the PJCHR that excluded the courts from this role but the decision by governments and parliament not to incorporate

[13] The 'dialogue model' of human rights protection is usually one where legislation sets out rights to be protected and then gives roles to each arm of government in relation to those rights. The judiciary is required to interpret legislation in a manner consistent with human rights. However, it cannot strike down legislation and can only issue a declaration of incompatibility. If a court makes a declaration parliament can choose to amend the law or ignore the declaration. The executive when introducing new legislation is required to include a statement of human rights compatibility: National Human Rights Consultation Committee, *National Human Rights Consultation Report*: xxv.

[14] Parliamentary Scrutiny Act ss 7-9.

[15] Human Rights Act 2004 (ACT) ss 8-27, ss 40B-40C; Human Rights Act 1998 (UK) ss 6-9; Charter of Human Rights and Responsibilities 2006 (Vic) ss 38-39. See also Kris Gledhill, Human Rights Acts: The Mechanisms Compared, Oxford, Hart Publishing, 2015.

[16] Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?', *The Modern Law Review*, 69(1) 2006: 1, 7-8; Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights', paper presented at the Department of the Senate Occasional Lecture Series, Parliament House, 8 December 2006; Helen Watchirs and Gabrielle McKinnon, 'Five Years of Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia', *UNSW Law Journal* 33(1) 2010: 136, 136-139.

[17] George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection', *Statute Law Review* 34(1) 2013: 58.

international human rights law directly into Australian domestic law (such as in the form of a human rights Act or other legislation).[18] In this context, the Parliamentary Scrutiny Act creates a dialogue between the parliament and the executive, but generally establishes no such specific dialogue between the parliament and the courts (as occurs in the UK, Victoria or ACT).[19]

MECHANISMS FOR PARLIAMENT TO ENGAGE IN THE CONSIDERATION OF HUMAN RIGHTS

Parliament can have a significant role in protecting and promoting human rights through the law making process.[20] That is, the process of debating, amending, considering and ultimately passing legislation or declining to pass legislation. It also has the power to incorporate international human rights obligations into domestic law. Drawing on comparative research, Chang identifies a growing level of recognition that parliaments may play a critical role in pinpointing human rights issues, monitoring a nation state's compliance with international human rights obligations and legislating to prevent or address human rights violations.[21] The role of elected representatives in the protection of human rights may therefore be viewed as a shared responsibility with other branches of government.

There may also be a perception that there exists a 'democratic deficit' in models of human rights protection which grant a specific role to unelected courts in adjudicating on human rights matters.[22] Hunt argues that these concerns should be addressed by giving consideration to providing institutional mechanisms and

[18] The courts do have a role adjudicating human rights when these rights have been incorporated into domestic law.

[19] Williams and Burton, 'Australia's Exclusive Parliamentary Model': 265.

[20] See, for example, Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015; Brian Chang, 'Global Developments in the Role of Parliaments in the Protection and Promotion of Human Rights and the Rule of Law: An Emerging Consensus', 2017. Accessed at: <https://www.law.ox.ac.uk/research-and-subject-groups/parliaments-rule-law-and-human-rights-project/2017-paper-emerging>.

[21] Chang, 'Global Developments': 6, 36.

[22] Murray Hunt, 'Introduction', in Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015: 1, 6, 12.

opportunities for parliamentarians to engage meaningfully with human rights.[23] While Australia does not have a legislative bill of rights at the Federal level, providing mechanisms for elected representatives to meaningfully engage with human rights issues may to some extent be addressed through the PJCHR's broad goals of encouraging consideration of human rights, fostering a 'culture of rights,' and ensuring more systematic consideration of human rights issues.[24]

Parliamentary committees are an established mechanism for members of parliament to examine particular issues in detail, supplementing the law making process when it occurs before the passage of legislation. With powers to receive advice, evidence and submissions and to hold hearings, parliamentary committees provide a space for more focused consideration of issues, policies, legislation and human rights than can occur on the floor of the parliament.[25] The parliamentary committee process usually results in a report that is tabled in parliament.[26] The work of parliamentary committees therefore not only provides scope for members of a particular committee to be better informed about an issue but also to assist in informing members of parliament and the public more broadly. Committee reports and recommendations may therefore shape broader debates within parliament and beyond including potentially in relation to human rights considerations. However, such reports do not bind either chamber so whether recommendations or findings are adopted into legislation depends on the majority in the legislative chambers.[27] The work of the PJCHR should be understood within this context.

Prior to the creation of the PJCHR, parliament and parliamentary committees were still receiving some information about the human rights implications of proposed legislation. Much of this information was provided by submitters to parliamentary committees in the course of inquiries into proposed legislation.[28] This included

[23] Hunt, 'Introduction': 13.

[24] See, for example, McClelland, Second Reading Speech; Explanatory Memorandum, Human Rights Parliamentary Scrutiny Bill 2010 (Cth); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*, 5 December 2017: 1.

[25] Rosemary Laing (ed.), 'Committees', *Odgers' Australian Senate Practice*, 14th edition, 2016: 461, 475.

[26] Commonwealth, Parliament of Australia, Senate Standing Order 38.

[27] Laing, 'Committees': 461.

[28] See, for example, Law Council of Australia, Submission 30 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009*: 1; Amnesty International, Submission 141 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry*

submissions raising human rights concerns from statutory authorities such as the Australian Human Rights Commission, human rights non-government organisations such as Amnesty International, professional groups such as the Law Council of Australia and academics. However, the consideration of the human rights implications of proposed legislation in this context tended to be *ad hoc* and contingent for a number of reasons.

First, Senate committee inquiries into a particular bill (referred to as 'bill inquiries') are initiated by a referral from the Senate.[29] This means that a Senate committee inquiry is not mandatory even if legislation raises significant human rights concerns. Second, once proposed legislation is referred for inquiry, whether or not evidence on its human rights implications is received is contingent on the interest, capacity and expertise of relevant individuals and groups in making a submission to the inquiry. Third, the particular interests and capacities of committee chairs and other committee members influence the extent of consideration of human rights issues.

In addition to bill inquiries, a further place for members of parliament to be informed about the human rights implications of proposed legislation was through the traditional Senate technical scrutiny committees. That is, the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances. However, in comparison to the seven human rights treaties that are the focus of the PJCHR, the terms of reference for these technical scrutiny committees is more narrowly focused on legislation that would 'trespass unduly on personal rights and liberties'[30] which is grounded in traditional common law rights. Further, the consideration of human rights is but one of the scrutiny principles these committees must apply to their scrutiny of legislation. As such, the

---

into the provisions of the Anti-Terrorism Bill (No. 2) 2005; Human Rights and Equal Opportunities Commission, Submission 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005*; Sydney University Centre for International Law, Submission 11 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Anti-People Smuggling and Other Measures Bill 2010*.

[29] Commonwealth, Parliament of Australia, Senate Standing Order 2A. The Senate Committee on the Selection of Bills consists of the Government Whip and two other Senators nominated by the Leader of the Government in the Senate, the Opposition Whip and two other Senators nominated by the Leader of the Opposition in the Senate, and the whips of any minority groups. It is responsible for recommending whether to refer a bill to a committee for inquiry. Laing, 'Committees': 473-474.

[30] Commonwealth, Parliament of Australia, Senate Standing Order 24.

mandate for these committees does not provide comprehensive consideration of human rights set out in international human rights law. In contrast to these processes, the PJCHR provides for a more consistent, systematic and comprehensive consideration of the human rights implications of legislation. Significantly, before the creation of the PJCHR and the requirement for legislation to be accompanied by a statement of compatibility, there was no specific imperative for legislation proponents or a parliamentary committee to consider the human rights implications of legislation and it was not usually apparent that these aspects had been assessed.

RELEVANCE, CHALLENGES AND APPROACHES TO ASSESSING THE 'EFFECTIVENESS' OF THE PJCHR

The Australian government, in reporting on Australia's compliance with its international human rights obligations to UN treaty monitoring bodies, has identified the work of the PJCHR as a mechanism to assist with ensuring consistency with its obligations.[31] Accordingly, issues of the PJCHR's effectiveness have implications for compliance with Australia's international obligations.[32] However, in some key respects it is difficult to assess the practical 'effectiveness' of the role and operation of parliamentary committees.[33] As Russell and Benton observe in the context of UK

[31] Australia, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, fifth periodic report of Australia, UN Committee on Economic Social and Cultural Rights, E/C.12/AUS/5, 16 February 2017; Australia, Consideration of reports submitted by States parties under article 40 of the Covenant, sixth periodic report of Australia, UN Human Rights Committee, CCPR/C/AUS/6, 2 June 2016: 2; Australia, Consideration of reports submitted by States parties under article 9 of the Convention Eighteenth to twentieth periodic reports of States parties due in 2014, UN Committee on the Elimination of Racial Discrimination, CERD/C/AUS/18-20, 2 February 2016: 6-7.

[32] That is, if the PJCHR is ineffective or does not make substantive contributions then it may not, in fact, be a mechanism to assist to ensure compliance with Australia's obligations.

[33] See, for example, Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures', *Human Rights Law Review* 6 2006: 545, 551, 545, 570; Meg Russell and Meghan Benton, 'Assessing the Impact of Parliamentary Oversight Committees: the select committees in the British House of Commons', *Parliamentary Affairs* 66 2013: 772, 766; Aileen Kavanagh, 'The Joint Committee on Human Rights: a Hybrid Breed of Constitutional Watchdog', in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015: 115; Malcolm Aldon, 'Rating the Effectiveness of Parliamentary Committee Reports: the Methodology', *Legislative Studies* 15(1) 2000: 22; Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – from a Lawyer's Perspective', *About the House* 2005: 55.

parliamentary committees 'much of Parliament's influence is subtle, largely invisible and frequently even immeasurable'.[34] Similarly, Webb and Roberts point to particular challenges in determining the effectiveness of parliamentary oversight of human rights more generally. These challenges include political realities, lack of independence and resourcing issues. They also note that the impact of parliamentary human rights scrutiny on legislative and policy reforms may be an 'iceberg phenomenon', which is to say that the impacts of parliamentary human rights activity may not be in the public domain through such things as, for example, direct amendments to bills arising from parliamentary scrutiny.[35]

This highlights the fact that an assessment of effectiveness that focuses solely on legislative outputs may only be capturing a small fraction of parliamentary activities. Relevantly, Sathanapally points to a gap in much of the existing literature that has assessed parliamentary models of human rights protection. She notes that such literature has tended, in large part, to focus predominately on legislative outputs to the detriment of issues of legislative deliberation or engagement in the parliamentary context.[36] Accordingly, there is a risk that applying criteria of effectiveness that are too narrow may neglect important aspects of the PJCHR and, as such, would be incomplete. In examining such issues, there is need to identify appropriate criteria to assess effectiveness which are suitable to the parliamentary context.

Perhaps in acknowledgement of these kinds of concerns, Webb and Roberts have contributed, as part of a research project with the Dickson Poon School of Law, to the development of a more comprehensive framework for determining the effectiveness of parliamentary human rights mechanisms (Dickson Poon Framework). Webb and Roberts suggest human rights oversight mechanisms be assessed by identifying 'core

[34] Meg Russell and Megan Benton 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches'. Paper presented at the PSA Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009, cited in Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015: 131.

[35] Philippa Webb and Kirsten Roberts, *Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness,* June 2014: 3. Accessed at: <https://www.kcl.ac.uk/law/research/parliamentshr/assets/Outcome-Document---Advance-Copy-5-June-2014.pdf>.

[36] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication*, Oxford, Oxford University Press, 2014: 50.

elements' such as particular goals and examining factors that influence achievement of such elements.[37] Importantly, the framework's emphasis on examining questions of effectiveness from multiple vantage points provides for the consideration of a range of evidence including impacts that may be less apparent.[38]

In this respect, a metric against which the effectiveness of the PJCHR may be assessed is by examining whether, and the extent to which, the PJCHR's working methods and operation address identified goals. As discussed above, the background to the development of the Parliamentary Scrutiny Act, and the establishment of the PJCHR reveal some of the identifiable goals of the PJCHR. This includes establishing dialogue between the parliament and the executive, contributing to a 'culture of rights', informing parliament about the human rights implications of legislation and providing scope for greater engagement with human rights in policy and legislative processes.[39] The following section of this article examines a number of key aspects of the PJCHR's operation, approach and institutional context and the extent to which these address such identified goals, including its:

- role and operation as a technical scrutiny committee;
- analytical framework and focus;
- reporting workload and time constraints; and
- dialogue with legislation proponents.

The analysis will also specifically consider the PJCHR's contribution to, and impact on legislation, parliamentary processes and more broadly as potential indicators of whether identified goals are being addressed. By looking at questions of effectiveness from a range of vantage points, this article seeks to contribute to a contextually based understanding of the PJCHR and questions of effectiveness.

---

[37] Webb and Roberts, *Effective Parliamentary Oversight of Human Rights.* Such factors may include relevant 'quality' 'resources', 'political support', 'partnerships', 'mandate/powers', 'approach', 'method of operation', 'politics' and 'national context.'

[38] Webb and Roberts, Effective Parliamentary Oversight of Human Rights: 6.

[39] See, for example, McClelland, Second Reading Speech; Explanatory Memorandum, Human Rights Parliamentary Scrutiny Bill 2010 (Cth); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 1.

ROLE AND OPERATION AS A TECHNICAL SCRUTINY COMMITTEE

Section 7 of the Parliamentary Scrutiny Act sets out the functions of the PJCHR and provides in particular that the PJCHR's functions are to examine bills and legislative instruments 'that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue'. The PJCHR also has a function to examine existing legislation and an inquiry function for matters which are referred to it by the Attorney-General. 'Human rights' are defined in section 3 of the Parliamentary Scrutiny Act as the rights and freedoms recognised or declared by seven core human rights treaties to which Australia is a party.[40] The PJCHR consists of 10 members, 5 from the House of Representatives and 5 from the Senate. It has 5 government members and 5 non-government members with the chair of the PJCHR being a member of the government and having a casting vote.[41]

Since its inception, the PJCHR has undertaken its function of examining legislation against the seven core treaties as a technical 'scrutiny committee'. The PJCHR's technical scrutiny approach draws on the longstanding working methods of the Senate Regulations and Ordinances Committee established in 1932 and the Senate Scrutiny of Bills Committee established in 1981 (Senate scrutiny committees). A technical scrutiny committee approach is characterised by an assessment of the extent to which legislation complies with particular scrutiny principles[42] or, in the case of the PJCHR, whether legislation complies with the seven core conventions. Beyond the essentials relevant to assessing this technical compliance, the assessment occurs without an inquiry into the broader policy merits of legislation.[43] There are also similarities between the PJCHR approach and the type of technical scrutiny undertaken by the UK Joint Parliamentary Committee on Human Rights (UK JCHR).[44] The PJCHR's annual report acknowledges the legacy of existing traditions of technical

[40] These treaties are the ICCPR; ICESCR; CERD; CEDAW; CAT; CRC; and CRPD: Parliamentary Scrutiny Act s 3.

[41] Parliamentary Scrutiny Act s 5; Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Resolution of Appointment, Parliamentary Joint Committee on Human Rights, 1 September 2016: 299 (Christopher Pyne).

[42] Laing 'Committees': 322.

[43] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*, 5 December 2017: 5.

[44] Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance', *European Human Rights Law Review* 3 2007: 232, 243; Kavanagh, 'The Joint Committee on Human Rights': 128, 129; Hiebert, 'Parliamentary Bills of Rights': 1, 17.

legislative scrutiny and states that 'in keeping with the longstanding conventions of the Senate scrutiny committees, the committee has sought to adopt a non-partisan, technical approach to its scrutiny of legislation.'[45]

This technical approach puts the usual work of the PJCHR in contrast to the most widely understood committees in the Federal parliament: the Senate legislative and reference portfolio committees.[46] These portfolio committees, as part of their routine practice, call for submissions, hold public hearings and table a report, which routinely divides along policy or party political lines. The chair of the PJCHR has therefore further explained the essential difference between the role of a PJCHR member and the role of members of portfolio committees as follows:

> Members of scrutiny committees, including this committee, may, and often do, have different views in relation to the policy merits of legislation. The report does not assess the broader merits or policy objectives of particular measures but rather seeks to provide parliament with a credible technical examination of the human rights implications of legislation. Committee members performing this scrutiny function are not bound by the contents or conclusions of scrutiny committee reports.[47]

As such, the focus of the PJCHR's scrutiny reports is on technical compliance with the seven core human rights treaties. It is relevant in considering the committee's impact that some commentators have warned that an approach to human rights scrutiny that is divided or not consensus based could undermine the effectiveness of the PJCHR.[48] In the current 45th parliament to date between August 2016 and March 2018 all the PJCHR's 20 scrutiny reports have been by consensus on a non-partisan basis.[49]

---

[45] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 5.

[46] Laing 'Committees': 461, 475-481. This is also the case in respect of the operation of House of Representatives and Joint Committees. House of Representatives, *Guide to Procedures*, 6th edition, 2017: 115-121.

[47] *Chair's Tabling Statement for the House of Representatives: Human Rights Scrutiny Report 9 of 2017*, Parliamentary Joint Committee on Human Rights, Parliament of Australia, 5 September 2017. Accessed at: <https://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2017/13_2017/TablingHouse.pdf?la=en>.

[48] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review* 41(2) 2015: 469, 481; Fergal Davis, 'Human rights in Australia will become a political play thing without consensus', *The Guardian,* 9 March 2015.

[49] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 7 of 2016*, 11 October 2016; *Human Rights Scrutiny Report 8 of 2016*, 9 November 2016; *Human Rights Scrutiny Report*

The PJCHR's working method has meant that the overall trend in PJCHR reporting has been towards consensus under a number of different PJCHR chairs.[50] Even though the overall trend in PJCHR reporting has been towards consensus and this can be seen in a positive light, the particular concern, perhaps, should be less of consensus *per se*, but whether the PJCHR's reports are capable of being a useful resource to inform parliament more broadly, something which is considered further below.

A significant element of the technical scrutiny approach, which is also different to portfolio committees, is the provision of legal advice as a mechanism to support the PJCHR to perform its legislative scrutiny function. The PJCHR has an independent part-time legal adviser, as well as expert secretariat staff (which generally include two Principal Research Officers who have specialist legal expertise in international human rights law).[51] This enables the PJCHR reports to contain analysis and conclusions against the standards of the seven core human rights treaties that is rigorous. In a technical scrutiny context, the credibility of analysis is essential as it addresses the goal of informing parliament about the human rights implications of legislation as well as providing opportunities for informed engagement about human rights. There are a number of indications that generally the PJCHR reports have been recognised as containing credible analysis. This includes the analysis being referred to in submissions to the legislation inquiries of portfolio committees as well as the work of the PJCHR and its recommendations being referred to by UN treaty monitoring bodies

---

9 of 2016, 22 November 2016; *Human Rights Scrutiny Report 10 of 2016*, 30 November 2016; *Human Rights Scrutiny Report 1 of 2017*, 16 February 2017; *Human Rights Scrutiny Report 2 of 2017*, 21 March 2017; *Human Rights Scrutiny Report 3 of 2017*, 28 March 2017; *Human Rights Scrutiny Report 4 of 2017*, 9 May 2017; *Human Rights Scrutiny Report 5 of 2017*, 14 June 2017; *Human Rights Scrutiny Report 6 of 2017*, 20 June 2017; *Human Rights Scrutiny Report 7 of 2017*, 8 August 2017; *Report 8 of 2017*, 15 August 2017; *Human Rights Scrutiny Report 9 of 2017*, 5 September 2017; *Human Rights Scrutiny Report 10 of 2017*, 12 September 2017; *Human Rights Scrutiny Report 11 of 2017*, 17 October 2017; *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017; *Human Rights Scrutiny Report 13 of 2017*, 5 December 2017; *Human Rights Scrutiny Report 1 of 2018*, 6 February 2018; *Human Rights Scrutiny Report 2 of 2018*, 13 February 2018; *Human Rights Scrutiny Report 3 of 2018*, 27 March 2018. Accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports>.

[50] In the 43rd Parliament all the PJCHR's scrutiny reports were by consensus. See Parliamentary Joint Committee on Human Rights, Parliament of Australia reports from *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 First Report of 2012*, 22 August 2012, to *Human Rights Scrutiny Report Thirtieth-First Report of the 44th Human Rights Scrutiny Report Thirtieth-Eighth Report of the 44th Parliament*, 3 May 2016.

[51] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: iv, 8.

in reviewing Australia's compliance with its obligations under human rights treaties. [52] It is also expected that analysis that lacks legal credibility would attract criticism. Accordingly, these are indications that the technical scrutiny approach appears to contribute to the effectiveness of the PJCHR against the goals of informing parliament about the human rights implications of proposed legislation as well as contributing to more informed engagement around human rights issues.

While the technical scrutiny approach is used by the PJCHR in its regular work examining legislation for human rights compatibility, the PJCHR has on one occasion undertaken a broad based policy inquiry in response to a referral it received from the Attorney-General. The PJCHR, in the context of this inquiry, examined a broad range of policy issues related to human rights and focused on matters outside solely compliance with international obligations. As such, there can also be scope within the PJCHR's working methods to look at human rights matters more broadly. This may also have value in terms of the goal of engagement with human rights, particularly noting the large number of submissions that the PJCHR received to this inquiry. [53]

PJCHR'S ANALYTICAL FRAMEWORK AND FOCUS

In the course of the PJCHR's work and its application of the technical scrutiny approach, the PJCHR has developed, and uses, what it refers to as its 'analytical

[52] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017) [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20, 8 December 2017, [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5, 23 June 2017, [5]-[6]; Law Council of Australia, Submission 42 to Senate Standing Committee on Community Affairs, *Inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017*, 11 August 2017: 2; Australian Lawyers Alliance, Submission 14 to Senate Standing Legislation Committee on Community Affairs, *Inquiry into the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*, 23 July 2014: 11; Australian Human Rights Commission, Submission 163 to Senate Standing Legislation Committee on Legal and Constitutional Affairs, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014, [183], [201].

[53] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth), 28 February 2017.

framework'.[54] The PJCHR's analytical framework is founded on international human rights law and the premise that Australia has voluntarily accepted international obligations under the seven core human rights treaties to respect, protect and fulfil human rights.[55]

Although the PJCHR reports on all legislation that comes before the parliament it focusses its attention, resources and analysis in reports on legislation which raises human rights concerns.[56] As such, it has developed the practice of listing bills that do not raise human rights concerns ('because the bill does not engage or promotes human rights, and or permissibly limits human rights') and cross-referring to the *Federal Register of Legislation* in respect of such instruments rather than reporting on each in detail.[57] This is an important means for the PJCHR to prioritise its work effectively in the context of its mandate and resources. In examining whether legislation raises human rights concerns the approach applied is to:

- **First**, identify whether human rights are engaged and may be limited or promoted by proposed legislation (with reference to the scope of human rights protections contained in the seven core conventions); and
- **Second**, assess whether any limitation is justifiable as a matter of international human rights law.[58]

---

[54] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual report 2012-2013;* Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-sixth report of the 44th Parliament,* 16 March 2016; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act: First Report of 2012*, 22 August 2012.

[55] See Parliamentary Joint Committee on Human Rights, *Guidance Note 1—Drafting Statements of Compatibility*, Parliament of Australia, December 2014. Accessed at: <http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/guidance_note_1.pdf>.

[56] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Eighteenth report of the 44th Parliament*, 10 February 2015: 1; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report: Twenty-First Report of the 44th Parliament*, 24 March 2015: 1.

[57] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018*, 27 March 2018: 1, 137.

[58] Parliamentary Joint Committee on Human Rights, *Chair's Tabling Statement for the House of Representatives: Twenty-first Report of the 44th Parliament,* 24 March 2015 (Philip Ruddock) Accessed at:

In relation to the second aspect of the task, as noted in the PJCHR's reports, international human rights law recognises that reasonable limits may be placed on most human rights. It is well accepted in international human rights law that there are very few absolute rights which can never be legitimately limited.[59] In line with this, where the PJCHR has considered legislative measures which engage absolute rights, it has generally approached its task from the perspective that there can never be acceptable justifications for limitations on these rights.[60]

All other rights may be permissibly limited provided certain criteria are satisfied.[61] In relation to rights that are not absolute, the PJCHR provides in *Guidance Note 1* that any measure that limits a human right must comply with the following criteria in order to be justifiable (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.[62]

<https://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2015/21_44/Tabling%20statement%20PDF.pdf?la=en>.

[59] Parliamentary Joint Committee on Human Rights, *Guidance Note 1*. Absolute rights include the prohibition on torture and cruel inhuman and degrading treatment, the prohibition on non-refoulement (the right not to be sent or returned to a place where there is a real risk that the person will face serious human rights abuses), freedom from slavery and servitude, the prohibition against retrospective criminal laws, the right to recognition before the law and freedom from imprisonment for inability to fulfil a contractual obligation.

[60] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, 'Migration Amendment (Protection and Other Measures) Bill 2014', *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Ninth Report of the 44th Parliament*, 15 July 2014; 'Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014' *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Fourteen Report of the 44th Parliament,* 28 October 2014.

[61] See, for example, ICCPR arts 12(3), 13, 14(1), 18(3), 21, 22(2); ICESCR arts 8(1)(a), 8(1)(c). See also Alexandra C. Kiss, 'Permissible Limitations on Rights', in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981.

[62] *Guidance note 1* sets outs the Committee's guidance on the specific elements of this criteria. The limitation criteria are consistent with the guidance provided by the Commonwealth Attorney-General's Department for government departments in relation to the preparation of statements of compatibility.

Examining whether measures in legislation permissibly limit human rights is the focus of much of the PJCHR's work.[63] Substantively, the limitation criteria draws on and distils international human rights law jurisprudence as to when and how it is permissible to limit human rights.[64] Unlike its counterpart human rights committees in other jurisdictions which focus more narrowly on civil and political rights, the PJCHR has a mandate to assess the human rights compatibility of civil and political as well as economic, social and cultural rights.[65] In distilling international human rights law, the PJCHR applies the limitation framework consistently across these rights.[66] Given the large volume of legislation the PJCHR considers, the detailed analysis in the PJCHR's reports contributes to the understanding of these rights in the context of their application to particular measures.[67]

In popular discourse around human rights, criticisms are made about the difficulty of balancing what are seen as competing human rights.[68] This regularly arises in contentious policy areas, such as national security, where it may be seen as necessary to limit certain rights to achieve intended policy outcomes.[69] However, the analytical framework to some degree addresses this issue by focussing on whether a particular measure limiting a human right is justifiable. Justification is often a matter of

[63] See, for example, PJCHR Scrutiny Reports 45th Parliament, October 2016 to March 2018..

[64] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, E/CN.4/1984/4, 1984; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Maastricht, 2-6 June 1986; UN Human Rights Committee, General Comment 16, The right to respect for privacy, family, home, correspondence, and protection of honour and reputation (Article 17), 8 April 1988; UN Human Rights Committee, General Comment 27, Freedom of movement (Article 12); UN Human Rights Committee, General Comment 22 (Article 18), 1993; Pinkey v Canada, UN Human Rights Committee, Communication No. 27/1978, final views of 29 October 1981 (CCPR/C/OP/1) 95. See also, in a comparative law context, Handyside v United Kingdom (1978-1979) 1 EHRR 737; London Regional Transport v Mayor of London [2001] EWCA Civ 1491 (United Kingdom); Brown v Stott [2001] 2 WLR 817; R v Oakes [1986] 1 SCR. 103 (Canada); Noort v MOT [1992] 3 NZLR 260 (New Zealand).

[65] Gledhill, *Human Rights Acts*.

[66] This is subject to the nuances of the particular right and in the case of economic, social and cultural rights the obligation of progressive realisation.

[67] See, for example, PJCHR Scrutiny Reports 45th Parliament, October 2016 to March 2018.

[68] See, for example, Shaheen Azmi, Lorne Foster and Lesley A. Jacobs (eds.), *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles*, Leichhardt, Federation Press, 2012.

[69] See, for example, Christopher Michaelson, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric', *University of New South Wales Law Journal* 29(2) 2006: 1.

evidence in terms of the extent of the problem being addressed and the efficacy of the proposed legislative response. Indeed, matters going to the limitation criteria are the focus of what the PJCHR explores in the context of dialogue with legislation proponents.[70] The analytical framework has allowed the PJCHR to focus the bulk of its scrutiny work on limitations that are of most concern. The analytical framework can also be seen in the context of the PJCHR's operation as a technical scrutiny committee. That is, it provides a framework for the technical scrutiny approach to be applied. In key respects it complements scrutiny dialogue processes by providing a focus for questions to legislation proponents (see, discussion below). Accordingly, it addresses related goals of engagement, understanding and dialogue around human rights issues.

REPORTING, WORKLOAD AND TIME CONSTRAINTS

The PJCHR usually tables a scrutiny report every joint parliamentary sitting week which assesses the human rights compatibility of new bills and instruments since the previous report, any deferred matters and follow up responses from ministers or other legislation proponents.[71] During the current (45th) Parliament from August 2016 to March 2018 the PJCHR has tabled 20 scrutiny reports and examined[72] a very large volume of legislation: 463 bills and 3,286 instruments of delegated legislation.[73] Since its inception to March 2018 the PJCHR has examined 1,375 bills and 11,070 instruments.[74] This highlights the very significant volume of the PJCHR's work,

[70] PJCHR Scrutiny Reports 45th Parliament, October 2016 to March 2018.

[71] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 13 of 2017*, 5 December 2017: 1.

[72] The Committee examines and reports on all these bills and instruments.

[73] Parliamentary Joint Committee on Human Rights, *Chair's tabling statement for the House of Representatives: Report 13 of 2017*, Parliament of Australia, 5 December 2017 (Ian Goodenough) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements>; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 1 of 2018*, 6 February 2018; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 2 of 2018*, 13 February 2018; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018*, 27 March 2018; Australian Government, Federal Register of Legislation, <https://www.legislation.gov.au>

[74] Parliamentary Joint Committee on Human Rights, *Chair's tabling statement*; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2012 -2013*, December 2013: 15; Parliamentary Joint

particularly noting the detailed analysis contained in its reports in relation to legislation raising human rights concerns. Reporting on legislation in this manner is clearly the PJCHR's primary ongoing contribution, both to the parliament and more broadly. As discussed further below, the PJCHR's reporting on legislation that raises human rights concerns often occurs in two stages with both initial and concluding reports tabled.[75]

There are a number of challenges for the PJCHR in performing these functions. In the context of its considerable workload, the issue of the timeliness of the PJCHR's reporting is significant. This is because if the PJCHR does not report in a timely manner then its reports may not be available to inform the deliberations of parliament or to assist with engagement around human rights before legislation is passed. It is therefore an important factor in relation to the effectiveness of the PJCHR against these goals. The PJCHR on its website explains that it 'works to conclude its assessment of bills while they are still before the Parliament, and its assessment of legislative instruments within the timeframe for disallowance (usually 15 sitting days)'.[76]

However, on occasion the PJCHR has faced criticism for bills having passed both houses of parliament before its concluding report is published in respect of this legislation.[77] It has also received criticism for deferring its consideration of legislation including high profile or controversial legislation such as national security legislation.[78] The UN Human Rights Committee in its concluding observations on

---

Committee on Human Rights, Parliament of Australia, *Annual Report 2013 -2014*, 3 May 2016: 11; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014-2015*, 5 December 2017: 11; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 11.

[75] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 4 of 2018,* 8 May 2018.

[76] Parliamentary Joint Committee on Human Rights, *Correspondence Register*, Parliament of Australia. Accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Correspondence_register>.

[77] See, for example, Williams and Reynolds, 'Operation and Impact': 469-479, 490; Fergal Davis, 'Political Rights Review and Political Party Cohesion', *Parliamentary Affairs* 69(1) 2016: 221.

[78] Williams and Reynolds, 'Operation and Impact', discuss the example of the National Security Legislation Amendment Bill (No 1) 2014 having been deferred three times by the PJCHR and then passing both houses of parliament prior to the PJCHR's final report.

Australia also expressed concern 'that bills are sometimes passed into law before the conclusion of review by the PJCHR'.[79]

Unlike Senate legislation portfolio committees, there is no procedural impediment to a bill passing before the PJCHR reports. When a bill is referred to these other committees for inquiry, Senate Standing Order 115(3) operates and the bill may not be further considered by the Senate until the committee has reported.[80] As the PJCHR does not receive bills until they are introduced into parliament, the PJCHR is engaged in a race to undertake its full analytical, information gathering and reporting processes (which frequently include complex human rights issues) before the passage of legislation. This also occurs in a broader context, including that the ten members of the PJCHR also have other substantial parliamentary commitments.

During 2017, 18 of the 270 new bills considered by PJCHR passed before the PJCHR published its *concluding* report (meaning 6.7 percent of bills passed prior to final reports).[81] However, for 8 of these 18 bills the PJCHR had published a detailed initial human rights analysis in advance of passage. This means that the in the calendar year 2017 significant reporting was available to inform members of parliament about the human rights implications of legislation for 96 percent of bills prior to passage.[82] It is not uncommon for the PJCHR's initial report on legislation, which is often detailed, to be utilised by members of parliament as a resource for analysis in relation to human rights issues.[83] For example, the PJCHR's report has been used to inform questioning in hearings before other committees.[84]

---

[79] UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [11].

[80] Commonwealth, Parliament of Australia, Senate Standing Order 115(3).

[81] PJCHR Scrutiny Reports 45th Parliament, October 2016 to December 2017, in particular Report 1 of 2017 to Report 13 of 2017; Senate Table Office, *Bills List: Bills Before Parliament for the Year 2017,* Parliament of Australia, 13 December 2017; House of Representatives, *Daily Bills Lists*, Parliament of Australia, 13 December 2017; Parliamentary Joint Committee on Human Rights, *2017 Index of Bills Considered by the Committee*, Parliament of Australia. Accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments/Archive>.

[82] PJCHR Scrutiny Reports 45th Parliament, October 2016 to December 2017.

[83] See, for example, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017: 73 (Jacinta Collins); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment

There is an additional element that can substantially affect the timeliness of the PJCHR's concluding reports on legislation: the timeliness of responses to the PJCHR's requests for further information from legislation proponents.[85] As discussed further below, consistently with other technical scrutiny committees and in keeping with the 'dialogue model', the PJCHR's general approach, where particular legislation raises human rights concerns, is to table an initial report setting out detailed concerns and to seek further information from the legislation proponent. The response from the legislation proponent is then usually examined and reported on in a concluding report entry. This meant the PJCHR's concluding report entry could be delayed, and legislation passed, even if the delay in reporting was caused, at least in part, by the failure of the legislation proponent to furnish a response to the PJCHR. The PJCHR faced criticism for not developing approaches to draw matters to a close more quickly even where a response was not received.[86] In its 2015-2016 annual report the PJCHR explained that while it had stipulated deadlines for responses, only 8 percent of responses were provided by legislation proponents by the requested date.[87]

Since this parliament commenced in August 2016, the PJCHR has adopted some additional measures to attempt to address this situation. Where the PJCHR prepares an initial report and seeks further information from the legislation proponent, the PJCHR now sets a date on which it will report on this legislation. Where a ministerial response is not received by the requested date the PJCHR may decide to conclude its examination in the absence of this further information. A register of correspondence published on the PJCHR's website has also been established to record whether responses have or have not been received.[88] Since instituting these mechanisms,

---

(Validation of Decisions) Bill 2017, 16 August 2017: 8653 (Graham Perrett); Senate Education and Employment Legislation Committee, Inquiry into Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, Parliament of Australia, *Committee Hansard*, 28 September 2017: 66 (Sue Lines and Chris Ketter); *Journals of the Senate no. 58*, 6 September 2017: 1182 (Rachel Siewert); Commonwealth, *Parliamentary Debates*, Senate Hansard, Second Reading Debate, Australian Border Force Amendment (Protected Information) Bill: 7463 (Senator Nick McKim).

[84] See, for example, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017: 73 (Jacinta Collins)

[85] Parliamentary Joint Committee on Human Rights, *Annual Report 2015-2016*: 20.

[86] Williams and Reynolds, 'Operation and Impact': 479.

[87] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 20.

[88] PJCHR correspondence register.

there has been marked improvement in the timeliness of responses with 30 percent of responses received by the requested date during this period to the end of 2017.[89] No other changes were made to the PJCHR's processes that could account for this variance, so the new mechanisms are the most likely cause.

Additionally, the above reporting statistics should be understood in the parliamentary context of the speed with which legislation may be passed. This is a factor over which the PJCHR has no direct control. In this respect, of the bills the PJCHR considered in 2017, 7 out of the 18 bills that passed both houses of parliament prior to the PJCHR reporting passed in fewer than 6 scheduled sitting days. This restricted the PJCHR's capacity to report on such legislation.[90] Where legislation passes quickly there may be insufficient time for the PJCHR to fully consider and report on the sometimes complex human rights matters raised by legislation.

However, notwithstanding these potential concerns, the fact that the PJCHR has reported on 96 percent of bills prior to passage in 2017 indicates that the current working methods of the PJCHR are generally effective in addressing the goal of informing parliament regarding the human rights implications of legislation. The changes to the PJCHR's approach to reporting on concluding matters also shows that its working methods have been responsive to concerns regarding timeliness.

At the same time, the fact that any bills raising human rights concerns may pass the parliament prior to the PJCHR's concluding report is still of concern. The UN Human Rights Committee has specifically recommended that Australia should 'strengthen its

[89] Unpublished statistics, complied by the PJCHR secretariat for the period August 2016 to December 2017. Responses were requested in relation to 54 bills in the reporting period. Responses in relation to 16 of these bills were received by the requested date. Responses were requested in relation to 35 instruments in the reporting period. Responses in relation to 11 of these instruments were received by the requested date.

[90] PJCHR Scrutiny Reports 45th Parliament, October 2016 to December 2017; Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (introduced 8 February 2017, passed 15 February 2017); Human Rights Legislation Amendment Bill 2017 (Introduced 22 March 2017, passed 31 March 2017); Marriage Law Survey (Additional Safeguards) Bill 2017 (Introduced 13 September 2017, passed 13 September 2017); Parliamentary Entitlements Legislation Amendment Bill 2017 (Introduced 9 February 2017, passed 16 February 2017); Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 (Introduced 14 June 2017, passed 20 June 2017); Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill (No. 2) 2016 (introduced 1 December 2016, passed 1 December 2016); Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (No. 2) (introduced 28 November, passed 1 December 2016); Parliament of Australia, *Parliamentary sitting calendar 2017, Parliamentary sitting calendar 2016* Accessed at: <https://www.aph.gov.au/About_Parliament/Sitting_Calendar/Previous_sitting_calendars>.

legislative scrutiny processes with a view to ensuring that no bills are adopted before the conclusion of a meaningful and well-informed review of their compatibility with the [International Covenant on Civil and Political Rights]'.[91]

In this context, there is scope for further improvement through considering additional procedural or other mechanisms including those currently available in respect of other parliamentary committees. Newly permanent Senate Standing Order 24(1)(e)-(h) enables Senators to ask the responsible minister why the Senate Scrutiny of Bills Committee has not received a response if that committee has not finally reported on a bill because a ministerial response has not been received. In reflecting on the effectiveness of this mechanism in its first year in operation, the Senate Scrutiny of Bills Committee noted that the proportion of ministerial responses that were received late had reduced from 44 percent to 22 percent.[92] This approach could similarly further improve the timeliness of responses to the PJCHR. However, a more far-reaching solution would be to introduce an equivalent to Senate Standing Order 115(3) that would have the effect of preventing the passage of legislation prior to the PJCHR's final report. This would also address issues of timeliness of reporting and also might allow further time for the PJCHR to consider legislation raising human rights concerns.

DIALOGUE WITH LEGISLATION PROPONENTS

As noted above, the Parliamentary Scrutiny Act requires that the legislation proponent for a bill or instrument prepare a statement of compatibility with human rights.[93] While the statement of compatibility is the legislation proponent's assessment or view on the human rights compatibility of legislation, it should be founded on a credible human rights analysis. The statement of compatibility is a key material for the PJCHR's analysis, but it is often only a starting point. Rather than relying only on statements of compatibility, in order to fulfil the PJCHR's mandate a large part of the PJCHR's work necessitates a transparent dialogue with, including

[91] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [12].

[92] Senate Standing Committee on the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest 13/17*, 15 November 2017: 165.

[93] This does not include instruments that are exempt from disallowance: Parliamentary Scrutiny Act s 9(1).

seeking further information from, legislation proponents. As is the case with the Senate scrutiny committees, the PJCHR has also adopted a scrutiny dialogue-model which it explains as follows:

> The committee's main function of scrutinising legislation is pursued through dialogue with legislation proponents (usually ministers). Accordingly, where legislation raises a human rights concern which has not been adequately justified in the relevant statement of compatibility, the committee's usual approach is to publish an initial report setting out its concerns, and seeking further information from the legislation proponent.[94]

The committee publishes its concluding analysis and also the responses it receives from legislation proponents in its reports and on its website.[95] Accordingly, the reports provide significant information about the application of Australia's human rights obligations from both the government's perspective as well as the PJCHR.

The further information sought by the PJCHR has generally been in relation to whether there is a sufficient basis for justifiably limiting human rights applying the PJCHR's analytical framework (discussed above). This may be because the statement of compatibility did not identify a right as being engaged or limited. Alternatively, it may be because the assessment of a measure limiting human rights did not provide sufficient information to justify the limitation. There are numerous examples of the PJCHR concluding that a measure is compatible with human rights following an adequate response from a legislation proponent.[96]

---

[94] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 7.

[95] Parliamentary Joint Committee on Human Rights, *Guidance Note 1.* See also, for example, Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report Thirty-Seventh Report of the 44th Parliament*, 2 May 2016; Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report Eighteenth Report of the 44th Parliament*, 10 February 2016; Parliamentary Joint Committee on Human Rights, *Index of Bills Considered by the Committee*, Parliament of Australia. Accessed at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments>.

[96] See, for example, Parliamentary Joint Committee on Human Rights, *Senate Tabling Statement*: *Human Rights Scrutiny Report 12 of 2017,* Parliament of Australia, 28 November 2017 (Ian Goodenough) accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements>; Parliamentary Joint Committee on Human Rights, *Chair's Tabling Statement for the House of Representatives: Human Rights Scrutiny Report 11 of 2017,* Parliament of Australia, 17 October 2017 (Ian Goodenough) accessed at: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statements>

One such example arose during consideration of a measure which required newly arrived migrants to serve a waiting period prior to being able to access particular social security payments. The measure engaged and limited the right to social security and the right to an adequate standard of living. While the engagement of these rights was acknowledged in the statement of compatibility, the PJCHR initially noted that it was unclear from the information provided whether identified safeguards would enable families subject to the measure to meet basic necessities: adequate safeguards would support an assessment that the measure is a proportionate limitation on human rights.[97] The PJCHR therefore sought advice from the relevant minister including as to the effect of a type of Special Benefit social security payment. The minister's response provided a range of further information about the availability of Special Benefit payments and the level of income support provided in situations of financial hardship. On the basis of this further information, the PJCHR concluded that the measure was likely to be compatible with human rights noting that the 'Special Benefit appears to provide a safeguard such that these individuals could afford the basic necessities to maintain an adequate standard of living in circumstances of financial hardship'.[98] An outcome of this process was a more detailed, reasoned explanation of the proportionality of the limitation on human rights that forms part of the public record.

The process of transparent dialogue can be seen as facilitating the goal of engagement around human rights. Given that, on some occasions, the PJCHR is able to conclude that a measure is compatible with human rights after such dialogue provides support for this view. The scrutiny-dialogue model also directly addresses the goal of providing for dialogue between the executive and parliament. It sits in contrast to the situation that existed prior to the creation of the PJCHR and the introduction of the requirement for legislation to be accompanied by statements of compatibility. Specifically, prior to the Parliamentary Scrutiny Act there was no requirement for legislation proponents to consider human rights at all, let alone whether limitations on human rights are justifiable.

[97] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 4 of 2017,* 9 May 2017: 149-154.

[98] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 4 of 2017*: 154.

The PJCHR raising questions and, where warranted, forming different conclusions to the legislation proponent is also a key aspect of the dialogue processes. There is a role for such processes to support considered deliberation within parliament.[99] This is because it allows for substantive exploration of issues but also for different sources of information to be provided as to matters of human rights compatibility. For example, in the course of its dialogue with legislation proponents, the PJCHR has consistently concluded across successive parliaments that, as a matter of international human rights law, Australian domestic law has insufficient procedural safeguards for the purpose of compliance with Australia's *non-refoulement*[100] obligations under the ICCPR and the CAT.[101] However, ultimately whether a dialogue process is possible is dependent not only on the PJCHR, but on the willingness of legislation proponents to engage constructively in this process. As set out above, consideration could be given to additional procedural mechanisms to further facilitate this engagement.

THE IMPACT OF THE PJCHR ON LEGISLATION, PARLIAMENTARY PROCESSES AND MORE BROADLY

The impact and contribution of the PJCHR on parliamentary processes, legislation and more broadly is also relevant to consider against the identified goals of the PJCHR. There is some literature which has reflected on aspects related to the effectiveness of the scheme introduced under the Parliamentary Scrutiny Act against such factors.[102]

---

[99] See, for example, Sathanapally, *Beyond Disagreement*: 62, 65.

[100] The obligation of non-refoulement is the obligation to not return any person to a country where there is a real risk that they would face persecution, torture or other serious forms of harm, such as the death penalty; arbitrary deprivation of life; or cruel, inhuman or degrading treatment or punishment.

[101] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, Human Rights Scrutiny Report Second Report of the 44th Parliament, February 2014: 45; Human Rights Scrutiny Report Fourth Report of the 44th Parliament, March 2014: 513; Human Rights Scrutiny Report Nineteenth report of the 44th Parliament, 3 March 2015: 13-28; Human Rights Scrutiny Report Thirty-sixth report of the 44th Parliament, 16 March 2016: 195-217; Human Rights Scrutiny Report 2 of 2017, 21 March 2017: 10-17; Human Rights Scrutiny Report 4 of 2017, 9 May 2017: 99-111.

[102] Williams and Reynolds, 'Operation and Impact': 469; Dan Meagher, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts', *Federal Law Review* 42(1) 2014: 1-25; Davis, 'Political Rights Review': 213–229; Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Human Rights (Parliamentary Scrutiny) Act 2011,' *University of Queensland Law Review* 2015: 7-27.

Legislative impact

The legislative impact of the PJCHR may be used as an indicator of whether the PJCHR achieves its goals. In this respect, one factor against which Williams and Reynolds, for example, assess effectiveness is the degree to which laws passed by parliament respect and promote human rights.[103] In their study they conclude that the PJCHR has limited legislative impact as there is limited evidence that amendments or lack of passage result from PJCHR reports.[104] Such concerns were also reflected by the UN Committee on the Elimination of Racial Discrimination in its recent concluding observations on Australia's compliance with that treaty. While noting the role of the PJCHR in scrutinising the human rights compatibility of legislation, it was 'concerned that recommendations of the Joint Committee are often not given due consideration by legislators'.[105]

While this may be a potential concern, there may also be dangers in concluding that the PJCHR is ineffective on this basis or in attributing too much value to whether PJCHR reports result in amendments.[106] As set out above, in considering issues of effectiveness it is important not only to consider legislative impact but also the capacities and opportunities for parliament to engage with human rights issues.[107] More specifically, framing criteria of effectiveness only against an expectation that laws passed by parliament be compatible with human rights may unduly lead to a conclusion that the PJCHR is ineffective. This is particularly in a context where the PJCHR only reports on legislation after it is introduced to parliament and its findings do not affect the ability of legislation to be passed or its legal validity. By contrast, as set out above, there is a range of processes which the PJCHR has developed which provide opportunities and capacities for engagement with the human rights implications of legislation.

---

[103] Williams and Reynolds, 'Operation and Impact': 488.

[104] Williams and Reynolds, 'Operation and Impact': 488-494.

[105] UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20, 8 December 2017 [6].

[106] See, for example, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Final Report*, ALRC Report 129, December 2015: 73 [3.86]; Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures': 551.

[107] Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures': 551.

Further, as Benton and Russell explain 'it is impossible to determine accurately whether a committee was causally responsible for recommendations being implemented or whether the government was influenced by the wider policy community'.[108] For example, a PJCHR report may be one of many reasons that members of parliament choose to vote for or against a bill. This points to some of the difficulties in assessing the effectiveness of parliamentary committees particularly where, for example, a PJCHR report is not identified directly by the government as a reason for an amendment. That is, it is difficult to identify a causal relationship between a particular PJCHR report and legislative changes. As discussed below, it is possible that influence might arise from an analysis being adopted by a submitter to another inquiry. It also further indicates that it is important to look beyond the *direct* legislative impact in assessing matters of effectiveness or contribution. Indeed, it may be that the PJCHR is no less effective than other parliamentary committees in achieving amendments to legislation in a context where such amendments are not proposed by government.

This is not to suggest that legislative outcomes are unimportant, but rather that there is a range of factors that may account for them beyond the effectiveness or otherwise of the PJCHR. Unlike other 'dialogue models' of human rights protection the courts are provided no role in adjudicating human rights under the Parliamentary Scrutiny Act. Accordingly, there may also be fewer direct incentives for government to always address human rights concerns. In this context, ensuring legislative outcomes are compatible with human rights is arguably a responsibility shared with the parliament and the government.

While the PJCHR reports have not routinely led directly to legislative amendments that can be causally attributed to it, there are some concrete examples of the PJCHR's views being taken into account in the development and refinement of legislation.[109] A specific example of where a PJCHR's report appears to have contributed to a legislative amendment occurred in relation to the Norfolk Island Legislation Amendment Bill 2015. This bill was first considered by the PJCHR in its *Twenty-*

[108] Russell and Benton, 'Assessing the Impact': 766.

[109] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, 'Australian Public Service Commissioner's Directions 2013', *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 Tenth Report of 2013*, 27 June 2013: 183-184.

second report of the 44th Parliament.[110] The bill would have led to the exclusion of New Zealand citizens who are Australian permanent residents on Norfolk Island from eligibility for social security (all other Australian permanent residents on Norfolk Island had eligibility to them extended through the bill). The PJCHR's report noted that the measure engaged and limited the right to equality and non-discrimination and the right to social security. In his response, the Assistant Minister for Infrastructure and Regional Development noted the committee's concerns and agreed to amend the bill to ensure that New Zealand citizens living on Norfolk Island would enjoy the same access to social security benefits as New Zealand citizens living on the Australian mainland.[111]

Further, while evidence of legislative impact may be a relevant indicator, the absence of such evidence should not necessarily lead to a conclusion that the PJCHR is ineffective in its working methods or operation or is not making a contribution. This is because, as set out above, there are a number of factors that could account for this lack of evidence.

Impact in contributing to human rights consideration and debate

As noted above, a key goal of the PJCHR reports is to inform members of parliament about the human rights implications of legislation and consequentially to inform the deliberations of parliament more broadly. Reference made to the PJCHR's reports or underlying analysis could be one possible measure of the extent to which this goal is being addressed.[112] Williams and Reynolds assess the deliberative impact of the PJCHR against the frequency with which there were 'substantive references' in Hansard to either statements of compatibility or the PJCHR. They conclude that although substantive references to PJCHR reports have been increasing, with 106

[110] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report Twenty-second Report of the 44th Parliament,* 13 May 2015: 66.

[111] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-second report of the 44th Parliament,* 1 December 2015: 87-90; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-fifth report of the 44th Parliament,* 25 February 2016: 1-2.

[112] Paul Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, Oxford, Hart Publishing, 2015: 141, 143.

substantive mentions up until 4 January 2016, overall there is relatively limited use of the PJCHR reports in parliamentary debate.[113]

However, it is possible that after only 4 years in operation it was premature to conclude that the PJCHR is ineffective on this basis. By way of comparison, research into the operation of the UK JCHR shows that in its first 5 years in operation there were only 23 substantive references to its reports in parliamentary debates but in the next five years there were over 1006 references to the UK JCHR's reports.[114] At the end of 2017 the PJCHR had only been in operation for little over five years. However, examining 'substantive references'[115] to the PJCHR in the 12 months up until the end of 2017 reveals that there continues to be an increase in members of parliament referring directly to PJCHR's reports and work in parliamentary debates. Of these references, while many were made in the context of opposition to a particular legislative measure, others have occurred in the context of support for a bill or to highlight issues for consideration.[116]

---

[113] Drawing on Yowell's definition of 'substantive reference' in the context of the UK JCHR, Williams and Reynolds describe 'substantive references' as any mention in Parliament relating to: the specific content of a Committee report or an [statement of compatibility] SOC; the influence of a Committee report or an SOC on an issue; a finding by the Committee; the effect of a Committee report on legislative outcomes.' They describe 'Non-substantive' references as 'a mere acknowledgement of someone as a member of the Committee; generic praise for the Committee's work; indications that the Committee will scrutinise or has scrutinised a Bill; a mention of the Committee as one of a number of bodies that share a certain view; the tabling statement of each Committee report … a reference to an SOC in a first reading speech (rather than a second reading speech).' Williams and Reynolds, 'Operation and Impact': 484-488.

[114] Yowell, 'The Impact of the Joint Committee': 141, 143; Kavanagh, 'The Joint Committee on Human Rights': 132.

[115] This article defines 'substantive reference' as including reference to (a) the specific content of a PJCHR report; (b) the specific views, positions or analysis of the PJCHR on particular issues or legislation; (c) the influence of a PJCHR report or an SOC on an issue; (d) a finding or conclusion by the PJCHR; (e) the effect of a PJCHR report on legislative outcomes or amendments; (f) government responses to PJCHR reports; and (g) the PJCHR's reports to raise questions. This article includes additional criteria (g) as using the PJCHR's reports to raise questions relates to the substance of the PJCHR reports. It has been included for completeness as such references may also be captured by other categories.

[116] See, for example, Commonwealth, *Parliamentary Debates*, Senate Hansard, Second Reading Debate, Social Services Legislation Amendment (Welfare Reform) Bill 2017, 7 December 2017, 80 (Jenny McAllister); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second reading debate, Social Services Legislation Amendment (Cashless Debit Card) Bill 2017, 26 October 2017, 12173 (Michael Freelander); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017, 19 October 2017, 11310 (Graham Perrett); Commonwealth, *Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, 16 October 2017, 10616 (Brendan

Further deliberative impact may be seen outside of parliamentary debates. Another measure of the impact of the PJCHR is the use of its reports by other parliamentary committees.[117] Significantly, there are examples of the PJCHR's report being used to provide portfolio and other committees with information about human rights implications and of this being used by these other committee members as the basis for questioning witnesses in the course of committee inquiries.[118] The PJCHR's reports and analysis are also often referred to and drawn upon by portfolio committee reports.[119]

O'Connor); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017,16 October 2017, 10670 (Chris Hayes); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, 16 October 2017 10686 (Matt Keogh); Commonwealth*, Parliamentary Debates*, Senate Hansard, Second Reading Debate, Australian Border Force Amendment (Protected Information) Bill 2017, *,* 16 October 2017, 7461 (Senator McKim); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Social Services Legislation Amendment (Welfare Reform) Bill 2017*,* (7 September 2017) 9630 (Graham Perrett); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Validation of Decisions) Bill 2017, 16 August 2017, 8653 (Graham Perrett); Commonwealth*, Parliamentary Debates*, Senate Hansard, Second reading Debate, Fair Work Amendment (Corrupting Benefits) Bill 2017, 9 August 2017, 5160, 5166 (Doug Cameron); Commonwealth*, Parliamentary Debates*, Senate Hansard, Second reading Debate, Fair Work Amendment (Corrupting Benefits) Bill 2017, 9 August 2017 4922 (Doug Cameron); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 358 (Andrew Giles); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 361 (Julian Hill); Commonwealth*, Parliamentary Debates*, House of Representatives Hansard, Second Reading Debate, Second Reading Debate, Migration Amendment (Visa Revalidation and Other Measures) Bill 2016, 8 February 2017, 354 (Shayne Neumann).

[117] References to the PJCHR in the Hansard of other committees or in other committee reports were not considered by Williams and Reynolds.

[118] See, for example, Senate Education and Employment Legislation Committee, Inquiry into Higher Education Support Legislation Amendment (A More Sustainable, Responsive and Transparent Higher Education System) Bill 2017, Parliament of Australia, *Committee Hansard*, 24 July 2017: 73 (Jacinta Collins); Education and Employment Legislation Committee, Inquiry into Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017, Parliament of Australia, *Committee Hansard*, 28 September 2017: 66 (Sue Lines and Chris Ketter); Legal and Constitutional Affairs Legislation Committee, Inquiry into the Australian Citizenship Amendment (Intercountry Adoption) Bill 2014, Parliament of Australia, *Committee Hansard*, 28 July 2018: 15 (Senator Marshall).

[119] See, for example, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 27 February 2015: 38, 63, 86, 98; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Australian Citizenship Amendment(Intercountry Adoption) Bill 201,* August 2014: 5-6; Senate Education and

The PJCHR's reports may also be used to inform debates more broadly. The PJCHR's reports may be used as a resource by civil society organisations in their own consideration of proposed legislation. In this respect the PJCHR's reports are regularly referred to by non-government organisations in submissions and evidence to other parliamentary committees.[120]

Impact on statements of compatibility and a culture of justification

Additionally, the PJCHR's reports may influence the quality of statements of compatibility or subsequent responses prepared by legislation proponents. For example, in its 2014-15 Annual Report, the committee noted that the 'quality of statements of compatibility continued to improve over the reporting period'.[121] Part of any improvement (or otherwise) in the quality of statements of compatibility may relate to the willingness, resources and experience of legislation proponents to

---

Employment Legislation Committee, Parliament of Australia, *Dissenting Report of the Australian Greens, Inquiry into the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*, October 2017: 35; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016*, March 2016: 4; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, June 2015: 10; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Dissenting Report of the Australian Greens, Inquiry into Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, June 2015: 38; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, November 2014: 55; Senate Community Affairs Legislation Committee, Parliament of Australia *Dissenting Report of the Australian Greens Inquiry into the Social Services Legislation Amendment (Welfare Reform) Bill 2017*, September 2017: 55.

[120] Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, 'Declared area' provisions, Police stop, search and seizure powers, the control order regime and the preventative detention order regime, *Committee Hansard*, 1 December 2017: 1 (Sarah Pritchard); Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017, *Committee Hansard*, 20 September 2017: 26 (Charles Morland Bailes); Evidence to Senate Community Affairs Legislation Committee, Inquiry into Social Services Legislation Amendment (Welfare Reform) Bill 2017, *Committee Hansard*, 31 August 2017: 13 (Fiona McLeod); Law Council of Australia, Submission 3 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016*, 4 March 2016: 5-7; Australian Human Rights Commission, *Submission 16* to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014: 37; Law Institute of Victoria, Submission 117 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*: 14.

[121] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2014-2015*: 28.

engage with this process.[122] In this respect, the PJCHR has developed a number of resources to assist to educate and inform the Australian Public Service about human rights obligations and preparing statements of compatibility.[123]

However, improvements may also be attributable to the awareness that unless limitations on human rights are justified then legislation may be subject to a PJCHR report raising human rights concerns. There are numerous instances of the PJCHR being able to conclude its assessment of legislation without having to request further information from the legislation proponent because the information provided in the statement of compatibility was adequate.[124] The statement of compatibility for the Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018 provides one such example. While the bill imposes limitations on a range of rights, including the right to privacy and the right not to incriminate oneself, the statement of compatibility provides a detailed assessment as to why these limitations are permissible against the limitation criteria.[125] In this instance, the PJCHR listed the bill as not raising human rights concerns and concluded its examination without requesting further information.[126]

There is also evidence that the PJCHR's work may lead to improved explanations of why a measure engages and limits particular human rights. The PJCHR regularly concludes that measures are likely to be compatible with human rights after correspondence with legislation proponents. This indicates that by requesting further information from the legislation proponent the PJCHR is providing a potential safeguard where insufficient information has been provided in the statement of compatibility. As the legislation proponent's response is made publicly available as

[122] Compare ACT Human Rights Act Research Project ANU, Creating a Human Rights Culture within the ACT Government: Report on Interview Research Assessing the Impact of the Human Rights Act 2004 on the ACT Public Service, 2008: 21.

[123] See, for example, Parliamentary Joint Committee on Human Rights, Guide to Human Rights, March 2014. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources; *Guidance note 1*.

[124] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 24.

[125] Explanatory Memorandum, Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018, Statement of Compatibility: 17, 21.

[126] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 3 of 2018,* 27 March 2018: 137.

part of the PJCHR's report this helps to rectify the initial deficiency. Such processes also show that there is scope for further improvement in respect of statements of compatibility if such information had been provided in the first instance. [127]

Even where the PJCHR is unable to conclude that a measure is compatible with human rights following such a response, it is still likely to provide increased transparency and potentially an improved explanation of the measure. For example, this arose in the context of the PJCHR's examination of the human rights compatibility of the powers of the Australian Federal Police (AFP) to share information with agencies overseas. At the PJCHR's request the relevant minister provided the PJCHR with copies of the AFP National Guideline on international police-to-police assistance in death penalty situations and the AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment (guidelines). These guidelines were published in the PJCHR's report with the minister's response. While the PJCHR ultimately concluded that the powers still raised human rights concerns, there is now a more transparent explanation of the extent of any safeguards provided by such guidelines in the context of the legislation.[128]

Impact on international processes

As noted above, the Australian government, in reporting on Australia's compliance with its international human rights obligations to UN treaty monitoring bodies, has pointed to the work of the PJCHR as a mechanism to assist to ensure consistency with its obligations.[129] The Australian government's reliance on the role of the PJCHR and

---

[127] Parliamentary Joint Committee on Human Rights, Parliament of Australia*, Annual Report 2014 -2015,* 5 December 2017: 28; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2015-2016*: 24.

[128] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report 8 of 2017*, 15 August 2017: 83-91.

[129] Australia, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, fifth periodic report of Australia, UN Committee on Economic Social and Cultural Rights, E/C.12/AUS/5, 16 February 2017; Australia, Consideration of reports submitted by States parties under article 40 of the Covenant, sixth periodic report of Australia, UN Human Rights Committee, CCPR/C/AUS/6, 2 June 2016: 2; Australia, Consideration of reports submitted by States parties under article 9 of the Convention Eighteenth to twentieth periodic reports of States parties due in 2014, UN Committee on the Elimination of Racial Discrimination, CERD/C/AUS/18-20, 2 February 2016: 6-7.

references made to the PJCHR by the international treaty monitoring bodies and procedures is some evidence that the PJCHR is having an impact on these international processes at least in so far as it is pointed to as a mechanism for compliance.[130] In this respect, a number of UN treaty monitoring bodies have also requested specific information from the Australian government about the PJCHR's work and its findings.[131] However, while acknowledging the work of the PJCHR, these UN treaty monitoring bodies in their concluding observations have also called on the Australian government to strengthen legislative scrutiny processes.[132]

NOT INEFFECTIVE, BUT NOT A HUMAN RIGHTS PANACEA

The PJCHR is made up of a small group of parliamentarians who are assisted by expert advisers. It does not exist as part of a more wide-reaching system of domestic human rights protection in contrast to the UK, the ACT and Victoria. This means that it would be ill-conceived to view the PJCHR as a fix-all for human rights considerations in the Australian context or even the parliamentary context. Rather, claims that the PJCHR is ineffective must be understood in the context of parliamentary processes and the potential effectiveness of parliamentary committees more generally. While the PJCHR can raise concerns about the human rights compatibility of legislation, choices as to whether such legislation proceeds depend on the majority in the legislative chambers.

---

[130] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20, 8 December 2017 [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5, 23 June 2017 [5]-[6]. See, also, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia, A/HRC/35/41/Add.2, 9 June 2017: 15 -16.

[131] See, for example, UN Committee on the Elimination of All Forms of Discrimination Against Women, *List of Issues*, UN Doc CEDAW/C/AUS/Q/8, 30 November 2017 [1]; UN Committee Against Torture, *List of Issues Prior to Reporting*, UN Doc CAT/C/AUS/QPR/6, 9 January 2017 [8].

[132] UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6, 9 November 2017 [3], [11]; UN Committee on the Elimination of Racial Discrimination; *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20, 8 December 2017 [5]-[6]; UN Committee on Economic Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5, 23 June 2017 [5]-[6].

This article has applied criteria of effectiveness which are grounded in the parliamentary context within which the PJCHR exists. Taken on these terms, the PJCHR provides scope for a more systematic consideration of the human rights implications of legislation than was previously the case. Prior to the Parliamentary Scrutiny Act there was no requirement that legislation proponents or a parliamentary committee consider the human rights implications of legislation at all. As outlined in this article, while the PJCHR is not a panacea for all human rights issues in Federal legislation, over its more than five years in operation it has been successful at developing working methods and modes of operation that are capable of addressing the goals of informing members of parliament about the human rights implications of legislation; contributing to dialogue with the executive; and creating scope for engagement around human rights issues. This challenges the claim that the PJCHR is ineffective. There are also some indications that the work of the PJCHR is having an impact in areas including contributing to considerations of human rights issues and international obligations in the parliament and beyond.

At the same time there is scope for additional mechanisms and approaches to support the work of the PJCHR and to strengthen human rights legislative scrutiny in the Australian context. This includes ongoing engagement from the executive, continued engagement by members of parliament as well as consideration being given to procedural mechanisms to improve timeframes for meaningful consideration of human rights issues before the passage of legislation.

Vote Seeking and the Strategy of Provocation: An Initial Analysis of the AfD's Impact on the German Bundestag*

Charles Lees

Professor and Dean (People and Resources), College of Business, Government and Law, Flinders University.

* Double-blind reviewed article.

INTRODUCTION

The outcome of the 24th of September 2017 German Federal Election shook the German political class and sent shockwaves across Europe. The cause was the political arrival of the right wing populist Alternative for Germany (AfD) party as a third force in German politics, which finished the election with 12.6 per cent of the vote and 94 seats in the 709 seat Bundestag. In a country known for consensual politics and a traditionally risk-averse electorate, the success of the AfD marked an historic juncture in the Federal Republic's political development.[1]

The AfD's rise has provoked alarm in some quarters because the party has progressively radicalised since its formation in 2012 and is now an explicitly right wing populist party that mobilises distinct sections of the electorate, including previous non-voters. Populism is a 'thin' ideology that articulates the idea of an antagonistic relationship between 'the people' and a morally suspect 'elite'. As a rule, left wing populism tends to define the people along class lines, whilst the right wing variant focuses more on ethnicity and national identity.[2] Right wing populist parties like the AfD often use 'nativist' rhetoric that plays on voters' concerns about immigration, multiculturalism and Islam. The AfD's hard-edged electoral campaign explicitly

[1] C. Lees, 'The Alternative for Germany: The Rise of Right-Wing Populism in the Heart of Europe', *Politics* 38(3) 2018: 295-310. DOI: http://journals.sagepub.com/eprint/NkXgkYYR5SvZaVAFAGda/full

[2] See B. Stanley, 'The Thin Ideology of Populism', *Journal of Political Ideologies* 13(1) 2008: 95–110; *C.* Mudde, 'The Populist Zeitgeist', *Government and Opposition*. 39(4) 2004: 541–63.

mobilised these concerns to a pitch and with a degree of success that was unprecedented in contemporary German politics.

In order to assess the tactics employed by the AfD, particularly the party's behaviour in parliament since the Federal Election, this article draws upon Wolfgang Müller and Kaare Strøm's analytical distinction between 'policy seeking, 'office seeking', and 'vote seeking'.[3] Müller and Strøm's typology captures the strategic trade-offs that confront political parties and how their leaders address them. Sometimes these leaders have to make hard choices. For instance, a party leadership may choose to eschew votes in order to keep faith with a long-cherished but electorally unpopular policy proposal ('policy seeking' trumps 'vote seeking'), or they may decide to drop a key policy in order to enter a coalition government ('office seeking' trumps 'policy seeking'), or decide that the electoral costs of being in government outweigh the benefits and therefore rule it out ('vote seeking' trumps 'office seeking'), or that the best way to keep an electoral coalition together is to avoid clarifying the party's position in a contentious policy area ('vote seeking' trumps 'policy seeking').

All political parties must make these trade-offs from time to time. However, new parties face additional pressures to build organisationally and programmatically for the longer term whilst ensuring their survival in the short to medium term.[4] As a result, in the early stages of their development, new parties tend to favour vote seeking over office seeking or policy seeking. In addition, newly emergent populist parties also run the risk of alienating their core vote by appearing to be co-opted by the despised elites if they pursue an office seeking strategy. Thus, although there have been instances where European left wing populist parties have successfully made the transition to the political mainstream and even into government,[5] the radical edge that characterises right wing populism in Europe has made this transition more difficult for right wing populist parties.[6]

[3] W. Müller and K. Strøm (eds.), *Policy, Office, or Votes: How Political Parties in Western Europe make Hard Decisions*, Cambridge: Cambridge University Press, 1999.

[4] R. Harmel and L. Svåsand, 'Party Leadership and Party Institutionalism: Three Phases of Development', *West European Politics* 16(2) 1993: 67-88.

[5] Y. Stavrakakis, 'Populism in Power: Syriza's Challenge to Europe', *Juncture* 21 (4) 2015: 273-280.

[6] T. Akkerman, 'Populist Parties in Power and Their Impact on Liberal Democracies in Western Europe', in R.C. Heinisch, C. Holtz-Bacha and O. Mazzoleni (eds.), *Political Populism*, Baden-Baden, Nomos, 2018: 169-80.

At present, the conditions do not exist for the AfD in Germany to make the transition to the mainstream. The party has only just established itself in the Bundestag on an anti-establishment party program and it has been isolated by the mainstream parties, which currently refuse to co-operate with it. Just before the 2017 Federal Election, Chancellor Angela Merkel used a speech in the outgoing Bundestag to call on all of the mainstream parties to unite against the AfD, which she described as 'not just a challenge to the CDU … it is a challenge for all of us gathered in this house'.[7] Given the obvious electoral appeal of the AfD's anti-system stance with its core voters, as well as the deliberate isolation of the party within the Bundestag, this article argues that for reasons of expedience as well as strategy the AfD's current activities are almost entirely devoted to vote seeking.

The rest of the article proceeds as follows. In the next section, I provide a theoretical and empirical analysis of the coalition formation process in Germany after the 2017 Federal Election and show that the AfD's pariah status within the Bundestag meant it was unable to be office seeking even if that had a strategic objective. Following that, I examine the impact of the AfD on Bundestag business and argue that its provocative tone in parliamentary debate is designed to enhance its electoral offer and that its role in parliamentary committees and in the Bundestag executive are currently secondary to this goal. I conclude by arguing that it remains to be seen whether the AfD will eventually overplay its parliamentary hand, whether the other mainstream political parties will be able to forge and maintain a coherent strategy to contain the AfD, or if access to Federal funding will eventually professionalize the party and moderate its current strategy of provocation.

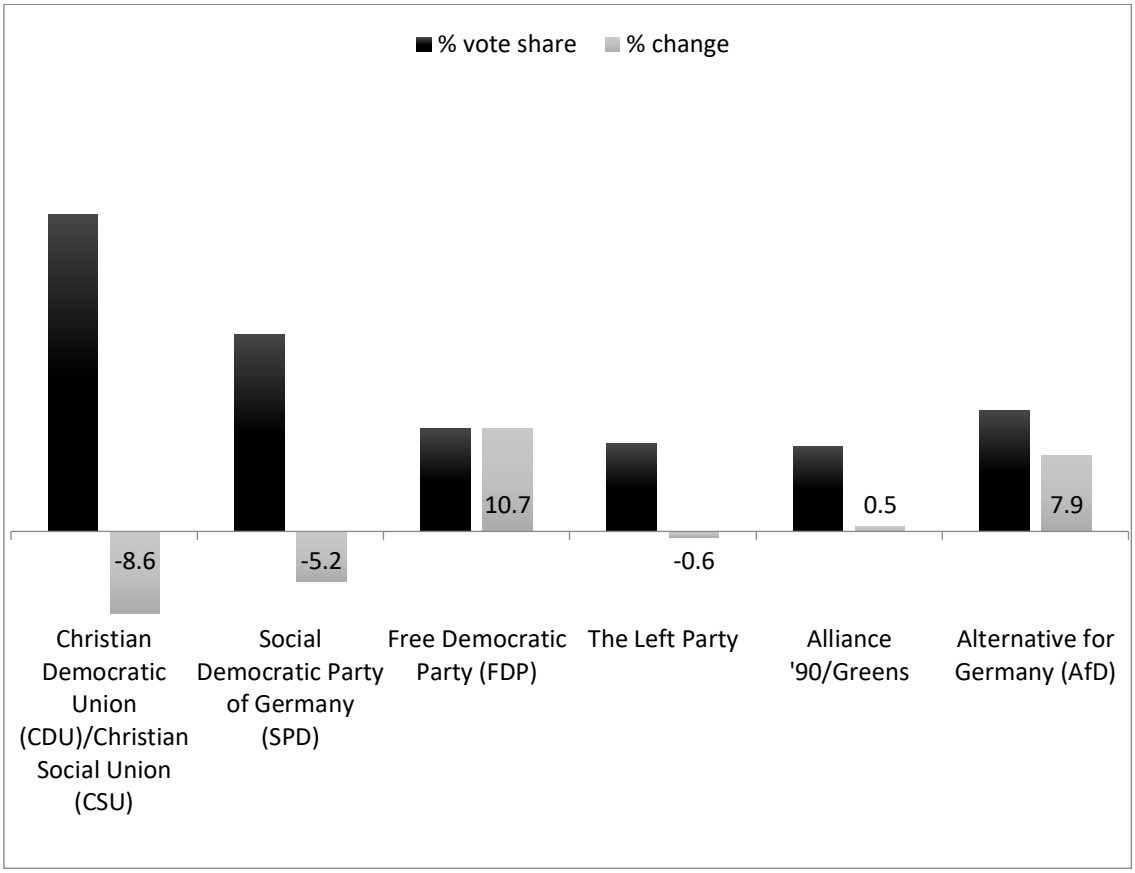
THE 2017 FEDERAL ELECTIONS

The results of the election are provided in Figure 1, below. The Christian Democratic Union/Christian Social Union (CDU/CSU) emerged as the largest party for the fourth successive Federal Election, with 33 percent of the vote. The CDU/CSU's Social Democratic Party (SPD) competitor was only able to poll a little more than 20 per cent of the vote: its lowest electoral share since the foundation of the Federal Republic in

[7] J. Delcker, 'Angela Merkel Urges German Unity Against AfD', *Politico*, 2017. Accessed at: https://www.politico.eu/article/angela-merkel-urges-german-unity-against-afd-open-door-policy-on-refugees/

1949. Support for the established smaller parties—the liberal Free Democratic Party (FDP), the Left Party (the successor to the ruling party of the former East Germany) and the centre-left ecological Alliance '90/The Greens—remained little changed from the previous election, with them winning 10.7, 9.2, and 8.9 percent of the vote respectively.

Figure 1. The 2017 German Federal Election: Parties' Percentage Vote Shares and Percentage Change from the 2013 Federal Election



Source: Forschungsgruppe Wahlen, 2017. Accessed at: http://www.forschungsgruppe.de/Startseite/

Germany's Mixed Member Proportional (MMP) electoral system sets an electoral hurdle of five per cent of the popular vote or three directly elected seats before a political party can win seats in the Bundestag.[8] German MMP, which was the model for New Zealand's electoral system, is part of a suite of constitutional arrangements, procedural rules, norms, and societal relations that the British political scientist Gordon Smith identified as Germany's 'efficient secret'. This efficient secret drove a 'politics of centrality' that encouraged ideological moderation and political consensus, shutting-out flanking parties of the left or right and cultivating long term policy making. For Smith, these institutional features and policy outcomes contrasted with those found in more adversarial political systems based on the Westminster model[9]. Coming after the AfD narrowly failed to enter the Bundestag in 2013, the party's unexpectedly strong performance in the 2017 Federal Election signaled at least a weakening of this politics of centrality and the emergence of a more confrontational style of politics in Germany.

Since German unification in 1990, a number of challenger parties from the populist or extreme right of politics,[10] including the Republicans[11] and the Party for a Rule of Law Offensive (the so-called 'Schill Party'),[12] have tried to open up a viable political space to the right of the CDU/CSU. Some of these parties enjoyed limited success at the level of state politics but only the AfD has succeeded in breaking thorough at the Federal level. In addition, the AfD is a force in state politics—particularly in the states of the former East Germany—and enjoyed success in elections to the European

[8] Germany's system of MMP was established in 1956 and, under it, the Bundestag is composed of roughly 50 per cent directly elected seats from single-seat districts and 50 per cent seats allocated proportionally through state-level lists. Each voter has two votes. The first is the primary vote for the constituency candidate and is regarded as the main vote. The second vote is cast for party lists. As noted, only parties with three or more directly elected seats or five per cent or more of second votes are eligible for Bundestag seats. The Federal Election Commission determines the number of seats received by each party using the second votes, currently distributed using the Sainte Laguë method in proportion to the total number of second votes polled nationally. This yielded 709 seats after the 2017 election, including 111 'overhang' seats.

[9] G. Smith, *Democracy in Western Germany* (3rd edition), Portsmouth, Heinemann, 1986.

[10] W.D. Chapin, 'Explaining the Electoral Success of the New Right: The German Case', *West European Politics*, 20:2 1997: 53-72.

[11] Thomas Saalfeld, 'The Politics of National-Populism: Ideology and Policies of the German Republikaner Party', *German Politics* 2(2) 2007: 177-199.

[12] F. Decker and F. Hartleb, 'Populismus auf schwierigem Terrain. Die rechten und linken Herausfordererparteien in der Bundesrepublik', in F. Decker F. (ed.) *Populismus*. Berlin, VS Verlag für Sozialwissenschaften, 2006.

Parliament. The AfD has advanced at all levels of German politics since its inception in 2012. This progress has generated interest from academic researchers.[13] Scholars have noted the party's steady radicalization, from an eccentric mix of neo-liberal, ordo-liberal, and populist critiques of Chancellor Angela Merkel's centrist politics and Germany's role in the Eurozone, towards an ideological profile consistent with that of a typical European right wing populist party.[14] This harder edge, with its sustained emphasis on opposition to immigration and hostility to Islam, allowed the AfD to communicate a clear political message[15] to a distinct set of German voters and erstwhile non-voters. In the language of Müller and Strøm's typology, this was a highly effective vote-seeking strategy and the AfD became the third force in the Bundestag because—and not despite of—the party's increased radicalism.[16]

GOVERNMENT FORMATION

What worked as a vote-winning strategy was not conducive to office seeking, as none of the established political parties were willing to co-operate with they considered to be an openly racist and anti-European party. However, to state an argument that runs throughout this article, at present the AfD is not an office seeking party. It has no intention of being co-opted into the establishment consensus and attempts to isolate the party only play into its narrative of being the persecuted outsiders speaking truth to power.

[13] See A. Baluch, 'The Dynamics of Euroscepticism in Germany', in B. Leruth, N. Startin and S. Usherwood (eds.) *The Routledge Handbook of Euroscepticism*, Abingdon, Routledge, 2018; R. Schmitt-Beck, 'The Alternative für Deutschland in the Electorate: Between Single-Issue and Right-Wing Populist Party', *German Politics*, 26(1) 2017: 124-148; F. Decker, 'The Alternative for Germany: Factors Behind its Emergence and Profile of a New Right-Wing Populist Party', *German Politics and Society* 34(2) 2016: 1–16.

[14] J. Kette, 'Populism, Euro-Scepticism, and Euro-Populism in the Party Systems of Germany, the United Kingdom and France: First Results on the Basis of the Analysis of the AFD-Basic-Program'. Paper given to the 6th ECPR Graduate Student Conference, Tartu, Estonia, 10-13 July 2016.

[15] The AfD used the Texas-based Harris Media agency, known for earlier work with UKIP in Britain and the Trump campaign in the USA, in its hard-hitting electoral campaign.

[16] Lees, 'The Alternative for Germany'.

Table 1. Percentage Vote Shares/Number of Seats in the German Bundestag Since 1990

	PDS/ Left	A'90/ Grns	(SPD)	CDU/ CSU	FDP	AfD	(Other)	Total
1990	2.4/17	5.0/8	33.5/239	43.8/319	11.0/79	---	(4.3/00)	100/662
1994	4.4/30	7.3/49	36.4/252	41.4/294	6.9/47	---	(3.6/00)	100/672
1998	5.1/36	6.7/47	40.9/298	35.1/245	6.2/43	---	(6.0/00)	100/669
2002	4.0/2	8.6/55	38.5/251	38.5/248	7.4/47	---	(3.0/00)	100/603
2005	8.7/54	8.1/51	34.2/222	35.2/226	9.8/61	---	(4.0/00)	100/614
2009	11.9/76	10.7/68	23.0/146	33.8/239	14.6/93	---	(6.0/00)	100/622
2013	8.6/64	8.4/63	25.7/193	41.5/311	4.8/00	4.7/00	(6.3/00)	100/631
2017	9.2/69	8.9/67	20.5/153	32.9/246	10.7/80	12.6/94	(5.0/00)	100/709

Source: Wahlen, Wahlrecht und Wahlsysteme. Accessed at: http://www.wahlrecht.de
PDS/Left: Party of Democratic Socialism/The Left Party
A'90/Grns: Alliance '90/The Greens
SPD: Social Democratic Party of Germany
CDU/CSU: Christian Democratic Union/Christian Social Union
FDP: Free Democratic Party
AfD: Alternative for Germany

The isolation of the AfD also served further to complicate a government formation process that for many years had been made difficult by ongoing party system change and fragmentation. Table 1 sets out the percentage vote shares and numbers of seats won by political parties in the eight Bundestag elections since German Unification in 1990. As we can see from the data, the two big German catch-all parties, the CDU/CSU and the SPD, both did badly in the 2017 Federal Election. This was consistent with a longer-term trend of steady electoral decline that – with one or two peaks and troughs over the period--goes back to the 1980s.[17] Nevertheless, as is the

[17] C. Lees, 'The German Party System(s) in 2005 – a return to *Volkspartei* dominance', in C. Clemens and T. Saalfeld (eds.), special issue of *German Politics* on 2005 German Federal Elections, 15(4) 2006: 361-375.

norm in the Federal Republic, the larger of the two big catch-all parties is considered the *formateur* at the start of coalition negotiations, with a right to try to form a majority coalition capable of governing. After the 2017 Federal Election, this was Angela Merkel's CDU/CSU, with 32.9 percent of the vote and 246 Bundestag seats.

The CDU/CSU needed to build a working majority of at least 355 of the 309 seats in the Bundestag[18] but the AfD's 94 parliamentary seats, combined with its pariah status, had fundamentally changed the distribution of voting power within the Bundestag and the subsequent dynamics of coalition building.

In Tables 2 and 3, I present data on party system fragmentation, party strength and possible coalitions in the Bundestag since 1990. Table 2 uses the Laakso Taagepera Index of the 'effective number' of parties[19] and the alternative Herfindal-Hirschman Index to show the number of effective parties in the Bundestag over time. Broadly speaking, the effective number of parties is the number of parties in a legislature that are actually relevant to the process of government formation.

Table 3 shows the 'voting power' (VP) of each party in the Bundestag, using adjusted Banzhaf scores[20], as well as the number of 'coalitions with swing'. Voting power measures the extent of each party's relevance for forming a majority in the Bundestag (the higher the number, the more power). The number of 'coalitions with swing' denotes the total number of potential coalitions with a bare majority that could be formed or dissolved by the joining or defection of just one or more parties[21].

[18] German MMP was the model for New Zealand's MMP system but the underlying norms and procedures of government formation are very different in the two countries. For instance, New Zealand went to the polls the day before the 2017 German Federal Election. Following the New Zealand election, National was the largest party and had effectively 'won' the election by achieving a strong plurality of votes. However, Labour and New Zealand First worked together with the Greens to exclude the largest party from power. In Germany, where the norm of majority government led by the largest party is relatively strong, such an outcome would have been hard to defend politically. In New Zealand, where MMP was introduced in part as an antidote to the perceived excesses of strong 'responsible' government under the previous First Past The Post electoral system, excluding the largest party from government was controversial but defensible.

[19] M. Laakso and R. Taagepera, '"Effective" Number of Parties: A Measure with Application to West Europe', *Comparative Political Studies* 12(1) 1979: 3-27. In this index, the higher the number, the more fragmentation exists.

[20] See I. McLean, A. McMillan and D. Leech, 'Duverger's Law, Penrose's Power Index and the Unity of the UK', *Political Studies* 53(2) 2005: 457-76.

[21] O.C. Herfindahl, 'Concentration in the US Steel Industry'. Unpublished doctoral thesis. (Columbia University, 1950); A.O. Hirschman, 'The Paternity of an Index', *American Economic Review* 54(5) 1960: 761-2. This index was

As a rule of thumb, the greater the number of possible coalitions with swing in a legislature, the higher the degree of party system fragmentation as well and, with it, an increased potential for government instability.

Table 2. Table 2. Party System Fragmentation in the German Bundestag, 1990-2017

Election	*N* of Parties/Party Groups	Laakso-Taagepera	Herfindal-Hirschman
1990	5	2.6484	0.3776
1994	5	2.9050	0.3442
1998	5	2.9028	0.3445
2002	5	2.8025	0.3568
2005	5	3.4398	0.2907
2009	5	3.9686	0.2520
2013	4	2.8033	0.3567
2017	6	4.6368	0.2157
Mean	5	3.2634	0.3608

Source: data from http://www.wahlrecht.de

originally set up to measure the degree of monopoly existing in commodity markets, where 1.000 is a complete monopoly. Therefore, the lower the number, the more fragmentation exists.

Table 3. Voting Power (VP) and Coalitions with Swing in the German Bundestag, 1990-2017

Election	Party of Democratic Socialism/ The Left Party	Alliance '90/The Greens	Social Democratic Party	Christian Democratic Union/ Christian Social Union	Free Democratic Party	Alternative for Germany	Coalitions with Swing
1990	0.1667	0	0.1667	0.5	0.1667	0	14
1994	0	0.1667	0.1667	0.5	0.1667	0	14
1998	0	0.1667	0.5	0.1667	0.1667	0	14
2002	0	0.3333	0.3333	0.3333	0	0	12
2005	0.25	0.25	0.5	0.5	0.25	0	12
2009	0.1667	0	0.1667	0.5	0.1667	0	14
2013	0.1667	0.1667	0.1667	0.5	0	0	7
2017	0.1071	0.1071	0.1786	0.3929	0.1071	0.1071	27

Source: data from http://www.wahlrecht.de; coalitions calculated using the Voting Power and Power Index Website, Antti Pajala, University of Turku, Finland: http://powerslave.val.utu.fi/

Tables 2 and 3 show a relatively stable level of system fragmentation from 1990 until the 2013 Federal Election, when the failure of the FDP to scale the 5 per cent hurdle reduced the number of party groups to 4, the effective number of parties to 2.8 and halved the number of coalitions with swing to 7. Behind this period of apparent stability, however, post-Unification Germany saw the emergence of a much more fluid party system in which, as already noted, the combined vote share for the two big catch-all parties—and the SPD's vote in particular—declined steadily. However, for a period this decline created a paradox, in which we saw a greater concentration of voting power around the catch-all parties, despite their reduced vote share. The data show that one of the two catch-all parties enjoyed a VP score of 0.5 (effectively a

veto-playing position, meaning it was needed for any possible successful coalition) in six out of eight elections. This meant that none of the smaller parties was strong enough to act as the 'kingmaker' in the government formation process.[22]

The AfD's emergence as the third force in the Bundestag in 2017—along with the FDP's return to the Federal parliament after four years—revealed the extent of the fluidity underpinning German party politics. The number of party groups rose to 6, the effective number of parties almost doubled to 4.6 and the number of coalitions with swing nearly quadrupled from 7 to 27. At the same time, neither of the two catch-all parties enjoyed the effective veto power that had been the case following the majority of the previous elections since Unification. In short, the disruption that the AfD and to a lesser extent a resurgent FDP had generated within the Bundestag impacted at first on the degree of effectiveness of other parties within the coalition game. Even if it had been an acceptable coalition partner, the AfD did not enjoy enough voting power to assume the kingmaker role. What the AfD's presence in the Bundestag did do, however, was make it even more unlikely that any other smaller party could become kingmaker.

Obviously, although the number of mathematically possible coalitions following the 2017 Federal Election had risen to 27, far fewer coalition options than that were *politically* feasible. We have touched upon the exclusion of the AfD, but there other possible options that were ideologically problematic: not least for Angela Merkel's CDU/CSU as *formateuer*. Table 4 sets out the main coalition options available. The table is based on a 'median legislator'[23] analysis of the Bundestag, which assumes that parties' coalition preferences are limited to coalitions that are ideologically connected, in this case along the Left-Right ideological dimension, and that ideally they will be limited in their ideological range.[24]

[22] The 'kingmaker' function was played by the FDP in the 1960s and 1970s as it held the balance of power between the CDU/CSU and SPD in what was known as a 'triangular' party system. This triangular system broke down in the 1980s and 1990s with the entry of the Greens and later the PDS (subsequently the Left party) into Federal politics. See F. Pappi, 'The West German Party System', *West European Politics* 7 1984: 7-26; also C. Lees, *Party Politics in Germany - A Comparative Politics Approach*, Basingstoke, Palgrave, 2005.

[23] R. Axelrod, *Conflict of interest*, Chicago, Markham, 1970.

[24] de Swaan, A. (1973) *Coalition Theories And Cabinet Formation*. Amsterdam; Oxford: Elsevier.

Table 4. Structural Attributes and Coalition Options: A Left-Right Median Legislator Analysis of the 2017 German Bundestag Election*

Structural attribute		The Left Party	Alliance '90/ Greens	Social Democratic Party of Germany (SPD)	Christian Democratic Union (CDU)/ Christian Social Union (CSU)	Free Democratic Party (FDP)	Alternative for Germany (AfD)
% Vote		9.2	8.9	20.5	32.9	10.7	12.6
Seats		69	67	153	246	80	94
Total Seats	(709)						
Decision Rule	(355)						
Minimal Winner	(369)						
Minimal Connected Winner	(399)						
Mparty							
MPartyK							

* Parties presented from Left to Right on an ideological spectrum. Shaded areas represent possible coalitions based on ideological congruence.

Table 4 demonstrates that the 'decision rule' in the 709 seat Bundestag, at which point a coalition can command a legislative majority of 50 percent plus 1 votes, is 355. The smallest mathematically possible coalition with a majority—or 'minimal winning' coalition[25]—would have been made up of the SPD, Left Party, Alliance '90/Greens and the FDP. This minimal winner would have commanded 369 votes but it would not have been completely ideologically connected (the FDP is significantly to the right of the other parties listed and sits to the right of the CDU/CSU) and it would have had a large ideological range. If it were ever to have formed, such an arrangement would have presented considerable problems in terms of policy

[25] Riker, W. H. (1962) *The Theory of Political Coalitions*. New Haven: Yale University Press.

formulation and agreement, ministerial portfolio allocation, and day-to-day political management. By contrast, the 'minimal connected winner' is the smallest possible coalition that is adjacent along the Left-Right axis and, in this case, that would have been a Grand Coalition between the two big catch-all parties (CDU/CSU and SPD), commanding 399 votes.

Median legislator analysis gets its name because one of its core assumptions is that the party that controls the median legislator (the 'Mparty') in any potential coalition is decisive because it blocks the ideological axis along which any connected winner forms. If a party is Mparty and, crucially as in Germany, a majority coalition is required, then we can predict that it will be included in the winning coalition. If a party controls the median legislator within the winning coalition then it is 'MpartyK' and is decisive in determining the coalition's potential composition, program, and stability. As Table 4 demonstrates, in a Grand Coalition arrangement, Angela Merkel's CDU/CSU would be both Mparty and MpartyK. In theory, therefore, it would have held all of the cards.

There was just one problem with this analysis: the Grand Coalition option appeared to be unavailable following the SPD leadership's decision, in the immediate hours after the election, to go into opposition in order to rebuild its support and refresh its political offer to voters. This meant that, for the first months following the Federal Election, Germany's second largest party was not available for coalition building. In practical terms, this left the option of the so-called 'Jamaica' coalition between the CDU/CSU, FDP and Greens (so named because of the three parties' respective colours of black, yellow, and green). As in the Grand Coalition, the CDU/CSU would have been both Mparty--and therefore *formateur* – and also MpartyK. In terms of our theoretical assumptions, therefore, we would have expected this option to be reasonably attractive to the CDU/CSU.

Not surprisingly, then, the first two months following the 2017 Federal Election were dominated by talks between the CDU/CSU, Greens, and FDP. Interestingly, though, it was only towards the end of the process when the talks were in some difficulty that Angela Merkel and other senior figures became fully engaged. This raises the possibility that Merkel was playing a long game and waiting for pressure to build on the SPD to re-consider its decision to sit out coalition negotiations. Eventually, the FDP's leader Christian Lindner announced that his party was withdrawing from coalition talks and, in January 2018, the SPD announced that it was willing to re-enter coalition negotiations. In March 2018, the SPD agreed to enter another Grand Coalition as junior partner to the CDU/CSU. This made the AfD – as the third largest party--the official opposition in the Bundestag.

THE AFD IN THE BUNDESTAG

There are 778 members of the Germany's bicameral parliament, made up of the 709 members of the Bundestag and 69 delegates to the Bundesrat. The Bundesrat is made up of State Premiers and Cabinet Ministers from Germany's 16 Federal states, which means the Bundestag is the only directly elected Federal organ. Thus, whilst the Bundesrat has considerable power, including the right to introduce, deliberate, pass, and even veto legislation, in the eyes of the public at least the Bundestag has the greater democratic legitimacy.

This combined total of 778 members is much larger than the recognised international average size of parliament (250.63), even if we take into account the greater size of Germany's population (just under 83 million) compared with the international average population size for democracies (around 44 million).[26] In particular, the Bundestag is much bigger than the average size for a first or lower chamber of 209.88.[27] It will be recalled from Table 2 that the average level of fragmentation in the Bundestag since 1990 as measured by the Herfindal-Hirschman Index[28] is 0.3608, which is around the international average of 0.37.[29] However, fragmentation in the current Bundestag has increased to 0.2157, which is significantly higher than the international average.[30] In comparative politics terms, the current Bundestag remains larger than most parliaments and has also become more fragmented.

These two observations about size and fragmentation have important analytical implications. In terms of size, rational choice modelling of parliamentary rules predicts that greater problems of uncertainty mean that larger parliamentary chambers require more restrictive rules of procedure, under which individual members will enjoy far less autonomy, than is the case with smaller chambers[31]. To a certain extent, these predictions are supported by comparative analysis of real-world

[26] UNDP Global Parliamentary Report 2012.Accessed at: http://archive.ipu.org/gpr-e/media/index.htm

[27] UNDP Global Parliamentary Report 2012.

[28] Herfindahl, 'Concentration'; Hirschman, 'Paternity of an index'.

[29] UNDP Global Parliamentary Report 2012.

[30] Remembering that the Herfindahl-Hirschman index goes down as fragmentation increases.

[31] R. Carroll, G.W. Cox and M. Pachón, 'How Parties Create Electoral Democracy, Chapter2', *Legislative Studies Quarterly* 31(2) 2006: 153-74.; C.J. Carruba and C. Volden, 'Coalition Politics and Logrolling in Legislative Institutions', *American Journal of Political Science* 44(2) 2000: 261-77.

legislatures,[32] although more research is required to determine how and to what extent these assumptions apply across cases.[33] In terms of increased legislative fragmentation, rational choice analyses provide the theoretical insight that as the number of players in a majority-based voting game increases, the potential for 'cycling'—the phenomenon in which any 'winning' majority solution can be voted down by an alternative—increases exponentially and with it the need to impose an arbitrary solution to the voting game.[34]. In addition, empirical study demonstrates that the imperative for arbitrary solutions is amplified when there are increased levels of ideological conflict within the chamber. Such arbitrary solutions include changes to decision rules about the openness of plenary sessions and roll call votes, as well as the increased use of the parliamentary committee system as means of agenda setting[35] and uncertainty reduction.[36]

As the title of this article suggests, this is an initial analysis. It is too soon to observe changes to formal procedures in the Bundestag as a result of the greater degree of ideological conflict introduced into the chamber by the AfD, although, as is discussed below, the mainstream political parties have pushed the limits of existing practices in order to restrict the AfD's impact on parliamentary business. However, we do find a degree of restriction in terms of rules of procedure and individual autonomy in the Bundestag, as might be expected in a relatively large parliamentary chamber. Thus, the Bundestag's key organising unit is not the individual Member of Parliament, but rather the parliamentary group or *Fraktion*, made up of at least five per cent of legislators.

---

[32] See A. Taylor, 'Size, Power, and Electoral Systems: Exogenous Determinants of Legislative Procedural Choice', *Legislative Studies Quarterly* 31(3) 2006: 323-45.

[33] S. Hug, S. Wegmann and R. Wüest, 'Parliamentary Voting Procedures in Comparison', *West European Politics* 38(5) 2015: 940-68.

[34] K.J. Arrow, *Social Choice and Individual Values*, New York, Wiley, 1951; K. May, 'A Set of Independent, Necessary, and Sufficient Conditions for Simple Majority Decisions', *Econometrica* 20 1952: 680–684; L. Ubeda, 'Neutrality in Arrow and Other Impossibility Theorems', *Economic Theory* 23(1) 2003: 195–204.

[35] M. Koß, 'The Origins of Parliamentary Agenda Control: A Comparative Process Tracing Analysis', *West European Politics* 38(5) 2015: 1062-85.

[36] L. Curini and F. Zucchini,'Legislative Committees as Uncertainty Reduction Devices in Multiparty Parliamentary Democracies', *West European Politics* 38(5) 2015: 1042-61; for a theoretical explanation, see B.R. Weingast, 'A Rational Choice Perspective on Congressional Norms', *American Journal of Political Science*, 23(2) 1979: 245-62.

Parliamentary groups – rather than individual legislators – are the main recipients of Federal funding for legislative and administrative business and possess a common and formally codified organisational structure. In addition, the size of each parliamentary group determines the amount of time allocated to its members in parliamentary sessions, the size of its representation on legislative committees and the number of committee chairs and deputy chairs it holds, as well as the extent of its representation on the Bundestag's executive bodies. Let us look at each of these features in turn.

Parliamentary sessions

The AfD's 94 seats make it the third largest *Fraktion* in the Bundestag. It has two parliamentary party leaders, Alice Weidel and Alexander Gauland, five deputy leaders, and four parliamentary managers (*Parliamentarische Geschäftsführer*). The organisation of the *Fraktion* is centred around a number of working groups that shadow the Bundestag's Parliamentary Committee structure (see Table 5 below). The working groups provide an opportunity for AfD legislators to caucus their positions on key issues of current legislation and refer back to the main *Fraktion* before the start of the week's parliamentary business. Parliamentary funding ensures that the parliamentary groups and their working groups enjoy a degree of policy-relevant capacity that is superior to, say, a typical party room in the Australian Parliament. The resources endowed in and delegated to the parliamentary groups mean that, even for a relatively new and explicitly anti-system party like the AfD, the party's policy positions are quite developed and relatively stable compared with an equivalent Australian party such as One Nation.

The AfD becoming the official opposition party in the Bundestag was another shock to the political establishment, not least because both the content and tone of the AfD's *Fraktion* was antithetical to established parliamentary practice. In terms of content, I have described elsewhere what I call the 'levers' by which the AfD tries to prise apart the scaffolding of the German political settlement. The first is a 'narrative lever', through which potentially disruptive propositions are smuggled into the mainstream political discourse. The second is a 'procedural lever', which casts doubt upon the

efficacy of existing political institutions and pushes for political alternatives that empower populist discourses.[37]

The AfD's preparedness to use these two levers was clearly apparent when, just days after the 2017 Federal Election, the new parliamentary group published its key priorities for the coming legislative period. Members of the AfD *Fraktion* had three priorities. First, they wished to stop what they called Germany's 'migration chaos', a reference to Merkel's 'open door' policy during the 2015 migration crisis (which was subsequently tightened up as voter unease became apparent). Second, they intended to campaign to prevent any German support for French President Emmanuel Macron's plans to further integrate the EU, which they labelled a 'Declaration of World Government' (*Weltregierungserklärung*). Finally, they argued for the introduction of more direct democracy in Germany with regular referendums to consult with 'the people'.[38] The first two of these proposals were part of the narrative lever: clear objections to key planks of German statecraft as it has evolved over time, in particular the cross-party commitment to European integration and the strategic alliance with France that dates back to the late 1950s. The third proposition, on the other hand, constituted the AfD's procedural lever: intended to de-legitimise the 'politics of centrality'[39] discussed earlier. For the AfD, an article of faith in their populist political offer is the belief that this politics of centrality is not Germany's 'efficient secret' but rather a brake on popular sovereignty and a negative resource in the ongoing and antagonistic relationship between the people and the elites.[40] As such, it had to be undermined and maligned at every opportunity. This strategy of delegitimation included a proposition to change the statutory basis of Germany's international broadcaster (and alleged mouthpiece of the German elite) the *Deutsche Welle*.[41]

[37] C. Lees, 'The Alternative for Germany: The Rise of Right-Wing Populism in the Heart of Europe', *Politics* (forthcoming, 2018). DOI: http://journals.sagepub.com/eprint/NkXgkYYR5SvZaVAFAGda/full

[38] https://www.afdbundestag.de/wp-content/uploads/sites/156/2018/04/AfD_BTF_Flyer_Resolutionen_RL.pdf

[39] Smith, *Democracy in Western Germany*.

[40] For more on the (still contested) definitions of populism, see *inter alia* C. Mudde, 'The Populist Zeitgeist', *Government and Opposition* 39(4) 2004: 541-63; B. Stanley, 'The Thin Ideology of Populism', in *Journal of Political Ideologies*, 13(1) 2008: 95-110.

[41] 'Populist AfD slammed in Bundestag debate on Deutsche Welle's future'. *Deutsche Welle* online. Accessed at: http://www.dw.com/en/populist-afd-slammed-in-bundestag-debate-on-deutsche-welles-future/a-43476586

For many German politicians, it appears that the AfD's strategy extends beyond undermining the German political settlement to encompass attacking parliamentary democracy itself. In April 2018, the *Financial Times* reported that Alliance '90/Greens MP Franziska Brantner had described the AfD as a 'Trojan Horse …. trying to dismantle our democracy'. She went on to claim that the Bundestag's 'atmosphere has become more tense, more aggressive, more menacing'.[42] This aggressive tone was established by joint parliamentary leader Alexander Gauland on election night, when he declared that the AfD would 'hunt (Merkel) down' ('wir werden sie jagen'). Months later, the first general debate of the new legislative period, which by custom is on the national budget and opened by the main opposition party, saw his co-leader Alice Weidel tear into the re-formed Grand Coalition's financial plans. Weidel accused the Federal Government of hiding 30 billion Euros of EU payments in the national accounts and in effect 'throwing money out of the window with both hands'. Weidel then went on to voice a number of racial and anti-immigrant sentiments before concluding 'this country is being governed by idiots'.[43]

Such language is rarely heard in the Bundestag and is part of a wider strategy of procedural disruption and open contempt for other parliamentarians, often using sustained interruptions, laughter, and co-ordinated applause.[44] This behaviour has been interpreted by some observers, such as the historian Volker Weiss, as a deliberate attempt to provoke and, in doing so, to widen the range of acceptable discourse towards the right wing of German politics.[45] One does not have to subscribe to the 'Overton window' theory of political discourse to accept that this is quite an intuitive explanation; however, the AfD's abrasive tone has also provoked a degree of push back from mainstream politicians across the partisan divide. On the one hand, this pushback also plays into the hands of the AfD, in that it allows the party to portray itself as the victim of the Bundestag elite, articulating the populist 'us and

[42] 'AfD turns up the heat in the Bundestag'. *Financial Times* online. https://www.ft.com/content/5a9d5fc0-2d17-11e8-9b4b-bc4b9f08f381

[43] 'Germany's Angela Merkel ignores xenophobic attack in Bundestag debate'. *Deutsche Welle*, 1 June 2018. Accessed at: http://www.dw.com/en/germanys-angela-merkel-ignores-xenophobic-attack-in-bundestag-debate/a-43801414

[44] 'Die AfD in Bundestag. Das gespaltene Parlament'. *Süddeutsche Zeitung* online. Accessed at: https://projekte.sueddeutsche.de/artikel/politik/die-afd-im-bundestag-e362724/

[45] 'AfD in Bundestag: die method Provokation', *Der Taggesschau* online. Accessed at: https://www.tagesschau.de/inland/afd-bilanz-sechs-monate-101.html

them' dynamic discussed earlier. Bernd Baumann, the AfD's chief whip, has complained of 'defamation and demonisation' by other parties.[46] At the same time, however, the newly abrasive tone in the current Bundestag has injected life into what had become a moribund chamber in recent years. As Ulf Poschardt, Political Editor of the heavyweight *Die Zeit*, observed, 'the AfD has shaken the Bundestag awake'.[47]

Legislative committees, chairs and deputy chairs

We now move on to distribution of membership of legislative committees, as well as the chairs and deputy chairs of committees. As already noted, a parliament's legislative committee system is a key means of agenda setting and uncertainty reduction.[48] In order to achieve this, legislative committees often work to a 'norm of universalism'[49] in which committee members seek unanimity, or at least a broad consensus that commands a super-majority. In addition, there is also often a strong norm that committee members in their main role as members of parliament will do little to interfere with or overturn the legislative proposals of other committees when they come to the floor of the chamber.[50]

All of this is intended to facilitate the efficient and credible development of legislation but, as already discussed, the AfD is an explicitly vote seeking party that mobilises around a populist anti-system narrative. It is not an office-seeking party—at least not yet—and in as far as it is policy seeking, its interest in the legislative process is primarily performative. This does not mean that the AfD has no influence over the policy making process. Indeed, its appeal to significant sections of the electorate—including erstwhile non-voters[51]—has compelled competitors on the right and left of German politics to shift their positions in an attempt to reposition themselves in

[46] 'AfD turns up the heat in the Bundestag'.

[47] **'**Die AfD hat den Bundestag wachgerüttelt'. Die Welt online. Accessed at: https://www.welt.de/debatte/article173912272/Debattenkultur-Die-AfD-hat-den-Bundestag-wachgeruettelt.html

[48] Koß, 'The Origins of Parliamentary Agenda Control'; Curini and Zucchini,'Legislative Committees as Uncertainty Reduction Devices'.

[49] Weingast, 'A Rational Choice Perspective on Congressional Norms'.

[50] M. Fiorina, 'Universalism, Reciprocity, and Distributive Policy Making in Majority Rule Institutions', in J.P. Crecine (ed.) *Research in Public Policy Analysis and Management*, Greenwood, JAI, 1981: 197-221.

[51] Forschungsgruppe Wahlen, 'Wahlbarometer' datasets, 2017. Accessed at: http://www.forschungsgruppe.de/Wahlen/Grafiken_zu_aktuellen_Wahlen/Wahlen_2017/Bundestagswahl_2017/

response. For instance, the conservative CSU has responded to the electoral threat from the AfD in Bavaria by distancing itself from Merkel's relatively liberal policies on immigration and open borders.[52] At the same time, the socialist faction within the Left Party, which competes with the AfD amongst blue-collar voters in the states of the former East Germany, has also reacted to the AfD threat by arguing that the Left Party should toughen its stance on immigration.[53] Nevertheless, despite this real but indirect impact on the policy agenda in Germany, the AfD has little interest in the efficiency or credibility of the legislative process. For the time being, it uses its position as the official opposition to highlight inefficiency and undermine the credibility of 'politics as usual'. In so far as the AfD intends to hold the Executive to account, it is in order to further expose and accentuate the antagonistic relationship between the elites and the people. That this might also contribute to the good governance of German democracy is a secondary consideration.

It is not surprising, therefore, that the mainstream parties sought to limit the AfD's impact on the Bundestag's legislative committee system. Table 5 sets out the AfD's current participation in the Bundestag legislative committee structure, including its membership—or otherwise—of the Main Committee and the other scrutinizing bodies and oversight panels. As the Table demonstrates, all of the political parties in the Bundestag are represented on the committees but the lion's share of chairs and deputy chairs are allocated to the CDU/CSU and SPD, particularly in key policy areas such as European Union Affairs, Defence, and Foreign Affairs. This is consistent with what we know about the use of committee chairs in the management of coalition government, where committee chairs are deployed in order to either constrain ministerial autonomy and/or mitigate agency loss to delegated ministerial portfolios.[54]

[52] https://www.politico.eu/article/horst-seehofer-takes-germany-to-the-brink-angela-merkel-migration-fight/

[53] https://www.economist.com/europe/2018/08/11/what-the-far-left-and-right-have-in-common-in-germany-and-elsewhere

[54] L.W. Martin and G. Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance*, Oxford, Oxford University Press, 2011.

Table 5. AfD Participation in Bundestag Legislative Committee Structure (Including Main Committee and Further Bodies)

Committee	Size	Number of AfD members on Committee	AfD members as % of Committee	Chair affiliation	Deputy-Chair affiliation
European Union Affairs	39	5	12.8	CDU/CSU	SPD
Budget	44	**6**	**13.6**	**AfD**	SPD
Building, Housing, Urban Development and Local Government	24	3	12.5	CDU/CSU	---
Culture and Media Affairs	18	2	11.1	SPD	CDU/CSU
Defence	36	5	13.8	SPD	CDU/CSU
Digital Agenda	21	3	14.3	FDP	CDU/CSU
Economic Affairs and Energy	49	6	12.2	Left party	CDU/CSU
Economic Co-operation and Development	24	3	12.5	CDU/CSU	Alliance'90/Greens
Education, Research and Technology Assessment	43	5	11.6	SPD	CDU/CSU
Environment, Nature Conservation and Nuclear Safety	39	5	12.8	Alliance'90/Greens	SPD
Family Affairs, Senior Citizens, Women and Youth	40	5	12.5	Left party	Alliance'90/Greens
Finance	41	**5**	**12.2**	FDP	**AfD**
Food and Agriculture	38	5	13.2	CDU/CSU	FDP
Foreign Affairs	45	6	13.3	CDU/CSU	SPD
Health	41	5	12.2	CDU/CSU	Left party
Human Rights and Humanitarian Aid	17	**2**	11.9	FDP	**AfD**
Internal Affairs and Community	46	**6**	13.0	CDU/CSU	**AfD**
Labour and Social Affairs	46	6	13.0	SPD	Left party
Legal Affairs and Consumer Protection	43	**6**	13.9	**AfD**	CDU/CSU

Table 5 (contd.)

Committee	Size	Number of AfD members on Committee	AfD members as % of Committee	Chair affiliation	Deputy-Chair affiliation
Petitions	28	4	14.3	CDU/CSU	SPD
Scrutiny of Elections, Immunity and Rules of Procedure	14	2	14.3	CDU/CSU	FDP
Sports	18	2	11.1	SPD	CDU/CSU
Tourism	18	**2**	11.1	**AfD**	CDU/CSU
Transport and Digital Infrastructure	43	6	13.9		
Plus					
Main Committee	47	6	12.8	CDU/CSU	CDU/CSU' SPD; FDP; Left party; Alliance'90/Greens
Further bodies					
Parliamentary Advisory Council on Sustainable Development	17	2	11.8	CDU/CSU	SPD
Parliamentary Oversight Panel on Intelligence Services	9	0	0	CDU/CSU	Left party
G 10 Commission on Restrictions on Privacy	4	0	0	---	---
Panel set up under the Customs Investigation Service Act	9	0	0	CDU/CSU	---
Committee for the Scrutiny of Acoustic Surveillance of the Private Home	9	0	0	CDU/CSU	---

Source: Data from https://www.bundestag.de/en/committees

The AfD's allocation across all committees as a percentage of overall committee membership is roughly equivalent to its vote and seat share and broadly speaking reflects its status as the third force in the Bundestag. The AfD's allocation of committee chairs and deputy chairs has been more problematic, however, as has its potential role on some of the more sensitive oversight panels mentioned towards the bottom of Table 5. At present, the AfD provides the chair for three committees (Budget; Legal Affairs and Consumer Protection; and Tourism) as well the deputy

chair for another three (Finance; Human Rights and Humanitarian Aid; and Internal Affairs and Community). Of the former, the CDU/CSU provides the deputy chair on two committees and the SPD on one, whereas on the latter FDP chairs two committees and the CDU/CSU chairs one.

Of these committee roles, the chair of the Budget committee is by far the most powerful. The committee has oversight of the finance ministry, including its activities in leading the bailout of Eurozone countries,[55] and represents a powerful platform for the AfD's critique of the Eurozone and Germany's role as paymaster. Traditionally, the committee chair goes to the main opposition party so the AfD could claim a 'right' to it. However, this did not stop other parliamentarians lobbying against it, including the outgoing chair of the Budget committee, the left party's Gezine Lötzsch. In particular, there was much unease about the AfD's proposed chair Peter Böhringer.[56]

Böhringer was eventually able to take up his position[57] but the AfD was blocked from nominating the chair of the culture committee because of the committee's involvement with sensitive issues such as Holocaust remembrance. Concerns about the AfD's commitment to the Federal Republic's constitutional security meant that it was also blocked from joining the Parliamentary Oversight Panel on the Intelligence Services. We can discern a consistent rationale behind such moves to contain the AfD but they also play into the party's wider narrative about an elite plot against the German people. It was predictable, therefore, and not without some justification that a senior AfD member complained that the party could 'nominate Mother Teresa or the Dalai Lama and they wouldn't be elected'.[58]

[55] In 2011, in what was seen by many as evidence of Germany's growing hegemony in Europe, the Bundestag Finance Committee insisted on being given sight of the Republic of Ireland's budget before the Republic's Parliament, the Dáil Éireann, got to see it.

[56] In leaked emails, Böhringer appeared to call Chancellor Merkel a 'whore' and refer to 'criminal, Koran-enslaved Muslims'. He has only partially denied these accusations. See 'AfD settles into Bundestag opposition leader role' in *The Irish Times* online. Accessed at: https://www.irishtimes.com/news/world/europe/afd-settles-into-bundestag-opposition-leader-role-1.3367310

[57] In the vote on Böhringer's appointment, the AfD and FDP voted for him; the CDU/CSU, SPD, and Alliance '90/Greens abstained; and the Left party voted against.

[58] 'AfD settles into Bundestag opposition leader role'.

Representation on the Bundestag's Executive Bodies

The Bundestag's executive is made up of the Presidium and the Council of Elders. The Presidium is responsible for the administration, public relations, and research activities of the Bundestag and is made up of the President of the Bundestag, who usually comes from the largest parliamentary group, and Vice Presidents from the other groups. However, the AfD's candidate for Vice President, Albrecht Glaser, was blocked from taking up his position over three rounds of voting. The Council of Elders is the co-ordination hub for the Bundestag and assists the Presidium in its duties, as well as providing a forum for the discussion and mediation of procedural and other disputes. It is made up of the Presidium, plus 23 other members of parliament. The AfD should have four members on this body but the blocking of their candidate for Vice President means that they currently only have three.

The willingness of the mainstream parties to block the AfD's candidate for Vice President over three rounds of voting indicates the importance of the Bundestag executive in symbolic terms but also as a potential forum for further containing the impact of the AfD. We have already touched upon the potential impact of fragmentation and ideological conflict on the degree to which parliamentary procedures are tightened up and the discretion of individual members is constrained.[59] If this were to happen in the Bundestag as a result of the AfD's apparent provocations, the proposed rule changes would have to be deliberated and approved by the Presidium and Council of Elders. The absence of an AfD-nominated Vice president does not just demonstrate the extent of the party's isolation vis-à-vis the other political parties; it also potentially weakens the AfD's ability to block or at least shape future moves to centralise parliamentary procedure.

But can we imagine such a move actually taking place? Empirical evidence from Western Europe indicates that such changes have taken place under circumstances where they have offered partisan advantage to a majority in parliament or where they might achieve efficiency gains.[60] Moreover, the German political scientist

[59] Curini and Zucchini'Legislative Committees as Uncertainty Reduction Devices; Weingast, 'A Rational Choice Perspective on Congressional norms'; Koß, 'Origins of Parliamentary Agenda Control'.

[60] U. Sieberer, W. Müller and M-I. Heller, 'Reforming the Rules of the Parliamentary Game: Measuring and Explaining Changes in Parliamentary Rules in Austria, Germany, and Switzerland, 1945-2010', *West European Politics* 34(5) 2011: 948-75.

Michael Koß argues that the very attributes—such as strategic patience and risk taking—that make anti-system parties like the AfD formidable disruptors of the legislative process can play into the hands of their political adversaries. As Koß observes, "'anti' parties engaging in extended obstruction eventually strengthen the procedural bargaining power of establishment parties and provide them with a justification for the centralisation of agenda control'.[61]

CONCLUSIONS

In the context that Koß sets out, one wonders if it may just be a matter of time before the AfD overplays the parliamentary cards the electorate has dealt it. At the same time, however, the mainstream political parties still struggle to formulate a coherent strategy to contain the AfD. It is clear that the AfD's strategy of provocation is designed to send clear signals to their supporters and provoke a reaction from their opponents. This is an explicitly vote seeking strategy based on the notion of being the political 'outsider' that is now familiar from political campaigning elsewhere.[62] The AfD's strategy presents the other political parties with a conundrum to solve. If they do not react to provocation, they appear to be the weak, effete, elites the AfD portray them to be. If they over-react, they buttress the populist 'us and them' narrative on which the AfD thrives. If, however, the other parties can demonstrate that the AfD is actually obstructing the government of the Federal Republic then they might be able to construct the political space to move against the AfD through a process of procedural reform. Getting to that position will require a great deal of careful political management.

One key question that remains to be answered is whether the AfD can, or even wants to, make the transition to becoming a policy seeking or even an office seeking party. A recent study by the Otto Brenner Foundation, drawing on data from state parliaments where the AfD has seats, indicates that the party's legislators at the level of state politics have made little substantive policy impact to date and lack the

[61] Koß, 'Origins of Parliamentary Agenda Control': 1063.

[62] G. Enli, 'Twitter as Arena for the Authentic Outsider: Exploring the Social Media Campaigns of Trump and Clinton in the 2016 US Presidential Election', *European Journal of Communication* 32(1) 2017: 50-61.

expertise to do so.[63] In addition, as the first anniversary of the AfD's entry into the Bundestag approached, co-leader Alexander Gauland attracted criticism and some ridicule when he appeared to be unable to articulate the party's broader socio-economic policies in a major interview on Germany's second TV channel, ZDF.[64]

This might indicate that, over time, the party's single-minded vote seeking strategy might not be enough to sustain the party's appeal with voters. Certainly, comparative analysis from across Europe indicates that the *repeated* re-election of emergent parties depends on those parties' ability to demonstrate that they have adapted to the demands of parliament and have legislative achievements to demonstrate to their voters.[65] This would indicate that the AfD will eventually feel compelled to modify its parliamentary behaviour and its wider strategy. Here it is worth noting that Germany's generous funding for political parties that break through at the Federal level means that the AfD will receive an estimated 200 million Euros of state support over the current legislative period.[66] Such funds can buy a great deal of policy expertise and will inevitably lead to a professionalization of the AfD's approach to politics. One legislative arena where we might see early evidence of a shift toward a more policy or even office-seeking strategy will be in the Bundestag's committee system where, as already discussed, the AfD has a contested but potentially influential presence, including chairs and deputy chairs. Nevertheless, from the perspective of this initial analysis, the question remains open as to whether AfD politicians will eventually grow tired of provocation and decide to make a substantive contribution to public life in Germany.

[63] Otto Brenner Stiftung (2017) 'Wie die AfD den Protest in die Parlamente trägt!'. Accessed at: https://www.otto-brenner-stiftung.de/fileadmin/user_data/stiftung/05_Presse/02_Pressemitteilungen/2017_07_17_PM_AH91.pdfto

[64] 'ZDF-Sommerinterview mit Alexander Gauland'. 12 August 2018. Accessed at: https://www.zdf.de/politik/berlin-direkt/berlin-direkt---sommerinterview-vom-12-august-2018-100.html. In the now familiar pattern across Europe and beyond, the ZDF's interviewer Thomas Walde was subjected to sustained abuse on social media after the interview.

[65] N. Bolleyer and E. Bytzek, 'Origins of Party Formation and New Party Success in Advanced Democracies'. *European Journal of Political Research* 52 2013: 773-96.

[66] Otto Brenner Stiftung, 'Wie die AfD ein Netzwerk knüpft und neue Allianzen im Bundestag schmiedet'. 15 June 2018. Accessed at: https://www.otto-brenner-stiftung.de/sie-moechten/presseinfos-abrufen/detail/news/wie-die-afd-ein-netzwerk-knuepft-und-neue-allianzen-im-bundestag-schmiedet/news-a/show/news-c/NewsItem/news-from/112/

Localism, Diversity and Volatility: The 2016 Australian Federal Election and the 'Rise' of Populism*

Nick Economou and Zareh Ghazarian

Senior Lecturer, School of Social Sciences, Monash University

Lecturer, School of Social Sciences, Monash University

* Double-blind reviewed article.

Abstract

The outcome of a series of recent international electoral events has revised interest in the impact of populism on the politics of liberal-democratic states. Australia is just such an example of this given the return of candidates from the One Nation Party at the 2016 general election. This paper analyses the result of this election in order to dispute claims that the One Nation performance is part of this international trend. Rather, the paper argues that the electoral performance of populist parties of all types in Australia was actually quite weak and confined to specific geographic regions within the national electorate. It also finds that populist representational success owed more to the vagaries of Australia's electoral system than to amassing any particularly significant support within the national electorate.

INTRODUCTION

Recent election results in the United States and Europe have revived interest in the impact of populism on the voting choices of electors in late industrial liberal democratic states—including Australia. The success of Donald Trump as the Republican Party candidate for the United States presidential election, the emergence of Marine Le Pen as one of the two candidates in the French presidential run-off, and the success of the 'Brexit' campaign in the British referendum on that country's future in the European Union have all been cited as manifestations of a resurgent

'populism'.[1] Populism is understood in this context as a voter reaction against what is perceived as the main features of globalisation and cosmopolitanism, including veneration of economic liberalisation, advocacy of the importance of the global transfer of humanitarian values as well as humans themselves, and of the importance of tolerance when dealing with social and humanitarian minorities.[2] Consequently, populism has been characterised as the advocacy of a return to protectionism in a bid to defend local employment, the call for a reduction in rates of immigration, and the articulation of a rather narrow and jingoistic approach to national identity based on view that that identity is under threat from external cultural and/or geostrategic threats.[3]

Australia's political commentary community has often sought to conflate these international developments with local events to demonstrate the relevance of populism to this nation's politics.[4] One such local event has been the return of Pauline Hanson and the political party that bears her name, Pauline Hanson's One Nation, to the national parliament as a Senator and leader of other Senators elected

[1] A. Nossiter, 'Marine Le Pen Echoes Trump's Bleak Populism in French Campaign Kickoff', *New York Times* 5 February 2017. Accessed at: https://www.nytimes.com/2017/02/05/world/europe/marine-le-pen-trump-populism-france-election.html; P. McPhee, 'After Brexit and Trump, France is the Next Big Test for Populism', *Sydney Morning Herald* 20 April 2017.

[2] P.A. Taggart, *The New Populism and the New Politics: New Protest Parties in Sweden in a Comparative Perspective*, London, Macmillan Press, 1996: 34; A. Mughan, C. Bean and I. McAllister, 'Economic Globalization, Job Insecurity and the Populist Reaction', *Electoral Studies*, 22(4) 2003: 619-620; C. Mudde, 'The Populist Zeitgeist', *Government and Opposition* 39 (4) 2004: 544-545.

[3] H.G. Betz and S. Immerfall (eds.), *The New Politics of the Right: Neo-Populist Parties and Movements in Established Democracies*, New York, St Martin's Press, 1998: 4; H.G. Betz, 'Conditions Favouring the Success and Failure of Radical Right-Wing Populist Parties in Contemporary Democracies', in Y. Mény and Y. Surel (eds.), *Democracies and the Populist Challenge*, London, Palgrave Macmillan, 2002: 198-199; A. Zaslove, 'Here to Stay? Populism as a New Party Type', *European Review* 16(3) 2008: 327; P. Hainsworth, *The Extreme Right in Western Europe*, New York, Routledge, 2008: 11; M. Krzyzanowski, 'From Anti-Immigration and Nationalist Revisionism to Islamophobia: Continuities and Shifts in Recent Discourses and Patterns of Political Communication and the Freedom Party of Austria', in R. Wodak, M. KhosraviNik B. Mral (eds.), *Right-Wing Populism in Europe*, Sydney, Bloomsbury, 2013: 142.

[4] Australian Broadcasting Corporation, Senate Results: New South Wales, 2013. Accessed at: http://www.abc.net.au/news/federal-election-2013/results/senate/nsw/; P. Hartcher, 'The Twin Threats Facing Malcolm Turnbull: Donald Trump and Pauline Hanson', *Sydney Morning Herald* 4 February 2017; R. Kurmelovs, *Rogue Nation: Dispatches from Australia's Populist Uprisings and Outsider Politics*, Sydney, Hachette, 2017.

under the One Nation rubric at the 2016 Federal Election.[5] Hanson's first foray into Australian national politics occurred in 1996 when, as a candidate endorsed by the Liberal Party of Australia to contest the previously safe Labor federal electoral division of Oxley, her comments criticising the alleged racial imbalance of national welfare policy in favour of Australia's indigenous community caused party leader, John Howard, acute embarrassment.[6] Hanson's Liberal endorsement was withdrawn as a result, but Hanson still managed to win the seat. Sitting as an independent MP in the House of Representatives, Hanson was able to use the parliament as a platform to attack indigenous affairs policy, the rate of Asian immigration to Australia, and the principles of 'multi-culturalism'. She also worked to put a party organisation together in anticipation of being able to contest future state and federal elections.[7]

Hanson's actions precipitated enormous media attention (not to mention furious protest reaction particularly from Australia's radical left), but by 1998 both she and her party achieved very limited electoral success. After a stellar performance in the Queensland state election where it secured 11 seats, the One Nation Party soon imploded with the entire state parliamentary wing of the party resigning *en masse* to create a new organisation, the Country City Alliance.[8] In the 1998 Federal Election held soon after, Hanson failed in her bid to win the lower house division of Blair, and the party's sole success was the securing of a Senate position in Queensland.[9] Hanson then left her party, spent some time in gaol for alleged electoral fraud (a conviction later overturned on appeal), became a minor television personality and something of an habitual candidate in state and federal elections. These campaigns did not result in her being returned to the national parliament, although the effect of her candidature on the non-Labor vote in the Senate contest for Queensland in 2004 helped the

[5] B. Winsor, 'Trump, Hanson and Brexit: The Real Reason it's Happening Now', In The Feed, Special Broadcasting Service, 16 November 2016. Accessed at: https://www.sbs.com.au/news/thefeed/article/2016/11/16/trump-hanson-and-brexit-real-reason-its-happening-now; E. Tamkin, 'Australia Greets 25 Recession-Free Years with Rising Populism', *Foreign Policy* 1 March 2017. Accessed at: http://foreignpolicy.com/2017/03/01/australia-greets-25-recession-free-years-with-rising-populism/

[6] M. Gordon, 'A Martyr to the End', *The Age* 23 August 2003; see also Rodney Smith, *Against the Machines: Minor Parties and Independents in New South Wales, 1910-2006*, Sydney, Federation Press, 2006: 97-98.

[7] Commonwealth of Australia Parliamentary Debates. Canberra: House of Representatives: 1996: 3862.

[8] Z. Ghazarian, *The Making of a Party System: Minor Parties in the Australian Senate*, Melbourne, Monash University Publishing, 2015: 135.

[9] M. Kingston, *Off the Rails: The Pauline Hanson Trip*, Crows Nest, Allen and Unwin, 2001: x.

Liberal and National parties secure a rare Senate majority, and Hanson herself nearly won a Senate seat in the New South Wales contest in 2013.[10]

By 2016, however, Hanson had returned to the One Nation Party that then contested the national election held in that year with some success. Hanson was re-elected to the national parliament, this time as a Senator from Queensland, and her ticket's vote was large enough to secure a second seat.[11] One Nation was also successful in the Senate contests in Western Australia and New South Wales, and fell less than 200 preferences short of defeating the Greens for the final position available in the Senate election for Tasmania.[12] In total, Pauline Hanson's One Nation Party secured four Senate seats—one more than the next largest party on the Senate cross-bench, the Nick Xenophon Team (NXT). Given the importance of the Senate to the legislative process in Australia, One Nation has since figured as a significant part of the upper house cross-bench with whom the Liberal-National coalition government must negotiate. With its four Senators and a media ready to obsess about its leader, One Nation gives the impression of being the focal point of a surge in Australian populism commensurate with similar instances of populist politics in other liberal democratic states.

This article seeks to analyse the electoral basis upon which the impression of One Nation's leadership of Australian populism is based. It finds that, in reality, the electoral foundation for the resurgence of Hanson and One Nation was based on a comparatively small vote share that is regionally specific to a very narrow part of the Australian community, and that the party's ability to secure so many Senate seats was due in no small way to the fact that the 2016 contest was a full Senate election. Indeed, when the 2016 Senate result is considered, it becomes clear that Hanson and her party do not have a monopoly over Australian populism, but in fact have to share this segment of the electorate with some other parties (and their prominent leading candidates) that have a similarly narrow electoral base either in terms of their very small share of the vote, and/or the regional specificity of their appeal. As it turns out,

[10] N. Economou, 'A right-of-centre triumph: The 2004 Australian half-Senate election', *Australian Journal of Political Science*, 41(4) 2006: 501-516; Australian Broadcasting Corporation, Senate Results: New South Wales, 2013.

[11] Australian Electoral Commission, 2016 Federal Election Results. Accessed at: http://www.aec.gov.au/Elections/Federal_Elections/2016/index.htm

[12] Australian Electoral Commission, 2016 Federal Election Results.

Australia's populist parties pose a minor threat to the direct contest for executive power. Their very small share of electoral support might make them competitive in Senate contests, but they cannot be competitive in contests for the single member electoral districts that return representatives to the House of Representatives – the parliamentary chamber that decides which party or parties shall form a government. Moreover, Australia's populist parties lack organisational discipline and have proven incapable of suffering from internal dysfunction and/or an inability to survive beyond one or two turns of the electoral cycle.

IDENTIFYING 'POPULIST' PARTIES

There has been much discussion in recent years about the characteristics of populist candidates.[13] As Betz has argued, providing a concise and universally accepted definition of populist politics is difficult, especially as populism could be associated with candidates from the right or left of the political spectrum.[14] In Europe, for example, populism has often been associated with candidates from the right who have opposed immigration and cosmopolitanism while in other polities, such as South America, populism has been a feature of candidates from the left who have sought to oppose neoliberalism.[15] There are, however, three distinctive characteristics of populism that are apparent across the political spectrum and are also observable in the Australian minor parties examined here.

[13] L. Helms, 'Right-Wing Populist Parties in Austria and Switzerland: A Comparative Analysis of Electoral Support and Conditions of Success', *West European Politics* 20(2) 1997: 37-52; W. van der Brug and A. Mughan, 'Charisma, Leader Effects and Support for Right-Wing Populist Parties', *Party Politics* 13(1) 2007: 29-51; .S. Bowler, D. Denemark, T. Donovan and D. McDonnell, 'Right-Wing Populist Party Supporters: Dissatisfied but not Direct Democrats', *European Journal of Political Research* 56(1) 2017: 70-91.

[14] Betz, 'Conditions Favouring the Success and Failure': 4; see also C. Mudde and C. Rovira Kaltwasser, *Populism: A Very Short Introduction*, New York, Oxford University Press, 2017.

[15] Mudde and Rovira Kaltwasser, *Populism*: 2; see also C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo and P. Ostiguy, 'Populism: An overview of the Concept and the State of the Art', in C. Rovira Kaltwasser, P. Taggart, P. Ochoa Espejo and P. Ostiguy (eds.), *The Oxford Handbook of Populism*, Oxford, Oxford University Press, 2017; K. Burgess and S. Levitsky, 'Explaining Populist Party Adaptation in Latin America: Environmental and Organizational Determinants of Party Change in Argentina, Mexico, Peru and Venezuela', *Comparative Political Studies* 36(8) 2003: 881-911; S. Levitsky and K.M. Roberts (eds.), *The Resurgence of the Latin American Left*, Baltimore, Johns Hopkins University Press, 2011.

First, populism is confrontational.[16] Populists most commonly argue that they represent 'the common people' who had been consistently ignored by the political establishment.[17] Moreover, populist candidates sought to manufacture a sense of division in society by arguing that the policy demands of the 'ordinary people' were being overlooked by the powerful elites.[18] According to populist candidates, these elites had 'lost touch' with ordinary citizens and were not capable, or interested, in addressing the policy concerns of ordinary people.[19] Established parties were often seen to be pursuing policies that were at odds with the interests of the broader population. It was the populist's goal, therefore, to advance the interests of ordinary citizens who were 'pure' and 'innocent' while countering the influence of the elites who were 'corrupt' and did not work as hard, 'other than to further their self-interest'.[20]

Second, the leadership approach of populist candidates is also distinctive as they seek to present themselves as qualitatively different to leaders of established parties. They position themselves as champions for the ordinary citizen and, unlike those from established political parties, populists make a virtue of displaying 'bad manners' in their leadership performances.[21] Appearing to be suspicious about state institutions, corporations and other established political actors is part of the performance repertoire of populists as is the promise they will change the status quo if elected to parliament.[22] While populist leaders may not necessarily be charismatic in the traditional sense (such as by being strong oratorical performers), they garner the publics' attention by railing against the norms advanced by established parties in the pursuit of advancing the interests of 'ordinary citizens'.[23]

[16] David Arter, 'The Breakthrough of Another West European Populist Radical Right Party? The Case of the True Finns', *Government and Opposition* 45(4) 2010: 490.

[17] J.W. Muller, *What is Populism?* Philadelphia, University of Pennsylvania Press, 2016.

[18] Mudde and Rovira Kaltwasser, *Populism*.

[19] K. Abts and S. Rummens, 'Populism versus Democracy', *Political Studies* 55(2) 2007: 405-424; Bowler et al, 'Right-Wing Populist Party Supporters'.

[20] Muller, What is Populism?: 23.

[21] B. Moffitt, The Global Rise of Populism: Performance, Political Style, and Representation, Stanford, Stanford University Press, 2016: 8.

[22] Moffitt, *The Global Rise of Populism*; Dennis Altman, 'Perils of Populism', *Griffith Review* 57 2017: 80-92.

[23] D. McDonnell, 'Populist Leadership', *Social Alternatives* 36(3) 2017: 26-30.

Third, populist parties tend to have distinctive organisational characteristics. In particular, they are specifically structured to advance the political aspirations of the leader. As Ignazi put it, the leader is the most important feature of new populist parties as 'no formal organization existed before or beyond the leader: the party is 'insignificant' vis-à-vis the leader'.[24] As we shall see, the parties examined in this paper demonstrated populist characteristics. In particular, they were all confrontational in so far as positioning themselves as champions for the 'ordinary citizen' and advanced a policy agenda that contrasted with those of the established parties. Organisationally, these parties were also somewhat brittle, with one example struggling to remain a cohesive entity shortly after entering parliament. Furthermore, these parties were led by 'charismatic' leaders who sought to use their high public-profile as a lightening-rod to mobilise electoral support. It is also typical for these leader-dominated organisations to become dysfunctional or to even collapse. Populist parties are thus characterised by significant internal volatility.

PRELUDE TO THE RISE OF AUSTRALIAN 'POPULISM': THE 2013 SENATE CONTEST

General elections in Australia actually involve two separate elections – one for the House of Representatives where electors vote for candidates contesting in single member districts using a majoritarian voting system, and the other for the Australian Senate utilising multi-member districts and the single transferrable vote (STV) to allocate seats proportionally (at least in theory).[25] Most commentary attention focuses on the contest for the House of Representatives given the importance of the election to determining the party nature of government and its rather more straightforward majoritarian electoral system. The Senate's STV system is far more complicated, and takes much more time to count. Representational outcomes can sometimes surprise. In the 2013 Senate contest, for example, the election of Ricky Muir in Victoria—a candidate from the hitherto unknown Australian Motor Enthusiasts Party (AMEP)—caused outrage given his rather paltry share of the state-wide primary vote cast (0.5 percent). Of course, under the STV system Muir did

[24] P. Ignazi, 'The Crisis of Parties and the Rise of New Political Parties', *Party Politics* 2(4) 1996: 552.

[25] D. Farrell and I. McAllister, The Australian Electoral System: Origins, Variations and Consequences, Sydney, UNSW Press, 2006.

achieve the requisite quota after the distribution of preferences but this fact was rarely acknowledged in the expression of dismay at his presence in a finely balanced upper house.[26]

Indeed, the infamy of this result made its way in to the national parliament's legislative response to the 2013 election. The nature of the Senate contest and its outcome became a major issue for the Joint Standing Committee on Electoral Matters (JSCEM), the parliamentary committee that reflects on elections post fact and recommends amendments to Australia's national electoral laws. Two matters in particular preoccupied the Committee and those members of the public who made submissions to it. These were, first, the matter of how the existing Group Vote Ticket (GVT) system of preference allocation in which electors would vote for a party ticket that then directed preferences to all other candidates (as distinct from filling in their own preferences) had contributed to Muir's success; and, second, the exponential increase in the number of political parties that had been formed and had nominated to appear on Senate ballots across the states. On the first matter, the JSCEM recommended (and the government later accepted and legislated) to do away with the party determination of preference allocation and replace it instead with a rather cumbersome system of optional preferential voting.[27] This reform was linked to the second objective of both discouraging the rate of party formation ahead of an election and, if these parties nominated anyway, severely curtailing their likelihood of winning a Senate seat by trying to deny them a full allocation of preferences from previously eliminated candidates.

It is worth reflecting on the implications of the JSCEM's approach, particularly to the issue of party formation. The Committee was clearly persuaded by arguments that the increase in the number of political parties being formed ahead of the 2013 election was the result of deliberate attempts by a small number of political operatives to try to impact on Senate outcomes by registering as many parties and candidates as possible.[28] The polite language employed by the JSCEM to describe this alleged corruption was 'gaming' the system and was linked to cross-preference

[26] S. Morey 'How Do We Solve a Problem Like the Senate? *The Conversation*, 2013. Accessed at: https://theconversation.com/how-do-we-solve-a-problem-like-the-senate-18042.

[27]Joint Standing Committee on Electoral Matters, The 2013 Federal Election: Report on the Conduct of the 2013 Election and Matters Related Thereto, Canberra, Parliament of Australia: 2015: 2.

[28] Joint Standing Committee on Electoral Matters, *The 2013 Federal Election*: 190.

agreements entered in to by so many of these parties made possible under the auspices of the GVT system.[29] Kefford has also noted the way the political commentary community had delineated these emerging parties from other 'minor' parties (such as the Australian Greens, for example) by utilising the term 'micro-party' to describe them.[30]

Both approaches sought to de-legitimise these parties and the opprobrium that arose from Muir's election was a reflection of this. Of course, an alternative interpretation of political events leading up to the 2013 election could be made based on a more benign view of party formation as outlined by Sharman, who once observed:

> The question of what explains the emergence and persistence of minor parties is a contentious one in political science, but there are three elements involved. The first is broad social and political change and the emergence of new issues which existing parties have not accommodated, thus giving a new party the chance to articulate a distinctive political agenda. The second is the occurrence of political events which trigger the formation of a new party or splits in an existing party. The third is the effect of the electoral system in encouraging the formation or persistence of small parties by making parliamentary representation an avenue for pursuing influence.[31]

Accordingly, the rise in the rate of party formation ahead of the 2013 election may well have been due to responses to the political debate at the time. The 2013 election came after two terms of a Labor national government where, in the second term, there was a period where Labor and the Australian Greens had a majority in the Senate, and during which time such contentious matters as climate change and marriage equality had dominated the policy debate. By far the greatest proportion of the parties being formed for the 2013 election were from the right of Australian

[29] Joint Standing Committee on Electoral Matters, Interim Report on the Inquiry into the Conduct of the 2013 Federal Election: Senate Voting Practices, Canberra, Parliament of Australia, 2014: vi.

[30] G. Kefford, 'Rethinking Small Political Parties: From Micro to Peripheral', *Australian Journal of Political Science* 52(1) 2017: 95-109.

[31] C. Sharman, 'The Representation of Small Parties and Independents in the Senate', *Australian Journal of Political Science* 34(4) 1999: 356-357.

politics.[32] These parties had policy positions that either advocated conservative social policy positions, were highly critical of directions that environmental policy (including climate change policy) had taken under the leadership of the Labor governments of both Kevin Rudd and Julia Gillard, or were seeking to mobilise a sense of voter resentment at the approaches of both major parties in their seeking to consolidate Australia as part of a free trading, globalised economy.[33]

This latter group included the Palmer United Party (PUP), the party that was to win the largest proportion of what turned out to be significant levels of voter support for this plethora of right-tending non-major parties contesting the Senate. It was the PUP that ended up with the largest block of cross-bench seats after the 2013 election, as well as a lower house seat with the election of the party's leader, property developer, industrialist and former Liberal National Party office-bearer, Clive Palmer, to the Queensland seat of Fairfax. The PUP qualifies as a populist party, in as much as it appeared to be mobilised on the basis of a strong sense of opposition to whatever was happening in the political debate at the time without actually articulating a coherent manifesto as to what it was the party would achieve were it to exercise executive power.[34] The party's leader typified the sort of charismatic yet domineering personality type also commonly associated with populist politics, as indeed did the sense that the party's organisation was centred on the leader's aspirations and outlooks and any challenge to the leader from some party luminary (usually in the form of a member of the parliamentary wing) could precipitate an organisational implosion.[35] This is precisely what occurred, with two of the four members of the PUP parliamentary wing resigning soon after their election to the Senate and Palmer himself coming under increased scrutiny over his business interests.[36]

The 2013 Senate contest was thus very important precursor to the 2016 contest for a number of reasons. First, this was the election that was characterised by a significant

[32] N. Economou. 'An Instance of Cartel Behaviour? The Politics of Senate Electoral Reform 2016'. Electoral Regulation Research Network, Democratic Audit of Australia, Working Paper No. 40 2016: 6. Accessed at: http://law.unimelb.edu.au/__data/assets/pdf_file/0010/1939870/WP40_Economou.pdf.

[33] Ghazarian, The Making of a Party System: 190-191.

[34] Ghazarian, The Making of a Party System: 187.

[35] Ignazi, 'The Crisis of Parties': 552.

[36] P. Colgan, 'Clive Palmer's Political Project is Disintegrating, *Business Insider Australia* 13 May 2015. Accessed at: https://www.businessinsider.com.au/clive-palmers-political-project-is-disintegrating-2015-3.

increase in the number of non-major parties being created and nominating candidates for the election, with the vast majority of these parties being identified (courtesy of their GVTs) with the right-of-centre of Australian politics. Second, this election resulted in a significant right-of-centre, non-major party vote although this significant share (equal in all but one instance to more than the quota of 14.4 percent in each state) was spread out over a large number of competing tickets. The capacity of this vote share to result in a representational outcome depended on a full flow-through of preferences guaranteed under the GVT system, and this duly occurred in each state. in addition to Palmer's success in winning the lower house district of Fairfax, PUP won the largest share of the non-major party right-of-centre Senate vote in three states, giving the party a total of three Senators (including Jacqui Lambie from Tasmania, who would figure prominently in the re-casting of the populist party system ahead of the 2016 election).

THE 2016 FULL SENATE ELECTION

Despite the efforts of the JSCEM and the Turnbull government to deter them, a proliferation of minor parties registered with the AEC with the intention to contest the 2016 full Senate election.[37] Based on the aforementioned criteria, some of these parties qualified as 'populist' and a list of these (including the percentage of the national primary vote won in the Senate contest) is provided in Table 1. Pauline Hanson's One Nation (PHON) party was arguably the most prominent of the overtly populist parties and the Table shows that the party obtained the largest share of the populist vote. In addition to One Nation were parties formed by charismatic individuals. These included ex-rugby league player and former PUP Senator, Glen Lazarus; Jacqui Lambie under the new banner of the Jacqui Lambie Network (JLN); former Victorian journalist and broadcaster Derryn Hinch, who created and led the Derryn Hinch Justice Party (the DHJP); former Democratic Labor Party Senator John Madigan, who contested under the John Madigan's Manufacturers and Farmers Party (MMFP); and former independent South Australian Senator Nick Xenophon, who organised a Nick Xenophon Team NXT) and ran tickets in every state Senate contest. The Katter Australia Party (KAP) is also included in this list, notwithstanding the fact

[37] A. Green, 'Federal Election 2016', Australian Broadcasting Corporation, 2016. Accessed at: http://www.abc.net.au/news/federal-election-2016/guide/senate/.

that the party's charismatic leader, Bob Katter, concentrated his efforts on retaining his lower house division of Kennedy.

Table 1. 'Populist' Party Vote at the 2016 Australian Election

	Senate			House of Representatives	
Party	Australia-wide primary votes (percentages in brackets)	Vote as percentage of overall populist vote	Seats won	Australia-wide primary votes (percentages in brackets)	Seats won
PHON	593,013 (4.2)	39.1	4	175,020 (1.3)	
NXT	456,369 (3.2)	30.1	2	250,333 (1.8)	1
DHJP	266,607 (1.9)	17.5	1	16,885 (0.1)	
JLN	69,079 (0.5)	4.5	1	--	
KAP	53,123 (0.4)	3.5		72,879 (0.5)	1
GLT	45,149 (0.3)	2.9		10,094 (0.5)	
PUP	26,210 (0.2)	1.7		315 (0.0)	
MMFP	5,268 (0.03)	0.3		--	
Total	1,514,818 (10.9)	100.0	8	525,526 (3.8)	2

Key: PHON (Pauline Hanson's One Nation), NXT (Nick Xenophon Team), DHJP (Derryn Hinch Justice Party), JLN (Jacqui Lambie Network), KAP (Katter Australian Party), GLT (Glen Lazarus Team), PUP (Palmer United Party), MMFP (John Madigan's Manufacturers and Farmers Party).
Source: Australian Electoral Commission, 2016 Federal Election Results. Accessed at: http://www.aec.gov.au/Elections/Federal_Elections/2016/index.htm

If the primary vote cast for these tickets across the nation is tallied, the 'populist' vote cast at the 2016 full Senate election can be quantified. The 1,514,818 primary votes cast for the parties listed in Table 1 constituted 10.9 percent of the national Senate vote. The PHON tickets accounted for nearly 40 percent of the populist vote, followed by the NXT with 30 percent, and the DHJP with 17.5 percent. The JLN share of the national populist vote was 4.5 percent and mere 0.5 percent of the national Senate primary vote, but this was sufficient for the ticket to win a seat in the Tasmanian Senate contest. At the conclusion of the Senate count, PHON secured four Senate seats, the NXT two seats, the DHJP one seat, and the JLM one seat. The PHON, NXT and DHJP also fielded candidates in some House of Representatives divisions, with the Xenophon Team concentrating its efforts in South Australia and securing one

lower house seat (Mayo) from the Liberal Party. The KAP ran Senate tickets but the party's best performance was in the return of Katter as the Member for Kennedy. The total national populist vote for the House of Representatives was 3.8 percent – a much smaller return than the Senate doubtlessly influenced by the limited number of populist candidates contesting the lower house.

The national results provide an incomplete picture of the nature of the populist vote in 2016—a point highlighted by the fact that the JLT could win a seat in the Senate with a paltry national vote of less than 1 percent. Given that the Senate contest involved a full Senate election, the consequent diminution of the quota needed to secure one of the twelve seats for each state to 7.7 percent enhanced the potential for the non-major parties to secure a Senate seat. The importance of this aspect of the contest can be appreciated when the populist performance is measured by state, rather than nationally. Such a state-based comparison, provided by Table 2, gives an insight to the significant regional variation in the populist vote. Given that the PHON, NXT, DHJP and JLN parties were arguably the most significant of the populist cohort in terms of both their share of the populist vote and that these were the parties to win Senate representation, a comparison of the state-by-state performance of the four re-enforces the notion of regional variation in Australian populism.

Table 2. 'Populist' Party Performance in the 2016 Senate Election by state

	State					
Party	**NSW**	**VIC**	**QLD**	**WA**	**SA**	**TAS**
PHON	4.1	1.8	9.2	4.0	2.9	2.5
NXT	1.7	1.5	2.0	2.1	21.7	1.5
DHJP	0.07	6.0	0.06	0.7	0.2	0.4
JLN	0.04	0.05	0.04	--	--	8.3

Source: As for Table 1.

The Table shows quite clearly that PHON performed best in Queensland, New South Wales and Western Australia. In South Australia, Victoria and Tasmania, however, the party's performance was much weaker and certainly subordinate to another populist ticket. In Victoria this was the DHJP and Hinch was to secure a Senate seat. In South Australia, the NXT polled 21.7 percent and, in so doing, won two seats. The specificity of the NXT to South Australian politics is revealed in the Table: in no other state did the party secure a primary vote of anything more than 2.1 percent. Meanwhile, the

JLT was the preferred ticket for Tasmania's populist vote, although it is also true that the exhaustion of preferences from the Shooters and Fishers ticket denied PHON the last Senate position that ended up being won by the Greens.

Table 2 indicates a state-based variability in the populist vote. It is possible to discern an intra-state regional variation at least in the case of support for PHON and the JLT in the case of their strongest states although, by the same token, support for the DHJP in Victoria and the NXT in South Australia was much more evenly spread. Figure 1 plots the primary vote cast for the strongest populist Senate ticket by House of Representative electoral division in each of the states. The x-axis on the graph ranks the highest to lowest populist voting divisions for the preeminent populist ticket in that state. In the case of those states in which One Nation was the main recipient of this vote, a pattern emerges. In Queensland, New South Wales and Western Australia the One Nation primary vote was strongest in rural and regional seats, and weakest in metropolitan divisions. Tasmania replicates this pattern, although in that case it was the JLN, rather than PHON, securing the vote. These graphs confirm previously held views that populist politics resonates most in non-metropolitan regions dependent on agriculture or decentralised industrial activity, where there are lower median family incomes, lower levels of educational attainment and so on.

The graphs that plot the distribution of the populist vote for the pre-eminent tickets in Victoria (the DHJP) and South Australia (the NXT) vary somewhat from the axiomatic pattern observable in the other states. In both cases a much more even distribution of the primary vote occurs. Further, the rural/regional versus metropolitan divide discernible in the other states does not apply to the same extent. Indeed, in the case of South Australia, some of the NXT's best divisions were urban-based seats such as Sturt and especially the seat of Mayo, where an NXT candidate was elected. The pattern of support for the DHJP in Victoria was similarly quite evenly distributed, with a number of suburban-based seats figuring amongst the strongest divisions for the ticket.

What the data shows is that, while it may be possible to quantify a national populist vote, this needs to be understood against a backdrop of regional diversity. The regional variation helps account for why some charismatic leaders resonated in some parts of the country and not in others. It also accounts for differences in the approach these parties took to the policy debate and how voters responded to their agendas. One Nation can now said to have a long tradition of campaigning on race, criticism of immigration and expressions of concerns about national identity in addition to seeking to critique liberal free market economics. Indeed, Pauline Hanson and One Nation are the closest Australian populism comes to conforming to the typology

constructed by international scholarship. The results show that PHON is the dominant populist party in Queensland and New South Wales and its approach appears to resonate in those states plus Western Australia. In the other three states, however, the appeal of One Nation is weak.

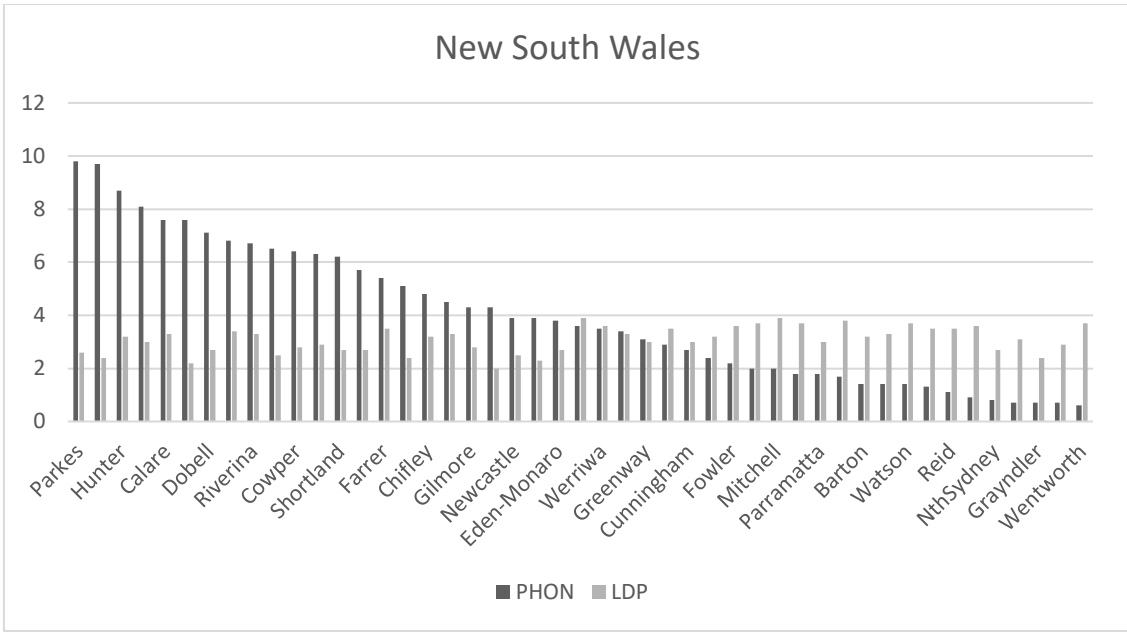
It is arguable that the JLN in Tasmania comes closest to the PHON model, and Jacqui Lambie was also known to dabble in debates about immigration and national identity.[38] However, voter support for her, as both a PUP candidate and then under the auspices of the JLT, was driven less by national identity politics (which does not usually resonate in Tasmania) and more by community responses to the impact of industrial restructuring on the Tasmanian economy, especially in the north western region of the state, which has been Lambie's solid electoral base for two elections.[39] Whilst her performance and message may sometimes replicate Pauline Hanson, Lambie and her organisation are actually more like the NXT and its leader, Nick Xenophon, whose campaign resonated against a backdrop of South Australia's industrial restructuring, in which the manufacturing sector was severely diminished.

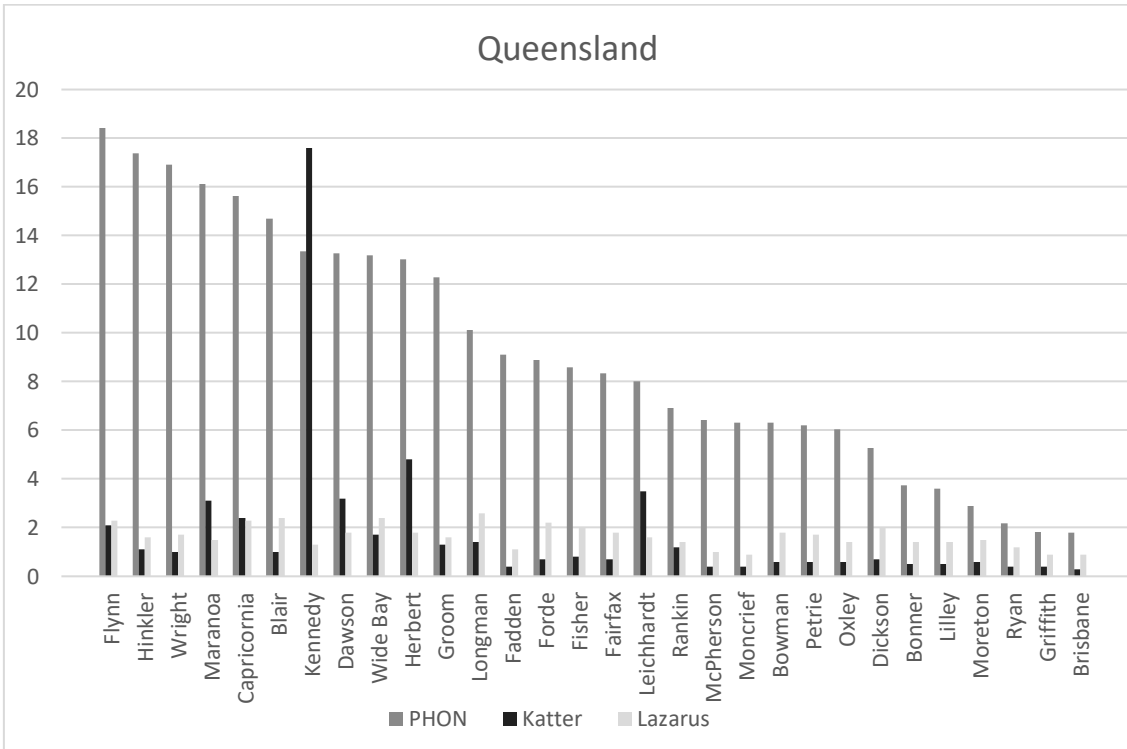
Meanwhile, in Victoria, if Derryn Hinch is known for anything it is for his crusade on a series of law and order issues more relevant to state politics than the national debate. A strong sense of dissatisfaction with 'the system' has always underpinned Senator Hinch's contribution to the public debate even in the days before his election to parliament. This message clearly resonated in Victoria but, as the results show, nowhere else in Australia. Similarly, the JLT resonated in Tasmania and nowhere else. Even the impact of the seemingly omnipresent Nick Xenophon was confined to his home state. The only party that could claim to resonate beyond its home state was One Nation, and even this was based on a fairly small share of the primary vote.

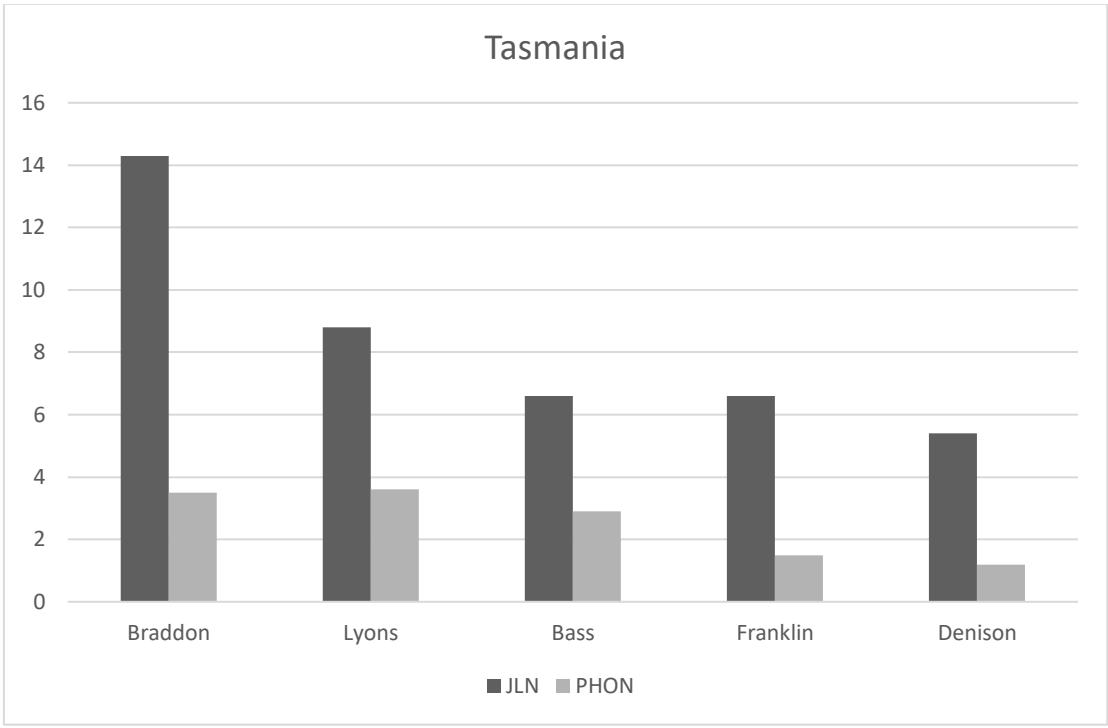
[38] L. Cox, 'Jacqui Lambie Questions Refugee Intake, Recommends Electronic Tagging', *Sydney Morning Herald* 18 November 2015.

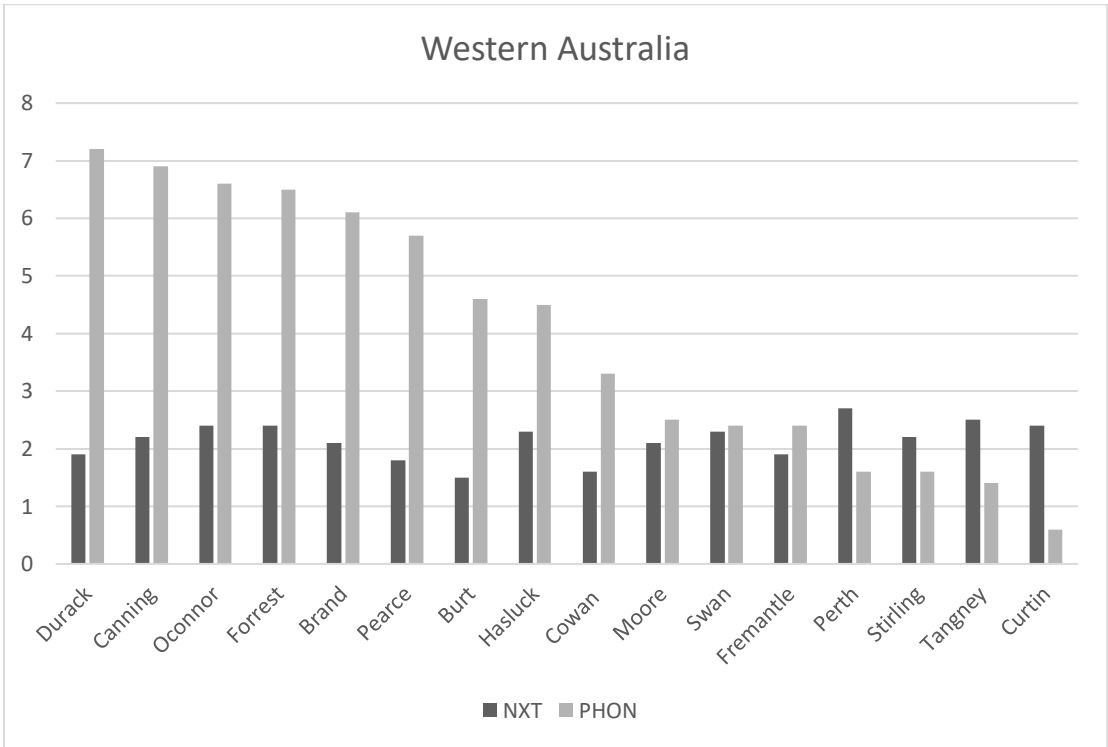
[39] L. Bourke, 'Senator Jacqui Lambie Claims Tasmanians Are Worried About Sharia Law, Foreign Aid Spend'. *Sydney Morning Herald* 1 April 2015.

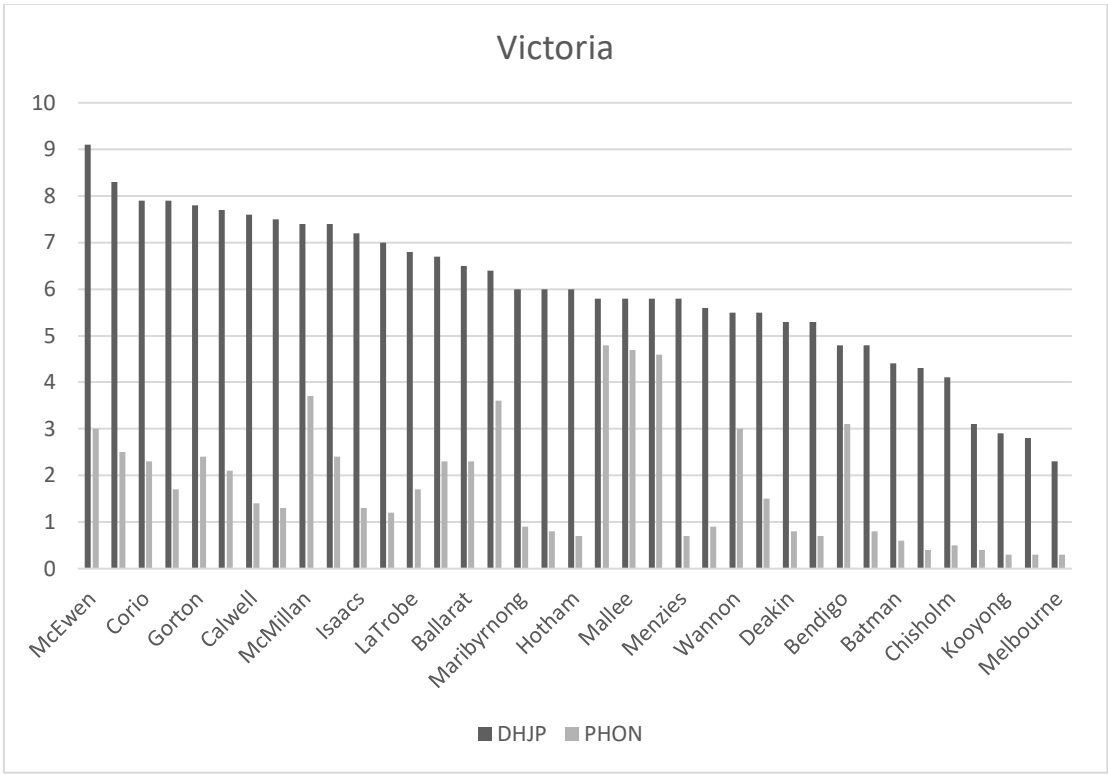
Figure 1. Populist Voting in the 2016 Senate Election by House of Representatives District and State

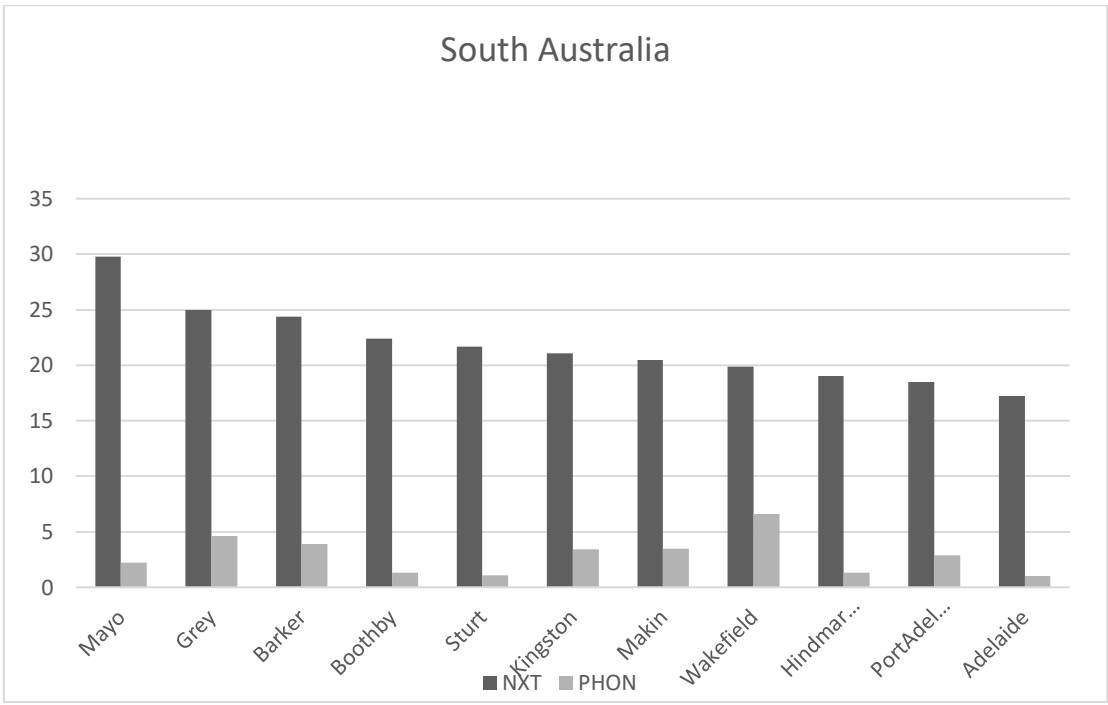





Tasmania
16
14
12
10
8
6
4
2
0
Braddon
Lyons
Bass
Franklin
Denison
JLN
PHON


Western Australia
8
7
6
5
4
3
2
1
0
Durack
Canning
Oconnor
Forrest
Brand
Pearce
Burt
Hasluck
Cowan
Moore
Swan
Fremantle
Perth
Stirling
Tangney
Curtin
NXT
PHON


Victoria
10
9
8
7
6
5
4
3
2
1
0
McEwen
Corio
Gorton
Calwell
McMillan
Isaacs
LaTrobe
Ballarat
Maribyrnong
Hotham
Mallee
Menzies
Wannon
Deakin
Bendigo
Batman
Chisholm
Kooyong
Melbourne
DHJP
PHON


South Australia
35
30
25
20
15
10
5
0
Mayo
Grey
Barker
Boothby
Sturt
Kingston
Makin
Wakefield
Hindmar...
PortAdel...
Adelaide
NXT
PHON

DISCUSSION

Despite advancing divergent policy demands, each of the parties explored above correspond to the populist type identified in other liberal democracies.[40] They presented themselves as champions for ordinary citizens and railed against what they identified as 'the establishment' by highlighting what they perceived as the significant policy and personnel shortcomings of the major parties. Moreover, they all had high-profile leaders who were prominent before, and during, the election campaign. These leaders also demonstrated populist tendencies as they were central to the development of their party and sought to use the party to advance their political aspirations. All bar the DHJP were to experience significant internal stresses soon after the election. Senator Hanson seemed to be involved in ceaseless struggles for control of her party, amidst the disqualification of elected Senators for various breaches of Section 44 of the Australian Constitution. Senator Lambie was also disqualified by the High Court due to uncertainty about her citizenship, and Senator Xenophon departed the national parliament to undertake an unsuccessful tilt at South Australian state politics. His NXT organisation has since been re-branded as 'Centre Alliance'.

Disaggregating the 2016 Senate election result does much to clarify the nature of Australian populism, both in terms of the party system and the nature and extent of a 'populist' vote. The impression emanating from media interest with Pauline Hanson is that One Nation was the national lightning rod for populist dissatisfaction with the policy debate and/or the political system. Election data suggests that populist politics is much more regionally diverse than this and, in terms of national support, it involves a relatively minor share of the national electorate. By considering the state and local district variations in the electoral performance of these parties, the following actual characteristics of Australian populism can be observed.

First, the data indicate that in all jurisdictions, bar South Australia, the vote for those whom might be considered populist was only a very small share of the total vote, and the greatest collective impact was on the result in the Senate (the NXT lower house success in South Australia notwithstanding). The variation of the rate of support in South Australia only really holds if the NXT is considered to be part of the 'populist' type—a proposition that the NXT itself objects to. Even if the NXT result is excluded,

[40] Muller, What is Populism?.

there is little change to the overarching national reality that, as a proportion of the national electorate, support for populism was relatively weak and confined primarily to rural and peri-urban districts especially in Queensland, Western Australia and New South Wales.

Second, the 2016 Federal Election showed that Hanson was not the only charismatic anti-system leader trying to attract voter support. Hanson's attempt to be seen as a populist leader was challenged in at least three including Tasmania (Jacqui Lambie and the JLT), Victoria (Derryn Hinch and the DHJP) and South Australia (Nick Xenophon and the NXT). Here again the question of localism arises: as capable as these characters were of garnering national media attention, the pattern of the vote won by their respective parties highlighted their regional alignment. Beyond their home states, these leaders attracted next to no support. One Nation was able to perform more strongly in Western Australia and New South Wales, but this was due to the lack of a local charismatic figure who could discharge the role in these states commensurate with that of Lambie, Hinch or Senator Xenophon.

Finally, any assessment about the impact populism had on the 2016 Federal Election result must be assessed against the fact that the election for the all-important Senate was for the entire chamber and that this, in turn, significantly reduced the minimum vote required by a candidate to secure a seat. Given the extent of the number of seats won by minor party candidates, including those who might be thought of as populist, the community could be forgiven for thinking that this alone confirms claims of a rising populist constituency. The problem here is that the double dissolution that precipitated the 2016 Federal Election had the effect of lowering the quota in order to win a seat, and that this allowed candidates who might otherwise have failed to secure a seat to become Senators. Only three of the populist Senators returned in the 2016 election are entitled to serve six year terms under the auspices of section 15 of the Australian Constitution. The rest will face the next election with the added hurdles of a much higher quota and an altered electoral system that now no longer allows for the Group Vote Ticket option—a reform designed to prevent the flow of preferences from the vast array of minor parties winning paltry shares of the primary vote through to a more competitive minor-party ticket. Their re-election prospects will be extremely remote unless the various populist tickets are able to win a significantly higher share of the vote than they have done so far.

CONCLUSION

The results of the 2016 Australian election revised interest in debates about populism in liberal democracies. After all, several minor parties that corresponded to the populist type all won parliamentary representation. Pauline Hanson's One Nation Party returned to the Senate almost twenty years after it first won parliamentary representation, while Victorian media personality Derry Hinch was elected to the Senate for the first time. The former PUP Senator Jacqui Lambie also returned to the Senate and former independent Senator Nick Xenophon was also very successful in this election not only in the Senate but also in the lower house district of Mayo. These results coincided with international electoral results, such as Donald Trump becoming President of the United States, Marine Le Pen being one of the two candidates in the French presidential run-off, and the success of the 'Brexit' campaign in the British referendum. As a result, the 2016 Australian Federal Election was seen to be part of a global trend where populist candidates were achieving significant electoral success. This paper has argued that the Australian manifestation of populism is nowhere near as dynamic as these aforementioned international instances.

Indeed, Australian populism is a case study in localised politics in which variations between, and within, states makes a significant contribution to the type of personality that seeks to win a Senate seat, the agenda pursued by the organisation they put together to tackle the electoral process, and the way the electors respond to their campaigns. A sense of proportionality needs to be retained when considering Australian populism. This paper finds a national populist vote of 10.9 percent for the Senate, and 3.8 percent for the House of Representatives. This may be a level of support that can win Senate seats, although the potential for this to happen is influenced by whether all or half of the upper house is up for election. If the 2016 election is any guide, then the following can be said about populism in Australia: the populist vote is only a small proportion of the national electorate, although it is regionally varied and is shared by a variety of parties and candidates. It is a volatile vote that provides the basis for a volatile and erratic populist party system that faces a bleak future should the next election be for only half of the Senate.

One final point should be made in relation to the rate of party formation ahead of national elections that was of such concern to the JSCEM after the 2013 election. The pattern of populist party politics associated with the 2016 election (including the election result) does not conform with the JSCEM view that party formation has been subjected to 'gaming' of the system by a small ground of political operatives. The regional variation in the nature of populist party politics suggests that the formation of these parties was driven by localised responses to issues in the national political

debate. These responses might have been the source of discomfort to some observers, as the regionally-based populist agenda tends to face its sternest criticism and opposition from the metropolitan-based social progressives.[41] The comforting aspect of this, however, is that all participants still seem to have faith in the process of party formation and in participating in the electoral process especially for the Senate. In this way, the 2016 election confirms Sharman's view of the reasons why citizens in a liberal democracy seek to form parties and contest elections, and, in so doing, challenges the much more cynical approach of the JSCEM.

[41] B. Tranter and M. Western, ' Overstating Value Change: Question Ordering in the Postmaterial Values Index', *European Sociological Review* 26(5) 2009: 571-583.

Public Office as/is a Public Trust

David Solomon AM

Former Queensland Integrity Commissioner

INTRODUCTION

The title of this paper encapsulates two concepts used by judges and commentators to describe the obligations and duties of those elected or appointed to public office—that is, members of parliament, officials and others who discharge public duties. The first concept—public office as a public trust—is favoured by some judges who take the word 'trust' in its strictly legal sense, involving fiduciary obligations under equitable doctrines. Former Chief Justice of the High Court, Robert French, has referred to the 'public trust metaphor', saying the notion of public office as a public trust is an old one, 'borrowed … from the principles of equity which define the duties of trustees'.[1]

The second concept—public office is a public trust—uses 'public trust' as a special kind of trust, involving obligations not necessarily the same as those that arise with private trusts. This is not to say that the 'public trust' is not a legal concept: as will be shown below, it is the basis on which successful criminal prosecutions have been brought against some politicians in recent years, most notably, the former NSW Minister, Eddie Obeid.

THE TERM 'PUBLIC TRUST' IN THE LAW

In fact, the term 'public trust' has been recognised and adopted in the statutes establishing anti-corruption bodies in New South Wales, Queensland, Western

[1] Robert French, 'Public Office and Public Trust', the Seventh Annual St Thomas More Forum Lecture, 2011. Transcript, p. 8.

Australia and Victoria,[2] requiring those bodies to provide a safeguard against 'a breach of public trust'. It is also recognised as an ethical requirement in the Public Sector Ethics Act 1994 (Qld), which states in s. 6, 'In recognition that public office involves a public trust …'), and in the Commonwealth Government's Ministerial Code ('In recognition that public office is a public trust…').[3]

The public trust principle is not restricted to criminal laws. It was used in aid of a decision by the High Court in 2017 holding that a South Australian Senator, Bob Day, was disqualified from sitting as a Senator under the Constitution.[4] The High Court's decision sets out in general terms what are the public trust obligations and duties of a Member of Parliament as a public officer.[5] These include 'that parliamentarians have a duty not to use their position to promote their own pecuniary interests (or those of their family or entities close to them) in circumstances where there is a conflict, or a real or substantial possibility of conflict between those interests and their duty to the public' and that 'the fundamental obligation of Members of Parliament in carrying out their functions was to act with fidelity and single-mindedness to the welfare of the community'.[6] Significantly, the High Court's decision also shows that these obligations and duties are fundamental, under the Constitution.

THE HISTORY OF THE NOTION OF PUBLIC TRUST

In one sense, there is nothing particularly new about the High Court's views about the public trust in the Day case. The various judgments quote and adopt statements from judgments of the High Court dating back almost a century. But they come at a time when there is renewed interest in the notion of the public trust and the conduct that is required of (or forbidden to) members of Parliament and other public officers.

[2] For example, the New South Wales *ICAC Act* (1988). s. 8.3.

[3] Australian Government, Statement of Ministerial Standards. Accessed at: https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards.pdf

[4] *Re Day* [No 2] [2017] HCA 14.

[5] The Court was unanimous in its decision but a number of different judgments were delivered. They provide slightly different formulations of the obligations of a public officer.

[6] Submission by the Crown in the Obeid case, based on the judgments in Day, summarised in the judgment of Bathurst CJ in Obeid v. R (2017) NSWCCA 221 [55].

The notion of public trust has a long history in English and American law. In the 1980s and 1990s, Professor Paul Finn[7] wrote a series of papers in which he explained the origins of the concept and its evolution. In one such article, he wrote:

> Though one can point to a significant body of medieval law in England regulating the holders of public office, the common law idea that the officers of government held trusts for the public and were accountable to the public for the use and exercise of their offices, seems to have been consolidated, if not necessarily established, in the 17th century.
>
> … In the shadow of the constitutional monarchy, and with governmental offices in the main formally held under the Crown, the judges of the 17th and 18th centuries were unable to draw the treasonable conclusion that public power came directly from the people. But by a more circuitous route they could still bring public officials into a trust relationship with the public: whatever the source of their power and position, if their offices existed to perform a public service (to discharge public duties) theirs were offices of 'trust and confidence concerning the public'.[8]

The relevant criminal law in the 18th century was set out in the following statement by Lord Mansfield in *R v Bembridge*, a case involving fraudulent behaviour by an accountant in the office of the paymaster-general of the forces:

> Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatsoever way the officer is appointed. … Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between King and the subject it is indictable. That such should be the rule is essential to the existence of the country.[9]

[7] Research School of Social Sciences, Australian National University. Later, a judge of the Federal Court.

[8] Paul Finn, 'A Sovereign People, a Public Trust' in P.D. Finn (ed.), *Essays on Law and Government*, Vol. 1,, Sydney, Law Book Co, 1995: 10-11 (footnotes omitted).

[9] *R v Bembridge* (1783) 93 ER 679 at 681, quoted in David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office', *Criminal Law Journal* 38 2014: 340.

In the 18th and 19th centuries, 'there were frequent prosecutions for the common law offence of misconduct in public office (although seldom referred to by that precise name) in the United Kingdom and the United States', as well as occasional prosecutions in Canada and Australia, according to David Lusty.[10] While such prosecutions continued in the US in the 20th century, and a similar offence was prosecuted in Canada, elsewhere it was rarely utilised. It was not until the last quarter of the 20th century that the common law offence was again prosecuted in the UK, Hong Kong, Australia and elsewhere.[11] As will be seen later, the Obeid case demonstrates its continued use in Australia today.

Criminal prosecutions aside, according to Chief Justice French:

> The importance of the public trust metaphor diminished over time with the rise of specific mechanisms for oversight and accountability, including statutory regulation of the public service, parliamentary scrutiny of official action, the political accountability of ministers and the employment arrangements of officials. However, a loss of faith in these mechanisms in the late twentieth century was, as Justice Finn has observed, 'one of the principal stimuli to renewed interest in "the public trust" and its implications both for officials and for our system of government itself'.[12]

The person most responsible for reviving interest in the public trust doctrine, particularly in Australia, was Professor Finn, as he then was. I have mentioned earlier his many papers discussing the subject. Additionally, he was a principal consultant to the Queensland Electoral and Administrative Review Commission for its 'Review of Codes of Conduct for Public Officials' and was quoted extensively in its report. He was subsequently a leading consultant to the West Australian Royal Commission into the Commercial Activities of Government and other Matters – otherwise known as the WA Inc Royal Commission, which reported in 1992.

[10] Lusty, 'Revival': 340.

[11] Lusty, 'Revival': 341.

[12] French, 'Public Office and Public Trust': 12. The quotation is from P.D. Finn, 'The Forgotten "Trust": The People and the State', in M. Cope (ed.), *Equity: Issues and Trends*, Leichhardt, Federation Press, 1995: 134.

DEFINING THE PUBLIC INTEREST

The public trust doctrine requires a public officer to advance the public interest, as opposed to personal interests. This raises the further question of how the public interest might be determined, or if it is possible to say with any precision what it might be. In a speech given when presenting the 2013 Accountability Round Table Integrity Award, former Chief Justice Sir Gerard Brennan said:

> This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.[13]

Drawing on cases from the 1920s to elaborate on his theme, Sir Gerard Brennan argued that:

> It has long been established legal principle that a Member of Parliament holds 'a fiduciary relation towards the public' and 'undertakes and has imposed upon him a public duty and a public trust'.[14] The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee. As Rich J said: 'Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit'.[15]

Sir Gerard Brennan acknowledged that the demands placed upon members of Parliament and the Executive Government were 'many and varied' and that 'the law takes cognisance of the realities of political life'. Nonetheless, the law 'assumes that the public interest is the paramount consideration in the exercise of all public

[13] Sir Gerard Brennan, 'Presentation of Accountability Round Table Integrity Award', Canberra, 11 December 2013.

[14] The reference is to *R v Boston* (1923) 33 CLR 386, 412 per Higgins J.

[15] The reference is to *Horne v Barber* (1920) 27 CLR 494, 501.

powers'.[16] Citing former Senator and Government Minister Fred Chaney's reflections on 'the compromises needed in government and the many claims on the loyalty of practising politicians', Sir Gerard Brennan noted that Chaney 'did not suggest that any of these claims should subvert consideration of the public interest'. Instead, '[w]henever political action is to be taken, its morality – and, indeed, its legality – depends on whether the public interest is the paramount interest to be served by the intended action'.[17]

Sir Gerard Brennan summarised the duty of officials to the public interest as follows:

> True it is that the fiduciary duties of political officers are often impossible to enforce judicially. The Courts will not invalidate a law of the Parliament for failure to secure the public interest – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty.[18] Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry 'whatever it takes' is not consistent with the performance of fiduciary duty.[19]

POLITICAL DEMANDS AND THE PUBLIC INTEREST: RECENT STEPS TO FILL THE VOID

The compromises needed in government and the many claims on the loyalty of practising politicians that Sir Gerard Brennan and Fred Chaney addressed were matters that also concerned Professor Paul Finn. In 1992, he wrote about the 'modern nature of a parliamentarian's trusteeship'. He said:

> It is right that we should be unrelenting in our insistence upon probity in government and in public administration. But equally we should not forget,

[16] Brennan, 'Presentation'.

[17] The reference is to Fred Chaney, 'Integrity in Parliament – Where Does Duty Lie?', Melbourne Law School, 11 October 2011. https://www.accountabilityrt.org/wp-content/uploads/2011/10/Inaugural-Lecture-Fred-Chaney.pdf

[18] The reference is to *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1,10.

[19] Brennan, 'Presentation'.

> as a media-driven Australian public opinion seems in danger of doing, that the processes of the democratic, representative and party-based system to which we have committed ourselves, are based, in part at least, upon the striking of compromises, upon securing and using influence, upon obtaining advantages for constituents, and – let it not be gainsaid – for Members of Parliament and for Ministers. Necessarily, limits, and strict ones at that, must be placed upon the compromises and the like we are prepared to countenance in allowing our systems of government to function. But unless we recognise in the roles we have given our politicians and in the laws that bind them, that in some degree and for some purposes, compromise, the use of influence, and advantage seeking and taking are tolerable is not necessary features of our public life, we run the risk of demanding standards of our elected officials which are beyond their reach and which also may be prejudicial to the very public purposes we ask them to serve for our benefit.
>
> My argument is not for the tolerance of corruption. Far from it. It is for the recognition that the standards of conduct properly to be expected of a given class of officials are, first and foremost, the standards of role … Our quest for what is meet in official behaviour is not answered simply by calling an official a public trustee or fiduciary and by assuming that this carries set consequences…[20]

This partial void can be filled by what parliament and, where relevant, the common law say about the standards that must be met. In 1996, Justice Finn, as he then was, pointed out that:

> … public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment. From 1862, Australian public service legislation has imposed strictures and limitations upon the employment and non-employment (or private) conduct and activities of public servants; the acquisition of personal interests conflicting with duties of office …[21]

[20] Paul Finn, 'Integrity in Government', *Public Law Review* 1992: 248 (emphasis in the original).

[21] *McManus v Scott-Charlton* (1996) 70 FCR 16 at 24.

Referring to this judgment, Justices Gummow, Hayne, Heydon and Kiefel, in a High Court decision, stated 'Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest'.[22]

The Obeid case is a recent example of the way the common law seeks to enforce the trust principle through the criminal law. Obeid was a former Minister in NSW. He was charged that he, while holding office as a Member of the Legislative Council, 'did in the course of or connected to his public office wilfully misconduct himself by making representations' to a public servant with the intention of seeking an outcome favourable to a company in which he had an interest 'knowing at the time he made the representations that he had a commercial and/or beneficial and/or family and/or personal interest in the said tenancies which he did not disclose to' the public servant. The NSW Court of Criminal Appeal, applying a decision by the Victorian Court of Appeal,18 held that the elements of the offence of misconduct in public office were:

(1) a public official;

(2) in the course of or connected to his public office;

(3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.[23]

On appeal, Obeid argued that the court proceedings involved an assessment of the standards, responsibilities and obligations of a Member of Parliament, which meant the matter fell within the exclusive jurisdiction of the Parliament and was not within the cognisance of the Court. All members of the Court rejected this argument.

In the Obeid case, the trust or duty issue in point (3) above was argued on the basis that it was for the Crown to establish beyond reasonable doubt that it was Obeid's

[22] *Commissioner of Taxation v. Day* (2008) HCA 53 [34].

[23] *R v Quach* (2010) 27 VR 310; [2010] VSCA 106, at [46].

sole purpose to advance his or his family's pecuniary interests. This meant it was not necessary to specify the specific obligations and duties of a Member of Parliament. An attempt by senior counsel for Obeid to have the court consider what those obligations and duties would be was rejected by the High Court on a special leave application. It was unnecessary to do so because of the way the Crown had put its case in the trial.[24]

As mentioned earlier, the High Court considered the obligations and duties of parliamentarians in the Day case. That was one of a number of cases considered by the High Court (in its role as the Court of Disputed Returns) following the 2016 Federal Election concerning the constitutional qualifications (or lack of them) of some MPs and Senators. At issue was whether Day was disqualified from sitting as a Senator because of the provisions of s 44(v) of the Constitution, which states (in part):

> Any person who:
>
> (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth …; shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

At issue were arrangements for the lease of property in which Day had an interest that was to be leased by the Commonwealth for use as Day's electoral office. A significant issue that had to be met by all members of the High Court, was a decision by Chief Justice Barwick, sitting alone as the Court of Disputed Returns, in the only other case considered by the Court concerning s 44(v) of the Constitution, In re Webster.[25] According to that decision, the purpose of the provision 'was to secure the freedom and independence of Parliament from the Crown.'[26] Such a view, if followed in the Day case, would mean there could be no disqualification, because Day's financial arrangements would not allow the Commonwealth to influence Day's parliamentary activities. However, in *Day*, Barwick's interpretation was rejected by every member of the High Court.

Chief Justice Kiefel, and Justices Bell and Edelman, said in their judgment:

---

[24] *Obeid v. The Queen* (2018) 23 March 2018.

[25] (1975) 132 CLR 270; [1975] HCA 22.

[26] *Re Day* [No 2] [2017] HCA 14, at [14].

> A conclusion that s 44(v) has some purpose wider than the protection of the freedom and independence of parliamentarians from the influence of the Crown is inescapable. That wider purpose can only be the prevention of financial gain which may give rise to a conflict of duty and interest.[27]

They said the object of s 44(v):

> … is to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict.[28]

They continued:

> A construction of s 44(v) which proceeds from an understanding that parliamentarians have a duty as a representative of others to act in the public interest is consistent with the place of that provision in its wider constitutional context. The representative parliamentary democracy, for which the Constitution provides, informs an understanding of specific provisions[29] such as s 44(v) and assists in determining the content of that duty, which includes an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.[30] In *R v Boston*, Isaacs and Rich JJ spoke of a parliamentarian having a 'single-mindedness for the welfare of the community'.[31] More recently, it has been said[32] that Parliament has important functions to question and criticise government on behalf of the people and to secure accountability of government activity. This is not a new idea.[33] There can be

---

[27] At [39].

[28] At [45].

[29] The reference is to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 211; [1992] HCA 45.

[30] The reference is to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-99; [1915] HCA 92.

[31] (1923) 33 CLR 386 at 400; [1923] HCA 59.

[32] The reference is to *Egan v Willis* (1998) 195 CLR 424 at 451 [42], 453 [45]-[46]; [1998] HCA 71.

[33] The reference is to *Horne v Barber* (1920) 27 CLR 494 at 500; [1920] HCA 33.

> no doubt that if personal financial interests were to intrude, the exercise of those obligations would be rendered difficult or even ineffective.[34]

They said the section 'looks to the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest'.[35] Later, explaining why Barwick CJ's 'unduly narrow' approach should be rejected, they said:

> To give s 44(v) a limited operation, when it is accepted that it is intended to operate more widely, would be to deny its true purpose. Moreover there is much to be said for the view that the provision has a special status, because it is protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy. So understood there can be no warrant for limiting its operation because of the consequences which might follow for a person who is disqualified.[36]

Justices Nettle and Gordon, in their joint judgment, reached similar conclusions. In the course of their judgment they said:[37]

> Section 44(v) is located in Ch 1 of the Constitution, which provides for a system of representative government:[38] a system that vests the legislative power of the Commonwealth in a Parliament[39] and gives the people of the Commonwealth control over the composition of the Parliament.[40] In that system of representative government, the elected representatives exercise sovereign power on behalf of the Australian people. Parliamentarians 'are not only chosen by the people but exercise their legislative and executive powers as representatives of the people'.[41] The fundamental obligation of a Member of Parliament is 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'.[42]

---

[34] *Re Day* [No 2] [2017] HCA 14, at [49], [50].

[35] At [66].

[36] At [72].

[37] At [269].

[38] The reference is to *ACTV* (1992) 177 CLR 106 at 229; [1992] HCA 45.

[39] S 1 of the Constitution.

[40] See, for example, ss 7, 13, 24, 28, 32 and 41 of the Constitution.

[41] *ACTV* (1992) 177 CLR 106 at 138.

[42] *R v Boston* (1923) 33 CLR 386 at 400; [1923] HCA 59, (emphasis in the original).

Justice Keane reached similar conclusions and quoted more fully the statement of Justice Isaacs in *The King v. Boston*:

> The fundamental obligation of a member in relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation ... is *the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.[43]

CONCLUSION

The judgments in the High Court indicate that members of Australian parliaments have a duty to act 'in the public interest'; that they have a 'fundamental obligation' to 'serve'; that they should act 'with fidelity with a single-mindedness for the welfare of the community'; that they are obliged 'to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations'; that they should avoid putting 'themselves in a position where their duty to the people they represent and their own personal interests may conflict'. The term 'public trust' was not used by any member of the court, but it is a convenient shorthand for the obligations set out in their judgments.

[43] *Re Day* [No 2] [2017] HCA 14, at [179].

Book Reviews

The Australian Policy Handbook: A Practical Guide to the Policy-Making Process (6th Edition), by Catherine Althaus, Peter Bridgman and Glyn Davis. Sydney: Allen & Unwin, 2017, pp. 320. RRP $55.00.

Colleen Lewis

Adjunct Professor, National Centre for Australian Studies, Monash University.

One of the many strengths of *The Australian Policy Handbook* is the background of the authors. All have hands-on experience navigating the challenging complexities that surround the formulation, implementation and analysis of public policy, and the politics that often influence its final shape. Two of the three authors have also taught public policy at the university level, which has enabled them skillfully to identify the gaps between theory and practice.

Associate Professor Catherine Althaus is an academic. Her expertise in the policy field spans two countries (Australia and Canada) and includes time as a policy officer in Queensland Treasury. Peter Bridgman is a barrister. His career includes time as a psychologist and as a consultant in the areas of public governance and integrity. Bridgman has headed a variety of government agencies and is currently a member of Queensland's Civil and Administrative Tribunal and the Queensland Mental Health Review Tribunal. The career of Professor Glyn Davis AC spans academia (teaching public policy) and senior leadership positions in government and academia. He is currently Vice Chancellor of Melbourne University, having previously been Vice Chancellor of Griffith University. Professor Davis also headed the office of Premier and Cabinet in Queensland for two premiers and was the Foundation Chair of the Australian and New Zealand School of Government.

These brief biographies serve to highlight why anyone interested in gaining a greater understanding of public policy and public administration, from an academic and practitioner perspective, should read this well-written, logically structured and highly informative book.

The Australian Policy Handbook consists of 13 chapters, as well as a useful Appendix that provides policy checklists for practitioners and an extensive Glossary that will be particularly useful to anyone who is not an expert in public policy. Each chapter ends by posing questions designed to enhance classroom discussions and raise interesting

points for public sector practitioners to consider. *The Australian Policy Handbook* will also be a valuable resource for anyone in the private sector involved in public-private partnerships and government-business relations more generally.

The *Handbook*'s first chapter explains the difficulties associated with trying to precisely define public policy. The authors point to the multitude of definitions put forward by political scientist over the past 70 years. They have chosen to describe policy in "four different but compatible ways" and to discuss why it can be seen as the authoritative choice of governments; as a hypothesi*s*; as the objective of governmental action; and as public value (a variation of policy as objective). The chapter concludes by reiterating the authors' 2015 proposition that, 'The policy cycle does not assert that policy making is rational, occurs outside politics, or proceeds as a logical sequence rather than as a contest of ideas and interests'.

Chapter 2, 'The Institutions of Public Policy' outlines the institutional context surrounding public policy in the context of the Australian system of responsible government. The chapter alerts readers to a very diverse third sector, which does not form part of the public and private sectors but includes charities, lobby and interest groups, schools and tertiary institutions, thinks tanks and a variety of voluntary organisations. This diverse sector, the authors argue, plays an influential role in society and can affect the shape and outcome of public policy.

The 'policy cycle' is the focus of the relatively brief Chapter 3, which outlines issues that arise as policy progresses from the identification of issues through to evaluation of its consequences. Chapters 4 ('Identifying Issues'), Chapter 5 ('Policy Analysis'), Chapter 6 ('Policy Instruments'), Chapter 7 ('Consultation'), Chapter 8 ('Coordination'), Chapter 9 ('Decision'), Chapter 10 ('Implementation') and Chapter 11 ('Evaluation') describe and analyse in some depth the issues that arise at different stages of the policy process. These chapters all offer theoretical and practical perspectives, with the emphasis being on the latter. The practical approach the authors offer will greatly assist anyone trying to make sense of the policy process.

In Chapter 12, Managing the Policy Process', the authors begin by making reference to an obvious but sometimes overlooked aspect of public policy, namely that 'the policy process does not run itself'. This opening remark reminds readers of why policy actors need to ensure that actions are sequenced so policy can progress as smoothly as possible from the ideas stage to implementation and evaluation. Most importantly, this chapter moves beyond public policy management and planning to highlight the need for procedural integrity, ethical decision-making and the value of frank and fearless advice. Chapter 12 also notes a decline in policy capacity, largely attributed to state of political leadership and public service executives.

The final chapter, 'When Policies Succeed and Fail', explains why policies often fail. It points to poor design, inadequate implementation, under resourcing, knee-jerk responses by governments pressured to react to real or perceived problems, and external factors that can impact quickly on policy decisions. However, the authors do not focus solely on failures. They discuss policy successes and what contributes to them, drawing on Jill Rutter's seven factors for successful public policy, as well as former United Kingdom Cabinet Secretary Gus O'Donnell's thoughts on good public policy practice.

Based on 30-years of experience, O'Donnell makes the following recommendations: be clear about the outcomes you want to achieve; enhance policy as objectively as possible; do not bear false witness against your neighbour's policies; do not assume the government must solve every problem; do not rush to legislate; honour the evidence and use it to make decisions; be clear who is accountable for what and line up the powers and the accountabilities; do not kill the messenger; remember that it is a privilege to serve; and keep a sense of proportion. O'Donnell's list should be placed on the office wall of every person involved in the policy process.

I wish *The Australian Policy Handbook* had been available when I did my degrees in public policy many years ago. Students did not have the advantage then of being able to access such a comprehensive, well-researched and well-written policy handbook, which outlines very clearly the complex, frustrating but nevertheless fascinating processes and relationships that influence good and bad public policy outcomes. I have no hesitation in recommending *The Australian Policy Handbook* to anyone wishing to learn or learn more about all aspects of public policy.

Animal Welfare in Australia: Politics and Policy, by Peter John Chen. Sydney: Sydney University Press, 2016, pp. xxi + 406. RRP $40.00 (pb).

Darren Halpin

Professor of Political Science, Research School of Social Sciences, the Australian National University.

This book offers, in the author's own words, 'a broad overview of a diverse policy field', namely animal welfare in Australia. Right from the first paragraph, Chen draws the reader to the obvious paradox of public attitudes and animal welfare: we lavish attention and resources on the care of companion animals, yet slaughter and consume large numbers of farm animals (and at the same moment we campaign to save a handful of sharks). It follows that for all 'sides' involved in the policy field, not to mention policy makers, this is a difficult terrain in which to operate.

Chen's approach is one of well-read and erudite synthesis matched with original fieldwork and data analysis. Drawing together thinking from sociology, philosophy, public policy and political science, this book shines a critical light on the theme of animal welfare policy and politics in Australia. The book's scope covers public opinion, media representations, elite policy maker perspectives, and policy/advocacy systems. It is thorough and systematic in its approach.

It is important to acknowledge that the author has strong convictions regarding his subject matter. It is immediately apparent—in the reference to human versus non-human animals, for instance—hat he will be highly critical of the 'animal-using' industry. Yet, these convictions do not, on my reading, hinder or impede the scholarly basis of his work or the conclusions he draws. Chen's analysis and discussion is open and even-handed.

While animal welfare may not rank with youth employment, migration and terrorism as a visible policy challenge of the era, it only takes one focussing event to propel it back on the policy agenda (as shown by the very recent April 2018 scandal involving mass death of sheep as part of Australia's live-export meat trade). This is a point that Chen himself makes in the concluding chapter – animal welfare is a policy space that is likely to ebb and flow on the public agenda.

The undoubted strength of this book is its scope—it focuses on one sector and examines it exhaustively. I strongly recommend a flick through the Annexes to this book, which contain a large and systematic corpus on key trends in animal welfare. This is a real treasure for scholars who want to pick this work up and develop its themes further. The data amassed is impressive, covering public opinion, media, original elite interviews, and so on.

For some, the absence of a single clear-cut theoretical and conceptual framework, or of well sign-posted clear and falsifiable research questions, will be a point of criticism. Chen has elected to push policy frameworks to the background and the let the richness of his empirical work (including his own expert knowledge of the field) shine. I think this is a wise decision for the book but I hope to see him produce some articles that flip this and stamp home the broader lessons for policy scholars.

In that vein, the chapter on advocacy organisations (chapter 6) holds many gems that could easily spin-off into stand-alone articles. For students of advocacy organisations, this is a reminder of the contribution that focussed sector-based studies can make to a sub-field that has, over the last two decades, moved heavily towards aggregate system-level studies. The book's discussion of animal protection groups in terms of 'primary activities' and 'ideological orientation' are straightforward, yet revealing. We learn about the ideological transformation of this sector, something that has real policy import but is a dimension of policy advocacy that is often lost (or difficult to implement) in contemporary large-n policy projects.

The scope of this book is impressive. Thorough to a fault, it is no doubt **the** book for policy scholars interested in animal welfare in Australia. It will be on the reading list for my own interest group and lobbying class, and I suspect it will be on many an Australian public policy reading lists. My hope is that inspires similar treatments of other policy sectors—perhaps Chen will himself move on to new policy domains?

Silent Invasion: China's Influence in Australia, by Clive Hamilton. Melbourne: Hardie Grant, 2018, pp. 376. RRP $34.99 (pb).

David Clune

Honorary Associate, Department of Government and International Relations, University of Sydney.

Clive Hamilton is an unusual person to have written this book. An environmentalist of the crusading kind, he founded and ran for almost two decades the left-leaning Australia Institute and was a Greens parliamentary candidate. He explains at the outset that his concern over Chinese influence began in 2008 when he joined a group of Tibetans protesting peacefully outside Parliament House as the Torch arrived on its way to the Beijing Olympics: 'The pro-Tibet protesters, vastly out-numbered, were mobbed and abused by a sea of Chinese people wielding red flags … What happened that day left me shocked … And I was affronted. How dare they arrive, on the doorstep of our parliament, the symbol of our democracy, and shut down a legitimate protest?' Revelations in 2016 about Chinese political donations that led to the resignation of ALP Senator Sam Dastyari reignited Hamilton's concern: 'China and Australian democracy had collided again … I decided to investigate and write a book so that Australians could understand what has been happening to our country'.

In summary, Hamilton's argument is as follows. In relatively recent years the Chinese Communist Party (CCP) has heavily promoted the world view that, after being humiliated by the west in the colonial era, China has recovered strength and prestige under Communist rule. It is now on the way to world domination. A new generation has imbibed this anti-western nationalism and equates loyalty to the CCP with loyalty to China. The Chinese Government sees Australia as part of its sphere of influence and a weak link in the western bloc. Its aim is to break the ANZUS alliance and make Australia a tributary state through systematic infiltration. Part of the strategy is to mobilise the local Chinese community as a 'fifth column'. Those not prepared to do the CCP's bidding are at risk of coercion and persecution. Chinese community organisations have been turned into fronts which promote the CCP line. Attempts are being made to place Chinese loyal to the CCP in parliament, key public sector and university positions. Chinese businessmen who flourish with CCP support have been encouraged to buy influence in Australia, particularly in political parties, through large

donations. Australia's economic dependence on China makes it vulnerable to coercion.

Early in the book, Hamilton attempts to refute some of the charges he (correctly) anticipated would be levelled against him. In response to those who say, 'The US has dominated Australia for decades, what's new?', Hamilton says, 'The US never had the kind of economic leverage over Australia China has, nor made threats to damage us if we do not toe its line. It hasn't endangered our democratic system of elected governments and its government has never used money to buy off our politicians'. This is something of an over-statement. Favoured Australian trade unionists received free trips to the US during the cold war. The CIA-funded Association for Cultural Freedom waged ideological war against the Australian left. Richard Nixon was so enraged by Gough Whitlam's attempts to forge an independent foreign policy that the Australia-US alliance almost foundered.

Hamilton denies that his book is racist and Sinophobic. He stresses that he is not conflating the Chinese people and their Government; to the contrary, that is a tactic he accuses Beijing of using to solidify its control over the Chinese diaspora. His target is the CCP not the Chinese nation. Hamilton says many Chinese Australians share his concerns about Communist influence. A number are quoted in the book.

A forthright author who is not afraid of controversy, Hamilton writes in a polemical, racy style; for example, 'If money talks in Australia, it increasingly does so in Mandarin'. This makes his book readable, but it does tend to inflame emotions. Hamilton also indulges in some personal attacks which are regrettable and unnecessary. That said, Hamilton has done his research and marshalled the facts to support his thesis. He has courageously raised a key issue regarding Australia's future. Is a resurgent China a benign power, best placated as US influence wains, or a potential hegemon intent on turning Australia into a sham democracy like Hong Kong? It is to be hoped that this book receives the serious consideration it deserves rather than unthinking rejection from vested interests of the left and right.

Australasian Study
of Parliament Group