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Editor - Professor Rodney Smith

Federalism in Australia

Public Engagement and Budgets in Bangladesh

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AUSTRALASIAN PARLIAMENTARY REVIEW

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

From the Editor

Rodney Smith

Professor of Australian Politics, University of Sydney

I am confident that this issue of the *Australasian Parliamentary Review* will have something of interest for all readers. It begins with two articles offering insightful legal perspectives on key questions of the day. In the first, former Chief Justice of the High Court of Australia, The Hon Robert French AC, places a series of recent court cases involving aspects of Australian federalism into their broader constitutional context. In the second, The Hon. D. L. Harper AM, a former Judge of the Court of Appeal of the Supreme Court of Victoria, examines the recent judgement of the Supreme Court of the United Kingdom on the attempt by Prime Minister Boris Johnson to prorogue the UK Parliament.

The next two articles continue the broad theme of relations between Parliament and the Executive, albeit in quite different contexts and with varied foci. Nizam Ahmed and Sadik Hasan analyse recent developments in strengthening parliamentary scrutiny of government budgets in Bangladesh that draw on the resources of civil society organisations. Anthea Howard focuses on three cases of serious policy failure – two from Australia and one from New Zealand – to tease out current expectations surrounding ministerial responsibility and how these expectations might be made more robust.

The next article focuses squarely on New Zealand. Greg Cotmore presents systematic evidence to show that the introduction of Parliamentary TV in the New Zealand House of Representatives has generally been associated with improved behaviour in the Chamber. He concludes that the current restrictions on television coverage could safely be relaxed to allow the House to be presented in a more dynamic way to the public.

Finally, David Clune and Rodney Smith discuss the 2019 NSW state election, a contest which showed, among other things, that the long period during which NSW was a 'Labor state' is over. Despite Gladys Berejiklian's victory, the election results for the Legislative Council mean that her Coalition Government will have a difficult time navigating its legislative program through the upper house.

This issue is rounded off with three book reviews, covering Australian electoral law, possible reforms to the Australian Constitution, and a new appraisal of the 1978 Hilton Hotel bombing in Sydney.

As is always the case, producing the *Australasian Parliamentary Review* has only been possible with the help of a number of article referees, book reviewers and others involved in the production process. I thank them again for their willingness to give their time and labour to support the journal. This issue has been delayed by a number of factors, for which I apologise, but I am also confident that readers will find it has been worth waiting for.

Articles

Federalism and the *Constitution* – An Update

The Hon Robert French AC[1]

Former Chief Justice of the High Court of Australia

INTRODUCTION

This paper concerns federalism in general, our federation in particular, and how our Federal Constitution affects Commonwealth law-making and executive powers, and the rule of law.

FEDERALISM IN GENERAL

Federalism denotes a class of systems of government in which power is distributed between one national government and several sub-national governments, each responsible for a part of the national territory. The distribution of powers between the centre and the regions is effected by a constitution which cannot be amended unilaterally by the central government or by the regions acting separately or together. That distribution of powers is generally interpreted and policed by a judicial authority.[2] Judicial authority is therefore an important feature of federation. A.V. Dicey wrote: 'Federalism ... means legalism — the predominance of the judiciary in the constitution — the prevalence of a spirit of legality among the people'.[3] Dicey described the courts in a federation like the United States as 'the pivot on which the constitutional arrangements of the country turn'.[4] The bench, he said, 'can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the

[1] Paper delivered to the Australasian Study of Parliament Group (WA Chapter) on 20 September 2018.

[2] Geoffrey Sawer, *Modern Federalism*. Carlton: Pitman, 2nd edition, 1976, p. 1.

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*. London: Macmillan, 10th edition, 1959, p. 175.

[4] Dicey, *Study of the Law of the Constitution*, p. 175.

guardian but also at a given moment the master of the constitution'.[5] Hence the importance of judicial decisions in shaping our federation. Ultimately of course, it is the people who are the masters of the Australian *Constitution* through their power to amend it pursuant to s 128.

Another important factor in the shaping of our federation has nothing to do with the judiciary. That is cooperative federalism. That describes an attribute of a federation in which the component governments routinely engage in cooperative action with a view to achieving common objectives. In Australia that cooperation can be legislative, administrative, judicial or a mixture of all or some of them. It can be vertical, between Commonwealth and State and Territory governments, or horizontal involving the State and Territory governments only. It may use joint decision-making regimes or a single decision-maker acting under a consultative regime. There are many examples of cooperative federalism at work in Australia and its development is a very important part, if not the most important part, of the evolution of our federation today. The courts, for all their significance, are ad hoc decision-makers. Their decisions depend upon the cases that come before them.

THE LAW-MAKING POWERS OF THE COMMONWEALTH PARLIAMENT

Australia's Federal Constitution confers legislative power on the Commonwealth Parliament with respect to enumerated topics set out in s 51. Although, for the most part, those powers are concurrent with the legislative powers of State Parliaments, they are, by operation of s 109, paramount. A State law inconsistent with a Commonwealth law is invalid to the extent of the inconsistency.

By reason of s 109, the broad judicial interpretation of Commonwealth legislative powers, the Commonwealth's financial strength as primary revenue raiser deriving from its taxation power and the power to make conditional grants to the States under s 96 on any topic, the Commonwealth is the dominant party in the Federation.

Further, some of the powers conferred upon the Commonwealth Parliament under the *Constitution* have been interpreted as ambulatory and enable it effectively to legislate with respect to subjects outside the enumerated list. Leading examples are the

[5] Dicey, *Study of the Law of the Constitution*, p. 175.

taxation power,[6] the external affairs power[7] and the corporations power.[8] Nevertheless, Australia is not a unitary State. Commonwealth powers do not cover all the matters which might be the subject of legislation. Moreover there are limits imposed on the legislative power of the Commonwealth and the States by express guarantees and prohibitions and judicially developed doctrines. Those doctrines include the proposition that the Commonwealth cannot make a law which will destroy or weaken the functioning of the States or their capacity to govern. That important qualification was developed in a number of cases dating back to 1947.[9]

A central element of the *Constitution* was the creation of an economic union in which the States and their people were accorded formal equality. Accordingly, by operation of s 92, trade, commerce and intercourse among the States are 'absolutely free'. The Commonwealth Parliament has exclusive power with respect to customs, excise, and bounties.[10] It was to impose uniform duties of customs within two years after its establishment.[11] It can make laws with respect to taxation under s 51(ii) but not so as to discriminate between States or parts of States.[12] Section 99 provides that the Parliament could not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another. A resident in any State

6 *Constitution* s 51(ii); *South Australia v Commonwealth* (1942) 65 CLR 373 (*First Uniform Tax Case*); *Victoria v Commonwealth* (1957) 99 CLR 575 (*Second Uniform Tax Case*); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Ray Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97.

7 *Constitution* s 51(xxix); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act C*ase).

8 *Constitution* s 51(xx); *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices Case*).

9 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1971) 122 CLR 353; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

10 *Constitution* s 90.

11 *Constitution* s 88.

12 As to the application of which see *R v Barger* (1908) 6 CLR 41, 78, 107; *Elliott v Commonwealth* (1936) 54 CLR 657, 668 and 683; *Conroy v Carter* (1968) 118 CLR 90; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548.

cannot be subject, in any other State, to any disability or discrimination which would not be equally applicable to him or her if resident in such other State.[13]

COOPERATIVE FEDERALISM

Despite the dominance of the Commonwealth, cooperative federalism in Australia is alive and well. It involves voluntary arrangements between the States and the Commonwealth in the service of national objectives which neither, acting separately, could achieve. This is manifested by the existence of a significant number of cooperative regulatory schemes involving mirror legislation or the enactment of a Commonwealth law outside its constitutional competency on the basis of a referral of power by the States. Such referrals are possible under s 51(xxxvii) of the *Constitution*. By way of example, the *Corporations Act 2001* (Cth) is made by the Commonwealth in the exercise of a referred power. For although the Commonwealth has power to make laws with respect to foreign corporations and trading and financial corporations formed within Australia, that power was held by the High Court not to extend to the formation of corporations.[14] It now has that power pursuant to a referral from the States.

The *Constitution* does not mandate cooperative federalism, but it certainly allows for it. Cooperative federalism tends to be driven by factors including, but not limited to, national objectives of economic efficiency and regulatory and legislative harmonisation calculated to enhance Australia's ability to compete in global markets.[15]

FEDERAL CONSTRAINTS ON COMMONWEALTH LEGISLATIVE POWER

It has long been the case that the Parliament of the Commonwealth can make laws affecting the States and their agencies. However, there is an implied limit that the Commonwealth cannot make laws which destroy or significantly burden or weaken the capacity of the States to carry out their proper legislative, executive and judicial

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13 *Constitution* s 117. See *Street v Queensland Bar Association* (1989) 168 CLR 461.

14 *New South Wales v Commonwealth* (1990) 169 CLR 482.

15 Robert French, 'Co-operative Federalism', in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution*. Oxford: Oxford University Press, 2018, pp. 807–29.

functions. The *Constitution* assumes the continuing existence of the States, their co-existence as independent entities within the Commonwealth and the functions of their governments.

On that basis the High Court in 2003 held that a law of the Commonwealth which imposed a special tax on the statutory pension entitlement of a State judge, which was supposed to be equated to the general superannuation surcharge, was invalid.[16] The tax law was not one of application to taxpayers generally. The judge would have been liable to pay a surcharge calculated in part on 'the amount that constituted the actuarial value of the benefit that accrued to him or her, … for each financial year'. The position of State judges was thus differentiated from that of other high income earners. Chief Justice Gleeson put it this way:

> That differential treatment is constitutionally impermissible, not because of any financial burden it imposes upon the States, but because of its interference with arrangements made by States for the remuneration of their judges.[17]

More likely to attract the sympathy of parliamentarians was the subsequent case of *Clarke v Federal Commissioner of Taxation*[18] in 2009 which concerned the validity of a similar law imposing a special surcharge on the statutory superannuation entitlement of retired Members of the South Australian State Parliament. In holding the law to be invalid, the Court said that the legislation involved a significant curtailment or interference with the exercise of State constitutional power. It impaired the capacity of the State to fix the amount and terms of the remuneration of its parliamentarians. That is a critical aspect of the State's capacity to conduct a parliamentary form of government and to attract competent persons to serve as legislators.

The High Court has also, in recent times, been concerned with the limits on Commonwealth power imposed by anti-discrimination provisions of the *Constitution*. Particular provisions in relation to tax and laws relating to trade, commerce or review are set out in s 51(ii) and s 99 of the *Constitution*. Section 51(ii) prohibits discrimination between States and parts of States in relation to taxation laws and s 99 provides that:

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16 *Austin v Commonwealth* (2003) 215 CLR 185.

17 *Austin v Commonwealth* (2003) 219 [28].

18 (2009) 240 CLR 272.

'The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof'. As was said in *Capital Duplicators Pty Ltd v Australian Capital Territory*[19] these provisions, taken with other parts of the *Constitution*, created a Commonwealth economic union not an association with States each with its own separate economy.

In *Fortescue Metals Group Ltd v Commonwealth*,[20] decided in 2013, Fortescue challenged the validity of the Commonwealth Minerals Resource Rent Tax legislation on the basis that it applied differentially between States dependent upon the local State royalty regimes. The challenge was rejected by the High Court. In a joint judgment Hayne, Crennan, Kiefel, Bell and Keane JJ, said that a Commonwealth law does not discriminate between States merely because it has a different practical operation in different States arising from the fact that those States may have created different circumstances in which the Commonwealth law will apply by enacting different State legislation. The *Minerals Resource Rent Tax Act 2012* (Cth) did not provide for any difference in MRRT liability according to where a mine operated. To the extent that the amount payable varied from State to State because different rates of royalty were charged, those variations were due to different conditions that exist in the different States and, in particular, the legislative regimes provided by the States.

The decision did not undercut in any sense the constitutional concept of a Commonwealth economic union rather than an association of States as separate economic entities.

In 2012 there was an attempt to invoke s 92 against a New South Wales State law which imposed particular fees in relation to out-of-State betting services. In *Betfair Pty Ltd v Racing New South Wales*,[21] s 33 of the *Racing Administration Act 1998* (NSW) prohibited an operator from using New South Wales racing field information unless it had an approval under that Act and complied with its conditions. The section empowered the relevant racing control body, in that case Racing New South Wales, to grant approval to a person to use New South Wales racing field information subject to the condition that the person pay a fee. A betting exchange operator, incorporated in Australia with its head office in Victoria, provided wagering services to customers

[19] (1993) 178 CLR 561.

[20] (2013) 250 CLR 548.

[21] (2012) 249 CLR 217.

throughout Australia by the operation from Tasmania of a call centre. It contended that the fee conditions infringed s 92 of the *Constitution* because a greater percentage of the revenue drawn from its wagering operations was taken up by the fees than was taken from bookmakers and the totalisator based in New South Wales which had higher profit margins. The Court held in *Betfair* that the fee condition did not infringe s 92. It was for the betting exchange operator to point to a relevant differential treatment likely to discriminate in a protectionist sense between interstate and intrastate wagering transactions which used New South Wales race field information. The interstate operator had not demonstrated that the likely practical effect of the fee condition would be a loss of, or impediment to, increasing market share or profit. The purpose of s 92 as an anti-protectionist measure supportive of an economic union was reinforced.

The shape of federation is affected not just by the scope of Commonwealth legislative power in its impact on the States but also by cooperative action between the States, Territories and the Commonwealth and laws made to give effect to such cooperation. There are, however, limits on the scope of such cooperative action if it engages a constitutional prohibition. In *ICM Agriculture v Commonwealth,*[22] the Court upheld the validity of New South Wales water legislation which provided for the conversion of existing bore licences into new aquifer access licences. The conversion provision was made to implement a funding agreement between the State and the Commonwealth. The funding arrangements between the Commonwealth and the State relied upon s 96 of the *Constitution* which provides for conditional grants to be made to the States. The Commonwealth was to contribute to the cost of a project proposed by New South Wales on condition that the State would convert all water licences to achieve a 50 percent reduction in entitlements by 1 July 2016. This arrangement was located within the general scope of an intergovernmental agreement known as 'The National Water Initiative' involving the Commonwealth, New South Wales, Victoria, Queensland, South Australia, the ACT and the Northern Territory.

The challenge to the conversion legislation, which did not succeed, was based on the proposition that the conversion of the licences in fulfilment of the condition imposed by the Commonwealth amounted to an acquisition of property other than on just terms pursuant to s 51(xxxi) of the *Constitution*.

[22] (2009) 240 CLR 140.

The Court ruled that the conversion was not an acquisition of property. Ground water was a natural resource. Importantly, however, four of the Justices, French CJ, Gummow, Heydon and Crennan JJ were of the view that the conditional grants power under s 96 of the *Constitution* does not authorise the Commonwealth to give financial assistance to States on terms and conditions requiring the States to acquire property other than on just terms.

THE EXECUTIVE SPENDING POWER OF THE COMMONWEALTH — THE *PAPE CASE*

The executive spending power of the Commonwealth, which is relevant to the balance of power between the Commonwealth and the States, has been explored in three cases beginning with *Pape v Federal Commissioner of Taxation*.[23] The cases have implications for federalism in terms particularly of the Commonwealth's power to expend directly into areas of State interests without the support of a s 96 conditional grant or under a valid Commonwealth law.

Pape concerned the validity of the *Tax Bonus for Working Australians Act 2009* (Cth). The Act provided for payments to be made to a large number of Australian resident taxpayers. Its purpose was to create a 'fiscal stimulus', to support economic activity as a means of mitigating the effects of the Global Financial Crisis. Mr Pape, a law lecturer at the University of New England, contended that the payment and the legislation authorising it were beyond the executive and legislative powers of the Commonwealth. A majority of the High Court held that the determination by the Executive, supported by agreed facts in the case, that there was a need for a fiscal stimulus, enlivened executive spending power and, with it, the power to enact the *Tax Bonus Act*. The *Tax Bonus Act* was incidental to the exercise of the executive power and therefore authorised by s 51(xxxix) of the *Constitution*. An important holding by all members of the Court was that satisfaction of the constitutional requirement for a parliamentary appropriation under ss 81 and 83, was not a source of substantive executive spending power. That had to be found elsewhere in the *Constitution* or in statutes made under it. Appropriation was a necessary, but not a sufficient condition of the power to expend public money.

[23] (2009) 238 CLR 1.

In their joint judgment in *Pape*, Gummow, Crennan and Bell JJ posed the question about the respective spheres of the exercise of executive power by Commonwealth and State governments. They said that s 61 confers on the Executive Government power to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[24] They described the Executive Government of the Commonwealth as the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale of the Global Financial Crisis. It was said to have its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the *Constitution*. Its form in Australia today is a power to act on behalf of the federal polity.[25] It was unnecessary to attempt an exhaustive description of the content of the power provided by s 61. That set the scene for the *School Chaplaincy Cases* in *Williams (No 1)*[26] and *(No 2)*.[27]

THE EXECUTIVE SPENDING POWER – THE *SCHOOL CHAPLAINCY CASES*

In *Williams (No 1)* the plaintiff, whose children were enrolled at a Queensland State Primary School, challenged the validity of an agreement made by the Commonwealth Government with the Scripture Union Queensland for the provision of funding under the National School Chaplaincy Program. Under the agreement the Scripture Union was to provide chaplaincy services and to ensure that they were delivered in accordance with the National School Chaplaincy Program Guidelines. The Commonwealth was obliged to provide the funding for those services, subject to the availability of sufficient funds and compliance by Scripture Union with the terms on which the funding was provided. That was direct money by the Executive and not a s 96 grant. There was no statutory authority for the expenditure. The Court held that the agreement and payments were beyond the executive power of the Commonwealth.

[24] (2009) 87–8 [228].

[25] (2009) 89 [233].

[26] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

[27] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

The Commonwealth argued that the Executive had a capacity similar to that of other legal persons which meant that its power to spend was affectively unlimited. In the alternative it argued that Commonwealth executive power mapped the contours of its legislative powers. The capacities argument was rejected by six members of the Court. Gummow and Bell JJ quoted from the 1954 judgment of the High Court in *Australian Woollen Mills Pty Ltd v Commonwealth* the observation that 'the position is not that of a person proposing to expend moneys of his own. It is public moneys that are involved'.[28] Their Honours also observed that the Commonwealth's submission on this point appeared to proceed from an assumption that the Executive branch had a legal personality distinct from the Legislative branch with a result that it was endowed with the capacities of an individual. The legal personality, as they said, is that of the Commonwealth of Australia, which is the body politic established under the *Commonwealth of Australia Constitution Act 1900* and identified in covering cl 6 of the *Constitution*.

Importantly, four of the Justices in *Williams (No 1)* rejected the argument that the executive power follows the contours of Commonwealth legislative power. In my view, expressed in my judgment, there were consequences for the Federation flowing from attributing to the Commonwealth such a wide executive power to expend moneys on any subject of Commonwealth legislative competency subject only to the requirement of a parliamentary appropriation.[29] Gummow and Bell JJ, in common with Crennan J, were concerned about the bypassing of the grants power in s 96 and the importance of the principle of responsible government in relation to the requirement of statutory authority for executive spending.[30]

The Commonwealth Parliament subsequently enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), an omnibus bill, purporting to provide broad legislative authority for the Executive to enter into contracts and to spend money on programs specified in regulations. The Chaplaincy Program was purportedly supported by this legislation. The program was challenged successfully in *Williams (No 2).*

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[28] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 236 [151] citing *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461.

[29] (2012) 248 CLR 156, 192–3 [37].

[30] (2012) 234 [143].

In *Williams (No 2)* the Court was invited to reopen *Williams (No 1)* but declined to do so. It held that the omnibus legislation, in its application to the National Schools Chaplaincy Program, was not supported by any constitutional head of legislative power. The making of payments for the purposes of the program was not within the executive power of the Commonwealth. Six Justices sat on the case. The Justices rejected an argument that *Williams (No 1)* should be reopened because it did not give a single and comprehensive answer to when and why Commonwealth spending needs statutory authorisation.

There are, no doubt, from an academic perspective, many unanswered questions about the scope of Commonwealth executive power in Australia and perhaps also the scope of the executive power of the States. Some of them may give rise to anxiety about future directions. The judiciary is unlikely to provide a comprehensive answer in any one case. The development of principle will proceed case-by-case. It may be that there will not be many more challenges to the expenditure of public moneys. In that connection, it may be noted that the Court recently dismissed challenges to the expenditure of Commonwealth moneys to fund a postal survey of electors on the question whether the definition of 'marriage' in the *Marriage Act 2004* (Cth) should be amended to extend to marriages between couples of the same gender.[31]

THE *COMMONWEALTH CONSTITUTION* AND STATE JUDICIAL POWER

The doctrine of separation of powers does not have a general application to State courts. There have been a number of unsuccessful challenges to State laws on the basis that they offended against that doctrine. Professor Carney[32] observed that they have failed for two principal reasons:

- The inability to derive any intent from the relevant State Constitutions to vest the judicial power of the State exclusively in its courts; and

[31] Wilkie v Commonwealth; Australian Marriage Equality Ltd v Minister for Finance [2017] HCATrans 176.

[32] Gerard Carney, *The Constitutional Systems of the Australian States and Territories*. Cambridge: Cambridge University Press, 2006, pp. 344-5; *Clyne v East* (1967) 68 SR(NSW) 385; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *Building Construction Employees and Builder's Labourers Federation of New South Wales v Minister for Industrial Relations* (NSW) (1986) 7 NSWLR 372; *Collingwood v Victoria (No 2)* [1994] 1 VR 652.

- The lack of entrenchment of those provisions which concern the judicial branch.

In *Kable v Director of Public Prosecutions (NSW)*,[33] a majority of the High Court held that the New South Wales Constitution does not embody a doctrine of the separation of judicial power from the legislative and executive powers.[34] As a general proposition, reiterated by four Justices of the High Court in a judgment delivered in December 2012,[35] the doctrine of separation of powers as developed and applied in the *Boilermakers' Case* in respect of the Commonwealth Court of Conciliation and Arbitration does not apply to the States.[36]

Nevertheless, the *Kable* doctrine and a number of cases which followed it over the years have developed principles which, taken together, have a number of features of a separation of powers doctrine for State courts which limit the law-making power of State parliaments. A full discussion of those decisions would require a separate paper. However, they have given rise to the following principles:

- State legislatures cannot abolish State Supreme Courts[37] nor impose upon them functions incompatible with their essential characteristics as courts nor subject them in their judicial decision making to direction by the executive.[38]
- A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the courts institutional integrity.[39]

[33] (1996) 189 CLR 51.

[34] (1996) 65 (Brennan CJ), 79 (Dawson J), 92–94 (Toohey J), 103–104 (Gaudron J), 109–110 (McHugh J).

[35] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343.

[36] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 368, [57] citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Hayne, Crennan, Kiefel and Bell JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 78–80 (Dawson J), 92-94 (Toohey J), 109, 118 (McHugh J); *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531, 573 [69].

[37] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J), *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543–44 [151]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[38] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

[39] *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92–93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

- A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[40]
- State legislatures cannot immunise statutory decision makers from judicial review by the Supreme Court of the State for jurisdictional error.[41]
- State judges acting persona designata cannot validly be given functions incompatible with the role of their courts as repositories of federal jurisdiction.

There are some elements of those propositions which produce outcomes similar to those flowing from the doctrine of separation of powers at Commonwealth level. However, putting to one side the inability of State legislatures to abolish Supreme Courts or to deprive them of their traditional supervisory jurisdiction, a key concept underpinning the stated limits is that of institutional integrity. That concept has been developed in terms of essential or defining characteristics which mark courts apart from other decision-making bodies.

The implications drawn by the High Court from Ch III of the *Constitution* and reflected in *Kable* and other cases has the effect of shoring up the rule of law at Commonwealth, State and Territory levels. There is no exercise of official power at Commonwealth or State levels that is beyond the scope of judicial review for jurisdictional error. All of that underpins the judicial system of Australia as not merely a system of State and Federal courts, but a national integrated judicial system with a number of components.

CONCLUSION

The story of federalism under the *Constitution* is sometimes depicted, in a rather simplistic way, as the story of the rise of Commonwealth power relative to that of the States. That is an important historical reality. But the full story is a good deal more complex. It is also a story about the limits of Commonwealth law-making and executive power derived from the federal nature of the *Constitution*. It is a story about cooperative federalism. It is also a story about the recognition of the rule of law as an

[40] *Wainohu v New South Wales* (2011) 243 CLR 81, 210 [47] (French CJ and Kiefel J).

[41] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

essential aspect of our federal and state judiciaries reflecting their collective character as a national integrated system of courts.

The story is a rich one and there is much more of it to be told.

R v The Prime Minister; Cherry and Others v Advocate General for Scotland

In the Supreme Court of the United Kingdom

Before Lady Hale, President; Lord Reed, Deputy President; Lord Kerr; Lord Wilson; Lord Carnwath; Lord Hodge; Lady Black; Lord Lloyd-Jones; Lady Arden; Lord Kitchin; and Lord Sales.

Judgment delivered on 24 September 2019 by Lady Hale and Lord Reed giving the unanimous judgment of the Court.

The Hon. D. L. Harper AM

Former Judge of the Court of Appeal of the Supreme Court of Victoria

In this judgment, the Supreme Court of the United Kingdom held that an Order in Council by which the Queen purported to prorogue the UK Parliament from mid-September to mid- October 2019 was unlawful. It is therefore not surprising that the Court described it as of 'grave constitutional importance'.[1] It is likely to be important in Australia as well. It is also of interest because it has been characterised by the conservative media as something it is not. An analysis of both its importance and its limitations might therefore be of interest.

On 27 August 2019 (or possibly the following day; the date of the relevant conversation is not clear) the UK Prime Minister, Boris Johnson, advised the Queen that the UK Parliament should be prorogued for a period of about five weeks: from a date between 9th and 12th September until 14 October. The Queen was bound to accept that advice, and did so. On 28 August a meeting of the Privy Council was held at Balmoral, and the

[1] Supreme Court judgment, paragraph 26.

necessary Order in Council was made. The issue before the Supreme Court was whether that Order was lawful.

The Prime Minister's lawyers argued that

> *… the court should decline to consider the challenges with which these appeals are concerned, on the basis that they do not raise any legal question on which the courts can properly adjudicate: that is to say, that the matters raised are not justiciable. Instead of the PM's advice to Her Majesty being reviewable by the courts, they argue that he is accountable only to Parliament. They conclude that the courts should not enter the political arena but should respect the separation of powers.*[2]

On 4 September the Lord Ordinary of Scotland agreed. On appeal, that decision was overturned. The appeal court (the 'Inner House' of Scotland) unanimously held that the advice given to the Queen was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the Executive, and that it and the prorogation which followed were therefore of no effect.

Meanwhile, as soon as the prorogation was announced, a declaration that the advice was unlawful had been sought from the High Court of England. On 11 September that application was refused on the ground that the issue was not justiciable. As in Scotland, the decision was unanimous.

Appeals were brought to the Supreme Court from both lower courts. Those appeals were heard on 17, 18 and 19 September. A unanimous judgment was delivered five days later. The speed with which each of the courts dealt with the matters before them was remarkable.

The power to prorogue Parliament is one of the prerogative powers of the Crown. It is generally exercised, as a matter of course, on the PM's advice. But it is not an unlimited power. As early as 1611, in the *Case of Proclamations,*[3] it was held that Charles 1 could not use any of the Crown's prerogative powers to alter the law: 'The King hath no

[2] Supreme Court judgment, paragraph 28.

[3] (1611) 12 Co Rep74.

prerogative but that which the law of the land allows him'; and just as, in Australia, the courts – not Parliament or the Executive – determine the limits of constitutional power, it is the courts of the UK which decide what 'the law of the land allows'.[4]

It follows, according to the Supreme Court, that the question 'whether a prerogative power exists, and if it does exist, its extent … undoubtedly lies within the jurisdiction of the courts and is justiciable, *as all the parties to these proceedings accept*'.[5] The Court later added that 'it is well established, *and is accepted by counsel for the Prime Minister*, that the courts can rule on the extent of prerogative powers'.[6]

This presented a problem for the PM. It is also a problem for those critics of the judgment who accuse the Court of making new law. The relevant legal principles are long established. And if (i) the courts can rule on the existence and extent of the prerogative powers, and if (ii) the power to prorogue Parliament is one of those powers, how could the PM argue that his advice to the Queen is not justiciable? His lawyers attempted to get around these difficulties by submitting that his decision to seek the Queen's consent to the exercise of the prerogative power was, in the circumstances in which the request was made, so clearly exclusively political that the occasion for judicial intervention did not arise. In that sense, the argument ran, the issue was not justiciable. The PM also relied upon a precedent known as *Civil Service Unions v Minister for the Civil Service*[7] for the proposition that the power to prorogue is an 'excluded category', a category the exercise of which is not challengeable in the courts and is therefore non-justiciable. But (so the Supreme Court held) the *Civil Service Unions* case was distinguishable. Unlike *R v The Prime Minister*, it concerned the lawfulness of the exercise of a prerogative power *within* its lawful limits. That brought it into an 'excluded category'. By contrast, *R v The Prime Minister* concerned the lawful limits themselves.

Another difficulty for the PM's lawyers has its source in the nature and effect of the power to prorogue. The (unwritten) constitution of the UK provides for the sovereignty of Parliament as the sole repository of legislative power, and as the body to which the executive government is accountable. The prerogative power to prorogue Parliament

[4] Supreme Court judgment, paragraph 32.

[5] Supreme Court judgment, paragraph 35 (my emphasis).

[6] Supreme Court judgment, paragraph 52 (my emphasis).

[7] [1985] AC 374.

cannot, therefore, impermissibly restrict either the power to legislate or the ability of Parliament to hold the Executive accountable to it. The question which the Supreme Court had to answer was whether a prorogation of some five weeks constituted, in the circumstances which then obtained, either or both an impermissible restriction on the sovereignty of Parliament or an impermissible restriction on the power of Parliament to hold the Executive accountable to it.

The nature and effect of the prorogation of Parliament is relevant when answering that question. While Parliament is prorogued, neither House can meet. Accordingly, neither House can debate or pass legislation. Nor can either House debate Government policy. No member may ask questions of Ministers. They may not meet and take evidence in committee. In general, Bills which have not yet completed all their stages are lost, and will have to start again from scratch in the next session of Parliament. At the same time, the Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits. Thus:

> … the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the PM being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the door after the horse had bolted.[8]

The Supreme Court held that a prorogation of some five weeks:

> … will be unlawful if the prorogation has the effect of frustrating, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[9]

[8] Supreme Court judgment, paragraph 33.

[9] Supreme Court judgment, paragraph 50.

The circumstances which obtain when prorogation is contemplated will inform the issue of its lawfulness. As the Supreme Court noted, the issue before it arose *in circumstances which have never arisen before and are unlikely ever to arise again. It is a 'one off'.*[10] Britain might leave the European Union by 31 October. It might do so without the Union's agreement. This is an outcome about which Parliament has reservations. On 9 September the *European Union (Withdrawal) (No. 2) Act* received the Royal Assent. It requires the PM on 19 October to seek from the European Council, by letter in the form prescribed in a schedule to the Act, an extension of the Brexit date by three months – unless by then Parliament has either approved a withdrawal agreement or approved leaving without one. The Government is bound by that law (although the PM has said that he would rather die in a ditch than seek an extension).

The Supreme Court held that a prorogation of five weeks or thereabouts would have the effect of frustrating the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. Furthermore, there was no reasonable justification for creating that situation.

In coming to this conclusion, the Court took into account the evidence of John Major, the former Prime Minister, who responded to Johnson's claim that a five week prorogation was necessary to prepare for a whole raft of new legislation to be announced in the Queen's speech when Parliament reassembled on 14 October. The former Prime Minister said that about six days was all that was necessary.

Given that the purported prorogation which followed the PM's advice to the Queen did have the effect of unjustifiably frustrating Parliament's ability to carry out its constitutional functions, the Court concluded that it was therefore unlawful and void. In those circumstances it was unnecessary to decide whether the PM had lied to the Queen.

In my opinion, the effect of the judgment is to preserve the constitutionally-protected role of Parliament. That is a result which is consistent with democratic principle. Commentators in *The Australian* see things differently. Henry Ergas, in an article entitled 'Judges May Disagree, but History Backs Boris Johnson',[11] which was published on Friday 27 September, looked back to the 19th century. In that era Parliament was

[10] Supreme Court judgment, paragraph 1.

[11] *The Australian, 27 September 2019, p.12.*

sometimes prorogued for six months at a time. But Ergas does not acknowledge that the UK was different then. It had a much smaller and less active government. No income tax. No social services. A tiny public service. No universal adult franchise. No Government broadcasting its dissatisfaction with an important piece of legislation, binding on the Government, such as the *European Union (Withdrawal) (No. 2) Act.* Ergas castigated the Supreme Court for failing – when under extreme pressure of time – to analyse the use of the prerogative power in the 19th century. The Court acted 'cavalierly' when dismissing the 'key factor' that is 'Parliament's jealously guarded control over appropriations which obliged governments to respect an annual budget cycle' (and, it seems, entitled Prime Ministers to advise the prorogation of both Houses for much of the remainder of the year). Two centuries ago, Ergas points out, Prime Ministers could use prorogation as a means 'for managing deeply divided parliaments. … It was therefore entirely unsurprising that Johnson, who knows British history better than most, turned to the instrument his predecessors so frequently relied on in similar cases – only to have that instrument snatched away'.

The Supreme Court did not proceed to ask whether the PM lied to the Queen. But it had reason to believe that Johnson sought the prorogation not because he thought that a five-week break would result in the healing of Parliament's deep divisions but because, the prorogation being granted, there would not be enough time either before or after prorogation for the Parliament to frustrate a no-deal Brexit on 31 October if Johnson and Europe could not reach an agreement, acceptable to Parliament, in the meantime.

Greg Sheridan, Janet Albrechtsen and Gerard Henderson each see the judgment of the Supreme Court as an assault on the will of the people as expressed in the referendum of 23 June 2016. According to Sheridan, 'What the political class can't get through the ballot box, it is determined to get through the courts or any other institution it controls'.[12]

Janet Albrechtsen has re-named the litigation officially known as *R v The Prime Minister.* For her, a name which is more appropriate because it reflects the bias of the Supreme Court bench is *The People's PM v The Elites*. According to her:

[12] 'The Slings and Arrows of Outraged Elites', *The Australian,* 28-29 September 2019, p.15.

> A cheeky, cranky people who voted to leave the EU will get riled all over again after 11 judges unanimously declared that Johnson's prorogation of Parliament was void. … The Court has handed Johnson more material to present himself as the lead in The People's PM v The Elites with an added responsibility of taking issue with an activist judiciary used by those trying to usurp the democratic will of the people.[13]

Gerard Henderson's article proceeds on the basis that 'most of the electorate is at odds with the position of most of their representatives. … [M]ost Brits decided to exit the EU in June 2016. … The decision of the Supreme Court has damaged the Westminster system of government'.[14]

It is in these circumstances pertinent to examine the cogency of these statements. How well did and does the referendum result reflect the will of the people? If 'the people' means the population of the UK, only 26 percent voted for Brexit. If the electorate equates to 'the people' then only 37 percent of the people voted for Brexit. 'The people' entitled to vote in the Scottish independence referendum of 2014 included those of 16 years of age and older. EU citizens resident in Scotland were also enfranchised. Both classes were included because both had a material interest in the outcome. By contrast, both were excluded from the UK referendum.

It is true that (fractionally under) 52 percent of those who voted on 23 June 2016 opted to leave. But the notion that then or now they were united in wishing for the same Brexit is fanciful. It is certain that some were and are in favour of a 'no deal' departure. It is equally certain that some were not and are not. No Brexit terms were put to the people during the referendum campaign. Nobody knew what terms the EU would accept. The PM was then David Cameron. The PM is now Boris Johnson, who came to office not after the election to government of the party he leads, but pursuant to internal Conservative Party rules. Much has changed since the referendum was held, and a clearer view of the chaos of the process of departure is now available. It is safe to assume that Parliament collectively knows more about the problems and opportunities on offer than the 37 percent who voted to leave. Parliament is opposed to a 'no deal' Brexit. It is also safe to assume that some who voted to leave now wish

[13] 'Boris Puts a Cracker Up the Parliamentary Backside', *The Australian,* 28-29 September 2019, p.21.

[14] 'Britain's Supreme Court Sides with 'European' Progressives', *The Australian,* 28-29 September 2019.

to remain. In June 2016 so little was known about the consequences of departure from Europe that only the 'remainers' knew what they were voting for.

I add that the democratic credentials of the referendum are also besmirched unless it was made clear before the vote that the result would be taken as binding upon Parliament no matter what. The results of referenda which might effect constitutional or other substantial change are not necessarily binding; in Australia, constitutional change requires the approval of a majority of electors in a majority of States. A substantial number of UK electors who voted to leave, or who failed to vote, may have voted to remain had they been aware that a minority of those entitled to vote, being a bare majority of actual voters, could compel the nation to leave without any agreement between the UK and the EU, or with an agreement the terms of which were entirely unknown.

In any event, it is very poor journalism, and unethical politics, to posit that Brexit on 31 October 2019, with or without any presently concluded agreement with the EU, is the will of 'the people'. An attack on the Supreme Court on the basis that it not only engaged in politics but, being so engaged, acted not in accordance with the law but on behalf of the 'elites' and thus 'usurped the will of the people' is in my view an attack so lacking in justification as to demean those who mount it.

Does Public Engagement Matter? Parliament, Public Engagement and the Budget Process in Bangladesh*

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Abstract This paper explores the role of public engagement in the budgetary process in Bangladesh. It particularly focuses on the role of the Parliamentary Caucus on National Planning and Budget (PCNPB) and its relations with different Civil Society Organisations (CSOs) which provide different kinds of support to MPs. Evidence shows that the strategic partnership that the PCNPB has established with different outside organisations have turned out to be beneficial in various ways. There is now better scope for 'informed' scrutiny of the budget than before, although it is difficult to measure its effects. The paper delineates problems that may discourage the institutionalisation of the PCNPB. It also identifies factors that may help it overcome the problems.

INTRODUCTION

Formally, the 'power of the purse' in Bangladesh, as in other democracies, is vested in the Parliament. Article 83 of the Constitution provides that no tax shall be levied or

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collected except by or under an authority of an Act of Parliament. Nor can any expenditure be incurred except with the authorisation of the Parliament. The case for legislative participation in budgeting rests on a number of grounds. Wehner argues that not only does the constitution require that the budget be authorised by the parliament; the involvement of the Parliament in the budget-making process provides some kind of checks and balances between the executive and the legislature, enhances transparency, enables effective scrutiny, ensures participation and encourages consensus among the conflicting actors.[2] Greater parliamentary input into the budgetary process leads to greater government accountability and transparency, sustainable national consensus regarding macro-economic policies and greater possibilities for community-level input. Many parliaments, especially those patterned on the Westminster model, however, find it difficult to contribute much to the policy/budget process mostly for structural reasons. One way to overcome the deficiency, as experience shows, is to encourage public engagement in the budgetary process.

Public engagement requires seeking input from the public to make 'informed' decisions on matters awaiting a parliament's attention/decision as well as sharing of parliamentary outputs/information with the public.[3] Reasons for engaging the public with parliament are intended, among other things, to allow access the institution, to increase public understanding of parliament and its work, to broaden the range of voices heard by parliament, and potentially to enhance legitimacy.[4] It is especially important for democratic renewal.[5] Greater engagement of the public with parliament and its activities is also likely to raise the public image of parliament and parliamentarians and improve public trust in politics.[6]

[2] Wehner, J. (2004) *Back from the Sideline: Redefining the Contribution of Legislatures to the Budget Cycle*. Washington: The World Bank Institute, 2004, pp. 2-4.

[3] The Hansard Society, *Parliaments and Public Engagement*. London: The Hansard Society, 2011.

[4] R. Kelly and C. Bochel, *Parliament's Engagement with the Public*. Briefing paper 8279. London: House of Commons, 2018.

[5] C. Hendriks and A. Kay, 'From "Opening Up" to Democratic Renewal: Deepening Public Engagement in Legislative Committees'. *Government and Opposition*, 54(1), 2019, pp. 25-51.

[6] R. Hardin, 'Government without Trust', *Journal of Trust Research*, 3, 2013, pp. 32-52; C. Leston-Bandeira, 'The Pursuit of Legitimacy as a Key Driver for Public Engagement: The European Parliament Case'. *Parliamentary Affairs,* 67, 2014, pp. 415-436.

There is, however, no one best way of encouraging public engagement. Differences can be noticed in the ways such engagement takes place.[7] The main fora of parliamentary engagement with the public include making petitions, visiting parliament, making evidence to select committees, attending public bills committee meetings, joining workshop and presentation, watching proceedings, and reporting on parliamentary activity.[8] The effect of these different methods will vary considerably.[9] Referring to petitions, Hendriks and Kay observe that these tend to replicate many of the existing socio-demographic biases in political participation, and thus they tend to attract public input from those already politically active. There is the need for improving the breadth and depth of engagement and participation:

> To deepen participation means moving beyond one-way information flows, towards more deliberative conditions where communication is open, reflective and dialogical ... To broaden participation requires reaching out to everyday publics and actively recruiting under-represented or marginalised voices.[10]

Public engagement may be direct and/or mediated through Civil Society Organisations (CSOs). CSOs are non-state actors whose aims are neither to generate profits nor to seek governing power; they unite people to advance shared goals and interests. CSOs include nongovernment organisations (NGOs),[11] professional associations, foundations, independent research institutes, community- based organisations (CBOs), faith-based organisations, people's organisations, social movements, and labour unions.[12] CSOs can help MPs undertake important functions in an effective manner. These can also help them improve communication with the electorate. In return, CSOs can legitimise their involvement with different policies by collaborating with

[7] C. Leston-Bandeira (ed.), *Parliament and Citizen*. London: Routledge, 2013.

[8] Kelly and Bochel, *Parliament's* Engagement with the Public; C. Leston-Bandeira, 'How Deeply are Parliaments Engaging on Social Media'. *Information Polity*, 18(4), 2013, pp. 281-297.

[9] C. Leston-Bandeira and L. Thompson, 'Integrating the View of the Public into the Formal Legislative Process: Public Reading Stage in the UK House of Commons'. *Journal of Legislative Studies*, 23(4), 2017, pp. 508-528.

[10] Hendriks and Kay, 'From "Opening Up" to Democratic Renewal'.

[11] Differences between CSOs and NGOs lie in their orientation, objectives and the strategies they adopt to get things done. Generally, CSOs have a more political and policy orientation than NGOs, which often are development-oriented and concerned with delivery of services. CSOs may also provide services but these are not as prominent as those provided by NGOs.

[12] Asian Development Bank, *Civil Society Organization: Source Book.* Manila: ADB, 2009, p. 1.

parliament including its committees. Parliamentarians and CSOs can both hope to gain from mutual interaction.

Until recently, parliaments in many developing countries did not realise the potential benefits of collaboration with outside actors – CSOs and NGOs – partly due to ignorance and partly because of legal loopholes. However, under the influence of donors, these parliaments are now learning how to use different techniques as a means to engaging the public with the parliamentary and governance processes. The above observations are not intended to argue that much of what CSOs do is politically value-free. They may often engage in activities that are aimed at regime change or destabilisation, and thus may risk causing political tension and controversy. In general, however, involvement of CSOs is seen as beneficial.

OBJECTIVES OF THE PAPER

This paper explores the role of public engagement in the budget process in Bangladesh, focusing particularly on the drafting and legislating stages of the budget cycle. It specifically tries to identify the roles and relations of the key actors involved in the budget-making process. Special emphasis will be given to identifying the role of the Parliamentary Caucus on National Planning and Budget (henceforth the PCNPB, or the Caucus) and examining the role of different CSOs in providing support to the Caucus and MPs. The PCNPB is an innovation of the Democratic Budget Movement (DBM), a CSO which has popularised the idea of decentralised budgeting for a long time. DBM provides the main source of support to the Caucus. SUPRO, another CSO, also has close links with the PCNPB, The Parliament Secretariat, which was not hospitable to proposals for public engagement in its activities in the past, has apparently changed its attitude now. It now voluntarily promotes public engagement, especially in budget-related activities. Detractors of public engagement now appreciate its need and value. This paper examines the extent to which public engagement matters in the budgetary process in Bangladesh.

METHODOLOGY

Data for this study has been collected from secondary and primary sources. Secondary sources include consultation of books, journals, and newspaper reports. Primary sources include reading of Hansard, interviews with different stakeholders, including in-depth interviews with chairs of parliamentary standing committees, members of the

PCNPB, officials of the Ministry of Finance, representatives of think tanks, and key officials of CSOs providing support to PCNPB. We held meetings with five parliamentary committee chairs including heads of different financial committees (e.g., finance, public undertakings, and estimates), heads of three NGOs/CSOs, representatives of the BEA and heads of two think tanks. In addition, we interviewed members of the PCNPB and representatives of different CSOs that provide specialised support to the Caucus. In total, we interviewed 13 MP/committee chairs, and 15 non-MP experts, mostly before and after the budget session (June-July) in 2017. Interviews were held in the offices of respondents. On average, interviews lasted an hour.

THE MAKING OF THE BUDGET

The Constitution of Bangladesh provides the basic legal framework for government budgeting. It requires that the government prepare an Annual Financial Statement every financial year (which starts on 1 July and ends on 30 June) and get it approved by the Parliament. The making of the budget is essentially a bureaucratic exercise. The Finance Division of the Ministry of Finance has the overall responsibility for the preparation of the budget The Budget Wing and the Development Wing of the Ministry are respectively charged with preparing the revenue budget and the development budget. The Development Wing, however, has to prepare the estimates of development outlay in close collaboration with the Planning Commission (PC). The PC plays a dominant role in the making of the development budget. The preparation of the budget takes a long time; by the time the budget is introduced, the budget for the following year has almost been in preparation already.

Different actors and agencies both within and outside the government are involved in the budget preparation process. Within the government, three organisations – the Internal Resources Division (IRD)/National Board of revenue (NBR), the External Relations Division (ERD) and the Planning Commission – play a crucial role. The IRD/NBR is mainly concerned with mobilising resources from the internal sources; while the ERD negotiates with bilateral and multilateral donors, seeking foreign aid and assistance mostly to finance development projects included in the Annual Development Program (ADP). The way these agencies behave will largely influence the budgetary process, especially in respect of the financing of the budget.

The budget cycle has two phases: Phase 1, when the budget is determined in aggregate form (size); and Phase 2, when details of ministry allocations are discussed. Phase 1 discussion mostly focuses on fiscal, monetary and external finance issues. A Coordination Council, headed by the Minister for Finance, and consisting of the

Minister for Commerce, Bangladesh Bank Governor, Secretary, Finance Division, Secretary, Internal Resources Division, and Member (Program) of the Planning Commission as members, is charged with exploring these issues. The Council is responsible for:

- coordinating the macro-economic framework including fiscal, monetary and exchange rate strategies and policies;
- ensuring consistency among macro-economic targets of growth, inflation and fiscal, monetary and external accounts; and
- meeting for the purposes of clauses (a) and (b) before the finalisation of the budget to determining the extent of public sector borrowing taking into account credit requirements of the private sector, monetary expansion based on projected growth, price inflation, and net foreign assets of the banking system.[13]

The Bangladesh Bank is responsible for placing before the Coordination Council relevant data relating to monetary expansion and government borrowing from the banking system, and the assessment of the Bangladesh Bank regarding the impact of economic policies of the government on monetary aggregates and balance of payments. The Ministry of Finance brings to the notice of the Co-ordination Council the impact of tax, budget and debt management policies on overall macro-economic situation.

The Budget Monitoring and Resource Committee headed by the Finance Minister is at the helm during Phase 2. All 10 relevant ministries/divisions are represented on the Committee. The Committee coordinates overall resource mobilisation and expenditure program of the government. Intra-governmental consultation on the budget between the Finance Division (FD) and the agencies, where the latter are allowed to discuss their needs with the Ministry, is also held at this phase. Taking into account the actual expenditures of the past six months and other relevant factors, estimates are finalised at the budget meetings. These two phases remain the exclusive prerogative of bureaucrats and professionals. There is no third party involvement or consultation at these phases.

[13] Bangladesh Parliament, *Rules of Procedure Parliament of the People's Republic of Bangladesh*. Dhaka: Parliament Secretariat, 2007.

PRE-BUDGET CONSULTATION AND PUBLIC ENGAGEMENT IN THE BUDGET PROCESS

Until recently, rarely was there any scope for public consultation on the budget. Budgeting was essentially seen as a bureaucratic exercise. However, although the budget is still heavily influenced by the bureaucracy, a new trend – consultation with outside stakeholders – is emerging. The Finance Minister now routinely holds pre-budget consultation meetings with different organisations usually between March and May, although the effect of such consultation is difficult to measure. The consultation meetings held with different groups are as follows: top economic think tanks, NGO leaders, parliamentary committee chairs, economic reporter's forum, renowned economists, top bureaucrats and representatives of national daily newspapers. Immediately after the consultations, Ministry of Finance officials prepare a summary of the main points discussed in each meeting and submit it to the Finance Minister. After the conclusion of these meetings, the Finance Ministry prepares a statement, classifying the recommendations into different groups with comments on their implementation status, and submits it to the Finance Minister.

It is difficult to identify the extent to which pre-budget consultations are merely 'public relations exercises' or whether they provide real inputs to the making of the budget. Those attending these consultation meetings have mixed feelings. Some argue that they have to attend such meetings without much preparation. The fault, however, does not lie only with the stakeholders; the Finance Ministry itself has also to accept the blame to a certain extent. As one parliamentary standing committee chair observed:

> I wasn't even in Dhaka when I got the call to have a pre-budget meeting with the Finance Minister. I was in my constituency. The call was made just a day before the meeting was scheduled to be held. What can you do in such a situation? I did not attend this year's meeting as I wasn't prepared for it.

Some other parliamentary committee chairs observed that such consultation meetings do not yield any positive results, even when stakeholders are notified about meetings in advance. One reason is that such meetings are held very late – just before the start of the budget session. There is not much scope to influence the policies and principles underlying the preparation of the budget, or even expenditure decisions. The Finance Minister occasionally accepts proposals for variations in taxation proposals, but rarely does he look with favour at proposals for changes in expenditure decisions.

The Bangladesh Economic Association (BEA), which has traditionally been consulted by the Finance Minister, has an extremely negative view of the process. One senior official of the BEA interviewed for this study observed:

> Consultation does not have any use; it is non-functioning ... it is essentially a show, a tactic of fooling the people... the Minister will do what he wants to do... the bureaucrats will do what they want to do... nothing else will happen'. Referring to the mode of consultation the BEA official observed: 'it is bogus ... bullshit.... you invite so many people in a meeting that its spirit is lost ... different people say different things and at the end of the day you achieve nothing ... no concrete result follows.

He suggested that what was needed was to hold separate meetings [much in advance of the budget session] with different groups of people and then to include their views [s much as possible] in the budget. He stressed on the need for consultation with officials working at the grassroots.

Not everyone attending such meetings, however, consider them mere 'eye wash'. Some consider pre-budget consultation meetings useful and beneficial. One senior official of a think tank – the Policy Research Institute (PRI) – observed:

> The Finance Minister is a good listener; he often takes notes and asks supplementary questions. He does not usually contest or defend anything; he holds consultation with an open mind. It is not that he accepts everything that is proposed. What is important is that the Finance Minister never interrupts while others are taking. What he does is to ask for further explanation of a particular point.

Asked to comment on the result of consultation, the PRI official observed:

> It would be too much to expect any major influence on the thrust of the budget or principles underlying the budget. What can realistically be expected is to have some changes here and there, although these are not always insignificant; these are needed to fine-tune the budget … We make lot of suggestions, some of which are accepted, and some rejected. But the consultation continues and there is scope for follow up consultation after the budget is passed.

NGO officials argue that consultation meetings have several advantages. One major advantage, argues an NGO top official who has attended consultation meetings, is that 'it provides an opportunity to the outsiders [like us] to make their points/ arguments known to the government. Although there is no guarantee that their proposals will

always be accepted, these meetings nevertheless provide an opportunity for sharing of ideas and opinion'.

In general, pre-budget consultation takes place mostly after final decisions have been taken on the main trust of the budget, influenced largely by political/ideological commitments of the party in power, and by bureaucratic preferences. Whatever changes are made in the budget relate mostly to sources of income, not to heads of expenditure. Officials of the Finance Ministry interviewed for the purpose of this study have also observed that pre-budget consultation does not lead to any serious action. Consultation is done mostly to get to know the viewpoints of different stakeholders and there is not much scope to make any substantive change to the budget to accommodate their opinions. Those attending such meetings try to raise demands that concern them or their organisations, rather than discussing the overall nature of the budget. The list of demands made by different groups of stakeholders during their meetings with the Finance Minister can be considered as something like 'shopping lists'. These focus less on policy and more on delivery of goods and services.

Parliamentary committee chairs are no exception to this. There is no single indication of committee chairs asking for the strengthening of parliamentary control of the budget. In fact, they do not seem to be aware of this fundamental aspect of budgetary process. Like other stakeholders, committee chairs were also found to be more concerned with raising allocations for diversifying activities of the ministries that their committees shadowed. They do not appear to be much oriented to important policy issues confronting them.

THE PARLIAMENTARY STAGES OF THE BUDGET PROCESS

The budget in the Parliament follows a number of steps – presentation, general discussion, discussion on demands for grants, and passage. Every year, the Finance Minister presents a budget to the Parliament. It is usually placed in early June. In the first part of the two-part budget speech, the Finance Minister provides an elaborate and up-to-date account of the state of the economy and polity. In the second part of the speech, the Finance Minister provides details of the proposed fiscal measures. He also introduces the finance bill on the budget day. No discussion on the budget takes place on the day in which it is presented to the House. After the presentation of the budget, the House is usually adjourned for a few days in order to give members enough time to go through the main budget statement as well as other documents so that they can participate in the other stages of the budget process in a productive manner.

The second stage usually begins with a general discussion on the supplementary budget, which may continue for a few days. The general discussion on the new budget may also start before the discussion on the supplementary budget is completed. Experience, however, shows that in most cases, it commences before the vote on demands for grants of the supplementary budget begins. The *Rules* provide that only the broad outlines of the budget and principles and policies underlying it can be discussed at this stage. No motion can be moved nor can the budget be submitted to the vote of the House at this stage. The Speaker can prescribe a time-limit for speeches. The general discussion, which normally continues for several days, provides the most important opportunity to the members to express their views on the whole of the budget; they are entitled to raise and discuss any issue they consider important.

It is only during the general discussion on the budget that the backbenchers have a chance to speak in the House in the way they want. Usually more time is allotted for the general discussion of the budget than for other stages. More MPs are allowed to speak in the budget session that at any other time of the year; they are also allowed to speak longer during the budget discussion than at any other time. Experience shows that members frequently use the opportunity to raise controversial issues that are unrelated to the budget. In fact, Speakers of the successive Parliaments have frequently advised members of the need to refer to issues that are more focused on the budget.

The third stage of the budget process commences with the discussion on demands for grants and appropriations. Usually a separate demand for grants is proposed for each ministry; the Finance Minister, however, can include in one demand grants proposed for more than one ministry. The *Rules* do not allow any motion aimed at increasing expenditure. Nor can any motion be moved for altering the destination of a grant. It is at this stage the members can move motions to reduce expenditure. The *Rules* allow the members to move three types of motions for expenditure cuts. These are referred to as policy cuts, economy cuts and token cuts. Members move a large number of cut motions but only a small percentage of such motions are accepted. Those that are accepted do not have any realistic prospect of being passed; these are either defeated along party lines or are withdrawn by members. After the votes on cut motions, the

Finance Minister moves the Appropriation Bill, which is invariably passed. This marks the end of the budget process in Parliament.[14]

THE BUDGET IN THE PUBLIC DOMAIN

After its announcement, the budget becomes a public document. Until recently, formal deliberation on the budget outside of the House was an exception. Traditionally, Opposition parties condemned the budget as an 'anti-poor' policy, and often called *hartals* (work stoppages) to register their protest; while the Government and its supporters lauded the budget as an example of Government achievement in moving the country forward. There was not much scope for informed public scrutiny of the budget.

The situation, however, has changed over the years, with some local think tanks/CSOs, particularly Centre for Policy Dialogue (CPD), *Unnayan Samannaya*, and Policy Research Institute (PRI), making in-depth comments on the budget immediately after its introduction in the House. *Unnayan Samannaya* has also played an important role in providing technical support to the MPs during the budget session by helping the Parliament Secretariat organise a help desk, which lawmakers have found very useful. The help desk offers help to all MPs who need it. Statistics show that the number of MPs turning to the help desk has increased over the years – from 50 in 2012 to 97 in 2013 and 134 in 2014.

An evaluation carried out by USAID observed: 'MPs and staff who are involved in that process uniformly stated that the Help Desk has enabled MPs to deliver more fact-based, relevant budget speeches than previously, when the statements tended to be based on political platitudes instead of facts and figure'.[15] *Unnayan Samannaya* assists the Parliament's help desk in producing a variety of written products, including preparing budget speeches to assist MPs in understanding the budget process and key issues. Among these are compendiums on the national budget and the national development plan, which serve as references for MPs and staff on the budget process and development planning; mid-term analyses of the budget; budget notes on key

[14] Bangladesh Parliament, *Rules of Procedure*.

[15] USAID, *Final Performance Evaluation of the Promoting Democratic Institutions and Practices Project*. Dhaka: USAID, 2015, p. 18.

sectors; newspaper clippings of budget analysis; and a booklet analysing the overall budget called *How About This Year's Budget?*.

Deliberations by different CSOs on the budget provide an important source of information that was not available until recently. Some CSOs specialise in budget-related issues, of which Democratic Budget Movement (DBM) is the most important. SUPRO (Campaign for Good Governance) also organises pre-budget and post-budget consultations in different parts of the country. Both organisations have in recent years used the PCNPB as a mechanism to promote their ideals. The PCNPB can be considered the 'brain-child' of DBM, which has long popularised the idea of decentralised budgeting. It provides secretarial support to PCNPB which includes, among other things, helping it organise pre-budget consultations in different places, preparing notes on different aspects of the budget and distributing these among its members, and providing funds on a limited scale to organise different activities. The PCNPB is a multi-party organisation composed of members of Parliament (MPs) belonging to different parties. A former Deputy Speaker is the chair of the Caucus.

The main objectives of (PCNPB) are to:

- Bring necessary amendments to the Constitution and the Rules of Parliamentary Procedure to ensure the effective role of the Parliament in the national plan and budgetary process.
- Ensure the mass of people's participation, with the objective of further democratising national planning and budgeting process.
- Create necessary institutional structures and processes aimed at involving the locally elected public representatives in an effective manner with the national planning and budget process.
- Ensure the role of all public representatives including the MPs in reviewing and monitoring the activities of the executive branch of the government.

As stated above, the PCNPB works in close collaboration with SUPRO and DBM. Such collaboration is based on solid grounds. SUPRO has a much stronger grassroots network than DBM. It organised pre-budget consultation meetings in 45 districts (out of 64) and held a high-level pre-budget discussion meeting in Dhaka about a month before the 2016-17 budget was placed in the House on 2 June 2016. Some Caucus members as well as MPs attended the meeting. Findings of the consultation meetings held at the district level were tabled in the Dhaka meeting and it was reported that budgetary demands made in different district level meetings were sent to the Ministry of Finance for action. SUPRO also organised a post-budget press conference a few days after the budget was presented. Several issues were discussed and recommendations

made to make the budget more 'pro-people'. Such deliberations provided an important opportunity for different stakeholders to share information and ideas.

PCNPB has more close relations with DBM than with any other CSO. A specialised Dhaka University research organisation – Centre on Budget and Policy – also provides support to the Caucus. These three organisations have collectively done some important work related to the budget. What is particularly important to note is that unlike the past, when the Caucus followed the lead of others in dealing with budget-related issues, in recent years it has played a key role. As examples, reference can be made to the organisation by the Caucus of pre-budget meetings in four divisions and a National Budget Convention (People's Budget Assembly) in Dhaka in May 2016, making public a preliminary review of the budget 2016-17, and holding a meeting entitled 'National Budget 2016-17 Review' at the media centre of the Parliament. These are some of the concrete examples of the new leadership role of the Caucus. These mark the beginning of a new trend in parliamentary deliberation on the budget outside Parliament.

The Caucus has a strategic view of the budget. Rather than focusing on every aspect of the budget, it accords importance to those sectors that concern the poor and the disadvantaged; for example, education, health, social security, labour and employment, and agriculture, and Indigenous people. For example, the National Budget Convention (People's Budget Assembly), organised by the Caucus in collaboration with others in May 2016, which was attended by people belonging to different professions, observed that the planned outlay of the budget was unlikely to bring the expected benefits mostly because of the fact that those responsible for implementation were unlikely to ensure the quality of expenditure and its appropriate use. It raised two concerns which it thought were unlikely to be addressed: a strategy for inclusive growth and measures for reducing the ever increasing income inequality. The Caucus made several demands for structural reforms, including decentralisation of the budget, reintroduction of district budgets and devolution of policy areas such as health, primary education and agricultural extension to local government. In an interview, one of the main leaders of the Caucus noted that its members would raise issues of inequality – both income and regional – during deliberations on the budget.

This marks a new trend in the scrutiny of the budget. Unlike the past when the MPs did not show much interest in any such exercise, the Caucus on the Budget has heralded a new beginning, although it is difficult to specify the extent to which it will be able to emerge as a viable institution. Perhaps the greatest challenge facing the Caucus is to devise ways to effectively communicate its views to those who matter – Finance Minister and the Prime Minister. The Caucus often invites the State Minister

for Finance to its pre-budget consultation meetings; however, he does not appear to have any influence over the way decisions on the allocation of resources are made. Nor can every member of the Caucus be seen as equally active. Some are more active than others. One caucus member even expressed ignorance about the fact that he was a member. Two women members of the Caucus also expressed the view that they did not know much about what the Caucus was doing. They attend meetings of the Caucus, supporting it whenever invited. One of them said that she simply agreed to be a member when someone asked her.

This does not mean that Caucus activities do not have any meaning. One positive advantage is that those dealing with matters related to finance will at least have an idea about what the MPs think about the budget. Much of what the MPs say inside the House is structured. Their roles have been predetermined – ruling party MPs will have to say good things about the budget, and the Opposition will say bad things. No major variation has ever been noticed in the behavioural patterns of the Government and Opposition MPs.

PARLIAMENTARY DELIBERATION ON THE BUDGET

The MPs have the opportunity to deliberate on the budget, as stated earlier, at two stages – general discussion on the budget and discussion and vote on demands for grant. Almost all MPs are allowed to take part in the general discussion. For the purpose of analysis here, we focus on the behaviour of the members of the PCNPB. We are particularly interested to determine the extent to which the pre-budget consultation with outside groups and resources made available by DBM (for example, briefing notes, advice etc.) and other organisations (for example, SUPRO) have had any impact on the behaviour of the Caucus members. We have checked word by word deliberation of the Caucus members on the budget for 2015-16. Initial plans to check the budget debates for 2016-17 had to be abandoned as the proceedings have not yet been finalised. Of the total 23 members of the Caucus, 19 took part in the general discussion on the budget for 2015-16.

Our scrutiny shows that the behaviour of Caucus members did not differ in a significant way from that of non-members of the Caucus. Most of the Caucus members lauded the role of the Government in the preparation of the budget. Members belonging to the official Opposition apparently competed with members of the Treasury bench to toe the Government line. Both groups of MPs were more interested in criticising the main Opposition party – the Bangladesh Nationalist Party (BNP), which boycotted the last election – than assessing the budget.

Some exceptions, however, could be found. In particular, the top leaders of the Caucus, while appreciating some of the measures of the Government, also criticised it for its failure in different fields. In particular, unemployment, inequality, and education received special attention of the senior members of the Caucus; these issues did not find much prominence in budget debates by other members. One possible reason was that most of the leading members of the Caucus belonged to parties ideologically oriented to 'left' and 'left of centre' politics. Issues mentioned above usually find prominence in election manifestos of those parties. Some of the Caucus members, while taking part in the budget debate, acknowledged support provided by different CSOs that helped them perform better in Parliament.

ACTORS, INTERACTIONS AND OUTCOMES: ASSESSING STAKEHOLDERS' OPINIONS

This section explores the opinion of the main actors associated with the budget review process through the Caucus, particularly its members and members of the Technical Committee providing specialist advice and support to it. As stated in an earlier section, the Caucus receives advice and support from two CSOs and one specialised centre. Much of what follows is based on discussion with members of these organisations. The section begins with examining the way in which members of the Caucus perceived its role.

Most of the Caucus members held a positive opinion about the role of the Caucus, with almost everyone claiming it as a new experience. Almost all of the members acknowledged the support of the CSOs which, as some argued, helped them to make informed commentary on the budget. It is widely acknowledged that the MPs lack knowledge, time and resources to critically review the budget. What they do is to focus on the general aspects of the budget; rarely do they concentrate on specific issues unless these have partisan implications. Members of the Caucus found the support provided by the Caucus very useful and informative. The General Secretary of the Caucus observed that one of its main purposes was to propose ways to make the budget participatory; that is, to involve different groups of people in the budget process and to act as a pressure group, exerting pressure upon the Government to realise this goal. One of the problems, as the Secretary observed, was that the Caucus was an NGO-induced organisation; it did not originate in Parliament. He thus argued that its institutionalisation would probably take longer than one might anticipate.

The setting up of the Caucus itself can be seen as an achievement. No such mechanism existed in the past. A member of the Caucus observed that what is needed most is to

adopt measures to make it more active and expressed interest in exploring the ways that these parliamentary bodies worked in other countries. In fact, those providing technical and administrative support to the Caucus—DBM and SUPRO—have observed that many MPs are now becoming interested in its activities, with some requesting information on different aspects of the budget before speaking on it in the House. MPs also ask for clarification on technical points that these organisations gladly provide. These are positive signs.

However, there are challenges in the institutionalisation of the Caucus. One of the prerequisites of institutionalisation is to create a 'critical mass' – spreading the idea of the Caucus to as many MPs as possible and using them for promoting its cause. It will require a respectable tally of MPs willing to work with local leaders and local people, promoting the idea of decentralisation and public participation in the budget process. It is, however, very difficult to get MPs on board. As the head of DBM observed, many MPs erroneously think that the Caucus is an anti-government body. This implies that partisanship still reigns supreme. This attitude needs to change. DBM wants to help the Caucus institutionalise. As a step to achieve the goal, it plans to organise different activities throughout the year. These include orientation sessions for the MPs, holding constituency-based public hearings on different issues that concern the common people such as health, education and safety net programs, and promoting long term relations between the Caucus and different standing committees. As a DBM official observed:

> We want to use the Caucus as a proxy ... Our main purpose is to strengthen the standing committees (SCs), to have dialogue with them. Parliament does not have any direct link with the people ... Such links can be established though SCs. SCs can travel to your place. Similarly, you can also turn to SCs to get things done. We may take our Caucus members to SC meetings to give them a message that you need to do more ... Since SCs do not do many important things, we want to set examples though the Caucus so that SCs can emulate.

Another problem is to have access to sufficient resources to organise different events. In other words, problems of finance will also figure prominently if DBM wants to promote the ideals of participatory budgeting and to involve the MPs in the process. DBM appears to be aware of the problem; it has already started collaboration with like-minded organisations. As a first step towards making the collaboration a success, DBM and 16 other CSOs helped the Caucus organise the 2016 National Budget Convention in Dhaka.

Perhaps the greatest risk in the institutionalisation of the Caucus is uncertainty about the re-election of most of its active members. Those members who appear to be serious about making the Caucus work have been ideologically oriented to 'left' politics. Those providing technical support to the Caucus are their ideological 'soul mates'. One can find some kind of fusion of ideological interests in the formation and working of the Caucus. But Caucus members belonging to other parties – AL and JP – do not appear to have any serious interest in its working. If and when inclusive parliamentary elections are held in the future, it is unlikely that the active members of the Caucus will be able to get elected. The AL MPs who have the prospect of being elected are unlikely to promote the ideals of the Caucus without the permission of the party. It is quite unlikely that any major party will ever support the formation and working of any such initiative. Nor do MPs belonging to the two main parties – AL and BNP – appear to be really keen to form such forums.

There is, however, a case for optimism about parliamentary reform, or at least about maintaining and perhaps strengthening parliament-civil society relations, even in the case of this Caucus becoming defunct and a new Caucus not being formed. The main architect of the Caucus observed that even if it did not exist, the spirit underlying its formation would exist. To understand this, one has to know the background to the formation of the Caucus and the philosophy underlying its work. To quote him:

> The formation of Caucus was more informal than formal. Those who are its members have strong 'friendship ties'. We held many informal meetings before its formation. Those attending such meetings are of similar age. Even if some of the members are not elected in the next election, we will continue undertaking the kind of activities the Caucus is doing, may be under the banner of ex-MPs' Caucus. We will use this forum as a platform outside the House. We have already started networking with like-minded organisations ... 17 organisations joined us in organising this year's National Convention on the Budget. This collaboration will continue in the future.

As stated earlier, another CSO – SUPRO – has also worked with the Caucus and MPs for several years. It has also planned some important activities for MPs. SUPRO has decided to work with MPs, no matter whether a Parliament is elected properly or not, and whether its legitimacy is recognised or not. The General Secretary of SUPRO observed:

> We do not want to ignore the MPs; rather we want to involve them in different activities through an education process. We don't have representation in Parliament. So if we want to influence Parliament, we

> need access to MPs. We need MPs to raise 'our' issues in the House. We have thus decided to work with the MPs' Caucus.

SUPRO has devised a five-year plan, one of whose important elements is to work with MPs in a more structured way. It has targeted two standing committees – Finance and Planning – and decided to work with their members in the next few years. Two main objectives that underlie SUPRO interaction with the MPs and committee members are: first, to organise pre-budget discussion with the participation of MPs; and second, to take MPs to the grassroots. SPRO Secretary observed:

> We will invite MPs to District consultations we organise throughout the year. People will listen to what they (MPs) want to say; they should also be able tell the MPs what they want them to do. MPs usually don't have direct interaction with the people after the elections – there may be one-to-one MP-constituency contact, but not many programmatic interactions – … through our regular district consultation we want to bridge the gap.

What is especially important to note, as the SUPRO Secretary has observed, is that there is now a kind of demand-driven interaction between the two; this is in sharp contrast to the supply-driven interaction that existed in the past. For example, MPs now want a quarterly report from the civil society perspective on the implementation of the budget. Part of the reason is that they probably want to tally the claims of the Finance Minister in quarterly reports tabled in the House on the implementation of the budget with reports provided by the civil society, to see where there are any discrepancies and what reasons lie behind them. The Parliament Secretariat generally cannot provide this support, mostly because of a lack of trained staff support.

SUPRO has agreed to this request from the MPs. It also has plans to organise events and meetings every three months, using members of the Caucus as the focal point. Probably one of the important successes of the CSO interaction with MPs over the years is that MPs have become more accessible. MPs want some kind of intellectual support from the CSO that the Parliament Secretariat cannot provide. The SUPRO Secretary observed: 'If we want MPs to talk about our concerns and issues in Parliament, we need to provide such intellectual support to them'. DBM has now formed a group of 11 people who can provide ready support on different issues to the Caucus, preparing position papers for the MPs on the 11 areas of the budget.

The SUPRO Secretary has observed:

> Many MPs now express interest to attend our District level consultation meetings. We have, as a matter of principle, decided to involve them with our different activities in at least 45 Districts where we work. Earlier we

> did not have much interaction with them. Now we invite them almost as a routine. We have also decided to work with possible MP candidates in different Districts. We will identify four/five MP aspirants in each constituency and make them part of our consultation process, will share our demands (for actions) with them and those who will be elected will certainly be, in one sense, our 'people'. We have a plan to devise projects with MPs as the main focus in the future.

The Secretary further said:

> Our main strength is our non-party image. We do not support or oppose any MP or party. We work for the people and with the people. MPs also want a platform to speak up their mind that they cannot do in party forums or Parliament. Thus, whenever we invite, they readily accept it. They openly say that we do not have role in the Parliament except thumping the table, expressing support to the party. We enjoy some freedom to say what we want to say [in this forum]. Media can also quote us.

It is evident from the discussion above that better scope exists for MP-CSO interaction now than in the past. Both perceive mutual benefits from such interaction. The extent to which such interaction has had any impact on parliamentary behaviour is difficult to ascertain. What, however, can be observed is that the recognition by CSOs that they need the support of the MPs to promote their cause in Parliament, along with the willingness of the MPs to consider CSOs as an important source of support, is likely to strengthen relations between the two. In the long run, this is likely to help promote democratic consolidation in the country. Assessing the success or failure of such interaction only on the basis of whether any change has been made in the budget is likely to be defective; interaction has a larger meaning that has not yet been recognised by many or explored in detail.

CONCLUSION

It is widely recognised that the MPs do not have much scope to influence the outcome of the budget. The mostly play a reactive role. This, however, does not automatically imply that the deliberation on the budget is something like *tamasha* (fun). To the contrary, issues of national importance – economic, political and social – frequently come up for discussion during the budget discussion. Senior and experienced Opposition members have frequently made critical comments on the Government's economic policies, challenging Government arguments and specifying the areas where deficiencies can be found. It has also become customary for members and in particular,

senior MPs, including Finance Ministers, to provide comparative data to counteract each other's arguments.

One of the important advantages of such debates is that much information that is otherwise not available or is extremely difficult to collect, becomes public. Discussion on the general budget has at least a publicising effect, if not much operational effect. In particular, it allows members to publicise the Government's weaknesses in fiscal management. This may influence Government thinking when it takes subsequent decisions on financial matters. The decision to broadcast live parliamentary debates on radio is also likely to have some significance. It will help members reach their constituents, raising their demands, and communicating the government's faults that, in the long run, may influence the Government to be receptive to alternative proposals.[16]

There is now better scope for public engagement in the budget process than before. Both the Government as well as parliamentarians now appreciate the role of such engagement. Although no significant change follows such engagement, it is nevertheless seen as an important step toward making the budget process more transparent and accountable. As stated earlier, most of the MPs who have had interaction with different CSOs during the budget session appreciate the different kinds of support provided by them.

The Parliament Secretariat is also learning new ways of responding to the demands of the MPs. Engaging CSOs to provide specialised support to MPs during the budget session is a prime example. The readiness of the Finance Minister to seek the opinions of different stakeholders on the budget can be seen as a new trend. None of those attending such consultation meetings dismiss their value outright, although some are critical of different aspects of such meetings. Support provided by CSOs to the creation of the PCNPB can be seen as a laudable step. It can be seen as an important step toward institutionalising interaction between parliamentarians and CSOs. The significance of public engagement thus should not be underestimated.

[16] N. Ahmed, *Limits of Parliamentary Control: Parliament and Public Expenditure in Bangladesh*. Dhaka: UPL, 2006, p. 162.

Ministerial Responsibility in Cases of Serious Policy Failure: The Role of Extra-Parliamentary Inquiry in Upholding Political Legitimacy*

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* Double-blind reviewed article.

'I ought to have known.

My advisers ought to have known and I ought to have been told, and I ought to have asked'.

Sir Winston Churchill, *The Hinge of Fate* (1950)

Abstract Cases of serious public harm (defined as policy and administrative failures resulting in fatalities), where there is a direct causal link with ministerial action or inaction, are few. Relevant examples in Australia are the home insulation program (colloquially known as 'the pink batts' case), and the Oakden Older Persons Mental Health Service, and in New Zealand the Cave Creek viewing platform tragedy. Traditional parliamentary scrutiny mechanisms were employed to interrogate the failures that resulted in the home insulation and Cave Creek tragedies. However, the manner in which the full extent of the Oakden scandal was ultimately exposed in South Australia suggests that, in some instances in contemporary Australian politics, only integrity bodies independent of parliament with appropriately legislated powers have any chance of holding individual ministers responsible for public harm caused by serious policy failure and supporting the maintenance of legitimacy of the Westminster political system.

INTRODUCTION

Individual ministerial responsibility is a critical convention in the Westminster system. In many respects the legitimacy of the system hinges upon the leadership shown by

ministers. Arguably, on occasion leadership may need to be demonstrated by acceptance of responsibility for serious policy failures that result in public harm, caused by ministerial actions, inaction or negligence within their portfolio, and resignation from a ministerial role. Ministerial inaction is captured by the notion of 'negative responsibility',[1] and voluntary resignation as both remedy and punishment for perceived wrong doing in the idea of 'vindicative responsibility'.[2] In the event that a minister does not recognise the seriousness of a policy or administrative failure themselves, or the chief minister does not request their resignation, and the parliament is unable to hold the minister (or the government) to account through any parliamentary mechanism (including scrutiny by parliamentary committees), due to the Opposition not holding a majority in either house, the only remaining option may be to have provision for extra-parliamentary investigation into the matter. The need for the automatic establishment of independent commissions of inquiry to 'support parliament in upholding ministerial responsibility' has been previously raised by Woodhouse.[3] As Mulgan notes, the evolution of extra-parliamentary scrutiny mechanisms has also had 'the effect of making public servants more directly accountable to the public'.[4] This scrutiny has assumed an increasingly critical dimension in an era of growing politicisation of the public service, in contrast to decades past when the public immunity principle was considered critical to protecting public servants in the interests of supporting their provision of full and frank advice to ministers.[5]

However, extra-parliamentary inquiries need to be established with appropriate authority provided by parliament, and have access to relevant documentation, which

[1] D. Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', in J. Fleming and I. Holland (eds.), *Motivating Ministers to Morality*. Aldershot: Ashgate, 2001, pp. 37-48.

[2] R. Gregory, 'Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek'. *Public Administration* 76 1998, pp.519-38.

[3] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.47.

[4] R. Mulgan, 'Assessing Ministerial Responsibility in Australia', in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press, 2012, p.178.

[5] R. Mulgan, 'Politicisation of Senior Appointments in the Australian Public Service'. *Australian Journal of Public Administration* 57(3) 1998, pp. 3-14; K. Spooner and A. Haidar, 'Politicians, Public Service Employment Relationships and the Coombs Commission'. *International Journal of Employment Studies* 13(2) 2005, pp. 43-67; R. Mulgan, 'Truth in Government and the Politicization of the Public Service'. *Public Administration* 85(3) 2007, pp. 569-86; A. Podger, 'Bipartisan Politicisation of the Public Service Obscures Debate'. *Australian Financial Review*, 9 January 2007, p. 39.

will inevitably raise conflicts with cabinet and parliamentary privilege. There have been a number of instances over the past forty years in Australia where the matter of access to documents has been tested in parliaments and the courts, and the conclusion of this discussion seeks to summarise the evolving state of play in this regard, in a context where the legitimacy of the political system is under growing pressure.[6] In this context, the question of Crown and executive immunity is also briefly discussed. This summary is preceded by a brief discussion of the convention of ministerial responsibility in relation to resignation resulting from serious policy and administrative failures, and an outline of the lessons from three case studies – the Cave Creek viewing platform tragedy in New Zealand, the Australian home insulation program, and the Oakden Older Persons Mental Health Service in South Australia – all of which resulted in serious public harm involving fatalities.

MINISTERIAL RESPONSIBILITY AND POLICY FAILURE

Woodhouse has argued that the convention of ministerial responsibility requires ministers to account for their actions in parliament, by informing, explaining and rectifying policy and administrative errors, and that in cases of major failures by their departments ministers should also resign.[7] The latter notion has been widely confused with the notion of 'vicarious' responsibility, that is, taking responsibility for others' actions whether the minister was aware of them or not, which may be considered negligence. In a later piece, Woodhouse acknowledges the notion of 'negative responsibility', where 'ministers are responsible for failing to act when they should have done so'.[8] Significantly, the Cave Creek tragedy is cited by Woodhouse as a critical trigger for such consideration:

[6] H. Hobbs and G. Williams, 'The Case for a National Whole-of-Government Anti-Corruption Body'. *Alternative Law Journal* 42(3) 2017, pp. 178-83; M. King, 'Last Gleaming of the Liberal Democratic Age?'. *InDaily*, 8 October 2018 (accessed at: https://indaily.com.au/opinion/2018/10/08/last-gleaming-of-the-liberal-democratic-age/); ABC News, 'Peter Dutton Says Parliament a "Disadvantage" for Government', 12 December 2018 (accessed at: https://www.abc.net.au/news/2018-12-12/peter-dutton-says-parliament-a-disadvantage-for-government/10609496).

[7] D. Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice*. Oxford: Clarendon Press, 1994.

[8] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.40.

> Failing to exert the appropriate level of supervisory authority is a breach of [ministerial] duties. Thus not knowing that something is happening may not be a good defence if it is felt that the Minister should have known. This was evident after 14 people died when a viewing platform collapsed at Cave Creek, New Zealand, in 1995.[9]

Mulgan summarises the debate around ministerial responsibility and resignation in cases of policy and administrative failure, noting that ministers 'frequently face calls for resignation for departmental failure when they can be said to share at least some of the blame'.[10] However, in Australia at least, no minister has ever resigned for this reason.[11] Mulgan argues that all such cases where ministerial resignations have been called for involve claims that the minister in question has some level of personal responsibility for the failure, including 'negligence or incompetence or through their responsibility for the general policy and budgetary settings within which the failure occurred'.[12] The inclusion of negligence in this description embeds the notion of 'negative responsibility'. Mulgan further argues that:

> The complete lack of observance of this principle, however, does not necessarily invalidate it: ministers *ought* to resign for presiding over departmental failure to which they have contributed personally.[13]

Woodhouse takes a similar view, suggesting that:

> There needs to be a public expectation that ministers will resign not only when their personal behaviour falls below the accepted standard but also

[9] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p. 40.

[10] Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 181.

[11] B. Page, 'Ministerial Resignation and Individual Ministerial Responsibility in Australia 1976-1989'. *Journal of Commonwealth and Comparative Politics* 28(2) 1990, 141-61; E. Thompson and G. Tillotsen, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility *Australian Journal of Public Administration*, 58(1) 1999, pp. 48-57; Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality'; R. Mulgan, 'On Ministerial Resignations (and Lack Thereof)'. *Australian Journal of Public Administration* 61(1) 2002, pp. 121-27; I. Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions*. Melbourne: Australian Scholarly Publishing, 2009; K. Dowding, C. Lewis and A. Packer, 'The Pattern of Forced Exits from the Ministry', in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press 2012; Mulgan, 'Assessing Ministerial Responsibility in Australia'.

[12] Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 180.

[13] Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 181.

> when they are implicated in serious departmental fault or have failed to supervise their departments adequately.[14]

This has been described as the notion of 'vindicative' responsibility by Gregory, in which the notion of voluntary punishment (that is, resignation), is viewed as critical to the maintenance of the integrity and legitimacy of the political system.[15] Gregory's assessment of the Cave Creek viewing platform tragedy, in which fourteen people died, gave rise to his view that 'exceptional cases [involving fatalities directly caused by policy and administrative failure] require exceptional responses'.[16] The comment that responses need to be 'exceptional' acknowledges that historically ministers have not resigned as a result of policy and administrative failures in their portfolios in most Westminster jurisdictions. However, departing from Bagehot's traditional view that ministerial dismissal is only punishment, not remedy, Gregory claims that in such cases ministerial resignations are both 'punishment and remedy'.[17]

Arguably, the more serious the failure, the greater the obligation on the minister responsible to resign. Referencing the Cave Creek tragedy, Woodhouse reinforces this view on the grounds that resignation in such circumstances is needed 'not only to restore the government's political reputation but also to restore confidence in the system'.[18] This suggests that adherence to this convention by ministers is critical to the integrity and legitimacy of the Westminster political system. Even so, resignation alone may be insufficient remedy in cases of potential criminal liability. Regardless, failure to resign in circumstances where ministerial action or inaction has resulted in serious public harm sorely tests the political legitimacy of a government, and history shows that punishment and remedy have results at the ballot box.[19] Fortunately, cases of serious public harm (defined as policy and administrative failures causing fatalities),

[14] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p. 48.

[15] Gregory, 'Political Responsibility for Bureaucratic Incompetence'.

[16] Gregory, 'Political Responsibility for Bureaucratic Incompetence', p.535.

[17] Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 534.

[18] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.40.

[19] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality, p.48. Changes in government followed all three cases referenced in the present discussion. However, this occurred for a wide range of reasons, which would confound any attempt to draw a direct causal link between these cases and the election losses.

where there is a direct causal link with ministerial action or inaction, are few. Three case studies are discussed below.

THE HOME INSULATION PROGRAM (THE 'PINK BATTS' CASE)

The $2.45 billion Home Insulation Program (HIP) was intended to provide economic stimulus during the Global Financial Crisis, while also supporting improved environmental outcomes (better insulated homes with lower power demands for heating and cooling). Fiscal stimulus promoted by speed of implementation was the over-riding goal of the program, with the Government halving the recommended roll-out time from five years to two and half.[20] Perhaps oddly, given it was primarily a building construction project (albeit with favourable environmental outcomes), implementation of the program was allocated to the Department of Environment, Water, Heritage and the Arts (DEWHA). Disaster struck early, with the deaths of four young labourers working on separate installations within the first twelve months (the first within six months of the project's commencement), and two hundred and two fire incidents resulting from unsafe installations. Following sustained attack on the Government in the Parliament, the program was cancelled in April 2010, only eleven months after it commenced.[21]

As Mulgan notes, 'all available parliamentary weapons' were marshalled by the then Opposition to attack the HIP and the Minister responsible. The deaths and administration of the program were raised as a 'matter of public importance' by the Shadow Minister in the House of Representatives, and sustained use of question time was made in both the House and the Senate, which in turn generated significant media attention on the program and the Minister.[22] The convention of ministerial responsibility received specific attention in the debate. The Opposition avoided the notion of vicarious responsibility, arguing instead that:

[20] C. Lewis, 'A Recent Scandal: The Home Insulation Program', in K. Dowding and C. Lewis (eds.), *Ministerial Careers and Accountability in the Australian Commonwealth Government*. Canberra: Australian National University E Press 2012, p.155.

[21] Lewis, 'A Recent Scandal', p.153.

[22] Mulgan, 'Assessing Ministerial Responsibility in Australia', pp. 184-85.

> …the minister was personally negligent and blameworthy for not doing more to ensure tighter safety standards after he had personally received a series of warnings about safety issues….[and his]…apparently passive reliance on official advice suggested a lack of responsible leadership.[23]

The Minister's negligence was in his apparent failure to heed advice provided to him, and then to actively inquire as to the details supporting concerns raised. This was a case of 'negative responsibility', where the Minister failed to act when the moral imperative to prevent harm arising from implementation of the program suggested that action to follow up serious safety concerns was warranted.

Further parliamentary scrutiny of the program was undertaken by the Senate Standing Committee on Environment, Communications and Arts. The Department of Prime Minister and Cabinet commissioned an external administrative review of the program, and the Auditor-General was asked to audit the program.[24] The Minister did not resign, but the program was removed from his portfolio. All of the installers involved in the deaths were deregistered by DEWHA, and state agencies in Queensland and New South Wales investigated the installers. This resulted in one being prosecuted and two fined in Queensland.[25] A subsequent Royal Commission into the program led by Ian Hangar AM QC did not pursue the matter of individual ministerial responsibility, as this was beyond the terms of reference.[26] Nor did it interrogate comments made by the former Prime Minister and relevant Ministers, as the Commissioner sought to ensure that 'the processes of the inquiry did not infringe the privilege of the Parliament'.[27]

The extensive scrutiny applied to the program ultimately found that the most critical issues were the untenable timeframe applied to implementation of the program (driven by the Department of Prime Minister and Cabinet), and the lack of capability

[23] Mulgan, 'Assessing Ministerial Responsibility in Australia', 186-87.

[24] Australian National Audit Office, *Home Insulation Program: Department of the Environment, Water, Heritage and the Arts, Department of Climate Change and Energy Efficient, Medicare Australia*. The Auditor-General Audit Report No. 12 2010-11. Performance Audit. Canberra: Commonwealth of Australia, 2010.

[25] Royal Commission into the Home Insulation Program, *Report of the Royal Commission into the Home Insulation Program*, Ian Hangar AM QC. Canberra: Attorney-General's Department, 2014.

[26] Royal Commission into the Home Insulation Program, *Report*, p. 9.

[27] Royal Commission into the Home Insulation Program, *Report*, p. 16.

and capacity within DEWHA to deliver it.[28] Commissioner Hangar also made particular note in his report of the imperative for provision of frank and fearless advice from the public service, commenting that:

> …Ministers and Department heads might procure written briefings that contain only information which supports a particular result… to act in this manner threatens the independence of the public service….[29]

He argued that, on the contrary, 'officers must be supported to engage with personal risk when giving advice, rather than to remain complicit with a particular approach thought to be favoured by the Minister or a political adviser…', and neither should Ministers or their advisers 'by subtle suggestion or otherwise, dictate what advice they receive'.[30] The Commissioner's focus on this issue betrayed a concern that Ministers may direct the content of advice supplied to them to deliberately avoid documentation of information that could confer responsibility upon them for poor outcomes.

THE CAVE CREEK VIEWING PLATFORM COLLAPSE

A tragic incident which shares several similarities with the HIP occurred in New Zealand on 28 April 1995, when a viewing platform built by the Department of Conservation at Cave Creek collapsed, with eighteen people on it falling forty metres. Fourteen people died, and four were seriously injured as a result.[31] On 8 May 1995, the New Zealand Parliament resolved to appoint an external Commission of Inquiry to investigate the causes of the tragedy and related matters.[32] The terms of reference for the Inquiry were initially focused on the events that led to the collapse, and during the course of hearings, were expanded to include matters consequent upon the collapse. Commissioner Noble found that:

[28] Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 188; Australian National Audit Office, *Home Insulation Program*, pp. 173, 176.

[29] Royal Commission into the Home Insulation Program, *Report*, p. 307.

[30] Royal Commission into the Home Insulation Program, *Report*, pp. 307-308.

[31] Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 519.

[32] The Department of Internal Affairs, *Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast*, Wellington: The Department of Internal Affairs, 1995.

> …the root causes of the collapse lie in a combined systemic failure against the background of an underfunded and under resourced department employing (at least at grassroots level) a band of enthusiasts prepared to turn their hands to any task.[33]

In his epilogue in the Inquiry Report, the Commissioner commented that faults in the processes of government reforms, and the failure of government to provide sufficient resources for the Department to undertake its functions, were fundamental causes of the catastrophe.[34] The Inquiry found that warnings of the consequences of under-resourcing had been provided to the Minister for five years prior to the incident by the Department's Chief Executive, a statutory authority and advisory boards.[35] Once again, this is an apparent case of 'negative responsibility', in which the Minister's failure to act upon the gravity of the warnings provided ultimately became a critical contributing factor in the disaster.

The Minister responsible did not resign at the time, nor did the chief executive of the Department of Conservation. As in the HIP case, the Minister did ultimately resign the portfolio (a year later, and just several months before a general election), but remained in Cabinet in another portfolio. Gregory notes that both the minister and the chief executive of the responsible agency argued that 'the doctrine of ministerial responsibility required them to stay in their jobs to see that managerial systems, and funding levels, were improved lest such a disaster recur'.[36] Rhodes and Wanna suggested that in so doing, the Minister invented a new convention in this regard, quoting him as saying: 'I gave a commitment to implement ministerial responsibility rather than shrink from it by resigning'.[37] They go on to comment that the Cave Creek tragedy highlighted situations 'where responsibility for policy in complex organisations is shared and it is correspondingly difficult to find out who is responsible'.[38] While the Minister was responsible for adequately resourcing the agency, the tasks of ensuring

[33] Department of Internal Affairs, *Commission of* Inquiry, p. 112.

[34] Department of Internal Affairs, *Commission of* Inquiry, p. 93.

[35] Department of Internal Affairs, *Commission of* Inquiry, pp. 45-51.

[36] Gregory, 'Political Responsibility for Bureaucratic Incompetence', p. 523.

[37] Cited in R.A.W. Rhodes and J. Wanna, 'Bringing the Politics Back In: Public Value in Westminster Parliamentary Government'. *Public Administration* 87(2) 2009, p. 179.

[38] Rhodes and Wanna, 'Bringing the Politics Back In', p. 179.

appropriate management systems were in place and staff were adequately qualified and experienced to undertake their roles rested with the Department.

THE OAKDEN OLDER PERSONS MENTAL HEALTH SERVICE

The third case of serious policy failure considered here dramatically underlines the concerns regarding the observance of the convention of ministerial responsibility outlined in the Cave Creek and HIP cases, and arguably takes them to another level. A range of significant issues regarding the ongoing operation of the Oakden Older Persons Mental Health Service were raised by the executive director with the then Minister for Health in 2002, including its recommended closure at that time.[39] However, it took a further 15 years before the facility was finally closed, in April 2017, after the adult children of residents who had suffered extended periods of significant abuse and in some cases died as a result, pursued complaints regarding their treatment through all available avenues, including the media.

The full extent of the issues at Oakden were exposed by a self-initiated maladministration inquiry conducted by the South Australian Independent Commissioner Against Corruption, announced on 25 May 2017. The Commissioner's 312-page report, released on 28 February 2018, documented a litany of horrendous policy and administrative failures over the fifteen year period.[40] During that time, five ministers of the same Government held the mental health portfolio, multiple reviews were undertaken, and over 400 complaints were received regarding the facility.[41] The Commissioner, the Hon. Bruce Lander QC, initiated his investigation following the release of a damning report on the Oakden facility by the Chief Psychiatrist in April 2017.[42] In describing how his investigation came about, the Commissioner commented on the Chief Psychiatrist's report:

> I was shocked at its content.

[39] Independent Commissioner Against Corruption, *Oakden: A Shameful Chapter in South Australia's History*. Adelaide: ICAC, 2018, p.65.

[40] Independent Commissioner Against Corruption, *Oakden*.

[41] Independent Commissioner Against Corruption, *Oakden*, Appendix 10.

[42] A. Groves, *The Oakden Report (The Report of the Oakden Review)*. Department for Health and Ageing, Government of South Australia, 2017.

> I listened intently to commentary following the release of the report, and in particular the government's response to its findings.
>
> I was concerned that notwithstanding the very serious findings and recommendations of the review panel no one appeared to be accepting responsibility for the manner in which the consumers at the Oakden facility had been housed and for the standard of care they received.[43]

Echoing the minister in the Cave Creek case, the then Minister for Mental Health rejected calls for her resignation at the time, claiming that now she was aware of the issues 'all the more reasons *[sic]* why I am going to remain the minister and clean this mess up'.[44] After seeking to prevent the findings in the ICAC report regarding her involvement in the Oakden matter being made public,[45] the Minister did subsequently leave the cabinet in September 2017. She then resigned from Parliament a fortnight prior to the release of the ICAC report, simultaneously removing her candidacy for the Legislative Council four weeks prior to the 2018 South Australian state election. Five ministers were implicated in the findings of the Oakden report, with four acknowledging that they had not taken the matter as seriously as they should have done and accepting degrees of responsibility for their failure to act. The Commissioner found that, had the senior administrators in the Department not acted of their own volition in relation to matters raised, the fifth minister would have been likely to be guilty of maladministration 'due to her inactivity'.[46]

Oakden was unlike the Cave Creek and HIP tragedies, which were investigated by traditional parliamentary scrutiny mechanisms (in the case of Cave Creek, an independent Commission of Inquiry established by resolution of Parliament). Attempts by the then Opposition to establish a parliamentary select committee on the matter in 2017 were unsuccessful, as they did not hold in a majority in either house. The Government at the time amended the terms of reference of an existing Joint Committee inquiring into elder abuse to include the Oakden matter but made only brief

[43] Independent Commissioner Against Corruption, *Oakden*, p.22.

[44] ABC News, 'Oakden Nursing Home Closure: Former Mental Health Minister Told of Concerns in 2013', 21 April, 2017. Accessed at: https://www.abc.net.au/news/2017-04-21/oakden-nursing-home-leesa-vlahos-vows-to-clean-up-mess/8460302 .

[45] Independent Commissioner Against Corruption, *Oakden*, pp.40-41.

[46] Independent Commissioner Against Corruption, *Oakden*, p.253.

reference to it in the final report, on the basis that it was being investigated elsewhere by that stage.[47] As noted above, it was ultimately a self-initiated investigation into potential maladministration in public administration undertaken by the Independent Commissioner Against Corruption (the first of its kind held in South Australia) that pursued the full extent of the matter. Other than sustained use of question time by the Opposition, which did generate significant media attention, in this instance usual parliamentary scrutiny mechanisms were not enacted as non-Government members could not command a majority in either house.

The Commissioner found maladministration by five administrators and clinicians, and the local health network responsible for the Oakden facility, but not by any of the ministers or agency chief executives. The view of ministerial responsibility taken by the Commissioner in the investigation did attract some controversy.[48] Although satisfied that his findings reflected the evidence before him, the Commissioner expressed his discomfort with the outcomes of the investigation, on the basis that ministers and senior executives 'ought to have known', and that each of the ministers and chief executives were responsible for the failures. He noted that, 'All but one minister who had responsibility for the Oakden facility over the past decade accepted some measure of responsibility for what occurred. [The remaining minister] sought to deflect responsibility'.[49]

It is critical to note that the Commissioner did not have access to Cabinet documents during the investigation, and the legislation under which he operated prevented hearings being held in public. Both points are referenced throughout his report in relation to numerous matters which could not be corroborated on the available evidence.[50]

Notwithstanding the comments noted above regarding the Commissioner's recognition of the notion of negative responsibility in stating that the ministers were

[47] House of Assembly, *Final Report of the Joint Committee on Matters Relating to Elder Abuse*. Adelaide: Parliament of South Australia, 2017.

[48] B. Siebert, 'What if ICAC Got it Wrong on Oakden? *InDaily*, 16 March 2018. Accessed at: https://indaily.com.au/opinion/2018/03/16/what-if-icac-got-it-wrong-on-oakden/ .

[49] Independent Commissioner Against Corruption, *Oakden*, p. 17.

[50] In his report the Commissioner outlined at some length the legislative framework he utilised to undertake the investigation and the complexities this involved relating to his jurisdiction, access to cabinet documentation, and the lack of public hearings. These legislative matters will not be addressed in the present discussion.

responsible for the failure to act, the view of ministerial responsibility articulated in his report was substantially based upon two elements. The first was the majority view in the *Egan* cases, and the second a (possibly misinterpreted) view that Ministers are not expected to resign in circumstances where they had no knowledge of a failure, for which Mulgan is cited.[51] The matters relating to the interpretation of case law regarding access to cabinet documentation will be canvassed further below. However, it is noted that the Mulgan article cited by the Commissioner specifically refers to responsibility attaching to 'negligence or incompetence or through their responsibility for the general policy and budgetary settings within which the failure occurred'.[52] Indeed, these were precisely the concerns identified by the Law Society of South Australia, which first publicly raised the proposal of the ICAC Commissioner undertaking a maladministration investigation in relation to Oakden:

> 'There has been reference to [the minister] having been notified a couple of years ago about the potential for neglect occurring at this particular facility,' Mr Rossi said.
>
> One of the questions that has been raised generally, is the extent to which the minister should have acted. Did she act in a neglectful way herself?
>
> Was she negligent? Was she competent?[53]

However, in the absence of access to Cabinet documentation, it was always going to be very difficult for the Commissioner to find maladministration by any minister, as he himself stated in the report, deferring that matter to Parliament:

> While the evidence does not permit a finding of maladministration against any of the Ministers, it remains the fact that they were, as Ministers, responsible for the Oakden Facility and for the care provided there during the time they were Ministers.

[51] Independent Commissioner Against Corruption, *Oakden*, pp.251-253.

[52] Mulgan, 'Assessing Ministerial Responsibility in Australia', p. 180.

[53] I. Dayman, 'Oakden Scandal Could Lead to ICAC Investigation against SA Minister Leesa Vlahos, Law Society Says', 8 May 2017. Accessed at: http://www.abc.net.au/news/2017-05-08/leesa-vlahos-could-be-investigated-by-icac/8505934.

> That, however, seems to me to be a matter between the Minister and Parliament.[54]

The extent to which staff and senior officers involved in the management of the Oakden facility sought to cover up what was occurring there was also fully exposed by the Commissioner's report, which reinforced in significant detail many similar findings from the Chief Psychiatrist's report. The extra-parliamentary nature of the investigation and, specifically, its independent non-political nature, was critical to facilitating this exposure and the apportionment of responsibility for policy and administration.

CASE STUDIES: DISCUSSION

The fatalities resulting from the Cave Creek, Home Insulation Program and Oakden policy and administrative failures drew strong responses from commentators and the public that ministers 'ought to have known' and acted, which is captured by the notion of 'negative responsibility', and that they should therefore resign. Resignation in these instances was viewed as 'vindication': an ultimate acceptance of responsibility and a punishment for perceived wrong doing. The initial failure of ministers to resign in each case had a significant negative impact on the reputation of the individuals and the political legitimacy of the governments, all of which lost office at elections following the scandals. As Gregory states:

> When all is said and done the manifest integrity of governmental systems can be sustained only by the sense of responsibility displayed by those officials, elected and appointed, who lead them.[55]

Worse, the Oakden case suggested that extra-parliamentary scrutiny mechanisms may be the only option to hold ministers responsible in some instances, particularly where parliament is unable to enforce scrutiny of a majority government. It also highlighted (not for the first time), the limitations of such investigations where they do not have access to cabinet documentation, and confront conflicts with conventions of cabinet responsibility, confidentiality and parliamentary privilege.

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[54] Independent Commissioner Against Corruption, *Oakden*, pp. 253-254.

[55] Gregory, 'Political Responsibility for Bureaucratic Incompetence', p.533.

Woodhouse describes the 'failure of parliament' occurring where majority governments and party politics dominate proceedings to the detriment of Westminster conventions, including ministerial responsibility.[56] Arguably, Oakden was one such case where parliament failed to institute effective internal scrutiny. The Cave Creek and Home Insulation Program cases provide an instructive contrast in this regard, as although the individual ministers in question did not initially resign, majority Governments in both cases submitted to forms of inquiry initiated and implemented by parliament. Of the case studies, Cave Creek is perhaps the best example of parliament exercising its ability to remedy policy failure. One of the key reforms of the New Zealand Parliament resulting from the Cave Creek Commission of Inquiry was the creation of new legislation, entitled the *Crown Organisations (Criminal Liability) Act 2002*, which was designed:

> …to protect society and the individual from harm or danger arising from the actions of the Crown by ensuring that there are mechanisms to hold the Crown responsible and accountable for its actions [and to] meet the principle that the Crown should in general be subject to the law and the same legal processes as everyone else.[57]

In the Oakden matter only one of the five ministers in question resigned (and then under significant duress following release of the ICAC report), and the majority Government refused to submit to parliamentary inquiry. While individual ministers need to assume responsibility for their actions and inaction, the legitimacy of responsible government is even more fundamentally challenged when the parliament fails to uphold convention and is unable to enforce scrutiny of the executive. It is in this context that extra-parliamentary scrutiny can play a critical role in upholding political legitimacy.

The concluding section of this discussion considers the importance of extra-parliamentary scrutiny and summarises some of the debates regarding access to

[56] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.43.

[57] New Zealand House of Representatives, *Parliamentary Debates (Hansard)*. Wellington: House of Representatives New Zealand, 3 May 2001.

privileged documentation to support the investigation of ministers where serious policy and administrative failure has occurred in their portfolios.

CHALLENGES FOR EXTRA-PARLIAMENTARY SCRUTINY

There are many matters to consider in designing approaches to effective extra-parliamentary scrutiny, and models vary around Australian jurisdictions. However, in the context of the present discussion arguably the most critical element to be addressed to enable effective extra-parliamentary scrutiny of ministerial action or inaction is the waiver or limitation of parliamentary privilege, including as it attends to Cabinet confidentiality. This conclusion is drawn from the ICAC Commissioners' experience in the Oakden case, where the unavailability of Cabinet documentation to the ICAC investigation arguably compromised the Commissioners' ability to make findings of fact regarding the existence or otherwise of maladministration by the ministers involved.[58] The Royal Commissioner into the HIP also noted the limitations parliamentary privilege placed on his ability to test the conclusions of previous inquiries or evidence supplied (while commenting that he did not intend it to be inferred that he wished to mount any such challenges).[59]

Professor Anne Twomey noted in her evidence to the Senate Select Committee on a National Integrity Commission in 2017: 'Parliamentary privilege of itself should not be a get-out-of-jail clause for people who are behaving in a criminal or corrupt way'.[60] Twomey's comment was made in the context of reflecting on the conflict between parliamentary privilege and investigation by extra-parliamentary bodies, particularly where the actions of ministers are involved. The reflex political response to any challenge to parliamentary privilege is generally to protect it in the strong terms of its derivation from Article 9 of the *Bill of Rights* 1689 (Eng.): 'That freedom of speech or

[58] It is noted that the *Independent Commissioner Against Corruption Act 2012* (SA) includes 'failure to act' in the definition of 'conduct' (s.5(c)).

[59] Royal Commission into the Home Insulation Program, *Report*, 16.

[60] Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, 12 May 2017, p. 15. Accessed at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Ff253b3da-ecda-4a0f-8884-a9eab3b9a546%2F0000%22 .

debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament'.[61]

However, dissenting views have long existed in the Australian judiciary and among eminent constitutional lawyers, providing a basis for challenging the abuse of parliamentary privilege in cases where its limitation would enable disclosure of evidence to support holding ministers responsible for their actions or inaction, including Cabinet documentation.

In *Sankey v Whitlam* (1978), the High Court took the view that protection from disclosure of Cabinet documents, where this was in the public interest, 'should not be absolute or eternal'.[62] However, the judgement also noted that the subject matter of the documentation needed to be considered to make such a determination, signalling that its release was an exceptional circumstance. Subsequent cases, including the majority judgements in *Commonwealth v Northern Land Council* (1993), *Egan v Willis* (1998) and *Egan v Chadwick* (1999) were not supportive of variation of the traditional restrictive view of the convention of cabinet confidentiality.[63] *Commonwealth v Northern Land Council*, while not upholding the broad disclosure proposed in *Sankey v Whitlam*, did consider that the content of certain documents may warrant their release:

> [We] doubt whether the disclosure of records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private right. *In criminal proceedings the position may be different*.[64]

[61] Cited in G. Griffith and D. Clune, 'Arena v Nader and the Waiver of Parliamentary Privilege', in G. Winterton (ed.), *State Constitutional Landmarks*. Leichhardt: The Federation Press, 2006, p. 332.

[62] E. Campbell, 'Parliamentary Inquiries and Executive Privilege'. *Legislative Studies* 1(1) 1986, p. 11.

[63] C. Mantziaris, *Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege*. Parliamentary Research Paper 12, 1999, pp. 31-33, 34). Accessed at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP12

[64] *Commonwealth v Northern Land Council* (1993), cited in S. Ohnesorge and B. Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council'. *Public Law Review* 29 2018, p. 123 (emphasis added).

Although this point will not be pursued in detail in the present discussion, and noting the comment from Twomey cited above, the release of cabinet documents in cases where there is reasonable suspicion of corruption or criminal liability, merits further exploration.

Sir Anthony Mason has argued that the courts have the power to override cabinet conventions in certain circumstances and the exercise of this power should be determined by the courts. Mason has interrogated the points of difference between the majority and minority judgements in the *Egan* cases, which he summarises thus:

> the existence of power in the courts to compel production of documents relating to Cabinet deliberations; and, more importantly,
>
> the significance of the doctrine of ministerial responsibility as an obstacle to the existence of the power.[65]

As noted above, it was the majority view in *Egan v Willis* that was cited by Commissioner Lander in support of his view of ministerial responsibility in the Oakden report.[66] In relation to the first point, Mason argues that the dissenting judgement of Priestley JA in *Egan v Chadwick* was right to uphold the view that courts have the power to order production of cabinet documents, albeit in exceptional cases.[67] In relation to the second point, regarding ministerial responsibility, Mason, citing the same initial passage as Commissioner Lander in his Oakden report, argues that it makes

> …clear that securing the accountability of government activity is the 'very essence' of responsible government. If there is to be a collision between the attainment of this object and the preservation of Cabinet confidentiality, then the former must prevail over the latter.[68]

Mason's footnote to this statement is also important to note, underlining the evolution of policy responsibility and the role of public servants:

> As an aside, it should be noted that the preservation of public service confidentiality designed to promote full and frank advice to Ministers,

[65] A. Mason, 'The Parliament, The Executive and the Solicitor-General', in G. Appleby, P. Keyzer and J.M. Williams (eds.), *Public Sentinels: A Comparative Study of Australian Solicitors-General*. Farnham: Ashgate, 2014, p.62.

[66] Independent Commissioner Against Corruption, *Oakden*, p. 251.

[67] Mason, 'The Parliament, The Executive and the Solicitor-General', p.63.

[68] Mason, 'The Parliament, The Executive and the Solicitor-General', p. 64.

> formerly regarded as supporting Crown privilege immunity of documents from production in court, has given way to inspections of the documents by a judge in appropriate cases.[69]

Mason is of the view that 'it is for the courts to determine the existence and scope of the powers and privileges of a House of Parliament', with due regard to 'the context of ministerial responsibility'.[70] Like Commissioner Lander, Mason ultimately takes the view that the resolution of matters of ministerial responsibility is a political question. However, he also cautions against the majority view in *Egan v Chadwick*, which he notes eschewed reference to the above-mentioned passage regarding responsible government from *Egan v Willis*.[71] Mason disputes the view that operating on the basis that there is inconsistency between the convention of ministerial responsibility (demanding, as it does, Cabinet confidentiality) and the power of the courts to order production of Cabinet documents is a qualification on the power itself.[72] In his view 'the right of the public to be fully informed about the activities of its government, and have those activities scrutinised by their elected representatives' should prevail.[73]

The debate outlined above concerns the production of Cabinet documents to the courts. Much discussion surrounds the distinction between the courts and extra-parliamentary integrity bodies, with the latter confined to making findings of fact. However, the point of principle elicited from the above discussion relates to the importance of limiting claims to parliamentary privilege and cabinet confidentiality in matters of critical public interest, such as the serious policy and administrative failures resulting in fatalities discussed earlier. In continuing her evidence to the Senate Select Committee on a National Integrity Commission cited above, Professor Twomey noted the importance of enacting appropriate legislation to determine how such a commission would interact with parliamentary privilege.[74] As Twomey noted: 'It is a space where parliament can, through its legislation, limit parliamentary privilege and

[69] Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

[70] Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

[71] Cited in Independent Commissioner Against Corruption, *Oakden*, p. 251.

[72] Mason, 'The Parliament, The Executive and the Solicitor-General', p.63.

[73] Mason, 'The Parliament, The Executive and the Solicitor-General', p.64.

[74] Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, p.15.

it can refer these issues to outside bodies if it thinks it is appropriate for outside bodies to deal with them'.[75]

As Twomey notes, there is a precedent for such legislation in New South Wales, in the *Special Commissions of Inquiry Amendment Act 1997* (NSW), and although this has never been used in that jurisdiction,[76] cases such as Oakden reinforce the need for such powers to be legislated.

While enabling full investigation of matters is critical, so is ensuring that remedy before the law can be applied where findings of fact indicate potential criminal liability. As noted above, one of the outcomes of the Cave Creek Commission of Inquiry was the passage of a Bill removing the immunity of the Crown from prosecution under legislation (including under the Building Act and the Health and Safety in Employment Act, in that instance) applicable to the community. In recommending removal of the Crown immunity from liability, the Commissioner in that case noted that after observing the lack of genuine accountability within the Government, 'it is difficult now to see why the Crown should be treated differently from any other organisation'.[77]

The Australian Law Reform Commission (ALRC) has twice reviewed issues of Crown immunity and liability, in 2001 and 2015, but there has been apparently little appetite at the political level in Australia to address this matter.[78] In its 2001 report on the judicial power of the Commonwealth, the ALRC considered the matter of Crown immunity in some detail, noting: 'The principle is widely accepted that governments, as representatives of the people, should be subject to the same laws as the people, unless Parliament provides otherwise'.[79]

The ALRC further commented that consultations undertaken and submissions received during its review had emphasised that 'this principle is at odds with the traditional common law principle that the executive is generally presumed to be immune from the

[75] Commonwealth of Australia. *Official Committee Hansard: Senate Select Committee on a National Integrity Commission*, p.15.

[76] 'Arena v Nader and the Waiver of Parliamentary Privilege', p. 360.

[77] Department of Internal Affairs, *Commission of* Inquiry, p.138.

[78] Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No. 92), 2001 (accessed at: https://www.alrc.gov.au/report-92); Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report No. 129) 2015 (accessed at: https://www.alrc.gov.au/publications/freedoms-alrc129).

[79] Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, p. 410.

operation of the law'.[80] The ALRC called for blanket removal of Crown immunity and supported the proposition that specific legislation define the extent of any immunities granted.[81] This would remove the (still) existing lack of certainty regarding the status of immunity, cited as a key concern in submissions to the review.

CONCLUSION

As Woodhouse notes, elected members of parliament:

> …need to be reminded again and again that our chosen form of liberal democracy, 'the Westminster model' … is highly vulnerable to abuse and distortion – because of its heavy reliance on conventions or unwritten rules which means dependence on the good faith and integrity of political practitioners.[82]

The quotation from Sir Winston Churchill at the start of this paper refers to this moral responsibility, and underlines that governance based upon convention is only functional and legitimated when morality is observed in action. Some western polities appear increasingly lacking parliamentary practitioners with respect for liberal democratic conventions, including the concept of ministerial responsibility. The three cases discussed here involving fatalities resulting from serious failures of policy and administration are sad and extreme examples of this apparent lack of respect and demonstrate the need for concept of ministerial responsibility to encapsulate responsibility for failure to act. Gregory's notion of vindicative responsibility as both remedy and punishment for such failure seeks to ensure consequences for ministerial inaction. However, as noted earlier, whether resignation alone is adequate remedy or punishment in cases of potential criminal liability merits further discussion.

There is increasing evidence that the failure by elected representatives to uphold such moral conventions has led to a collapse of public trust in many Westminster

[80] Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, pp. 410-411.

[81] Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, pp. 411-412.

[82] Woodhouse, 'The Role of Ministerial Responsibility in Motivating Ministers to Morality', p.48.

democracies, including Australia.[83] Arguably this necessitates greater sophistication in enactment of extra-parliamentary scrutiny mechanisms as a means of supporting the retention of political legitimacy where parliamentary mechanisms fail by omission. This includes addressing limitation of parliamentary [and cabinet] privilege in specific circumstances where there is clear evidence of its abuse against the public interest in cases of serious policy and administrative failure. If it is not possible to fully investigate the causes of and responsibility for public harm, it is not possible to make complete findings of fact to support apportionment of responsibility. In addition, there is a need to address Crown and executive immunity from liability to achieve genuine equality before the law, so that remedies can be sought when appropriate. As the ALRC noted in 2001:

> The doctrine of immunity of the Crown was developed at a time when governments engaged in only a narrow range of activities, and rarely so in respect of the kinds of activities carried on by ordinary persons or commercial entitles. The immunity of the Crown was accepted as a general rule because its impact on citizens was modest. However, the executive government 'carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many things'. Government entities increasingly affect the lives of citizens through sophisticated administrative functions and government engagement in commercial activities….[84]

The practice of Westminster-derived governance has endured because it has evolved over the centuries. While its attendant moral conventions remain as relevant as ever, processes to uphold their enforcement require urgent modernisation to restore public faith in many western liberal democracies in the face of the complexity of government operations and increasingly disingenuous behaviours by elected representatives.

[83] G. Stoker, M. Evans and M. Halupka, *Trust and Democracy in Australia: Democratic Decline and Renewal*. (Report No. 1). Canberra: Museum of Australian Democracy, 2018. Accessed at: https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf

[84] Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, p. 409, citing *Jacobsen v Rogers* (1995).

Effective or Affectation? Televising Parliamentary Proceedings and Its Influence on MPs' Behaviour*

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* Double-blind reviewed article.

> This dull, safe coverage is deliberately less interesting to the audience to make it more acceptable to MPs. No matter. The restrictions can always be relaxed later. They will be, as the Commons discovers the need to make its deliberations more compelling viewing. Broadcasters will be on their best behaviour but will gradually develop confidence and begin to deal less deferentially. So the coverage will get more interesting and television will become addictive. Fears will prove groundless. MPs will wonder why they wasted so much time resisting it in the first place.[2]

Former British Labour MP Austin Mitchell was a long-time advocate for televising the House of Commons. He got his wish on 21 November 1989. Writing not long after the start of television coverage, Mitchell judged it to be mediocre but predicted it would improve, even suggesting it would become compulsive viewing and MPs would reflect on their initial hesitancy. Of course, he was writing well before the development of 16:9 ratio, warts and all high definition TV.

[1] I am grateful to the New Zealand Parliamentary Library for researching data and media coverage. In particular I would like to thank Geoffrey Anderson, Jessica Ihimaera-Smiler, John Molloy, Hannah O'Brien, Tracey Shields, Bridgit Siddall, Rebecca Styles, Bessie Sutherland, Michiel Verkade and Brent Willis. I would also like to thank members and staff of the 51st Parliament who responded to my survey.

[2] Austin Mitchell, 'Beyond Televising Parliament: Taking Politics To The People'. *Parliamentary Affairs*, 43(1) 1990, p. 4.

An article in *The Telegraph* (UK) published 25 years later asked, 'Have TV cameras in Parliament made political debate coarser?' It claimed behaviour in the UK Parliament was no worse than before cameras arrived: 'If anything, MPs are more watchful' and 'Fewer MPs are thrown out of the chamber today for bad behaviour'.[3] This supports the idea that television cameras have had a positive influence on parliamentary behaviour.

This paper analyses the behaviour of MPs in New Zealand's debating Chamber from 1997 to 2016. The genesis of the paper was the looming tenth anniversary of Parliament TV (PTV) in July 2017 and particularly comments from some parliamentary old hands that the conduct of members had improved since the start of official television coverage. Overall, the results of my research suggest that televising the New Zealand Parliament has had a favourable effect.

My research drew on a number of key publications on the subject of broadcasting parliamentary proceedings.[4] Comparisons between the New Zealand experience and other jurisdictions and detailed psychological analysis about the reasons for parliamentary behaviour in New Zealand were both deemed beyond the scope of this research and are not discussed here.

[3] 'Have TV Cameras in Parliament Made Political Debate Coarser?'. The Telegraph (UK), 21 November 2014. Accessed at: https://www.telegraph.co.uk/news/politics/11244147/Have-TV-cameras-in-Parliament-made-political-debate-coarser.html

[4] These include Jay G. Blumler, 'The Sound of Parliament', *Parliamentary Affairs*, 37I(1) 1984, pp. 250–66; Bob Franklin, 'A Leap In The Dark: MP's Objections To Televising Parliament'. *Parliamentary Affairs*, 39(3) 1986, pp. 253-66; Suzanne Franks and Adam Vandermark, 'Televising Parliament: Five Years On'. *Parliamentary Affairs*, 48(1) 1995, pp. 57–71; Inter-Parliamentary Union, European Broadcasting Union and Association of Secretaries General of Parliaments, *The Challenge of Broadcasting Parliamentary Proceedings*, 2007 (accessed at: https://www.ipu.org/resources/publications/reference/2016-07/challenge-broadcasting-parliamentary-proceedings); Mitchell, 'Beyond Televising Parliament'; Stuart N. Soroka, Olga Redko and Quinn Albaugh, 'Television in the Legislature: The Impact of Cameras in the House of Commons'. *Parliamentary Affairs*, 68(1) 2015, pp. 203–217.

WHAT CONSTITUTES GOOD OR BAD BEHAVIOUR?

When it comes to the perceived modification of behaviour by parliamentarians, a number of potential reasons could be at play. The presence of television cameras may be merely coincidental. For example:

- The demographic make-up of New Zealand's Parliament changed after the introduction of Mixed Member Proportional representation in 1996. Maybe today's parliamentarians are just more relaxed and tolerant than those in the past.
- Some of the more turbulent and newsworthy members may have mellowed with maturity or else left Parliament.
- Perhaps we have become so accustomed to badly-behaved MPs that we just do not notice bad behaviour anymore.
- Maybe the cocktail of popular culture, smart technology and the ubiquitous YouTube has made MPs' behaviour seem relatively quaint, compared to the latest viral video of celebrities such as Kim Kardashian.

Despite the abundance of possible alternative influences on actual and perceived parliamentary behaviour, there is a fixed, measurable point of 17 July 2007 on which PTV started. With this day as my pivot, data from 20 years of House proceedings was analysed, spanning 10 years prior to the introduction of PTV and 10 years following its introduction. This data was supplemented with a survey of MPs and their staff. If the behaviour of MPs was shown to have improved after the installation of television cameras in the Chamber, and their attitude towards PTV was favourable, it could be argued that the strict rules currently governing coverage should be relaxed. This would allow the PTV director to use a greater variety of camera shots, making footage even more interesting and engaging for viewers.

It is acknowledged that terms such as 'badly-behaved' and 'improved' imply value judgements. Reacting to their inclusion in a 2004 list of 'worst-behaved' MPs, two Opposition MPs from the National Party, Dr Nick Smith and Gerry Brownlee, defended their performances, countering that it proved they were 'hard at work' and 'being the most active (rather) than being the worst-behaved.'[5] Clearly, there is disagreement as to what constitutes 'good' behaviour in the Chamber. Nevertheless, both *Standing*

[5] 'Dunne's Baddies List Upsets National MPs'. *The Press*, 24 December 2004.

Orders of the House of Representatives and *Speakers' Rulings* provide authoritative guidelines that must be followed. For the purposes of this study, any value judgements regarding MPs' behaviour reflects those made in these authoritative publications.

THE GENESIS AND GROWTH OF PARLIAMENT TV

PTV is a dedicated channel operated by the Office of the Clerk of the House of Representatives and is available on three digital platforms: Freeview, SKY and Vodafone. It is web streamed on Parliament's website (www.parliament.nz) and its *Virtual House* mobile device app. Video on demand clips are also available on the website.

Standing Orders require that the House 'sit in total about 90 days in the calendar year' (Standing Order 81 (3)). A Sitting Programme for each year is recommended to the House by the Business Committee (a select committee with representatives from all parties). PTV broadcasts all proceedings of the House, which sits on Tuesdays, Wednesdays and Thursdays for approximately 30 weeks every year, shortened to accommodate the triennial general election. In a typical parliamentary year, PTV screens at least 510 hours of live footage and 315 hours of replays. The remaining screen time displays a looped message with details on making Select Committee submissions and how to access and engage with Parliament.

In 2007, PTV's mandate was simply to broadcast live coverage of House proceedings; consequently, its technical capacity was relatively uncomplicated. Since then, new equipment has been added to allow replays, simultaneous English interpretation of Te Reo Māori, live closed captioning and the integration of NZ Sign Language interpretation. Making better use of PTV downtime has been a long-time goal and is presently being developed.

Prior to PTV, television coverage of parliamentary proceedings was limited to occasional filming by New Zealand's two commercial channels operated by Television New Zealand (TVNZ) and TV3, which set up their own *ad hoc* facilities in the Chamber galleries. From 1988 to 2007, successive Speakers allowed television coverage of question time; however, parliamentary filming rules restricted what could be shown to only the member with the call or the Speaker. This rule that flew in the face of the

'news media's ability to freely report and scrutinise the behaviour of our elected representatives'.[6]

In 2002, the Triennial Review of Parliamentary Appropriations recommended investigating the establishment of an in-house television facility. In its 2003 review, the Standing Orders Committee set out a proposal for the installation of small robotic cameras located under the galleries in the Chamber, remotely-controlled from a studio in Parliament buildings. Being closer to eye-level, coverage would prove to be a dramatic improvement on the high-angled shots from the galleries of coiffured hairdos and balding pates. Some backbench seats also could not be seen from the galleries.[7] One of its recommendations—not to allow broadcasters to use their own cameras once PTV was operating—led to a running battle with the news media.

THE RELATIONSHIP BETWEEN PARLIAMENT AND THE MEDIA

Like most other jurisdictions with an active Fourth Estate, relations between Parliament and the New Zealand media have often been both testy and tested. When the commercial, ratings-driven needs of the media and Parliament's requirement for fair representation clashed, it created an environment of antagonism and mistrust between the Speaker and the Parliamentary Press Gallery. For example, in August 2000, *The Evening Post* newspaper published a photo of National MP Annabel Young yawning in the House during a lengthy legislative debate. *The New Zealand Herald* described this as 'a good piece of photojournalism, telling the story of the filibuster as it was for those in the House'.[8] This prompted Speaker Jonathan Hunt to issue a week-long ban on both television cameras and newspaper photographers.

[6] 'Cameras in the House'. *The Press*, 21 March 2005.

[7] John E. Martin, *The House: New Zealand's House of representatives 1854-2004*. Palmerston North: Dunmore Press, 2004, p. 321.

[8] 'Suppress the Yawn, But Not the Picture'. *The New Zealand Herald*, 15 August 2000. Accessed at: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1 and objectid=147880

In late August 2006, Speaker Margaret Wilson banned TV3 after it showed New Zealand First MP Ron Mark making a one-fingered gesture towards the National Party members sitting in the Opposition benches. TV3 director of news and current affairs, Mark Jennings, responded:

> We were only showing what would have been observed by members of the public if they had been sitting in the public gallery on that day … Politicians behaving badly is a news story and the public have a right to see what is really going on in the debating chamber.[9]

TV3's tactic was not without its critics from within the media. In September 2006, media commentator Tom Frewen, in *The National Business Review*, referred to the disingenuous nature of TV3's breach:

> Over six years, one MP yawning, another asleep and another making a rude gesture do not add up to the ongoing and widespread bad behaviour that the media would have you believe goes on all the time and which they so bravely bring to your attention at great risk, not to themselves, of course, but to their credibility.[10]

In June 2007, in anticipation of uninterrupted televised coverage of parliamentary proceedings, a report of the Standing Orders Committee made the case for a review of the parliamentary rules for filming the Chamber. These rules had operated since 1990 and been restated by Speaker Hunt in 2000:

> In order to sustain interest and to give a more accurate impression of how the House actually operates, the scope of coverage could be expanded … There is a balance to be struck between the need to maintain a true record of the proceedings (interjectors do not have the call and have no right to intrude on the coverage of the member who does) and making the coverage visually informative by showing a reaction to what is happening. It is proposed to make provision for limited reaction shots involving questions and interjections and to permit more general background shots

[9] Mike Houlahan, 'TV3 Calls Parliamentary Rules on Filming of MPs "Arcane"'. *The New Zealand Herald*, 29 August 2006.

[10] Tom Frewen, 'TV3 Scores Own Goal When It Points the Finger'. *The National Business Review*, 8 September 2006.

> so as to illustrate the mood of the House and introduce some variety into the coverage.[11]

The report proposed permitting the commercial television channels to continue filming from the galleries, as long as they adhered to proposed new and more liberal rules for filming and conditions for use of official television coverage. These were to be incorporated into Standing Orders as Appendix D.[12]

Operated by professional television staff under contract to the Office of the Clerk, the coverage provided by PTV has proven to be unbiased, yet shot with as much creativity and flair as Standing Orders allow. Initial protests from the commercial news media have reduced to the point that PTV footage is now regularly used by TVNZ and TV3, often interpolated with shots taken by the channel's own high-angled cameras in the galleries. It appears commercial television directors prefer shots of faces to hairdos and bald pates.

ASSESSMENT OF PTV'S INFLUENCE ON MPS' BEHAVIOUR

Four comparisons using data compiled for the 10 years before the start of PTV and the 10 years after PTV have been used to assess the impact of PTV on MPs' behaviour. The four comparisons concern:

1. Ejection of members from the Chamber
2. Withdrawals and apologies
3. Points of order
4. Questions to members

Although the linkage of cause and effect is inferred rather than demonstrated in these comparisons, this analysis offers a rudimentary measure of three alternative potential outcomes: that television cameras made no difference to members' behaviour; that television cameras had a negative influence on behaviour; or that television cameras

[11] New Zealand House of Representatives, *Television Coverage of the House*, Report of the Standing Orders Committee (I.18A), June 2007, p. 3

[12] House of Representatives, *Television Coverage of the House*, pp. 7-8.

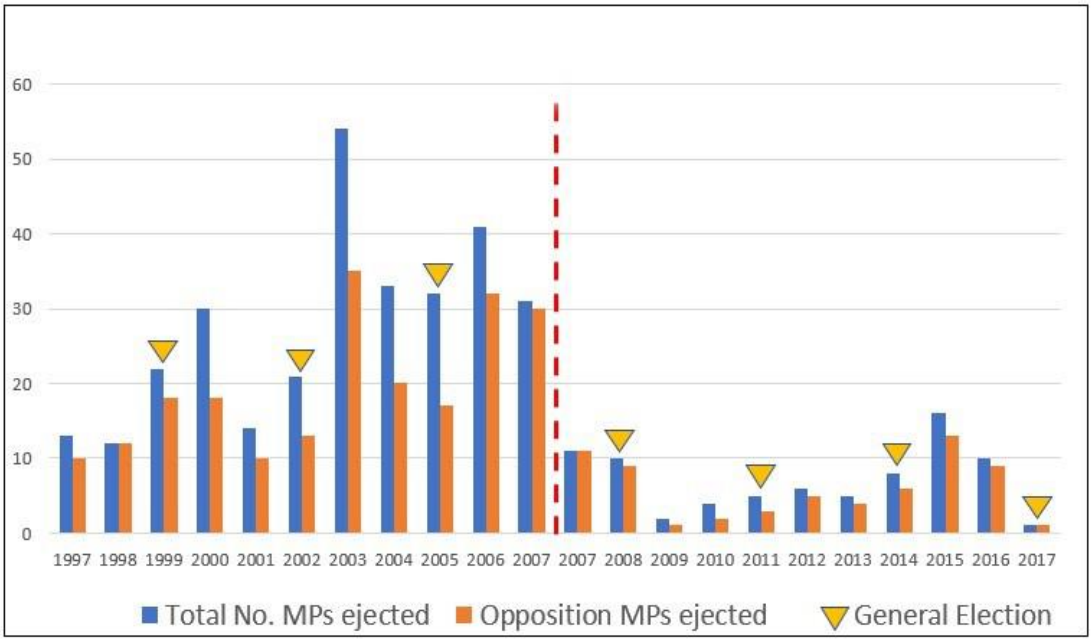
had a positive influence on behaviour. For each comparison, the data concludes at the end of the 51st Parliament on 18 August 2017.

Comparison 1: Members ejected from the Chamber

The Speaker has the ability under Standing Order 89 to 'order any member whose conduct is highly disorderly to withdraw immediately from the House'. Of a total of 382 ejections over 20 years, 79.3 percent occurred pre-PTV: 303 pre-PTV versus 79 post-PTV (see Figure 1). Looking at the seven triennial general elections since 1999, there were increases in MPs ejected immediately following the 1999, 2002 and 2005 elections. Since the start of PTV, misbehaviour in the Chamber after an election seems to have abated.

The 47th Parliament of 2002-2005 was particularly noteworthy for having 40 Ministers, all Labour members, ejected. This total contrasts with the post-PTV figure of only ten Ministers ejected from the Chamber between 2007 and 2017. The improved behaviour of Ministers is not entirely surprising. Ministers are the subject of most media attention and have a small army of press secretaries, communications advisors and media minders to help form and facet their public image. It is not difficult to conclude that Ministers are coached to restrain themselves in the House to avoid negative publicity. If television cameras have modified the behaviour of members, including Ministers, it appears to have been for the better.

Figure 1. Members ejected from NZ House of Representatives



Interestingly, being ejected from the Chamber does not necessarily hinder an MP's parliamentary or ministerial prospects. Six MPs in the 51st Parliament feature in the list of top ten offenders from 1997 to 2016, and include a former Prime Minister, Rt Hon Bill English, the current Deputy Prime Minister, Rt Hon Winston Peters, and Rt Hon Trevor Mallard who, on 7 November 2017, was elected Speaker of the 52nd Parliament.

Comparison 2: Withdrawals and Apologies

Long standing Speakers' Rulings allow the presiding officer to require a member to withdraw a statement and give an apology, unreservedly. This is one of the most effective procedural mechanisms to maintain order when the House becomes agitated. It can defuse an explosive atmosphere and avoid a member being asked to leave the Chamber.

Figure 2. Withdrawals and Apologies

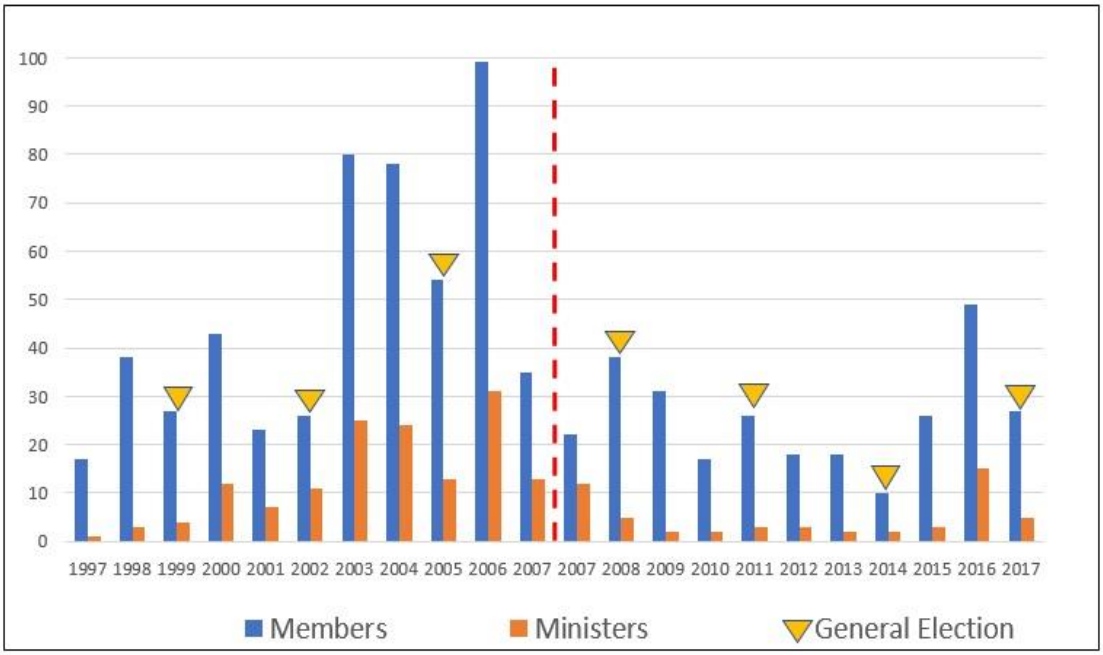


Figure 2 shows that from a total of 802 withdrawals and apologies over 20 years, 64.8 percent occurred pre-PTV (520 pre-PTV versus 282 post-PTV). Ministers made 193 of these withdrawals and apologies (144 pre-PTV and 49 post-PTV). Ministerial behaviour during the Fifth Labour Government of 1999-2008 appears to have been particularly challenging for the Speaker, with 136 Ministers reprimanded in the pre-PTV period. In 2006 alone, 31 Ministers were pulled up. As with the ejection of members, if television cameras have modified the behaviour of members, and in particular Ministers, it appears to have been for the better.

Comparison 3: Points of Order

When properly used, a point of order gives a member the ability to raise a procedural issue with the Speaker. Nevertheless, in an adversarial debating Chamber, points of order are often used to disrupt an opponent's speech. Sometimes a point of order is a feebly camouflaged attempt to grab attention, presumably grandstanding for the benefit of the radio microphones and television cameras.

Due to the large number and frequency of points of order, the analysis presented here is restricted to points of order raised during Question Time on Tuesday and Wednesday in the week when the highly-publicised annual Budget is delivered (traditionally on a

Thursday in mid-to-late May). My research does not assess the content of each point of order as its effect is the same, even if made between speeches; it interrupts the flow of business. Further research would be needed to determine the extent to which points of order were either productive or disruptive.

Figure 3. Points of Order

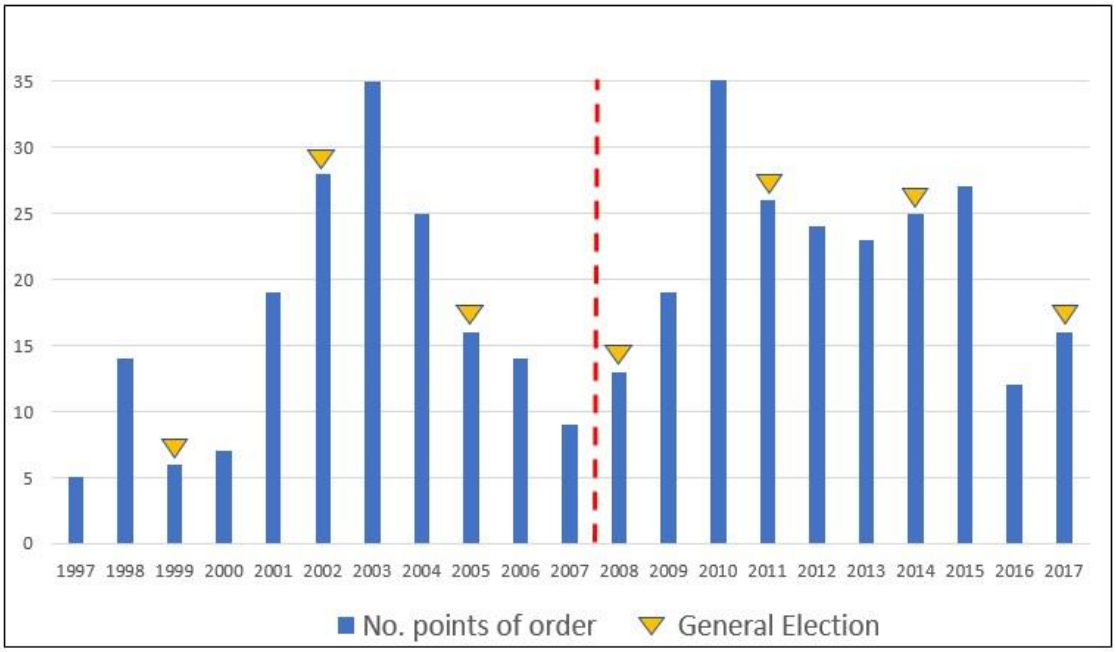


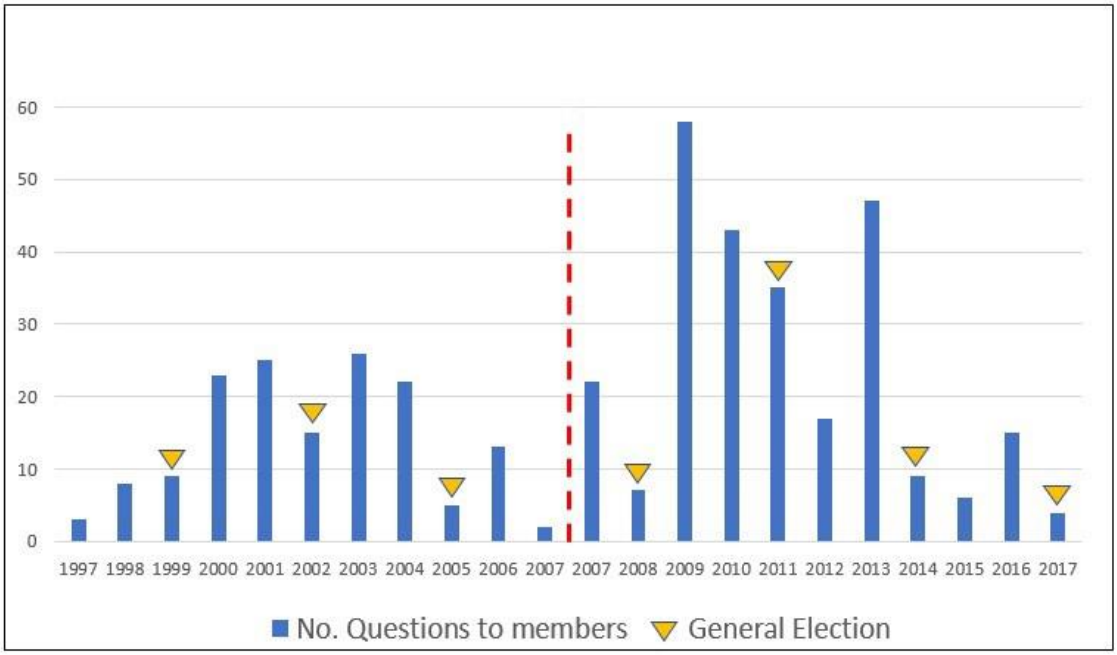
Figure 3 shows that nearly 55.3 percent of a total of 399 points of order over 20 years occurred post-PTV (178 pre-PTV versus 221 post-TV). It seems that the television cameras have not significantly affected the number of points of order made by members. Any anxiety that members would feel restrained by television cameras or, alternatively, be encouraged to 'showboat' is not reflected by the relatively even pattern of use of points of order pre- and post-PTV.

Comparison 4: Questions to members

Under Standing Order 379, a member may be asked about 'any bill, motion or public matter connected with the business of the House, of which the member has charge'. These questions are asked immediately after oral questions to Ministers: in television parlance, this is prime time viewing. Presumably an MP wishing to maximise television coverage would take advantage of this Standing Order. Did they?

Pre-PTV, 151 members asked questions of a member; post-PTV there were 264 such questions. From a total of 415 questions to members, 63.6 percent happened post-PTV. It appears the television cameras have enticed members to make the most of this media opportunity.

Figure 4. Questions to members



This is the only result from the four comparisons that shows an increase in activity. It is arguably a positive outcome, as questions to members give the viewing public an opportunity to learn more about parliamentary business. A more cynical interpretation would be that members have figured out how to maximise the television opportunity of Question Time. This development did not go unnoticed by the Speaker of the 51st Parliament, Rt Hon David Carter, who commented on the use of members' questions:

> I can see a discussion occurring at the Standing Orders Committee before too much longer about whether (questions to members) are necessary. If

> they are simply a means of raising publicity on a bill that is placed on the Order Paper, I can see that being questioned by members.[13]

From the above four comparisons, it can be reasonably argued that the presence of television cameras in the Chamber has, overall, improved the behaviour of MPs, and particularly Ministers. Simultaneously, the ability of members to function in the Chamber has not been impeded; arguably, they are now more positively engaged.

WHAT DO MPS THINK OF PTV?

The Office of the Clerk commissions biannual surveys asking respondents to rate the media used by the public to access Parliament. As helpful as these surveys are in evaluating public engagement, they offer no data specific to whether and how New Zealand's MPs value PTV. To fill this gap, I conducted an online poll of members and their staff.

Eight questions were emailed to party whips and party leaders' chiefs of staff to distribute to their members and support staff. A total of 59 responses were received. These came from 18 MPs (out of a total of 121 MPs) and 34 support staff, with identities of seven respondents undeclared. Although the survey was based on a small sample size, responses were received from all political parties represented in the Parliament except one (ACT, which has only one MP). Compared with the results of the 2014 general election, National Party members were underrepresented in the sample, while the Labour, Green and NZ First parties were all overrepresented.

Nearly 97 percent of respondents claimed to watch coverage of proceedings on PTV. Of these, 82 percent used the internal television system on the parliamentary precincts, 54 percent streamed from Parliament's website, 43 percent watched PTV at home, 41 percent viewed video on demand and 39 percent used the *Virtual House* app. Nearly 70 percent use footage on their social media and 61 percent regularly update content.

To the question 'How do you rate the value of PTV to you personally, or to the institution of Parliament, or to the nature of democratic representation?', there was a strong positive response of 98 percent, with 65 percent valuing PTV as 'essential' and

[13] Hansard, 25 August 2015, volume 708

33 percent seeing it as 'very important'. Only one respondent responded 'not important at all' and none indicated that 'it isn't that important'. When asked if they were aware of the television cameras in the Chamber, 17 MPs responded with 14 answering 'yes'. Asked if the presence of these cameras made them feel uncomfortable or self-conscious, only one MP answered 'yes'.

The combination of usage and perceived value leads to a number of conclusions:

- PTV is greatly valued by MPs and their staff.
- PTV is a popular communications component in today's social media mix.
- Television coverage in the Chamber does not negatively affect MPs' behaviour in the House.

CONCLUSION

The results from the four comparisons appear to indicate that MPs are now less rowdy, better engaged and more media savvy than they were before PTV. Similarly, the survey results appear to confirm that MPs and their staff are prolific users of PTV for their social media channels and consider PTV to be a highly significant part of New Zealand's democratic landscape. It is therefore fair to conclude that PTV has not impeded or impaired the ability of MPs to undertake their representative and advocacy work in the House.

After a decade of providing coverage of proceedings, PTV has proven to be a professional and balanced provider of official television coverage. Although Appendix D of Standing Orders prohibits broadcasting 'interruptions from the gallery' (Part A (1) 8), PTV currently recognises the unique flavour of the House and covers waiata (song), karakia (prayer) or similar activity in the galleries if the Speaker or presiding officer gives approval. However, to encourage greater viewer engagement, a wider variety of camera shots, including discretionary close-ups, would better convey the atmosphere of the House. This is not to say the rules should be liberalised to accommodate the media's self-serving interests. The dignity of Parliament is paramount, and its proceedings should not be reduced to a snappy headline or clickbait. Parliament's function is not to provide fodder for journalists after a good story or to cultivate their careers as political operatives.

It is to be hoped that one day the Standing Orders Review Committee will agree that MPs can trust the PTV operators to both maintain the dignity of Parliament and make

coverage more engaging for the public. And maybe even, as Austin Mitchell envisaged, it will become addictive.

POSTSCRIPT

Research for this paper began in 2016, as part of the *Parliamentary Law, Practice and Procedure* course at the University of Tasmania. Six months after this paper was originally submitted in 2017, outgoing Assistant Speaker Lindsay Tisch noted in his Valedictory Statement that the behaviour of members 'has improved with the advent of the television live feeds'.[14]

[14] *Hansard*, 10 August 2017, Volume 724.

Back to the 1950s: the 2019 NSW Election*

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* Double-blind reviewed article.

INTRODUCTION

The 23 March 2019 State election provided opportunities for two important shifts in NSW politics. First, the Premier, Gladys Berejiklian, had the opportunity to become the first female NSW Premier to contest a general election successfully. Second, the Liberal and National Parties had the opportunity to challenge the idea of NSW as a 'Labor state' by winning three elections in succession, something the Coalition had not done since 1971. Alongside these opportunities to redefine the state's politics for the 21st century, much of the major party contest in the election had the distinctly older tone of a 1950s-style campaign, with two no-frills party leaders engaged in a competition to entice voters with promises of more and better infrastructure, concessions and services.

THE NSW GOVERNMENT'S ECONOMIC PERFORMANCE

In the period leading into the 2019 State election, the NSW economy performed strongly relative to the other states; however, it began to show some signs of weakening. The NSW seasonally adjusted unemployment rate in February 2019 of 4.3 percent compared favourably with the national rate of 4.9 percent and was towards the lower end of the range of NSW joblessness since the 2015 State Election.[1] In mid-

[1] Australian Bureau of Statistics, *6202.0 – Labour Force, Australia, May 2019*. Accessed at: https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6202.0May%202019?OpenDocument

2018, NSW per capita Gross State Product (GSP) was $74,955, above the Australian per capita Gross Domestic Product (GDP) figure of $73,267 and the per capita GSP of all states except Western Australia. Despite the confident predictions of the NSW Treasurer in the *2018-19 Budget Papers* that NSW would continue to experience relatively high growth in per capita GSP, the annual percentage increase to July 2018 in NSW was the lowest of all states and territories at 1.0 percent.[2] It is likely to have fallen further before the 2019 election, given Australia's overall contracting per capita GDP.[3]

The economic growth that did occur in NSW was uneven. The construction sector, driven partly by the NSW Government's heavy investment in public infrastructure projects,[4] contributed strongly. By contrast, the NSW agriculture sector contracted significantly, largely due to the long-term drought.[5] To the extent that swinging voters judge governments retrospectively on their economic performance, rather than voting on probable future economic conditions,[6] the economic position of NSW gave voters little cause to punish the Coalition, although voters in rural and regional areas had stronger reasons than those in Sydney.

A CHANGE OF PREMIER

Premier Mike Baird's popularity had soared after his comfortable re-election in March 2015. At one stage, 'Magic Mike' was the most popular Premier in the country, according to Newspoll, with an approval rating of 63 percent.[7] In about the middle of

[2] Australian Bureau of Statistics, *5220.0 - Australian National Accounts: State Accounts, 2017-18* (accessed at: https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5220.02017-18?OpenDocument); NSW Government, *Budget Statement 2018-2019. Budget Paper No. 1*. Circulated by The Hon. Dominic Perrottet MP, Treasurer, and Minister for Industrial Relations. 2018 (accessed at: https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/Budget_Paper_1-Budget_Statement_UDPATED_2.pdf

[3] Stephen Letts, 'Australia's Economy Just Entered Recession on a Per Capita Basis', *ABC News*, 7 March 2019. https://www.abc.net.au/news/2019-03-06/gdp-q4-2018/10874592;

[4] NSW Government, *Budget Statement 2018-2019. Budget Paper No. 1*.

[5] Australian Bureau of Statistics, *5220.0 - Australian National Accounts: State Accounts, 2017-18*.

[6] M. Fiorina, *Retrospective Voting in American Elections*. New Haven: Yale University Press, 1981.

[7] AAP, 'Baird Australia's Most Popular Politician', *The Australian*, 25 September 2015. Accessed at: https://www.theaustralian.com.au/business/latest/baird-nations-most-popular-politician/news-story/53cbcf4e92c5e2906e06e7831b858bbb

2016, he began to encounter political turbulence and the tone of media coverage abruptly changed. Baird was portrayed as unresponsive and out of touch. By the end of the year, he was 'on the political ropes with his approval ratings pummelled … The conviction politician who had been admired for making unpopular decisions if they were right for the state was labelled an arrogant leader who did not listen to his constituents'.[8]

Two issues precipitated Baird's rapid decline in favour. Local government amalgamations have been political poison for Premiers since at least the 1940s. Baird, believing that good policy is good politics, initiated a comprehensive program of council mergers. There was widespread hostility in response, particularly in country areas.

Added to this was Baird's decision to ban greyhound racing, after a damning report on the sport from former High Court Judge Michael McHugh. The decision generated a growing public backlash, with even many of those not directly affected believing a complete ban was an unnecessary over-reaction. Bowing to public pressure and an intense media campaign from powerful commentators such as Radio 2GB's Alan Jones, Baird reversed his decision in October. However, it was too late to arrest the slide in his popularity. In January 2017, Baird resigned and was replaced by Treasurer and Deputy Liberal Leader Gladys Berejiklian.

The obvious successor, Berejiklian was unopposed for the Leadership. The new Premier was an astute veteran who had demonstrated high level skill in the Transport and Treasury portfolios. Determined and hard-working, she was unflappable in adversity. Hardly charismatic, Berejiklian's challenge was to sell herself to the voters as safe, trustworthy and competent.

ONGOING POLICY PROBLEMS

Although Berejiklian defused the issues that caused Baird's downfall, she detonated a damaging controversy with her decision to demolish and rebuild the ANZ and Allianz sporting stadiums. The Government was forced to backtrack on the demolition of ANZ but the dismantling of Allianz at Moore Park went ahead, commencing during the

[8] Sarah Gerathy, 'NSW Premier Mike Baird Went from Popular to Polarising in 2016'. *ABC News*, 22 December 2016. Accessed at: https://www.abc.net.au/news/2016-12-22/nsw-premier-mike-baird-went-from-popular-to-polarising-in-2016/8139520

election campaign. 'Schools and hospitals before Sydney stadiums' became Labor's slogan.

Other issues were hurting Berejiklian. Her cabinet contained a number of poor performers. The rapid pace of high-rise development in suburban Sydney led to an angry backlash from local residents. Although a large number of major infrastructure projects were underway, Berejiklian had not cut any ribbons at opening ceremonies. A signature project, the CBD and South East light rail, was over-budget and behind-schedule. In August 2018, Liberal MP for Wagga and Parliamentary Secretary, Darryl Maguire, was forced to resign over revelations by ICAC of corrupt conduct. At the resulting by-election on 8 September the Liberals lost Wagga, which they had held since 1957, to Independent candidate Joe McGirr with a swing of 29 percent.

A CHANGE OF OPPOSITION LEADER

As Opposition Leader, Labor's Luke Foley had performed well in the 2015 election campaign. He went on to exploit the Government's growing problems, particularly over the stadiums. Foley astutely portrayed the Liberals as obsessed with privatisation and more interested in the balance sheet than the battlers.[9]

Rumours had long circulated in Macquarie Street of inappropriate sexual behaviour by Foley towards a journalist. In October 2018, Corrective Services Minister David Elliott, during a heated parliamentary exchange with the Opposition Leader, said: 'I have not had a little bit too much to drink at a party and harassed an ABC journalist'. On 8 November 2018, ABC journalist Ashleigh Raper issued a statement saying that after a Christmas party at Parliament House in 2016, at a bar in the city, Foley had 'put his hand through a gap in the back of my dress and inside my underpants. He rested his hand on my buttocks. I completely froze'. Raper had steadfastly remained silent about the incident but after the revelations in Parliament had no choice but to speak out. Foley denied the claim but was forced to resign the leadership.[10]

[9] On the 2015 election, see D. Clune, 'The Accidental Leaders Play Their First Gig: The 2015 NSW Election'. *Australasian Parliamentary Review*, 31(2) 2016, pp. 6-18.

[10] *NSW Parliamentary Debates*, 18 October 2018; 'Daley "Very Unhappy" Over Foley's Press Conference, Backs Journalist'**,** *Sydney Morning Herald*, 9 November 2018; Sarah Gerathy*,* 'Luke Foley Backs Down on Threat to Sue ABC Over Journalist Ashleigh Raper's Sexual Harassment Allegations', *ABC News*, 28 November 2018.

Deputy Leader Michael Daley had long harboured leadership ambitions and had the support of the ALP right faction. Another right-winger, Chris Minns, also entered the contest, though more to stake a claim for the future than in the hope of winning. On 10 November, Daley was victorious by 33 votes to 12. A left-wing Legislative Councillor, Penny Sharpe, became Deputy Leader.[11]

A solicitor, Daley was elected MP for Maroubra in September 2005 after Bob Carr retired as Premier. He showed early promise, particularly given the lack of talent on the Government backbench, and became a minister in September 2008. Daley looked the part and was a good retail politician of the old-fashioned, populist variety. He was more in the mould of a 1950s Labor leader such as Joe Cahill or Pat Hills than more intellectually-inclined and issues-oriented leaders like Carr and Foley.

DIVISION IN THE GREENS

The Greens entered the campaign bitterly divided. The NSW branch has long been split between a Marxist-influenced hard left faction associated with former Senator Lee Rhiannon, and the moderate environmentalists who were more in the tradition of former Federal Leader Bob Brown. On 13 November, Greens MP for Newtown, Jenny Leong, used a statement in Parliament to strongly attack the leader of the moderate Greens, Jeremy Buckingham MLC, over allegations of sexual harassment of a Greens' staffer in 2011. Leong called for Buckingham to step down from the Greens ticket for the 2019 election.[12] He had already been relegated to an unwinnable position, as had fellow moderate MLC Dawn Walker. The leader of the hard left, Legislative Councillor David Shoebridge, and MP for Balmain, Jamie Parker, supported Leong. MP for Ballina, Tamara Smith, had an each way bet, publicly supported Leong but privately telling Buckingham her speech was nonsense. Moderate Greens upper house members Cate Faehrmann, Justin Field and Dawn Walker rallied to Buckingham's side.[13]

[11] Nick Sas and Philippa McDonald, 'NSW Labor Elects Michael Daley as New Leader After Luke Foley's Resignation', *ABC News*, 11 November 2018.

[12] *NSW Parliamentary Debates*, 13 November 2018.

[13] Deborah Snow, 'Power and Privilege: #MeToo Takes Parliament into Uncharted Waters', *Sydney Morning Herald*, 14 November 2018; 'Jeremy Buckingham Won't Quit, Plans to Contest the March Election', *Sydney Morning* Herald, 16 November 2018.

Buckingham denied the harassment allegation and refused to step down. In December 2018, the Greens' State Delegates Council passed a motion demanding that he vacate his position on the Legislative Council ticket. Buckingham subsequently left the Party and unsuccessfully sought re-election as an Independent.[14] After the election, Field announced he was leaving the Greens to serve the remaining four years of his term as an Independent.[15]

THE MAJOR PARTY CAMPAIGNS

Going into the March 2019 election, the Government had 52 of the 93 seats in the Legislative Assembly, with the Opposition holding 34. Labor needed a uniform swing of just under nine percent to gain a majority in its own right, which was a formidable task. There were seven crossbenchers in the lower house: three Greens, one Shooters Fishers and Farmers Party (SFF), and three Independents (Alex Greenwich, Joe McGirr and Greg Piper). The opinion polls predicted a close race, consistently showing a two-party preferred vote of 50 percent to 50 percent, or a 51 percent to 49 percent lead to either the ALP or the Coalition. This led to much speculation about the possibility of a hung parliament.[16]

Both sides staked out their positions early and did not greatly deviate from them during the campaign. The Government largely ran on its record. It had a good story to tell. Unemployment was low, government debt was negative, the infrastructure budget for the next four years was close $90 billion. Major projects underway included the Westconnex and Northconnex motorways, Sydney Metro, the largest public transport project in Australia, and the CBD and South East light rail. Thanks to Baird's privatisation of the electricity industry, the Government's coffers were overflowing. Berejiklian's message was not to jeopardise all this by electing Labor. She reminded the electorate of the factional brawling, policy paralysis and corruption that marked the final years of the last ALP Government in NSW.

[14] Lisa Visentin, '"Ripping Up My Membership": Jeremy Buckingham Quits "Toxic" Greens to Run as an Independent', *Sydney Morning Herald*, 20 December 2018.

[15] Alexandra Smith, 'NSW Greens MP Quits Party to Sit on the Crossbench', *Sydney Morning Herald*, 5 April 2019.

[16] See, for example, Tim Boyd, 'Hung Parliament Looms Over NSW', *Australian Financial Review*, 20 March 2019.

At her policy launch in the western suburbs seat of Penrith on 10 March, the Premier made a number of new commitments. She promised 4,600 extra teachers and $120 million to improve before and after school care. Bankstown-Lidcombe Hospital would be redeveloped at a cost of $1.3 billion, the palliative care workforce boosted, and 5,000 more nurses and midwives employed. Eight new schools would be built and 31 upgraded. The Coalition promised to build a metro rail line from St Marys to Sydney's second airport at Badgery's Creek at a cost of $2 billion.[17]

The Nationals faced problems in rural and regional areas. In spite of the fact that $9 billion had been allocated for regional infrastructure projects,[18] there was a perception that they were not doing enough for their base. The serious drought affecting all of NSW exacerbated this feeling. The Government's signature policy of privatisation was unpopular with rural dwellers who were often dependent on services provided by the state. The greyhound and local government decisions left a legacy of rural resentment. The stadiums controversy fostered the belief that the Government was too Sydney-centric. At a by-election in November 2016, the Nationals lost the previously safe seat of Orange to the SFF with a primary vote swing of 34 percent against them. The SFF launched a major assault on Legislative Assembly seats, hoping to exploit the Nationals' vulnerability.

Deputy Premier and Nationals Leader John Barilaro counter-attacked with an intensive campaign, highlighting the Government's achievements and dispensing largesse wherever he went. Up to and including his policy speech on 24 February, he made $5 billion worth of commitments. This led to him being nicknamed 'Pork Barilaro'. As well as a plethora of roads and bridges, the Nationals promised a 'nation-building, long-term water security program'. They also committed to giving rural seniors an annual $250 travel card.[19]

[17] Bellinda Kontominas and Sue Daniel, 'NSW Election Battlelines Drawn as Liberals, Labor Launch Campaigns', *ABC News*, 10 March 2019; NSW Parliamentary Budget Office, *Budget Impact Statement: Coalition*, 18 March 2019 (accessed at: https://www.parliament.nsw.gov.au/pbo/Pages/2019-Budget-Impact-Statements.aspx).

[18] NSW Government, *NSW Budget 2018-19: Regional Overview*. Sydney: NSW Treasury, 2018. Accessed at: https://www.budget.nsw.gov.au/sites/default/files/budget-2018-06/NSW%20Budget%202018-19%20-%20Regional%20Overview.pdf

[19] Lisa Visentin, '"We Are the Underdogs": NSW Nationals Warn of "Insidious Threat" as They Fight to Hold onto the Bush', *Sydney Morning Herald*, 24 February 2019.

The Opposition Leader initially struggled to gain momentum and attention. His main line of attack was the stadiums. Daley promised to stop the demolition of Allianz Stadium. He claimed the demolition was misuse of public money that should have been spent helping ordinary people who were doing it tough. The issue ignited three weeks from polling day when Daley took on influential radio commentator Allan Jones, promising to sack him and most members of the Sydney Cricket Ground Trust, which strongly supported the rebuilding of Allianz. Daley's stature was boosted as a politician who was unafraid to stand up to a powerful broadcaster and an elite board.[20]

Daley's policy launch at Revesby in the marginal Liberal seat of East Hills was on the same day as the Government's. His message was that the 'only way to fix things is to change this government before our hospitals are sold, before they privatise the rest of our electricity network and hike up prices even further — before it becomes easier to get a seat in a stadium than it is on a bus'. Daley promised to spend $250 million on mental health and hire more front line health care workers. Lower nurse to patient ratios would be mandated. Nepean Hospital would be upgraded at a cost of $1 billion and a new hospital built in in Sydney's northwest. Labor would put $2.7 billion into public schools. Early childhood education would be funded for three-year-olds and school children would travel free on public transport. In a swipe at the Nationals, Daley pledged $1 billion to improve rural water security.[21]

To fund his commitments and keep the budget in surplus, the Opposition Leader proposed to tax luxury cars and boats, scrap a number of tax concessions, and abandon some of the Government's major infrastructure projects, such as the western harbour tunnel, the northern beaches link, the south west metro, the F6 freeway extension and, of course, Allianz stadium. [22]

The Premier stayed 'on message' and rarely slipped up, but sometimes came across in the media as wooden. Brad Norington commented: 'Berejiklian seems a sincere politician trying to do her best, but could she sell free ice creams? In public she has

[20] Esther Han, '"You're Sacked", Labor Leader Michael Daley Tells Alan Jones and SCG Trust', *Sydney Morning Herald*, 5 March 2019.

[21] Kontominas and Daniel, 'NSW Election Battlelines Drawn'.

[22] NSW Parliamentary Budget Office, *Budget Impact Statement: ALP*, 18 March 2019. Accessed at https://www.parliament.nsw.gov.au/pbo/Pages/2019-Budget-Impact-Statements.aspx

often looked uncomfortable'.[23] Wisely, she did not try to create a false, flashy persona but relied on her positive image as a 'safe pair of hands'.

Daley was articulate and appealing on the campaign trail but increasingly prone to gaffes about basic facts as the campaign progressed. As an inexperienced, untried leader who had to persuade the electorate to trust him as Premier, this was particularly damaging. Norington commented on election eve:

> Intense scrutiny is suddenly focussed on the credibility of Labor Leader Michael Daley and how a government led by him would manage the nation's largest state economy. The sense that NSW Labor's funding commitments are light on detail, vague, not fully costed or still to be worked out has been demonstrated by Mr Daley's inability on repeated occasions to provide clear answers. Stumbles made by the NSW Opposition Leader during a televised debate with Premier Gladys Berejiklian on Wednesday night, rated by some as a disaster, deflated Labor insiders. [24]

The Opposition Leader's campaign finished disastrously. On 18 March, the Liberal Party leaked to the media a video of Daley at a forum in September saying: 'Our young children will flee and who are they being replaced with? They are being replaced by young people from typically Asia with PhDs. There's a transformation happening in Sydney now where our kids are moving out and foreigners are moving in and taking their jobs. And I don't want to sound xenophobic, it's not a xenophobic thing, it's an economic question'.[25] The Opposition Leader was universally condemned for racism. Labor officials were concerned that his comment would adversely affect the Party in seats with a large Chinese population. Daley was forced to issue an apology. The furore dissipated any momentum Labor might have had in the lead up to polling day.[26]

[23] Brad Norington, 'Premier Struggles to Project Her "Authenticity" to Voters', *The Australian*, 16-17 March 2019.

[24] Brad Norington, 'NSW Election: Michael Daley is Leader with a Vague Idea but Little Detail', *The Australian*, 22 March 2019.

[25] Lisa Visentin, 'Michael Daley Claims Foreigners Taking Young People's Jobs', *Sydney Morning Herald*, 18 March 2019.

[26] Alexandra Smith, Lisa Visentin and Esther Han, '"I Meant No Offence": Daley Apologises for Asian Comment as He Fights for Key Seats', *Sydney Morning Herald*, 20 March 2019.

THE RESULTS

The Coalition recorded a first preference Legislative Assembly vote of 41.6 percent, down 4.1 percent from its 2015 result. Its two-party preferred vote was 52.0 percent, a more decisive victory than any of the published opinion polls had predicted, but a swing of 2.3 percent to Labor. Despite its two-party preferred gain, Labor won just 33.3 percent of first preferences, down 0.8 percent from 2015. The Coalition won 48 Legislative Assembly seats (Liberals 35 and Nationals 13) to the ALP's 36, giving the Government a slim but workable lower house majority (see Table 1).[27]

Labor held all its Assembly seats but gained only two from the Coalition. It won Coogee in Sydney's eastern suburbs, a seat that Liberal MP Bruce Notley-Smith had won in 2011 and 2015 but that Labor had held before then since the mid-1970s. Labor's Janelle Saffin took Lismore on the NSW north coast, where the popular and long-serving National MP Thomas George, who only just held the seat in 2015, had retired. Saffin had previously been a Member of the NSW Legislative Council and more recently the Member for the NSW north coast House of Representatives Division of Page.

[27] For full details, see NSW Electoral Commission, NSW State Election Results 2019: Legislative Assembly—Formal Vote by Representation. Accessed at: https://vtr.elections.nsw.gov.au/la/state/formal

Table 1. 23 March 2019 Legislative Assembly Election Summary Results

Party	First preference votes (%)	Swing from 2015 (%)	Seats contested	Seats won	Seats change 2015-18
Liberal	32.0	-3.1	73	35	-2
National	9.6	-1.0	20	13	-4
Labor/Country Labor	33.3	-0.8	93	36	+2
Greens	9.6	-0.7	93	3	0
Shooters, Farmers and Fishers	3.5	3.5	25	3	+3
Sustainable Australia	1.5	1.5	54	0	0
Keep Sydney Open	1.5	1.5	42	0	0
Animal Justice	1.5	1.4	48	0	0
One Nation	1.1	1.1	12	0	0
Other[a]	6.4	-1.1	64	3	+1
Total	100.0	n/a	n/a	93	n/a

[a]Combined parties and Independents each with less than 1.0 percent of the state-wide vote.
Source: Compiled from NSW Electoral Commission, NSW State Election Results 2019: Legislative Assembly—Formal Vote by Representation. Accessed at: https://vtr.elections.nsw.gov.au/la/state/formal; NSW Electoral Commission, NSW State Election Results 2015: Legislative Assembly – Formal Vote by Representation. Accessed at: http://pastvtr.elections.nsw.gov.au/SGE2015/la/state/formal/index.htm

Labor's failure to win more seats on a 2.3 percent two party preferred swing was unsurprising, given that the pre-election pendulum put only three Coalition seats

(Lismore, East Hills and Upper Hunter) within range on such a statewide swing.[28] Equally importantly, as Table 2 shows, Labor failed to make strong two-party gains in any electoral region of NSW. The strongest average two-party swing against the Coalition (4.4 percent) was in northern Sydney electorates, where sitting Liberals simply had their comfortable winning margins shaved. The average anti-Coalition swing of 3.4 percent in western Sydney electorates was not enough to threaten sitting Liberal MPs. The closest any of them went to losing their seats was in Penrith, where Stuart Ayres's two-party vote was reduced to 51.3 percent. An average anti-Coalition swing of 3.1 percent in Central Coast electorates saw Labor strengthen its hold on three seats; however, it lost ground in the one seat in the area that it did not hold (Terrigal). In the other regions, the average swings were negligible and in some cases favoured the Coalition.

Another pattern evident in Table 2 is the loss of first preference votes by the major parties across most regions of the state. The Coalition lost first preference votes in all regions except southern Sydney and the old Hunter and Illawarra coal and steel belt. Labor dropped first preference votes in inner and southern Sydney, as well as coastal and inland rural NSW. The major parties' losses were particularly heavy in inland rural seats, where the Coalition first preference vote fell 10.9 percent and Labor's 7.2 percent. The major beneficiary there was the Shooters Fishers and Farmers Party, which won two seats from the Nationals (Barwon and Murray) and easily retained Orange, first taken from the Nationals at a November 2016 by-election. Independent Joe McGirr, who had won Wagga Wagga from the Liberals at a September 2018 by-election, retained his seat, as did Greg Piper in Lake Macquarie and Alex Greenwich in Sydney.

[28] Antony Green, 'NSW Votes: Pendulum'. Accessed at: https://www.abc.net.au/news/elections/nsw/2019/guide/pendulum

Table 2. 2019 NSW Legislative Assembly State Election Results by Region

	Inner Sydney	Northern Sydney	Southern Sydney	Western Sydney	Central Coast	Hunter/ Illawarra	Rural Coastal	Inland Rural
Liberal-National average first preference vote (%)	33.5	55.2	49.4	39.3	39.6	29.1	43.4	44.9
Liberal-National average first preference swing (%)	-2.5	-6.3	0.8	-4.2	-4.1	0.0	-1.7	-10.9
Labor average first preference vote (%)	35.7	19.2	34.3	41.7	41.4	47.2	22.4	18.1
Labor average first preference swing (%)	-0.7	2.1	-1.0	1.1	0.6	1.1	-2.3	-7.2
Liberal-National two party preferred vote versus Labor (%)	45.6	67.7	56.4	48.5	46.9	36.7	53.2	65.5
Liberal-National two party preferred swing versus Labor (%)	1.5	-4.4	0.3	-3.4	-3.1	-1.0	0.4	-0.6
Greens average first preference vote (%)	17.5	12.3	7.4	6.0	9.1	9.8	12.0	4.9
Greens average first preference swing (%)	-1.3	-2.2	-0.3	-0.2	-0.1	0.1	-1.0	-0.7
'Other'[a] average first preference vote (%)	13.8	13.2	8.9	12.9	9.9	14.0	12.2	32.0
'Other'[a] average first preference swing (%)	4.5	6.3	0.5	3.3	3.7	-1.3	5.0	18.8

[a]Combined parties and Independents with less than 1.0 percent of the state-wide vote each.
Source: Compiled from NSW Electoral Commission, NSW State Election Results 2019: Legislative Assembly – Formal Vote by Representation. Accessed at: https://vtr.elections.nsw.gov.au/la/state/formal; NSW Electoral Commission, NSW State Election Results 2015: Legislative Assembly – Formal Vote by Representation. Accessed at: http://pastvtr.elections.nsw.gov.au/SGE2015/la/state/formal/index.htm

The Greens were unable to profit from the erosion of the major party primary vote. They held their three existing seats (Ballina, Balmain, Newtown) but their first preference vote fell by 0.7 percent to 9.6 percent across NSW (see Table 1). On average, the party lost votes in every region, including a 1.3 percent loss in its bastion of inner Sydney electorates. Its only negligible gain came in the Hunter and Illawarra (see Table 2).

In the election for the Legislative Council, the Coalition won 34.8 percent of the vote and the ALP 29.7 percent. As a result, the Government forces in the Council fell from 20 to 17, while Labor's increased from 12 to 14 (see Table 3). Both major parties experienced swings against them, with the 7.8 percent swing against the Coalition much larger than the swing against it in the lower house election. With Liberal MLC John Ajaka remaining President after the election, the Government's numbers on the floor of the Council dropped to 16. This means that it will normally need five crossbench votes to win divisions.

Table 3. 2019 Legislative Council Votes and Seats

	Inner Sydney	Northern Sydney	Southern Sydney	Western Sydney	Central Coast	Hunter/ Illawarra	Rural Coastal	Inland Rural
Liberal-National average first preference vote (%)	33.5	55.2	49.4	39.3	39.6	29.1	43.4	44.9
Liberal-National average first preference swing (%)	-2.5	-6.3	0.8	-4.2	-4.1	0.0	-1.7	-10.9
Labor average first preference vote (%)	35.7	19.2	34.3	41.7	41.4	47.2	22.4	18.1
Labor average first preference swing (%)	-0.7	2.1	-1.0	1.1	0.6	1.1	-2.3	-7.2
Liberal-National two party preferred vote versus Labor (%)	45.6	67.7	56.4	48.5	46.9	36.7	53.2	65.5
Liberal-National two party preferred swing versus Labor (%)	1.5	-4.4	0.3	-3.4	-3.1	-1.0	0.4	-0.6
Greens average first preference vote (%)	17.5	12.3	7.4	6.0	9.1	9.8	12.0	4.9
Greens average first preference swing (%)	-1.3	-2.2	-0.3	-0.2	-0.1	0.1	-1.0	-0.7
'Other'[a] average first preference vote (%)	13.8	13.2	8.9	12.9	9.9	14.0	12.2	32.0
'Other'[a] average first preference swing (%)	4.5	6.3	0.5	3.3	3.7	-1.3	5.0	18.8

[a]Combined parties and Independents with less than 1.0 percent of the state-wide vote each.
Source: Compiled from NSW Electoral Commission, NSW State Election Results 2019: Legislative Assembly – Formal Vote by Representation. Accessed at: https://vtr.elections.nsw.gov.au/la/state/formal; NSW Electoral Commission, NSW State Election Results 2015: Legislative Assembly – Formal Vote by Representation. Accessed at: http://pastvtr.elections.nsw.gov.au/SGE2015/la/state/formal/index.htm

The minor parties that held Legislative Council seats going into the election had mixed fortunes (see Table 3). The Greens won 9.7 percent of the vote, comparable to the party's 2015 vote but lower than its 2011 result, meaning the loss of its fifth seat. Field's subsequent defection in April 2019 to sit as an Independent reduced the Greens to three seats. For the first time since 1981, Fred Nile's Christian Democratic Party did not win a seat, although Nile, who was not up for re-election, remains an MLC. The Shooters Fishers and Farmers Party increased its vote to 5.5 percent, comfortably winning a quota to retain its two seats. The Animal Justice Party added a second seat. Despite only winning 2.0 percent of the first preference vote, preference flows and exhausted ballots meant that the Party's Emma Hurst was eventually elected with 0.6 of a quota after the 343rd and final count.

The other three MLCs elected after the final count included One Nation's Rod Roberts, who ended up with 0.59 of a quota. He joined NSW One Nation Leader Mark Latham, who had easily won a full quota and was elected after the first count. One Nation, which had not contested the previous NSW election and had not won a seat in the NSW Legislative Council since 1999, emerged as one of the clear winners from the election.

The election left the Government confronting a much more complex Legislative Council than had been the case in 2011-15 or 2015-19. It is tempting shorthand to think of the

Christian Democrats, One Nation and Shooters Fishers and Farmers as forming a right-wing bloc in the Legislative Council that will hand the Government the five extra upper house votes that it needs to pass its legislative program. Given the differences between these minor parties, the reality is likely to be considerably more complex.

CONCLUSION

The 2019 NSW state election was hardly a clash of ideologies or visions. It was a 1950s-style campaign with Government and Opposition striving to outbid each other in providing concessions and services. As soon as one side made a commitment, the other usually matched it. Towards the end of the campaign it was estimated that the Government had made promises worth $28 billion and Labor $24 billion.[29] There was some policy differentiation. Labor promised to end privatisation and re-regulate electricity prices. The Opposition had stronger policies on the environment and climate change. A Labor government would be significantly more generous to the unions and the public sector. On the whole, however, the election was an echo of 1950s consensus politics. It was dominated by some traditional rules: appeal to the middle ground, alienate as few groups as possible, massage the 'hip pocket nerve' in Ben Chifley's famous phrase.[30]

Berejiklian, in her quiet, steady way, out-campaigned Daley. His over-concentration on the stadiums issue was a mistake. Labor failed to differentiate itself with an alternative policy vision. The Premier was able to persuade enough voters that the Government had significant achievements to its credit and was better equipped to deliver more in the future. Although there was some dissatisfaction with the Coalition, Labor could not convince the electorate that it was a superior alternative.

In our edited book on NSW Labor in government from 1995 to 2011, we speculated that the Liberal Party's inroads into Labor's heartland in 2011 might be the beginning

[29] Alexandra Smith, 'Labor Will Spend More than Coalition, but Save More Too, independent Costings Show', *Sydney Morning Herald*, 18 March 2019.

[30] On 1950s electioneering, see M. Hogan and D. Clune (eds.), *The People's Choice: Electoral Politics in Twentieth Century NSW*, Volume 2. Sydney: Parliament of NSW and University of Sydney, 2001.

of a more permanent realignment in NSW politics.[31] The regional analysis in this article indicates that the Liberals now have a secure base in western Sydney. Although Labor has won back the seats it lost in 2011 in the Hunter and Illawarra, the 2019 results in those regions showed no swing against the Liberal Party. In the traditionally swinging seats in southern Sydney, there was a slight increase in the Liberal vote. If, as seems likely, the Coalition serves a full term until March 2023, it will have been in office for 12 years, a period exceeded in NSW only by the ALP from 1941-65 and 1995-2011. While it would be premature to call contemporary NSW a natural Coalition state, Labor's claim to be the natural party of government in NSW seems to have receded into history.

[31] David Clune and Rodney Smith (eds.), *From Carr to Keneally: Labor In Office in NSW 1995-2011*. Sydney: Allen and Unwin, 2012.

Book Reviews

The Law of Politics: Elections, Parties and Money in Australia, by Graeme Orr. Alexandria (NSW): The Federation Press, 2nd edition, 2019. pp. xxxi + 336. Paperback RRP $89.95.

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It seems safe to assume that I do not have to work overly hard to convince the readership of the *Australian Parliamentary Review* of the value and importance of a text analysing the what, how and why of Australia's electoral law. If any audience is primed to receive and value its content, then surely it is the present one. How that fact relates to its author's, University of Queensland Law School's Professor Graeme Orr, assertion that '[e]lectoral study has more than its share of anoraks and wonks' (p. 3) I leave for individual readers to decide.

This second edition of Professor Orr's text appears some 9 years after the first. Its basic purpose has not changed. Professor Orr sets about describing and explaining the legal rules that govern and shape the processes and practices of representative democracy in Australia, at least insofar as these identify 'elected' officials to govern. He describes this field of study as 'the law of politics', for reasons worth setting out in full:

> [The term] is at once pragmatic and aspirational. The semi-synonymous term 'electoral law' is a bit narrow and dry. Conceiving of the field as the regulation of politics broadens its ambitions. It situates electoral democracy in the wider formal terrain of constitutional and administrative law, whilst drawing attention to the interdisciplinary insights provided by political science and democratic theory (p. 1).

In pursuit of his goal, Prof Orr's text covers the full range of issues involved in holding an election at the national and state level. He begins with boundary drawing in both a physical (how are electoral districts decided?) and a community (who gets to participate at the ballot box?) sense. How voters are formally placed on electoral rolls

is covered. The initiation of election contests and who gets to compete in them (both as individuals and as political parties) receives discussion. Controls on campaign methods in both the physical world and the electronic realm get due consideration. The actual voting process and methods of disputing the outcome of the vote are discussed, as is the vexed issue of regulating the necessary evil of money for electoral campaigning (variously termed 'political finance, party finance or election finance'). Finally, two separate chapters are devoted to the issues of electoral regulation at the local government level and the legal rules governing referendums and other forms of direct democracy. If there is a weakness to be found in the text as a whole, it perhaps is this newly included discussion of local government elections, which feels a little cursory and broad brush in comparison with the more granular and developed discussion of national and state electoral laws. Indeed, I would suggest that the range and variety of issues and their different resolution across various local government jurisdictions probably warrant a full stand-alone text rather than being shoe-horned into a chapter-length treatment.

While Prof Orr's general aims and approach are carried over from the text's first edition, the content of the second obviously has altered markedly in line with events of the past decade. Part of this changed content reflects Prof Orr's own work subsequent to the publication of the first edition; his *Ritual and Rhythm in Electoral Systems*[1] and (with Ron Levy) *The Law of Deliberative Democracy*[2] both deservedly receive citation throughout this text. It is one of the strengths of Prof Orr's work that he is able to weave deeper theoretical considerations with a more 'black letter' doctrinal analysis of the field. But changes to the second edition also take into account the sheer amount of electoral law material that the Australian political process has thrown up in recent times. To take but one example, fears around 'fake news' have led to amendments to the Commonwealth Electoral Act that impose what Prof Orr describes as 'a complicated, staged authorisation system for the communication of electoral matter'.[3] To take another, consider the various High Court cases stemming from the seemingly endless tit-for-tat allegations that various members of Parliament

[1] Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account*. Farnham: Ashgate, 2015.

[2] Ron Levy and Graeme Orr, *The Law of Deliberative Democracy*. London: Routledge, 2016.

[3] *The Law of Politics*, p. 177.

are disqualified from sitting due to what Prof Orr describes as 'frankly, often obscure legal questions' (p. 109).

At this point I am minded to steal from Tolstoy and note that every unhappy electoral process is unhappy in its own way. In my own text on New Zealand's electoral laws, the issue of candidate eligibility warrants a mere two pages of explication.[4] It is a reflection on what is a very odd feature of Australian politics that Prof Orr needs to devote some 19 pages to the issue of candidate qualifications (or, more accurately, *disqualifications*), culminating in an exasperated plea to establish a 'qualifications and ethics audit' for newly elected representatives (p. 112). A perhaps naïve view from across the Tasman is that New Zealand's de minimis rules regarding who can and cannot stand for election represent the preferable model; it frankly seems bizarre that a member of Parliament's (and potential Prime Minister's) right to remain as an elected representative ever hinged on how we characterise his family trust's day care business' receipt of parental subsidies from the Commonwealth.[5] Whatever the original intentions of Australia's constitutional designers, elevating this sort of question to a matter of political crisis cannot have been it. The fact that the obvious solution—get rid of the section 44(v) and perhaps other disqualifying grounds—appears not to be a practically tenable one in Australia then says much about the desirability of constitutionalising detailed rules around elections.

This new edition of Prof Orr's text is a compulsory addition to the shelf of anyone serious about the study of elections and political processes in Australia. It is not just a once-over-lightly revisiting of the first edition. Rather, it keeps the best of that text while strengthening and updating its approach. It is recommended unconditionally.

[4] Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy*. Wellington: LexisNexis NZ, 2nd edition, 2013.

[5] The case, of course, of Peter Dutton, which Prof Orr discusses at pp. 107-108 and proffers the 'clearly better view that there was no "agreement" from which Dutton benefited'.

YES, We Can... …Rewrite the Australian Constitution, by Klaas Woldring. Milton Keynes: Lightning Source, 2018. pp. 94. ISBN: 978-1-925457-75-9 Paperback approximately $30.00.

Anika Gauja

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electoral system reform, would be a useful way to improve the diversity of representatives and foster multiculturalism and social inclusion.

[illegible] impossible to achieve with the current constitutional system' (p. 12).

[illegible] legislative rather than constitutional means.

[illegible] only part of the problem, and its reform cannot be the whole solution.

[illegible] system of governance as social and political attitudes change.

The Hilton Bombing: Evan Pederick and the Ananda Marga, by Imre Salusinszky. Carlton (Vic.): Melbourne University Press, 2019. pp. 277. ISBN 9780522875492 Paperback RRP $34.99.

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The Hilton bombing, if not quite the moon landing, is a moment most of us of a certain age remember, though often through a haze of mist and misunderstanding. Imre Salusinszky has done a great service in reconstructing events precisely and objectively – as much as they ever will be. He has also done a great service to those who appreciate a beautifully written, compelling read.

Salusinszky's book succeeds on a number of levels. It is a moving morality tale of sin and redemption. It is the human story of a family who stuck together through some of the most awful events most parents can imagine. It is a commentary on the turbulent 1970s where many of the best and brightest rebelled against their background to seek freedom and enlightenment and came close to self-destruction – and some actually achieved it. It is an insightful account of cults and their ways of capturing and brain-washing adherents. Above all it addresses the question of why in February 1978 'the gentle child of the manse in Peppermint Grove, the shy boy who had trained pigeons and listened to unfashionable music, was ready to commit murder for his guru' (pp. 133-4).

Evan Pederick's father was a Methodist Minister in Western Australia. Evan grew up in a caring, functional environment, although of a strict, unemotional, 'just get on with it' kind. He was bright, finishing fifth in the State in his matriculation year of 1972 and the next year beginning a science degree at the University of Western Australia.

Evan became increasingly alienated from what he saw as his parents' bloodless, conventional lifestyle and found his university studies meaningless. He was looking for

something transcendent to believe in. He dropped out, lived the alternative lifestyle and worked as a gardener in Hobart. A friend took Evan to a lecture by a senior member of Ananda Marga, a Hindu cult founded by railway accountant PR Sarkar. 'Baba', as his devotees called him, was serving a long sentence in India for the murder of disenchanted disciples. The impressionable and immature Pederick was quickly drawn in: 'Everything the Margiis had introduced him to had been fantastic. In particular, he felt that through meditation he was approaching contact with something that was deep inside him as well as being larger than him. Whatever it was, it seemed to be a fount of energy and joy and good health, and he could hardly bear to turn away from it … ' (pp. 50-51).

What Evan experienced next was common to other cults: 'It is important first of all to keep the initiates unaware that they are being controlled or manipulated at all: in other words they have entered a totalistic environment. Relationships and connections outside the cult are progressively shut down. Brain-washing techniques create a sense of powerlessness and instability in the target, undermining their existing beliefs' (pp. 14-15).

By the mid-1970s, Ananda Marga had changed from a fringe spiritual group into a terrorist organisation which considered violence and other extreme measures as legitimate tools in its struggle to free Baba. Pederick was in awe of a senior Margii, Tim Anderson. According to Pederick, Anderson suggested the time had come for a drastic gesture. He proposed the assassination of Indian Prime Minister Morarji Desai when he visited Sydney for the forthcoming Commonwealth Heads of Government Regional Meeting. Pederick was initially taken aback and reluctant but finally agreed that the greater good of allowing Baba to change the world justified the taking of human life.

Salusinszky comments that Pederick joined Ananda Marga to 'transcend the limits of the individual ego; to focus on essentials by sloughing off unnecessary attachments. But in losing unwanted baggage he had lost himself. And the baggage he had thrown aside included the moral compass that had guided him through his life' (p. 106).

So it was that on 12 February 1978 Pederick, in a ridiculous disguise, stood opposite the Hilton Hotel ready to detonate a bomb he had constructed and concealed in a rubbish bin. When Desai appeared, the bomb failed to detonate. However, when garbage workers subsequently emptied the bin a massive explosion occurred that killed two of the workers and a Police Officer.

Pederick disappeared and resurfaced in Brisbane. He was never under any suspicion. He broke with Ananda Marga, got a job in the Commonwealth Public Service and lived a relatively normal life. All this changed in May 1989 when Pederick heard that Anderson had been charged with the Hilton bombing. Evan had for years wrestled with

intense remorse and guilt and this news triggered a decision to give himself up. He was tried, convicted on his own evidence and sentenced to 20 years imprisonment which effectively meant about eight.

In 1979, Anderson had been convicted of conspiracy to murder a neo-Nazi the Margiis considered an enemy. He was pardoned in 1985 on the basis that the Crown case rested on the evidence of a discredited informer and *agent provocateur*, Richard Seary. Anderson's alleged persecution by the authorities became a *cause celebre* among sections of the legal profession, academics and the media.

Anderson was tried over the Hilton bombing in late 1990. The Crown mishandled the prosecution. Because of factual inconsistencies in Pederick's recollection of events, it was alleged that he had attempted mistakenly to murder President Jayewardene of Sri Lanka. When subsequent disclosures made Pederick's testimony more credible, the Prosecution switched back to Desai as the intended victim. An alleged gaol confession by Anderson to notorious criminal Ray Denning was a key part of the Crown case.

Anderson denied all of Pederick's allegations and maintained that he had minimal contact with him. Anderson claimed that he was framed by the Police. His defence team portrayed Pederick as an unreliable fantasist who had falsely confessed to the crime for bizarre psychological reasons.

Anderson was convicted of murder and sentenced to 14 years imprisonment. However, he immediately lodged an appeal that was upheld on the basis of the Prosecution's botched handling of the case. The Court did find that much of Pederick's testimony was credible and that a jury could reasonably have brought in a verdict of guilty. Anderson was not retried and in 1998 became an academic in Political Economy at Sydney University.

A feature of the Hilton bombing is the conspiracy theories it has generated. The main one is that ASIO planted the bomb, intending to discover it in the nick of time, in an attempt to gain a boost in funding. When the bomb went off accidentally, ASIO, ASIS, the Army and the Special Branch orchestrated a massive cover-up involving a large number of people, all of whom have maintained complete silence ever since. According to the proponents of this theory, Pederick was a deranged fantasist and Anderson a scapegoat. Salusinszky argues that, in retrospect, this is *prima facie* absurd. In over 40 years 'not a single shred of evidence has emerged to support any of the conspiracy theories about the Hilton bombing' (p. 292). Pederick, in a letter to his parents from gaol in 1995, pointed out that the ASIO conspiracy theory depended on 'ignoring the fact that I remain in prison solely on the basis of my own confession' (p. 293).

Ironically, Evan Pederick finally found solace in the religion of his youth, Christianity. He was ordained an Anglican Minister in Perth in 2004. Salusinszky concludes his book this way:

> For three of his 63 years [Evan] was an unrecognisable person and that person did a terrible thing with consequences beyond description … And what about the naïve 21-year-old who went along to check out the lecture on meditation in Hobart at the end of 1976? Evan thinks of him, too, occasionally with some sadness and some compassion … That young man's idealism was betrayed and exploited by people who should have known better … Evan thinks of that boy as not so different from the rest of us. We all struggle to recognise what is good (p. 320).