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Editor - Professor Rodney Smith



Representative Democracy Under Pandemic

Aboriginal Voting Power

Australian Upper Houses



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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

Covid-19 is affecting everyone, directly or indirectly, in many ways. It has become central to our public discourse and our private imaginings. As the pandemic persists, scholars and practitioners are reflecting increasingly seriously on its profound implications for social, economic and political life. In that vein, the *Australasian Parliamentary Review* is pleased to present three detailed analyses of the effects of the pandemic on representative democracy.

In the first, Stephen Mills criticises the ‘growing capacity and willingness’ of Australian governments ‘to govern without Parliament, and an acquiescent Parliament unable to define a more assertive role for itself’. He argues that Parliament must be allowed to pursue its traditional roles in response to the coronavirus crisis. In the second article, the Hon. Jonathan O’Dea, Speaker of the NSW Legislative Assembly, makes a similar case for keeping Parliament operating and promotes the possibility of a ‘virtual’ NSW Parliament, reviewing virtual parliamentary experiences from a range of other jurisdictions in Australia and internationally in support. The third article, by Graeme Orr, teases out the knotty administrative, political and legal issues raised by efforts to hold, modify, postpone or abandon elections while the pandemic continues. Again, his article includes evidence from a range of jurisdictions across the world.

Elsewhere in this issue, Will Sanders presents a thorough and insightful analysis of the dynamics of Aboriginal voting in the Northern Territory over recent decades, arguing that Aboriginal enrolment and turnout figures point to a ‘potential Aboriginal electoral power that is as-yet unused’. The articles in this issue conclude with two discussions of Australian State upper houses. Kate Crowley and Joshua Lippis draw on extensive interviews and other evidence to shine light on the previously under-explored legislative and policy influence of Independent Members of the Tasmanian Legislative Council. Finally, a lively article by Patrick O’Brien suggests some possible direct and indirect measures to improve the quality of debate in State upper houses.

As these articles suggest, the *Australasian Parliamentary Review* is keen to publish articles on a range of topics related to Parliament and representative democracy more generally, and is keen to address critical issues of the day in a timely fashion where possible.

Articles

Parliament in a Time of Virus: Representative Democracy as a 'Non-Essential Service'*

Stephen Mills¹

Honorary Senior Lecturer, School of Social and Political Sciences, University of Sydney

* Double-blind reviewed article.

Abstract The emergency response to the COVID-19 pandemic in Australia saw an unprecedented expansion of the authority of the executive at the expense of Parliament. Using emergency powers and the innovation of a 'National Cabinet', the executive managed the crisis response, while the Federal Parliament was reduced to an unrepresentative 'rump' and then adjourned for twenty weeks. This eliminated or substantially compromised Parliament's ability to perform its principal functions of representation, executive legitimisation, authorisation, deliberation and accountability. In the event, Parliament was recalled earlier than planned, albeit on a limited and truncated basis, and a Senate Select Committee was established to provide scrutiny of the executive's pandemic response. Yet the overall crisis response demonstrated a growing capacity and willingness of the executive to govern without Parliament, and an acquiescent Parliament unable to define a more assertive role for itself. The COVID-19 response surrendered key features of Australia's system of parliamentary democracy, posing troubling questions for the Australian system of representative democracy. Some measures are proposed to revive a role for Parliament in a time of crisis.

¹ This is an expanded and revised version of an article entitled "'Where No Counsel is, the People Fall": Why Parliaments Should Keep Functioning During the Coronavirus Crisis', published in *The Conversation* on 27 March 2020. It can be accessed at: <https://theconversation.com/where-no-counsel-is-the-people-fall-why-parliaments-should-keep-functioning-during-the-coronavirus-crisis-134772>. The author is grateful for the comments of two anonymous referees.

INTRODUCTION

Australia's response to the COVID-19 pandemic was directed and coordinated by a committee of first ministers of the Commonwealth, states and territories, gathered under the title of a 'National Cabinet'. Activating emergency powers, the governments imposed nationwide residential lockdowns, business closures, event cancellations, border closures and restrictions on public assembly and on individual liberties. They also embarked on unprecedented expenditure programs to support economic activity through the crisis. This rapid expansion of the authority of executive government was matched at the federal level by a contraction in the role of the Federal Parliament. The House of Representatives and Senate were recalled in March for a one-day sitting of an unrepresentative 'rump'² of Members and Senators to approve a \$189 billion package of stimulus measures; they were then, over the protest of opposition parties, adjourned for twenty weeks until August. Parliament was in fact recalled for a further one-day sitting in April and then for three days in May—again, however, with severely pruned attendances.³ The COVID-19 response eliminated or substantially compromised Parliament's ability to undertake its core roles of representation, executive legitimisation, authorisation, deliberation and accountability.

This outcome represented a historically significant, if temporary, shift in the balance between executive and Parliament. The Australian House of Representatives has for more than a century provided Commonwealth governments with a stable foundation for executive power. The key factor has been the rise, after the first decade of Federation, of a strong party system in which, thanks in part to preferential voting, one or other of the two major party groups have secured a workable majority in the House, and in which individual Members of Parliament have only rarely bucked their party's line. Constitutionally, while the balance between the powers of the executive and the legislature is ambiguous, it seems clear that the executive possesses a substantial inherent prerogative, particularly where it needs to carry out activities of national

² The term 'rump Parliament' was applied during the English Commonwealth to that part of the Long Parliament that survived Pride's Purge (1648), and describes a Parliament that sits with a membership reduced by executive intervention.

³ In New South Wales, the Parliament was adjourned for a longer period, and local government elections were postponed for twelve months, with all incumbent councillors extended in their roles for the duration. See Jonathan O'Dea, 'Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW' in this issue of the *Australasian Parliamentary Review*.

scope that could not be otherwise carried out.⁴ Developing an effective national response to a pandemic clearly falls within that ambit.

Yet the COVID-19 response was of such a radical and unprecedented character as to suggest the scales have tipped out of balance, with an excessively expanded role for the executive and a severely contracted role for the legislature. There are three aspects to this imbalance as briefly noted above. First, emergency powers had been invoked that overrode legislation and could not be disallowed. Second, the National Cabinet emerged to occupy a new space for executive action, operating without accountability linkages back to any legislature. Third, providing the principal focus of this article, the severe restrictions imposed on the Federal Parliament served to eliminate or substantially compromise its capacity to perform its key functions.

Critical voices in the media, academy, civil liberty groups and judiciary, as well as the Labor Opposition, protested the reduction of Parliament.⁵ Common themes were that the Australian Parliament had sat uninterrupted through previous crises of war, epidemic and economic depression, and that its absence during the present crisis carried the risk of unaccountable and indeed authoritarian rule. The Centre for Public Integrity quickly demonstrated that the Commonwealth Government's initial drastic closure of Parliament made Australia an 'outlier' among comparable parliamentary democracies; a five month adjournment, it said, was a 'uniquely Australian' response

⁴ George Winterton, 'The Limits and Use of Executive Power by Government'. *Federal Law Review* 31(3) 2003, pp. 421-44.

⁵ Peter van Onselen, 'Coronavirus Australia: War Couldn't Stop Parliament, So Why Should COVID-19?'. *The Australian*, 24 March, 2020. Accessed at: <https://www.theaustralian.com.au/commentary/coronavirus-australia-war-couldnt-stop-parliament-so-why-now/news-story/a6b3ea10778ca67818142c5d01e41b37>; Peter van Onselen, News Item. 10News First, 24 March 2020. Accessed at: <https://twitter.com/10newsfirst/status/1242363251721191429?s=21>; Guy Rundle, 'Parliament Must Sit Through the Crisis. We Need More Democracy, Not Less'. *Crikey*, 25 March 2020. Accessed at: <https://www.crikey.com.au/2020/03/25/parliament-sitting-coronavirus/>; Anne Twomey, 'A Virtual Australian Parliament is Possible—and May Be Needed—During the Coronavirus Pandemic'. *The Conversation*, 25 March 2020. Accessed at: <https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540>; NSW Council of Civil Liberties, 'Prolonged Parliamentary Adjournment Unacceptable and Dangerous for Democracy'. Media Release, NSW Council of Civil Liberties, 30 March 2020. Accessed at: https://www.nswccl.org.au/statement_covid_19_and_government_oversight; Edward Santow, 'We Must Combat Covid-19 but Creeping Authoritarianism Could Do More Harm Than Good', *Guardian Australia*, 8 April 2020. Accessed at: <https://www.theguardian.com/commentisfree/2020/apr/08/we-must-combat-covid-19-but-creeping-authoritarianism-could-do-more-harm-than-good>.

to the pandemic.⁶ But amid the progressively tighter lockdowns deemed necessary by the National Cabinet, the restrictions on Parliament were described, and largely accepted, as appropriate and consistent with the emergency response to limit the spread of the virus, particularly the requirement for ‘social distancing’.⁷ They did not attract the outright condemnation that would almost certainly have been voiced in pre-virus times. In acquiescing to the restrictions, Parliament too seemed prepared to show that it could adjust to the new conditions. While executive government seized the opportunity to demonstrate a firm and coordinated response to the threat of the virus, Federal Parliament showed itself less able to assert a role for itself in managing the crisis. Amid the national shutdowns, services provided by hospitals and pharmacies, energy suppliers, supermarkets and some other businesses were declared ‘essential,’ and were permitted to continue.⁸ Parliamentary democracy, however, along with shuttered restaurants and bars, darkened theatres, and cancelled sporting fixtures, seemed to have been rendered a ‘non-essential’ service.

Overall then, the COVID-19 episode raises important, even existential, questions about the role of Australia’s long-standing institutions and practice of representative democracy. What fundamentally are the expectations, responsibilities and possibilities of Parliament in a time of crisis? Can Parliament contribute to the management and resolution of the problem—or must it simply stand aside and allow the executive to get on with the job? Has the widely reported international and domestic democratic malaise⁹ become so pervasive that Australians are prepared to do without Parliament entirely for long periods?

⁶ Centre for Public Integrity, ‘Pandemic International but Shutting Parliament Uniquely Australian’. 1 April, 2020. Accessed at: <https://publicintegrity.org.au/wp-content/uploads/2020/04/Briefing-paper-shutting-Parliament-uniquely-Australian.pdf>.

⁷ Australian Government. Department of Health, ‘Physical Distancing for Coronavirus (COVID-19)’. Accessed at: <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/physical-distancing-for-coronavirus-covid-19>

⁸ Definitions of ‘essential’ and ‘non-essential’ remained somewhat fluid throughout the shutdown period, and varied across the states and territories. Gary Mortimer, ‘What Actually Are “Essential Services” and Who Decides?’. *The Conversation*, 31 March 2020. Accessed at: <https://theconversation.com/what-actually-are-essential-services-and-who-decides-135029>

⁹ For example, Marc Plattner, ‘Is Democracy in Decline?’. *Journal of Democracy* 26(1) 2015, pp. 5-10; Gerry Stoker, Mark Evans and Max Halupka, ‘Trust and Democracy in Australia: Democratic Decline and Renewal’. December 2018. Accessed at: <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>

Before seeking to answer these questions, this article will first describe the measures taken between March and mid-May 2020 to expand the authority of the Commonwealth Government and to restrict the normal operation of the Federal Parliament. Particular attention is paid to the extraordinary organisational and procedural innovations put in place for the conduct of the one-day sitting of the House of Representatives on 23 March. The article then demonstrates that this response eliminated or substantially compromised Parliament's capacity to perform its key functions, surrendering key features of Australian representative democracy. The article concludes by outlining possible ways in which Parliament could exercise a constructive role in management and oversight of this and future crises.

THE EXECUTIVE EXPANDS, PARLIAMENT CONTRACTS: MARCH TO MID-MAY 2020

Federal Parliament was convened on 23 March with an urgent legislative agenda amid a declared pandemic. More than three weeks earlier, on 27 February, Prime Minister Scott Morrison had activated the Australian Government's Health Sector Emergency Plan, noting the rate of transmission of the virus outside mainland China indicted an imminent pandemic phase. On 11 March, the World Health Organisation had declared the outbreak of COVID-19 a pandemic. On 18 March, the Governor-General, acting on the advice of the Executive Council, had issued a declaration under the *Biosecurity Act 2015* that a human biosecurity emergency existed. This empowered the Federal Health Minister, for a three-month period, to make emergency requirements or declarations, including restricting or preventing the movement of persons, goods or vehicles, and ordering evacuations. These emergency powers overrode existing laws, and the declaration itself was a non-disallowable instrument in order, as the Explanatory Statement put it, 'to ensure that the Commonwealth is able to take the urgent action necessary to manage a nationally significant threat or harm to Australia's human health'.¹⁰

¹⁰ The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 and Explanatory Statement. Accessed at: <https://www.legislation.gov.au/Details/F2020L00266>. The powers were exercised to ban entry of cruise ships and outbound overseas travel. In NSW, similar provisions were activated under the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020. Accessed at:

The emerging public health crisis had been discussed at a scheduled meeting on 13 March of the Council of Australian Governments (COAG), the regular forum for the leaders of the nine governments in the Australian federal system (the Prime Minister, six Premiers and two Chief Ministers). According to *Guardian* journalist Katherine Murphy, as the COAG leaders received progressively more stringent recommendations from a parallel meeting of state medical advisers, they ‘invented a new governance structure’.

Within the hour, entirely on the hop, nine political leaders had invented a new governance structure. No papers, no proposals, no guidance from officials. Morrison suggested they manage the crisis by convening regularly as a National Cabinet. The proposal materialised in the room. The states agreed and insisted the group just be them, first ministers—no opposition leaders.¹¹

The self-description of this committee as a ‘National Cabinet’ was quickly and widely adopted, but it is a misnomer. This body is not a Cabinet as commonly understood in Australian practice. Cabinets are collections of senior ministers of one government, not leaders of nine different governments representing two different parties. Cabinet members are accountable individually, and collectively, to the one Parliament of which they are all members; the so-called ‘National Cabinet’ was not, beyond the accountability of individual leaders to their separate Parliaments, collectively accountable to any Parliament. Cabinet decisions are routinely exposed to debate and scrutiny by Parliament; decisions of the National Cabinet were announced at media conferences. Further, while cabinet government operates on principles of collective responsibility, with each member bound to support the decision of the whole,¹² the ‘National Cabinet’ operated with an in-built flexibility that allowed Premiers and chief ministers to vary the COVID-19 response within their own jurisdictions.¹³ Thus while

[https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20\(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement\)%20Order%202020.pdf](https://www.legislation.nsw.gov.au/_emergency/Public%20Health%20(COVID-19%20Restrictions%20on%20Gathering%20and%20Movement)%20Order%202020.pdf)

¹¹ Katherine Murphy, ‘The Two Meetings that Changed the Trajectory of Australia’s Coronavirus Response’. *Guardian Australia*, 4 April 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/apr/04/the-two-meetings-that-changed-the-trajectory-of-australias-coronavirus-response>

¹² Department of Prime Minister and Cabinet, *Cabinet Handbook*, 13th edition. Canberra, 2019, pp. 9-11.

¹³ As the Prime Minister conceded: ‘Ultimately, the National Cabinet is not a compulsory mechanism. That’s not how our Federation is built. That’s not what our constitution provides for. It is, I think, the preference of all the National Cabinet that wherever possible, they can move together and they can move together in a consistent way. But there

the National Cabinet proved to be an effective coordination mechanism to deal with the COVID-19 crisis across the Australian federation, its true innovation was the severing of accountability links to Parliament.

Concerns about the anti-democratic implications of inter-governmental relations within the Australian Federation long predate the advent of the National Cabinet. As Paul Kildea has observed of COAG, executive activity at this level of the national governance system has the capacity to ‘marginalise Parliaments and undermine responsible government’, including through generating new agencies and agreements that are ‘beyond the accountability of any single government’.¹⁴ The transformation of COAG into a National Cabinet has only intensified these accountability concerns. The unexpected elevation of National Cabinet to become a supreme decision-making body—or in the enthusiastic description of one minister ‘a single national unified government, the national unity Cabinet’¹⁵—has further undermined the principles of parliamentary democracy.

Recognising that the public health crisis posed significant economic challenges, the Commonwealth Government foreshadowed a substantial financial assistance package. The Coronavirus Economic Response Package provided \$189 billion in new household payments, cash flow assistance to small and medium business, investment support and regional assistance. The Commonwealth also proposed Supply Bills to provide assured funding for the normal operations of government until the passage of the 2020-21 budget, the introduction of which had been postponed from May until October 2020. Parliament was recalled to consider and approve these two legislative measures.

The Speaker of the House of Representatives, Tony Smith, took the chair at 10am on 23 March, and immediately drew the attention of the House to ‘special arrangements for the operation of the Chamber’. Consistent with prevailing ‘social distancing’ rules, which required individuals to keep at least 1.5m away from each other, the familiar

is also an important discussion about where other states are under more extreme circumstances, that measures that may be required there more urgently may be less urgent in other parts of the country’. Transcript, Prime Minister Press Conference, 25 March 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-250320>

¹⁴ Paul Kildea, ‘Making Room for Democracy in Intergovernmental Relations’, in Paul Kildea, Andrew Lynch and Greg Williams (eds.), *Tomorrow’s Federation: Reforming Australian Government*. Leichhardt: Federation Press 2012.

¹⁵ Health Minister Greg Hunt, Transcript, Prime Minister Press Conference, 29 March 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-12>

seating arrangements had been rearranged. Only one Member sat on each bench, and additional seats had been installed behind the benches, allowing those present to sit 'sufficiently far apart from each other'. The Speaker also noted that attendants would provide reduced services, the advisors' boxes would be vacated during divisions, and the press galleries had been closed to all but four press photographers. 'I'm very conscious of the need to limit the total number of people in the chamber at any one time,' he said.¹⁶

The Speaker failed to mention that achieving this level of separation in the Chamber was possible only because nearly half the House was not in attendance. Over the previous days, Leader of the House and Attorney-General Christian Porter and Manager of Opposition Business Tony Burke had negotiated a drastic reduction in attendance. As Burke explained later outside Parliament, 'Each side had organised for thirty members to stay home, so we never had more than 100 people in the room'.¹⁷ Through unprecedented use of pairing arrangements, 30 Coalition MPs and 30 Labor MPs were freed by their parties from the obligation to attend the sitting. Along with the single Greens MP and three of the five independents, who chose to attend, only 88 MPs (including the Speaker) attended—just 58 percent of the total of 151 elected MPs. The only explanation was offered by Burke—not by a government minister—who informed Parliament:

There are a large number of members of Parliament who want to be here today and who are not, because they understand the circumstances that we're in and the importance of the different distancing measures that are in place.¹⁸

This arrangement allowed Parliament to proceed with a quorum, protected the proportionate standing of the parties and safeguarded the Government's narrow majority on the floor. It also allowed Parliament to provide a model for social distancing. But these achievements came at a cost to the essential, representative, character of the Parliament. The absence of 60 MPs in the interests of social distancing

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 1.

¹⁷ Tony Burke, '#5and5- the Coronavirus crisis.' Email, 24 March 2020.

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 2. At the end of the day, the names of the absent MPs were read into Hansard in gratitude for their having, in the words of Government whip Bert van Manen, 'contributed to making the chamber work today by their absence'. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 86.

traded away the representation of roughly 6 million voters. Women were underrepresented: only about one-fifth of those present in the Chamber (18 out of 88) were women MPs. Labor selected only seven women in its contingent of 37, despite its commitment to gender parity; all three female Independents were in attendance. None of the five Tasmanian MPs was present, and of the 14 Western Australians, only two ministers and two Labor backbenchers made the journey across the Nullabor. Neither of the Indigenous Members of the House was present. Given most ministers did attend, the backbench as a whole was relatively underrepresented.¹⁹

In securing this outcome, these parties underlined their continuing dominant role in Australian governance, and illustrated an unexpected new manifestation of ‘cartel’ behaviour; that is, cooperation by rival party elites working on behalf of the state and without regard to smaller parties.²⁰ In this instance, the two major parties collaborated in a reduction of Parliament to secure expedited authorisation of the Government’s stimulus packages without referenced to the minor parties. A group of eight independents and minor party representatives protested to the Government about being cut out of the negotiations and deprived of an important part of their role as Members of Parliament.²¹

In the House of Representatives, the need for Parliament to provide an urgent legislative response to the crisis was accepted and endorsed by the Prime Minister, the Opposition Leader and all other speakers. Standing orders were suspended—again, by agreement of the two major parties—to permit expedited consideration of the Government’s two legislative packages. Government ministers had met with Opposition shadow ministers in the Cabinet room over the previous weekend to discuss the legislation and build support for it. The Opposition flagged its general support for the package, its desire to move selected amendments on the floor, and its

¹⁹ The Senate met under similar ‘rump’ circumstances, with Leave of Absence granted to 34 out of the total of 76 Senators, including Senators Susan Macdonald (Lib, Qld) and Andrew Bragg (Lib, NSW), who had contracted the COVID-19 virus. Commonwealth, *Parliamentary Debates*, Senate, 23 March 2020, pp.1-7.

²⁰ Richard Katz and Peter Mair, ‘Changing Models of Party Organisation and Party Democracy: the Emergence of the Cartel Party’. *Party Politics* 1(1) 1995, pp. 5-28; Richard Katz and Peter Mair, ‘The Cartel Party Thesis: a Restatement’. *Perspectives on Politics* 7(4) 2009, pp. 753-766.

²¹ The letter was signed by Greens leader Adam Bandt, Independent MPs Helen Haines, Bob Katter, Andrew Wilkie, and Zali Steggall, Centre Alliance MP Rebekah Sharkie and Senators Stirling Griff and Rex Patrick. See David Crowe and Rob Harris, ‘New Committee to Monitor Government on Coronavirus Measures’. *Sydney Morning Herald*, April 5 2020.

commitment to support the legislation even if the amendments failed.²² After focused cognate debates on each bill, and a Question Time of notable discipline and courtesy, that is what occurred. Further minor amendments made in the Senate were duly agreed to. Parliament, in other words, performed its legislative duty with care and alacrity.

All the more surprising then was Porter's release, at 6.45pm, of the Government's revised sitting calendar for Parliament. Porter's short speech was a model of ambiguity: the unpalatable reality was implied but never stated. He reminded Members that in the uncertainty created by COVID-19, the Government was unable to forecast economic parameters and had decided to delay the May Budget until October. Moreover, Parliament had just passed supply bills to cover the period ahead. A further consideration, Porter said, had played in the Government's mind in redesigning the sitting calendar:

[S]ome risk attaches to the operation of parliament, particularly during what is anticipated to be the peak point in the transmission of the coronavirus. Obviously, we come from all points in Australia. We've done our level best today, I think, to conduct this session and today's sittings with all of the appropriate social distancing that has been recommended for Australia at large. Nevertheless, some risk attaches to flying in multiple members from every corner in Australia.²³

In this utilitarian view, Parliament's only role during the pandemic was to provide the Government with supply and appropriation. Further, social distancing, used to justify the pared down membership of the Parliament, was now being used to rationalise the suspension of Parliament itself. Tellingly, Porter did not spell out the implications: the new sitting calendar omitted the 18 sitting days that had been scheduled for the May and June session, implying that Parliament would not be recalled until 11 August, twenty weeks away. Despite opposition from Labor, the Greens and one Independent, the new calendar was approved.

In the event, however, the Government did recall Parliament for a second one-day sitting, on 8 April, to gain legislative approval for its second support package, the \$130

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 11

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p. 82

billion ‘JobKeeper’ program. This sitting was even less representative than the first. Pairing arrangements saw the Coalition and Labor each excuse 47 Members from attendance; three Independents also opted not to attend. The package was voted on by the remnant 54 Members—barely one-third of the entire House, mostly drawn from NSW and Victoria. Labor had again signalled it would move amendments to the package but, if these were defeated, would vote in favour of the Government’s legislation. When the amendments were defeated 29-24, the Government’s ‘majority’ of 29 included 15 ministers; the executive essentially ensured Parliament approved its own legislation intact.²⁴ By mid-April, with the lockdowns yielding positive progress against the virus, the Prime Minister flagged a further recall, this time for a ‘trial week’ in May—although this too would have to conform to the reduced membership arrangements established for the previous sessions.²⁵ When the House convened on 12 May for an economic update and to approve the operation of the Government’s proposed COVIDSafe contact-tracing app, the Government and Opposition had paired a total of 82 Members, leaving just 65 voting Members in the Chamber.²⁶

IMPACT ON THE FUNCTIONS OF PARLIAMENT IN TIME OF CRISIS

In systems of representative government, Parliaments can be understood to perform five principal functions. As briefly mentioned earlier, Parliaments:

- represent the interests and preferences of individual voters in aggregate decision-making (*representation*);
- provide the institutional basis on which governments are formed and can be broken (*executive legitimisation*);
- provide the ultimate authority for legislation and the appropriation of public funds (*authorisation*);
- act as an assembly for advocacy, debate and consideration (*deliberation*); and

²⁴ Again, the Senate was reduced by similar measures, with Leave of Absence granted to 33 Senators.

²⁵ Transcript, Prime Minister Press Conference, 16 April 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-15>

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2020, pp. 43-4

- scrutinise executive actions (*accountability*).

The argument of this article is that the emergency response to the COVID-19 pandemic either eliminated or by substantially compromised Parliament's capacity to perform each of them.

First, and of fundamental importance, the three parliamentary sittings held from late March to early May subverted Parliament's *representative* role. These 'rump' sittings were unrepresentative of the Australian electorate and unrepresentative of the 46th Parliament that had been elected in May 2019. The March sitting of the House included representatives from just over half the 151 electorates in Australia—as noted earlier, this effectively left 6 million voters unrepresented. The April and May sittings were even less representative, with around a third of electorates represented. Reduced representation was ostensibly necessary to model social distancing. But the method of reduction was the outcome of negotiation between the major parties (Liberal and Labor), and their agreement on pairing reflected their self-interest. Reducing the size of the Parliament on party lines had the effect of subverting the key organising principle of a democratically elected Parliament: that it is assembled on the basis of broadly equivalent electorates drawn from every part of the country. The major party negotiations did not consider representation of minor parties, and their negotiations also set aside principles of gender and backbench representation.

In effect, the reduction of Parliament proceeded on the basis that the Government's majority remain secure. This denied Parliament the capacity to perform its *executive legitimisation* role. By contrast, during the perils of the Second World War in 1941 and just months before Pearl Harbour, the 16th Parliament (1940-1943) asserted its legitimisation role. By voting down a budget bill, the House of Representatives broke the Fadden Government and installed the Curtin Government. This occurred without noticeable disruption of the war effort. In the first decade of Federation, five Governments resigned after being defeated on significant legislation on the floor of the House.²⁷ Parliament's reserve capacity to bring about a change of government without an election, then, is a key component of Australian political arrangements, albeit one that has not been employed in recent decades. It is not suggested that the COVID-19 response led by the Morrison Government provided any political justification for its majority, earned at the May 2019 elections, to be tested on the floor of the House. It

²⁷ Ian Marsh, *Beyond the Two Party System*. Cambridge: Cambridge University Press, 1995, p. 277.

is to say that the reduction in size of Parliament, and its lengthy adjournment, effectively eliminated this capacity. A 'rump' Parliament could not have performed that function, as it could not express a legitimate view of 'the House'.²⁸

Parliament did of course perform its function of *authorising* the Government's spending packages. However, the *ad hoc* sequence of sittings—the recall for a one-day sitting on 23 March, the adjournment until August, the recall for a further one-day sitting on 8 April and then a three day sitting in May—and their minimally quorate character, suggest the executive saw Parliament's contribution as requiring, and limited to, a speedy performance of this authorising role. Parliament's *deliberative* role was likewise substantially compromised. In normal circumstances, expenditure on this mammoth scale would have received more protracted and careful consideration by the whole Parliament. In the circumstances however, Parliament's adversarial structure and practice was a potential impediment to speedy completion; this was no time for arguing. Introducing his first package of legislation, Treasurer Josh Frydenberg described it as a 'Team Australia moment';²⁹ his Labor opposite number Jim Chalmers agreed that, when it was not business as usual in the economy or society, 'it shouldn't be business as usual in our politics either'.³⁰ Speaking outside Parliament later, the Prime Minister was even more explicit about the desirability of abandoning party-based adversarial politics: 'There are no blue teams or red teams. There are no more unions or bosses. There are just Australians now, that's all that matters'.³¹

Parliament's fifth core function of Parliament in a representative democracy is *accountability*: holding the government to account through scrutiny of its decisions and actions. The suspension of Parliament effectively terminated Parliament's ability to perform this function – even at a time of unprecedented budget spending, novel

²⁸ *House of Representatives Practice*, 7th edition, p. 319. Accessed at: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML

²⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 6.

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020 p. 11

³¹ Peter Hartcher, 'Triumph of Unity is PM's Resurrection'. *Sydney Morning Herald*, 10 April 2020. Accessed at: <https://www.smh.com.au/politics/federal/triumph-of-unity-is-pm-s-resurrection-20200410-p54ixu.html>

mechanisms of ‘cabinet’ government, emergency ministerial powers and at least some public evidence of executive bungling.³²

In the absence of parliamentary scrutiny, civil liberties are at greater risk. President of the NSW Council for Civil Liberties Nicholas Cowdery described the prolonged parliamentary adjournments by the Commonwealth and NSW governments as ‘unacceptable and dangerous’: ‘The emergency circumstances in which we find ourselves render it difficult to overstate the potential for the dramatic overreach of unreviewable executive power ... [and] can seriously endanger our civil liberties’.³³ Australian Human Rights Commissioner, Edward Santow, also urged rejection of ‘authoritarian restrictions,’ arguing that while international law allowed freedoms to be restricted in a public health emergency, ‘emergency restrictions must be temporary, with genuine independent oversight’.³⁴

Labor and the Greens continued to call for Parliament itself to sit to provide scrutiny of executive actions. Shadow Attorney-General Mark Dreyfus QC said Parliament had provided the Government with emergency powers to respond to the crisis, and ‘every’ Member of the Parliament had a role in ensuring those powers were exercised in the best interests of their constituents and of the nation.³⁵

In the absence of a full parliamentary sitting, several substitute methods of scrutiny were proposed. The Finance Minister, Matthias Cormann, undertook to provide weekly updates on disbursements from the \$40 billion discretionary fund that had been set aside for unexpected emergency spending—transparency, at least, though

³² The decision to allow passengers from cruise liner Ruby Princess to disembark in Sydney Harbour, despite evidence of virus, became the subject of blame shifting between Federal and NSW authorities, a NSW police investigation and a NSW Government inquiry—but no parliamentary inquiry. In Canberra, amid lengthening queues of newly unemployed, the responsible Minister Stuart Robert told a media conference the Centrelink website had been attacked; in a later radio interview he took responsibility for this misinformation by using the informal expression ‘my bad’. When called to account in the 23 March parliamentary sitting, Robert provided a more coherent explanation: the website had simply been strained by unexpectedly high usage. Commonwealth, *Parliamentary Debates*, House of Representatives, 23 March 2020, p.44.

³³ NSW Council of Civil Liberties, ‘Prolonged Parliamentary Adjournment Unacceptable and Dangerous for Democracy’. Media Release, 30 March 2020. Accessed at: https://www.nswccl.org.au/statement_covid_19_and_government_oversight

³⁴ Santow, ‘We Must Combat Covid-19 but Creeping Authoritarianism Could Do More Harm Than Good’.

³⁵ Paul Karp, ‘Labor says Parliament should sit to scrutinise government's coronavirus emergency powers,’ *Guardian Australia*, 1 April 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/apr/01/labor-says-parliament-should-sit-to-scrutinise-governments-coronavirus-emergency-powers>

not scrutiny.³⁶ Labor suggested a role for the Australian National Audit Office; perhaps mischievously, given ANAO's recent role in investigating the Community Sport Infrastructure Program ('sports rorts') scandal.³⁷ But the logical vehicle for scrutiny was not an external agency but Parliament itself, through its committees; these continued to operate through the adjournment period. The Senate Standing Committee for Scrutiny of Delegated Legislation declared itself responsible for reviewing regulations made under certain legislation—although not the non-disallowable declarations under the emergency powers.³⁸

But a compelling model of parliamentary oversight quickly emerged in New Zealand. Its unicameral Parliament having been suspended for just over one month, a bipartisan select committee was established, chaired by the Opposition leader, Simon Bridges, to scrutinise the Government's response to the epidemic. Bridges commented: 'Scrutiny improves things. That scrutiny function will be constructive and could add to a confidence in New Zealanders about what is happening right now'.³⁹

In Australia, a group of six judges, convened by the Australia Institute thinktank and led by former High Court judge Mary Gaudron, urged Parliament (not the Government) to emulate the New Zealand model.⁴⁰ The suggestion was taken up by opposition parties and then supported by the Government. When Parliament was recalled for its second one-day sitting on 8 April, the Senate established a Select Committee on COVID-19. Chaired by Opposition Senator Katy Gallagher and with a majority of non-Government Members, the committee has wide terms of reference 'to inquire into the Australian Government's response to the COVID-19 pandemic'. It has powers similar to a Senate Estimates Committee.⁴¹

³⁶ Rob Harris, 'COVID-19 Emergency Measures to be Scrutinised for Civil Liberty Overreach'. *Sydney Morning Herald*, 2 April 2020. Accessed at: <https://www.smh.com.au/politics/federal/covid-19-emergency-measures-to-be-scrutinised-for-civil-liberty-overreach-20200401-p54g62.html>

³⁷ Karp, 'Labor Says Parliament Should Sit'.

³⁸ Harris, 'COVID-19 Emergency Measures to be Scrutinised'; Karp, 'Labor Says Parliament Should Sit'.

³⁹ Henry Cook, 'Coronavirus: Parliament Will Close Until Late-April, Replaced with Simon Bridges Chaired Select Committee'. *Stuff.co.nz*, 24 March 2020. Accessed at: <https://www.stuff.co.nz/national/health/coronavirus/120526301/coronavirus-parliament-will-close-until-lateapril-replaced-with-simon-bridgeschaired-select-committee>

⁴⁰ Peter Hartcher, 'Calls for Greater Scrutiny of Government During Shutdown,' *Sydney Morning Herald*, 2 April 2020.

⁴¹ Proceedings of the Committee are available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19. See also Paddy

From the perspective of the executive in the midst of a crisis, these wide-ranging and systemically crucial parliamentary functions no doubt appear as potential impediments to action. The Morrison Government appeared to prefer a minimal and subordinate role for Parliament. This was exemplified by Attorney-General Porter, who used a media interview to reject criticism of the adjournment of Parliament:

The power exists to recall parliament any time it's needed, which is exactly what we're doing on Wednesday and we're doing it in a flexible way. But why would we set down a regular sitting schedule over the coming weeks and months, in the most irregular time Australia has ever known? What is the point of that? Why we are being dragged into these bizarre procedural debates? If people want to sit out there during the greatest economic crisis Australia's experienced and read *Practice and Procedure of the House of Representatives*, good luck to them. But we've got better things to do.⁴²

In this frame the executive has 'better things to do' while Parliament is engaged in 'bizarre procedural debates'. If this suggests a merely rhetorical, short-lived, threat to norms of representative government, some troubling recent precedents are worth noting. Parliamentary prorogation and adjournment have become more familiar, if not yet routine, features of Australian governance over recent years. Parliament was unexpectedly prorogued by the Turnbull Government in 2016 and immediately recalled, to force consideration of its industrial relations legislation.⁴³ During the s44 eligibility crisis in 2017, the parliamentary calendar was altered so as to avoid sitting when ineligible Government Members of the House were awaiting by-elections.⁴⁴

Manning, 'Power House: the COVID-19 Senate Committee is Set to Have Huge Impact'. *The Monthly Today*, 9 April 2020. Accessed at: https://www.themonthly.com.au/today/paddy-manning/2020/09/2020/1586411110/power-house?utm_medium=email&utm_campaign=The%20Monthly%20Today%20-%20Thursday%209%20April%202020&utm_content=The%20Monthly%20Today%20-%20Thursday%209%20April%202020+CID_e0c7ebabba5f79851fdb81c9f28acf0d&utm_source=EDM&utm_term=Read%20on

⁴² Christian Porter, speaking on *RN Breakfast*, ABC Radio, 6 April 2020. Accessed at: <https://www.abc.net.au/radionational/programs/breakfast/government-will-not-broaden-definition-of-casual-workers/12124212>

⁴³ Paul Karp, 'How the PM Used an Obscure Part of the Constitution to Recall Parliament'. *The Guardian*, 21 March 2016. Accessed at: <https://www.theguardian.com/australia-news/2016/mar/21/how-the-pm-used-an-obscure-part-of-the-constitution-to-recall-parliament>

⁴⁴ For example, the House of Representatives did not sit in the lead-up to by-elections in New England (2 December 2017) or Bennelong (16 December 2017).

During leadership tensions within the Government in 2018, Parliament was hastily adjourned as numbers were counted in the Liberal party room for a leadership challenge against Turnbull.⁴⁵ And in the lead-up to the May 2019 federal election, the newly installed Morrison Government authorised just ten sitting days. Each of these measures seemed designed to suit the political convenience of the government of the day, either to protect its majority or to forestall political embarrassment of question time and urgency debates.⁴⁶ State Labor governments in NSW (2010) and South Australia (2006) procured early prorogation in the lead-up to elections, shutting down potentially embarrassing inquiries and scrutiny.⁴⁷

The Prime Minister's suggested role for Parliament—floated at a media conference, not in Parliament—was somewhat more constructive than the Attorney-General's. Members of Parliament could contribute to the crisis by advising their constituents on how to access the Government's stimulus and safety net programs:

Our parliamentarians, while they may not be meeting here [in Canberra], they're working incredibly hard in their communities. The phones are running hot every day, connecting people up in their communities to care and support the many programs. Frankly they've got a bigger job to do out there in their communities at the moment than they would have here, because their community needs them in their community, because they are local leaders who can help lead their communities through what will be the very difficult months ahead.⁴⁸

⁴⁵ 'Parliament Adjourned as Turnbull Says Leadership Meeting Possible Tomorrow,' *The New Daily*, 23 August 2018. Accessed at: <https://thenewdaily.com.au/news/national/2018/08/23/malcolm-turnbull-peter-dutton-new-challenge-2/>; Nikki Savva, *Plots and Prayers: Malcolm Turnbull's Demise and Scott Morrison's Ascension*. Brunswick: Scribe, p. 160.

⁴⁶ In the United Kingdom, the House of Commons was prorogued so as to avoid further debate on the Brexit negotiations by newly-appointed Prime Minister Boris Johnson; the move was overturned on appeal to the UK Supreme Court. See D.L. Harper, 'R v The Prime Minister; Cherry and Others v Advocate General for Scotland'. *Australasian Parliamentary Review* 34(1) 2019, pp. 20-27.

⁴⁷ Gemma Jones, 'Kristina Keneally Closes Parliament Three Months Before Election'. *Daily Telegraph*, 22 December 2010. Accessed at: <https://www.dailytelegraph.com.au/keneally-closes-parliament-three-months-before-election/news-story/e15bda3927b10802b6c56f01fe3fc7b7?sv=d57c7f80571885182804e4785038b879>; Jordan Bastoni, 'The Executive versus the Legislative Council: A Case Study from the South Australian Parliament', *Australasian Parliamentary Review* 27(1), 2012: 126-133.

⁴⁸ Transcript, Prime Minister's Press Conference, 2 April 2020. Accessed at: <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-020420>

In this minimalist vision, MPs are policy takers, not policy makers; they busy themselves by individual work in their communities, rather than by working together in the parliamentary forum in Canberra.

CONCLUSION – REVIVING A ROLE FOR PARLIAMENT IN TIME OF CRISIS

The emergency response to the COVID-19 crisis subverted Parliament's representative function and eliminated its capacity to express confidence in the executive. Parliament's authorising and deliberative functions were expedited and, with adjournment, then terminated. Parliament's accountability function was saved from elimination only by the Senate's capacity to install a mechanism for all-party scrutiny of executive decision making. The subsequent recalls of Parliament ahead of the anticipated twenty-week adjournment returned some degree of normality to the operations and expectations of representative democracy, but its representative function remained stunted.

In effect, the executive set out—initially for twenty weeks—to govern through the pandemic in a Parliament-free zone, resourced by extended supply arrangements, equipped with draconian emergency powers, and leading an unaccountable and non-transparent 'Cabinet'. Through the cooperation of the two major parties, Parliament acquiesced in its subordinate and unrepresentative role. It seemed that all it could do was diligently but speedily to authorise the legislation and get out of the way. Its 'rump' status and truncated sessions, and its acquiescence in a subordinate role to the executive suggested a Parliament with a minimal, cameo, role in the management of the crisis.

Little explanation was offered to the Parliament, or the public, by the executive for these measures. In effect, the suspension of Parliament was justified, by the executive, on the grounds that it was not needed, by the executive, to provide the executive with appropriations until the October budget. In dealing with the twin crises in the realms of public health and economic management, the executive exacerbated a third, less widely acknowledged, crisis in the sphere of governance. Combating pandemic and recession required surrendering key features of Australia's system of parliamentary democracy.

Given the imbalance between the executive and Parliament, is it possible for the Federal Parliament to reassert its influence? Can the Parliament be imagined contributing to the speedy and effective resolution of the COVID-19 crisis or future crises?

Any response must begin with a full restoration of Parliament's representative role: only meetings of the full Parliament should be regarded as legitimate and adequate. For reasons of social distancing, any such assembly would need to be held in a space larger than the existing chambers—such as the Great Hall in Parliament House. Alternatively, arrangements would need to be made for a 'virtual' Parliament, with Members participating electronically from their own electorates.⁴⁹ Ensuring secure and verifiable methods of participation and voting is of course complex and indeed unproven.⁵⁰ Yet at a time when millions of Australians were using digital methods to conduct business, execute financial transactions, receive and deliver education and express their culture, Parliament's inability to take steps towards virtual meetings seems a particularly blatant failure.

A fully representative Parliament could have performed its authorising and scrutiny functions as intended, bringing to the task the same recognition of the need for a speedy legislative response to the crisis. But it is in deliberative role that Parliament's biggest contribution might be made, helping define the strategic and implementation challenges presented by COVID-19. At a critical time when the big-picture strategy was still evolving, the language of 'Team Australia' presented crisis management as a largely unproblematic, unitary, top-down directive process, rather than as a collaborative and iterative one. In COVID-19, policy makers faced complex problems at the levels of both strategy and implementation. Despite expert advice to the National Cabinet, the strategy for attacking these problems was not obvious and was subject to legitimate disagreement.⁵¹ No choice was simple: prioritising public health jeopardised the

⁴⁹ Twomey, 'A Virtual Australian Parliament is Possible'. A virtual sitting may have been contemplated when, towards the end of the 23 March 2020 sitting, standing orders were amended to allow the House to meet 'in a manner and form not otherwise provided in the standing orders'—wording widely interpreted as allowing non-physical presence of Members. See also Jonathan O'Dea, 'Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW' in this issue of the *Australasian Parliamentary Review*.

⁵⁰ Unlike the UK, where the House of Commons set up a working group to investigate remote collaboration and videoconferencing, and actively tested virtual voting methods.

⁵¹ Consensus had developed around a strategy of 'flattening the curve'—that is, deferring the onset of the virus through social distancing and lockdowns to safeguard critical medical resources from being overwhelmed. But this inherently protracted process came at a steadily higher cost of social and economic dislocation. Alternative strategies were proposed. John Daley of the Grattan Institute, for example, argued for a quicker 'stop and restart' strategy. John Daley, 'The Case for Endgame C: Stop Almost Everything, Restart When Coronavirus is Gone'. *The Conversation*, 20 March, 2020. Accessed at <https://theconversation.com/the-case-for-endgame-c-stop-almost-everything-restart-when-coronavirus-is-gone-134232>. Researchers commissioned by the Group of Eight universities framed the choice as one between complete elimination of the virus and managing it at a very low level,

economy, and vice versa. The selection, testing and communication of proposed measures were unclear. In choosing among competing paths, policy makers needed to determine not just the costs and benefits of each course of action but how those outcomes should be allocated across members of society.

Such considerations should be the domain of a representative and deliberative assembly. Parliaments have conducted ‘conscience debates’ on sensitive subjects such as abortion, death with dignity and same sex marriage. It is a measure of the decline of the standing of the Federal Parliament that in the recent circumstances, parliamentary deliberation was not automatically and immediately seen as a vital contributor to the resolution of these problems, rather than as a potential impediment.

The deliberative forum of Parliament could have made a second equally valuable contribution to the crisis response. The strength of Parliament’s electorate-based design is that Members from around the nation can draw national attention, however fleetingly and imperfectly, to their local issues and insights. Not all parts of Australia are experiencing the crisis in the same way. Parliamentarians could play a positive role in this crisis by telling local stories of resilience and hardship, providing a medium for success transfer, recognising the achievements of local emergency response teams, and acknowledging individuals and communities experiencing joblessness, isolation and trauma.

In these ways a fully representative Parliament might exemplify the hopes of the proverb set into the floor tiles of the entrance to the Victorian Parliament: ‘Where no counsel is, the people fall: but in the multitude of counsellors there is safety’.⁵² In contemporary language, multiple sources of advice provide better outcomes.

rejecting a third option of herd immunity. See The Group of Eight Australia ‘Covid-19 A Roadmap to Recovery – A Report for the Nation’. Accessed at <https://go8.edu.au/research/roadmap-to-recovery>

⁵² Parliament of Victoria, ‘History of Parliament House’. Accessed at: <https://www.parliament.vic.gov.au/about/the-parliament-building/history-of-the-building>. The words are from the Old Testament book of Proverbs, 11:14.

Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW¹

The Hon. Jonathan O’Dea MP

Speaker of the NSW Legislative Assembly; Member for Davidson

INTRODUCTION

Over the past century, many millions of people have died defending traditional western institutions and our democratic way of life. Through two world wars, Parliaments around the globe ensured they continued to operate.

As people and organisations around the world now grapple with the increasing confines of the COVID-19 pandemic, it is imperative that our democracy continues to advocate for the interests of the people through the principal mechanism of Parliament. We should not cripple a central pillar of democracy.

A Member of a Parliament has a unique role in representing the people and making laws in the public interest. Notwithstanding constitutional and logistical challenges, a virtual Parliament should be pursued in New South Wales (NSW), as is occurring elsewhere.

Indeed, faced with the global pandemic, many jurisdictions have moved to partial or even fully digitised methods for convening parliamentary sessions and continuing the work of committees, including Australia, the United Kingdom (UK), Wales, New Zealand, Canada, the European Union (EU), Brazil and the Maldives.

BASIC PRINCIPLE: THE IMPORTANCE OF PARLIAMENT IN DEMOCRACY

Parliament is obviously central to the operation of democracy. The legislature must be able to hold the executive to account in accordance with the principle of responsible

¹ This paper was finalised on 1 May 2020.

government. Despite adverse circumstances, the Parliament should continue to make and review laws, which are implemented, enforced, interpreted and otherwise applied by other branches of government.

At the beginning of each sitting day, Members of the NSW Legislative Assembly pray that their deliberations may be directed ‘to the true welfare of Australia and the people of New South Wales’. Each Member has a duty to represent those who have elected them in the business of making and debating laws. This principal purpose can be achieved in an environment that encourages robust and orderly debate amongst Members of all backgrounds and political persuasions.

Traditionally, Members from NSW have physically gathered together to achieve this purpose in chambers located within the Parliament House on Macquarie Street, Sydney. They address various matters, ranging from laws that affect the State, questions about the actions of government, to community issues in local electorates. Laws are passed when votes are cast from the government and opposition benches. Many common terms in parliamentary parlance refer to the physicality of Parliament, such as the chamber, house, frontbench, backbench, crossbench, crossing the floor, and locking the doors.

In the rich vein of parliamentary tradition, the concrete experience of Parliament has significant value and we should not abandon it without compelling reason.

EXTRAORDINARY TIMES: PARLIAMENT IN PANDEMIC

By all accounts, the COVID-19 pandemic qualifies as sufficient reason to alter the usual methods of Parliament. At the time of writing this paper (1 May 2020), more than 3.1 million people had contracted COVID-19 and the virus had killed over 217,000 people.² With no vaccine or cure available in the near future, many governments have responded to the developing crisis by closing borders and largely shutting down economies to stop the spread of the disease. In NSW alone, over 3000 people have

² Johns Hopkins University and Medicine Coronavirus Resource Center, ‘COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University’. Accessed at: <https://coronavirus.jhu.edu/map.html>

contracted coronavirus and dozens have died.³ People have been prevented from leaving their residences without a reasonable excuse, with maximum penalties of up to \$11,000 or imprisonment for six months.⁴

As a result of the pandemic, 24 March 2020 was unique in the history of the NSW Parliament. The Legislative Assembly sat with a sparsity of Members in the chamber, spaced more than 1.5 metres apart with at least four metres square of space per person, to meet social distancing requirements. Over 50 of the usual 93 Members were absent from the precinct, a situation enabled by pre-negotiated pairing arrangements. The Leader of the House moved new sessional orders and a suspension of standing orders that allowed the House to only consider emergency bills instead of its usual routine of business.⁵

The House passed three important bills: COVID-19 Legislation Amendment (Emergency Measures) Bill 2020,⁶ Treasury Legislation Amendment (COVID-19) Bill 2020,⁷ and Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020.⁸ The sitting day was livestreamed on Facebook Live and the parliamentary website for the benefit of the public as well as Members and staff working from their electorate offices.⁹

³ New South Wales Health, 'NSW COVID-19 case statistics: As of 8pm 28 April 2020'. Accessed at: <https://www.health.nsw.gov.au/Infectious/diseases/Pages/covid-19-latest.aspx>

⁴ New South Wales Government, 'COVID-19 (coronavirus): What you can and can't do under the rules'. Accessed at: <https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules>

⁵ Hansard Reports, Parliament of New South Wales, 'Tuesday, 24 March 2020'. Accessed at: <https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-110356>

⁶ Parliament of New South Wales, 'COVID-19 Legislation Amendment (Emergency Measures) Bill 2020'. Accessed at: <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3741>.

⁷ Parliament of New South Wales, 'Treasury Legislation Amendment (COVID-19) Bill 2020'. Accessed at: <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3742>

⁸ Parliament of New South Wales, 'Better Regulation and Customer Service Legislation Amendment (Bushfire Relief) Bill 2020'. Accessed at: <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3740>

⁹ Parliament of New South Wales, 'Procedural Digest - Legislative Assembly, Fifty-Seventh Parliament, First Session, No. 3/2020: 24 March 2020'. Accessed at: <https://www.parliament.nsw.gov.au/la/proceduralpublications/Documents/Procedural%20Digest%20no%203%202020.pdf>

The House also resolved that the next sitting day would be 15 September 2020, with all Members allowed a leave of absence from 25 March until 15 September.¹⁰ Under the new Sessional Order 47A, the next scheduled sitting day could be varied or postponed in the public interest. Where the Government requests that the date of the next sitting be varied and the Speaker is satisfied it is in the public interest, he is to communicate the new sitting date and time to Members.¹¹ The new sessional orders give the House greater flexibility to navigate the extraordinary circumstances presented by the pandemic, subject to the public interest test.

This recall safeguard ensures that the House can continue to meet, as necessary in the public interest, in order to pass important legislation. It is a positive measure that promotes transparency and accountability during the COVID-19 crisis. Under these procedures, the Legislative Assembly has been recalled to sit on 12 May 2020 to pass urgent legislation related to the crisis.¹² Similar procedures have been followed in the NSW Legislative Council, which has also been recalled to sit on 12 May. However, NSW Parliament House remains closed to the public, as it has been since 30 March.

This is not the first time that a global pandemic has conspired to pause parliamentary proceedings in NSW. The 1918 flu pandemic (also known as the Spanish Flu) caused many Parliaments to have long breaks in sitting, including the Queensland Parliament (7 November 1918 to 5 August 1919), Victorian Parliament (20 December 1918 to 8 July 1919), and the Federal Parliament (20 December 2018 to 25 June 2019).

In NSW, His Excellency Sir Walter Davidson KCMG, KStJ, the Governor of NSW, prorogued the Parliament by Proclamation, ultimately from 11 December 1918 to 18 August 1919. On 19 August 1919, the Governor opened the Parliament with the following words in the Legislative Council:

The recent epidemic of influenza was the cause of profound distress throughout the State, and of deep anxiety to my advisers. Acting under the

¹⁰ Hansard Reports, Parliament of New South Wales, 'Tuesday, 24 March 2020'.

¹¹ Parliament of NSW, 'Legislative Assembly: Consolidated Standing and Sessional Orders and Resolutions of the House, 57th Parliament March 2020'. Accessed at: <https://www.parliament.nsw.gov.au/la/houseprocedures/standingorders/Documents/Consolidated%20Standing%20and%20Sessional%20Orders.pdf>.

¹² Alexandra Smith, 'NSW Parliament Recalled to Debate Rental Relief Measures'. *Sydney Morning Herald*, 21 April 2020. Accessed at: <https://www.smh.com.au/politics/nsw/nsw-parliament-recalled-to-debate-rental-relief-measures-20200420-p54lgu.html>

highest professional advice the Government of the State took all necessary steps for combating the plague.¹³

A century later, global leaders echo similar sentiments about the COVID-19 pandemic while they contend with complex challenges to public health and civic life that would be all too familiar to our democratic forebears.

What the leaders could not have known in 1919 are the rapid advances in telecommunication technologies that enable meeting in 2020 via videoconference, with parliamentary proceedings potentially streamed live to a global audience.

A WAY FORWARD: VIRTUAL PARLIAMENT IN NSW

With the technologies available to the NSW Parliament, why not consider how to stand together in democratic solidarity during this socially distanced time? It is a privilege that Members can represent their communities and advocate on their behalf, and this essential role should not be undermined by suspending Parliament during a crisis.

A virtual Parliament would help uphold robust democracy in NSW, as courts continue to operate under COVID-19 restrictions and executive government gains significant powers to impose restrictions on citizens.

It is in the public interest that the NSW Parliament continues to sit during each scheduled sitting week, including virtually when it is otherwise not feasible. Indeed, the emergence of the vile COVID-19 pandemic prompts an obligation to seriously consider implementing alternative methods of meeting.

Modern technology allows each person in an assembly or meeting to see each other via videoconference and to see and potentially hear any comments being made in real time via video, audio and/or chat functions. The Speaker of the NSW Legislative Assembly would continue to uphold order in the House, and act as a discussion moderator. For example, given the technology constraints, all microphones might be muted by default until a Member is called upon by the Speaker, so that one person could be heard at a time.

¹³ Hansard Reports, Parliament of New South Wales, 'Tuesday, 19 August 1919'. Accessed at: <https://api.parliament.nsw.gov.au/api/hansard/search/daily/searchablepdf/HANSARD-290296563-7592>

Even if the Parliament sat with a modified routine of business, restricted hours and adapted procedures, the symbolism of Parliament continuing to fulfil its role is powerfully vital in such exceptional times.

Parliament sitting virtually enables the Government to pass any emergency or urgent legislation without the administrative burden and public health risk of recalling Members for a special physical sitting of Parliament. The Opposition also retains the opportunity to ask challenging questions and hold the Government to account for its actions.

Question Time is the prime example of democratic dialogue at work. As a central feature of parliamentary business, having Question Time at least one day each sitting week conveys the enduring value of parliamentary debate and deliberation to the public.

In her report, *How Could a Virtual Parliament Work?*, Dr Hannah White, Deputy Director of the Institute of Government and former House of Commons clerk, underscores the significant role of the House of Commons in the UK's constitutional democracy:

The government needs to be able to pass legislation, and MPs and peers need to be able to hold ministers to account for the decisions they are making on behalf of citizens. Crucially, parliament needs to be seen by the public to be doing these things

Perhaps most fundamentally of all, the House of Commons needs to be capable of sitting and voting to demonstrate its confidence in the government, were that ever to be called into question. That is why innovations that will enable parliament to continue sitting, even if remotely, and operating as normally as possible are so important.¹⁴

In this respect, the historically derivative Parliament of NSW has the same prerogative as the House of Commons. The reality is that convening Parliament through videoconference or teleconference is comparable to assembling in person. While some

¹⁴ Dr Hannah White, *How Could a Virtual Parliament Work?*. London: Institute for Government, 9 April 2020, p. 2. Accessed at: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/virtual-parliament.pdf>

shortcomings of a virtual meeting must be acknowledged, it is surely a better alternative than not meeting at all.

If it were adopted by the NSW Legislative Assembly, a virtual Parliament would testify to Members' ongoing commitment to their constituents and determination to preserve democratic debate. Some Members have communicated support for the House to consider a virtual Parliament, and there have been relevant exchanges with the Premier's office.

As the independent and impartial representative of the NSW Legislative Assembly, the Speaker directed the staff of the Legislative Assembly and Department of Parliamentary Services to prepare possible parliamentary practices and procedures necessary to support a virtual sitting of Parliament. Groundwork has also been laid for the possibility of remote or electronic voting, with the Legislative Assembly recently introducing a new e-divisions application whereby the Whips use devices to electronically tally and verify Members' votes. These are then seamlessly transferred to parliamentary records.

Some parliamentary committees, comprised of Members from across party lines, have continued their work with remote participation. Standing Order 295(2) allows committee proceedings by electronic communication so long as there is a quorum of Members, and Members and witnesses are able to speak and hear each other contemporaneously.¹⁵

From the last term of Parliament, committee chairs have held videoconference meetings, virtual public hearings and even divisions by teleconference with the support of committee staff. Since the COVID-19 pandemic, 28 committees continue to be active across 38 inquiries. Many committees have opted for deliberative meetings via teleconference and videoconference to date, including the Committees for Investment, Industry and Regional Development, Staysafe (Road Safety), Community Services, Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission and Legislation Review.

¹⁵ Parliament of New South Wales, 'Consolidated Standing and Sessional Orders—New South Wales Legislative Assembly', p. 78. Accessed at: <https://www.parliament.nsw.gov.au/la/houseprocedures/standingorders/Documents/Consolidated%20Standing%20and%20Sessional%20Orders.pdf>.

The first virtual Legislative Assembly committee hearing is scheduled for 5 May 2020 via the videoconferencing platform, Cisco Webex. The Committee for Industry, Investment and Regional Development will meet and hear from witnesses. The Committee has already held a virtual roundtable with a range of stakeholders from Guyra to discuss issues relating to the drought-affected community. A manual for virtual committee proceedings is now available to Members and staff to guide them in transitioning to virtual meetings.

COMPARING APPROACHES: EXAMINING DOMESTIC AND INTERNATIONAL JURISDICTIONS

It is useful to survey the stances of other Australian jurisdictions towards virtual Parliaments to better inform how NSW might pursue its vision of a virtual Parliament. For public health and community safety reasons, many jurisdictions have closed or restricted access to their parliamentary precincts. At this stage, only Queensland has announced their plans to implement a hybrid model of a virtual Parliament, while other States and Territories have not stated whether they intend to implement reforms to allow virtual parliamentary sittings.

STATE AND TERRITORY JURISDICTIONS

Queensland

In Queensland, Parliament has been suspended until as late as 17 September, although the Speaker is able to call back Parliament at any time under the advice of the Palaszczuk Government. All functions and events in the precinct have been postponed or cancelled until 30 June 2020.¹⁶

Effective from 23 April 2020, special sessional orders in the Queensland Legislative Assembly currently take precedence over other standing and sessional orders until the COVID-19 Emergency Response Bill 2020 lapses or the House is dissolved. These

¹⁶ M. Doyle, 'Queensland Government Decision to Suspend Parliament Amid Coronavirus Crisis Sparks Criticism', *7News.com.au*, 19 March 2020. Accessed at: <https://7news.com.au/lifestyle/health-wellbeing/virus-fears-prompt-qlld-to-halt-parliament-c-752205>.

include the Speaker's power to approve the use of telephone, video or other electronic technology for meetings of the Legislative Assembly, so long as it facilitates continuous and contemporaneous communication between Members. The Committee of the Legislative Assembly can approve modified rules of debate adapted to meetings using approved technology.¹⁷

The Parliament is next expected to sit on 19 May in a 'hybrid sitting', with the potential to sit for 3 days. A maximum of 20 Members will be physically present and sit socially distanced from one another in a room located in the Parliament's Annexe building. The Speaker will preside over debate from his electorate, with the ability to remotely mute Members' microphones. The room will feature screens that show a live feed of Members who have video-conferenced into the meeting, and Members will be able to vote electronically or via proxy.¹⁸

Victoria

The Victorian Parliament sat on 23 April 2020 with a contingent of no more than 26 Members to discuss a revised order of business including emergency legislation related to COVID-19. The Leader of the House moved that the House may meet in a manner and form not otherwise provided for in their motion or the standing and sessional orders, with the agreement of the Leader of the House, the Manager of Opposition Business and the Speaker, or their representatives, and following consultation with representatives from other parties and the Independents.¹⁹ Parliamentary committees remain operational in Victoria, where inquiries have continued, although public hearings have been postponed.²⁰

As of 27 April 2020, sitting dates in May were cancelled and the next sitting day was scheduled for 2 June 2020. This may change if Parliament needs to sit sooner or if the

¹⁷ Queensland Legislative Assembly, 'Sessional Orders of the Legislative Assembly 57th Parliament (First Session) – amended 22 April 2020, effective 23 April 2020).

¹⁸ Lydia Lynch, 'The Last Time Parliament Sat Here, the Chamber was Wrapped in a Tent', *The Brisbane Times*, 29 April 2020. Accessed at: <https://www.brisbanetimes.com.au/politics/queensland/the-last-time-parliament-sat-here-the-chamber-was-wrapped-in-a-tent-20200429-p54o8f.html>.

¹⁹ Legislative Assembly of Victoria, Votes and Proceedings No 63 – Thursday 23 April 2020.

²⁰ Parliament of Victoria, 'Update on Parliamentary Committee Inquiries'. Accessed at: <https://www.parliament.vic.gov.au/about/news/4484-update-on-parliamentary-committee-inquiries>.

sitting needs to be delayed on the basis of health advice.²¹ While public galleries are closed and public tours and community events will not be held at Parliament House for the foreseeable future,²² members of the public are able virtually to tour Parliament House.²³

Western Australia

On 19 March 2020, the Western Australian Legislative Assembly adopted a temporary order that if, following agreement with party leaders, the Premier advises the House that it is necessary to pass urgent legislation or undertake immediate business related to COVID-19, standing orders are suspended to effect any changes to the passage of bills, routine of business and speaking time limits.²⁴

On 31 March, the Premier advised that this temporary order would apply to Legislative Assembly proceedings.²⁵ The Assembly sat as scheduled on 31 March, 1 April,²⁶ and 2 April,²⁷ and the Speaker exercised his discretion to dispense with various items of business. From 6 April, Parliament House in Western Australia was closed to visitors

²¹ Parliament of Victoria, '2020 Sitting Dates—Updated 27 April 2020'. Accessed at: https://www.parliament.vic.gov.au/images/stories/documents/assembly/2020_Sitting_dates.pdf.

²² Parliament of Victoria, 'Statement from the Presiding Officers'. Accessed at: <https://www.parliament.vic.gov.au/about/news/4473-statement-from-the-victorian-parliament-s-presiding-officers>.

²³ Parliament of Victoria, 'Virtual Tours'. Accessed at: <https://www.parliament.vic.gov.au/visit/virtual-tour>.

²⁴ The Legislative Assembly of the Parliament of Western Australia, 'Standing Orders of the Legislative Assembly of the Parliament of Western Australia – Temporary Order in relation to COVID-19 Adopted by the Assembly on 19 March 2020'.

²⁵ Parliament of Western Australia, 'Legislative Assembly of Western Australia, Votes and Proceedings No 186 – First Session of the Fortieth Parliament, Tuesday 31 March 2020'. Accessed at: [https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/CB68F158ACA46416482584870021B3B3/\\$file/AV401186.pdf?OpenElement](https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/CB68F158ACA46416482584870021B3B3/$file/AV401186.pdf?OpenElement).

²⁶ Parliament of Western Australia, 'Legislative Assembly of Western Australia, Votes and Proceedings No 186 – First Session of the Fortieth Parliament, Wednesday 1 April 2020'. Accessed at: [https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/F810E20BDD5086AF482584870021CCF4/\\$file/av401187.pdf?OpenElement](https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/F810E20BDD5086AF482584870021CCF4/$file/av401187.pdf?OpenElement).

²⁷ Parliament of Western Australia, 'Legislative Assembly of Western Australia, Votes and Proceedings No 186 – First Session of the Fortieth Parliament, Thursday 2 April 2020'. Accessed at: [https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/E8C7551299BCE731482584870021DD6D/\\$file/av401188.pdf?OpenElement](https://www.parliament.wa.gov.au/Parliament/sitsched.nsf/AllDocs/E8C7551299BCE731482584870021DD6D/$file/av401188.pdf?OpenElement).

until further notice.²⁸ The Legislative Assembly had adjourned from 2 April for a 5 week recess; however, it was recalled to sit on 15, 16 and 20 April to debate urgent COVID-19 legislation.²⁹

Australian Capital Territory

As part of the Legislative Assembly for the Australian Capital Territory's duty of care to Members, staff, and the public, the Parliament's building was closed to the public from 8 April. Previously scheduled sitting dates of 31 March and 1 April were cancelled, while the sitting calendar has been revised for the Assembly to sit on selected Thursdays.³⁰

A Select Committee on the COVID-19 pandemic response has been formed to enquire into the ACT's health and financial response, as well as other issues related to the pandemic.³¹ Committees are able to meet via videoconference as a result of a motion varying the Assembly's standing orders.³²

South Australia

In the South Australian Parliament, all public tours and school visits were cancelled, and public galleries closed, due to the pandemic.³³ On 8 April 2020, the Government successfully moved to adjourn Parliament until 12 May, relying on the Speaker's casting vote to pass the motion. The Legislative Council resolved to establish the COVID-19 Response Committee on the same day, with the task of monitoring and scrutinising the

²⁸ Parliament of Western Australia, 'Home Page'. Accessed at: <https://www.parliament.wa.gov.au/WebCMS/WebCMS.nsf/index>.

²⁹ Michael Traill, 'WA Parliament to be Recalled Amid COVID-19 Crisis', *The Albany Advertiser*, 7 April 2020. Accessed at: <https://www.albanyadvertiser.com.au/news/albany-advertiser/wa-parliament-to-be-recalled-amid-covid-19-crisis-ng-b881512990z>.

³⁰ Legislative Assembly for the Australian Capital Territory, 'COVID-19—Temporary Changes to Operations'. Accessed at: <https://www.parliament.act.gov.au/covid-19>.

³¹ Legislative Assembly for the Australian Capital Territory, 'Select Committee on the COVID-19 pandemic response'. Accessed at: https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/select_committees/select-committee-on-the-covid-19-response.

³² Legislative Assembly for the Australian Capital Territory, 'COVID-19—Temporary Changes to Operations'.

³³ Parliament of South Australia, 'Visit Parliament'. Accessed at: <https://www.parliament.sa.gov.au/How-Do-I/Access-Parliament>.

Government's management of the COVID-19 response.³⁴ However, following advice from the Speaker, the House sat on 28 April, the original scheduled date for Parliament's next sitting, and debated a normal legislative agenda.³⁵

Northern Territory

The Legislative Assembly of the Northern Territory was indefinitely adjourned from 24 March 2020, with public galleries closed for the last foreseeable sitting day.³⁶ During an emergency sitting on 24 April 2020 called to debate COVID-19 legislation, the Government came under criticism from the Opposition and Independents for dispensing with Question Time.³⁷ Voting procedures on the day were varied to help achieve social distancing, such that Members stood in their seats to vote affirmatively for a motion and sat in their seats to vote negatively against a motion.³⁸

Tasmania

From 26 March, the Tasmanian Parliament was suspended for five months until 18 August due to the coronavirus crisis.³⁹ Calls from the Opposition for a tri-partisan

³⁴ Parliament of South Australia, 'Committees'. Accessed at: <https://www.parliament.sa.gov.au/Committees/Committees-Detail>.

³⁵ David Washington, 'Crisis averted? Back to normal for State Parliament', *IN Daily*, 22 April 2020. Accessed at: <https://indaily.com.au/news/2020/04/22/crisis-averted-back-to-normal-for-state-parliament/>.

³⁶ Northern Territory Assembly, 'Minutes of Proceedings: Meeting Number 112', 24 March 2020. Accessed at: <https://www.territorystories.nt.gov.au/jspui/bitstream/10070/756715/5/Draft%20-%20Minutes%20of%20Proceedings%20for%20Meeting%20112%20on%20Tuesday%2024%20March%202020.pdf>.

³⁷ Steve Vivian and Jacqueline Breen, 'Government Accused of Shutting Down Debate in Extraordinary NT Parliament Session', *ABC News*, 25 April 2020. Accessed at: <https://www.abc.net.au/news/2020-04-24/nt-government-suspends-question-time-coronavirus-legislation/12180748>.

³⁸ Northern Territory Assembly, 'Draft Daily Hansard – 24 April 2020', 24 April 2020. <https://www.territorystories.nt.gov.au/jspui/bitstream/10070/787608/2/Draft%20Daily%20Hansard%20-%20Friday%2024%20April%202020%20to%20end%20of%20day.pdf>.

³⁹ David Killick, 'Tasmanian Parliament Suspended for Five Months', *The Mercury*, 26 March 2020. Accessed at: <https://www.themercury.com.au/news/politics/tasmanian-parliament-suspended-for-five-months/news-story/842a5d23d6130b64c953fa3d8730ee4a>.

COVID-19 committee did not eventuate in any new committees.⁴⁰ The Parliament was recalled on 30 April to discuss legislation related to the pandemic.⁴¹

COMMONWEALTH PARLIAMENT

At the Federal level, the Parliament had planned not to sit from 24 March until 11 August 2020 and the May budget has been postponed to October. However the Leader of the House also moved that, if the Leader of the House and Manager of Opposition Business agreed, the House may meet in a manner and form not otherwise provided in the standing orders, with the Speaker determining the manner in which Members may be present.⁴² Consequently Federal Parliament will return to sit for three days from 12 May 2020.⁴³

As of 23 March 2020, any committee hearings held in Federal Parliament were no longer open to the public. The Presiding Officers recommended that committees use videoconference or teleconference technologies and only call witnesses in person if necessary.⁴⁴ A meeting of the Joint Standing Committee on Migration was subsequently convened via teleconferencing technology.⁴⁵

⁴⁰ David Killick, 'Calls for Committee to Replace Parliament While in Recess', *The Mercury*, 2 April 2020. Accessed at: <https://www.dailytelegraph.com.au/news/national/calls-for-committee-to-replace-parliament-while-in-recess/news-story/3fbcecaadeebbed3a6219b5c0aa15c71?btr=462108016431201113b376af5dbf3090>.

⁴¹ David Killick, 'Parliament to Return Early to Deal with Pandemic Response'. *The Mercury*, 15 April 2020. Accessed at: <https://www.dailytelegraph.com.au/news/national/parliament-to-return-early-to-deal-with-pandemic-response/news-story/3ba4e332e71a3dfe9c649e7f6aa7426b?btr=5628394da6be9f14d36c1a134b23163a>

⁴² R. Lewis, 'Coronavirus: The Virtual Parliament House Stands Ready to Sit'. *The Australian*, 24 March 2020. Accessed at: <https://www.theaustralian.com.au/nation/politics/coronavirus-the-virtual-parliament-house-stands-ready-to-sit/news-story/c80f627033a7851489c3717f8807662a>.

⁴³ Matt Bungard, Michaela Whitbourn and Latika Bourke, 'As the Day Unfolded: Global COVID-19 Cases Surpass 2.7 Million, US Deaths Near 50,000 as Australia's Death Toll Stands at 79'. *Sydney Morning Herald*, 24 March 2020. Accessed at: <https://www.smh.com.au/national/coronavirus-updates-live-global-covid-19-cases-pass-2-6-million-us-deaths-near-50-000-as-australia-s-death-toll-stands-at-76-20200423-p54mny.html>.

⁴⁴ S. Jenkins, 'Coronavirus Prompts Changes to Hearings, Access at Parliament House'. *The Mandarin*, 17 March 2020. Accessed at: <https://www.themandarin.com.au/127635-coronavirus-prompts-changes-to-hearings-access-at-parliament-house/>.

⁴⁵ E. Visontay, 'How Australia's Politicians are Dealing with Social Distancing'. *The Australian*, 20 March 2020. Accessed at: <https://www.theaustralian.com.au/nation/politics/how-australias-politicians-are-dealing-with-social-distancing/news-story/c60acd7c8be0dd115e12e031c329d474>

Although Federal Parliament itself is not sitting on a regular basis, a new committee focused on the coronavirus pandemic has been formed to provide some measure of accountability. The Select Committee on COVID-19 is inquiring into the Australian Government's response to the COVID-19 pandemic, with a closing date for submissions of 28 May, and its final report due on or before 30 June 2022.⁴⁶

INTERNATIONAL JURISDICTIONS

From some of the oldest constitutional democracies boasting a rich tableaux of parliamentary traditions to more modern nation-states adopting innovative methods, many Parliaments across the globe are investigating the possibilities of virtual Parliament sittings. The Commonwealth Parliamentary Association has produced a 'CPA Toolkit for Commonwealth Parliaments and Legislatures on the COVID-19 (Coronavirus) Pandemic and Delivering Parliamentary Democracy' to guide its 180 Commonwealth Parliaments and legislatures in navigating practice and procedure.⁴⁷

With such a variety of democratic histories and social contexts, there is no 'one size fits all' approach to a virtual Parliament. It is, however, expedient to compare the ongoing work of international Parliaments to glean what wisdom can be shared across continents.

The United Kingdom

The usual scenes of Members heckling and jostling in the crowded House of Commons have been replaced by more sober socially distanced arrangements, perhaps informed by Prime Minister Johnson's recent personal health experience with coronavirus.

The Clerk of the House of Commons noted that, 'colleagues and I are keen to find ways of enabling Members to maintain their scrutiny of Government, despite the restrictions

⁴⁶ Parliament of Australia, 'Select Committee on COVID-19'. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19.

⁴⁷ Commonwealth Parliamentary Association, 'CPA Toolkit for Commonwealth Parliaments and Legislatures on the COVID-19 (Coronavirus) Pandemic and Delivering Parliamentary Democracy'. Accessed at: http://www.cpahq.org/cpahq/Main/Programmes/Coronavirus_Toolkit.aspx

that are in place', while also needing 'to ensure that our version of Zoom meets some basic legal, security and privacy requirements'.⁴⁸

Following a motion from the Leader of the House of Commons, it was resolved:

That this House is committed to taking all steps necessary to balance its responsibilities for continuing scrutiny of the executive, legislating and representation of the interests of constituents with adherence to the guidance issued by Public Health England and the restrictions placed upon all citizens of the United Kingdom, and is further committed, in pursuit of that aim, to allowing virtual participation in the House's proceedings, to extending the digital capacity of those proceedings to ensure the participation of all Members, and to ensuring that its rules and procedures are adapted to permit as far as possible parity of treatment between Members participating virtually and Members participating in person.⁴⁹

At the will of the House, the House of Commons implemented a hybrid model from 21 April 2020.⁵⁰ Up to 50 Members can sit socially distanced from one another in the Commons, while up to 120 Members can participate using the videoconferencing platform, Zoom.⁵¹ Screens are positioned in the Chamber to allow the Speaker and physically present Members to see their 'virtual' colleagues.⁵² The model is being trialled for the first two hours of the sitting day, which features oral questions to Ministers (including Prime Minister's Questions), urgent questions and ministerial

⁴⁸ Clerk of the House of Commons, UK Parliament, 'Letter to Chi Onwurah MP'. Accessed at: <https://www.parliament.uk/documents/commons-governance-office/CoH-to-Chi-Onwurah-Virtual-Parliament-030420.pdf>

⁴⁹ House of Commons, UK Parliament, 'Votes and Proceedings – Tuesday 21 April 2020'.

⁵⁰ Parliament of the United Kingdom, 'MPs Approve Historic Motion to Allow Remote Participation in Key Commons Proceedings'. Accessed at: <https://www.parliament.uk/business/news/2020/april1/mps-approve-historic-motion-to-allow-remote-participation-in-key-commons-proceedings/>

⁵¹ Peter Walker, 'Slimmed-Down "Virtual House of Commons" to Sit Next Week'. *The Guardian*, 17 April 2020. Accessed at: <https://www.theguardian.com/politics/2020/apr/16/slimmed-down-virtual-house-of-commons-to-sit-next-week>.

⁵² Parliament of the United Kingdom, 'Return of the House of Commons: Update on First Steps to a Virtual House'. Accessed at: <https://www.parliament.uk/business/news/2020/april1/return-of-the-house-of-commons-update-on-first-steps-to-a-virtual-house/>.

statements, with the aim of expanding the trial to the remainder of the day after adequate troubleshooting.⁵³

At this stage, all other Chamber proceedings will be entirely physical. A motion to extend hybrid proceedings to cover other business such as legislation is expected to be debated soon.⁵⁴

The question of remote voting remains to be settled by the House, with preparatory work on a suitable system underway, following the Speaker's request to the House Service and Parliamentary Digital Service.⁵⁵ The House of Lords will look to hold a similar style of remote sittings using Microsoft software.⁵⁶

Wales

The Welsh Senedd (National Assembly for Wales) is the first national legislature in the UK to move completely online, with its first virtual plenary session of the Parliament held on 1 April 2020.⁵⁷ The meeting was the first virtual Parliament in the world to simultaneously translate between languages.⁵⁸

This was made possible by the introduction of Standing Order 34, which details temporary provisions to facilitate the continuation of Assembly business during the COVID-19 outbreak. Provisions include amended voting rules and the ability to appoint temporary presiding officers and acting chairs of plenary meetings, as well as exclude the public and control broadcasting from plenary and committee meetings.⁵⁹

⁵³ Speaker of the House of Commons, UK Parliament, 'Speaker to all MPs 14 April 2020'. Accessed at: <https://www.parliament.uk/documents/Speaker%20to%20all%20MPs%20-%20Update%20re.%20virtual%20proceedings%2014%20April%202020.pdf>.

⁵⁴ Parliament of the United Kingdom, 'MPs Approve Historic Motion to Allow Remote Participation in Key Commons Proceedings'.

⁵⁵ Speaker of the House of Commons, UK Parliament, 'Speaker to all MPs 14 April 2020'.

⁵⁶ Walker, 'Slimmed-Down "Virtual House of Commons" to Sit Next Week'.

⁵⁷ 'Coronavirus: National Assembly to Hold its First "Virtual" Parliamentary Session'. *National Assembly for Wales*, 31 March 2020. Accessed at: <https://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=2089>.

⁵⁸ 'First Vote Cast at Virtual Plenary as National Assembly for Wales Meets Online'. *National Assembly for Wales*, 8 April 2020. Accessed at: <https://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=2093>.

⁵⁹ National Assembly for Wales, 'Standing Orders of the National Assembly for Wales – March 2020'.

The 'Emergency Senned' meeting occurred over the Zoom videoconferencing platform. Assembly Members heard statements from the First Minister, the Minister for Health and Social Services and the Minister for Economy, Transport and North Wales, and could then ask questions.

Parties agreed to nominate a limited number of Members to attend. The rules regarding voting were also amended so that only four Members were needed for votes at plenary meetings to be valid.⁶⁰

The Presiding Officer of the National Assembly for Wales noted that:

This was a first for the Senedd and a first for any parliament in the UK. The innovative way in which proceedings were conducted reflect the Assembly's determination to continue to fulfil its duty in allowing effective scrutiny to take place ... It is vital that [the] Welsh Government can continue to update Members throughout this developing crisis, and for Members to be able to hold the Government to account ... Democratic accountability is important, and continues to be important even in these most trying of times.⁶¹

The Assembly decided not to livestream its first virtual session, as it was deemed not practical for the meeting to be broadcast live. Rather, the recording was published on the parliamentary website after proceedings.⁶²

Following the first virtual session's success, it was decided that plenary sessions should be held via Zoom for the foreseeable future, especially considering the closure of the Senedd and Pierhead buildings to the public and suspension of all face-to-face events at the National Assembly for Wales, extended until at least 31 May.

The virtual plenary session on Wednesday 8 April was broadcast live online on Senedd.tv and BBC Parliament, with an expanded 28 Members participating in

⁶⁰ 'National Assembly for Wales Holds UK's First Virtual Parliamentary Meeting'. *National Assembly for Wales*, 1 April 2020. Accessed at: <https://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=2090>.

⁶¹ National Assembly for Wales – Plenary, 'Statement by the Llywydd', 1 April 2020. Accessed at: <https://record.assembly.wales/Plenary/6267#A700000220>

⁶² National Assembly for Wales – Plenary, 'Statement by the Llywydd', 1 April 2020.

proceedings.⁶³ Members heard statements on the latest response to coronavirus from the First Minister, and the Minister for Environment, Energy and Rural Affairs.⁶⁴

These were followed by a debate and a vote on Stage 1 of the Local Government and Elections (Wales) Bill. The vote was cast using weighted voting by roll call, where a representative of each party group cast votes on behalf of all Members of the group.⁶⁵

New Zealand

The New Zealand Parliament sat on 25 March 2020 to respond to the COVID-19 epidemic, with far fewer Members present than usual. The House passed legislation to fund the Government's response to the COVID-19 epidemic, and agreed to establish a committee with appropriate oversight responsibilities.⁶⁶

The new Epidemic Response Committee was established to consider and report to the House on matters relating to the Government's management of the COVID-19 epidemic. The committee meets regularly via videoconference, which is livestreamed on the Parliament's website. The powerful committee can compel witnesses and subpoena documents, and is chaired by the Leader of the Opposition, including six Opposition members out of a total 11 Committee members.⁶⁷ The committee heard from 'a range of people from sectors including health, business, police, and civil defence' in its first week.⁶⁸

The scrutiny of the Government performed by this committee is important during the adjournment of Parliament due to COVID-19, with the intention that the committee will keep Government action in check during the pandemic. Indeed, in April, the *Sydney Morning Herald* reported that 'Six former judges, including former High Court justice

⁶³ 'Plenary Meetings Continue, but Senedd Buildings Will Stay Closed Until June'. *National Assembly for Wales*, 7 April 2020. Accessed at: <https://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=2092>.

⁶⁴ 'First Vote Cast at Virtual Plenary as National Assembly for Wales Meets Online'.

⁶⁵ National Assembly for Wales – Plenary, 'Voting Time', 8 April 2020. Accessed at: <https://record.assembly.wales/Plenary/6288#A57495>

⁶⁶ New Zealand Parliament, 'FAQ: Parliament During COVID-19 Alert Level Four' Accessed at: <https://www.parliament.nz/en/get-involved/features/faq-parliament-during-covid-19-alert-level-4/#b>.

⁶⁷ New Zealand Parliament, 'FAQ: Parliament During COVID-19 Alert Level Four'.

⁶⁸ Epidemic Response Committee, New Zealand Parliament, 'COVID-19: What is the Epidemic Response Committee?'. Accessed at: <https://www.parliament.nz/en/get-involved/features/covid-19-what-is-the-epidemic-response-committee/>

Mary Gaudron, called for Australia to adopt New Zealand's approach of using an all-party select committee to scrutinise government decisions'.⁶⁹ Parliamentary select committees will continue to meet remotely using videoconferencing or teleconferencing, with witnesses able to provide evidence using the same technology.⁷⁰

On 25 March, amendments were made to two sessional orders regarding timing for replies to written questions and Government responses to committee reports. The Business Committee also waived the usual proxy vote limit of 25 percent of each party's Members for the sitting on 25 March, with the power to continue to waive the proxy vote limit during future sittings.⁷¹

Members agreed to adjourn the House until the alert level had lowered. With the country under the highest level restrictions under the COVID-19 alert system, Parliament was adjourned for five weeks until 28 April 2020, with the Business Committee, chaired by the Speaker, given authority to vary sitting dates.⁷²

Canada

The Canadian Parliament was suspended on 13 March until at least 20 April 2020 due to the COVID-19 pandemic. Prime Minister Trudeau self-isolated and worked from home for a number of weeks from 12 March, as his wife was confirmed to have COVID-19.⁷³ Parliament was recalled on 24 March in order to approve an \$82 billion financial

⁶⁹ David Crowe and Rob Harris, 'New committee to monitor government on coronavirus measures'. *The Sydney Morning Herald*, 5 April 2020. Accessed at: <https://www.smh.com.au/politics/federal/new-committee-to-monitor-government-on-coronavirus-measures-20200405-p54h8j.html>

⁷⁰ New Zealand Parliament, 'How Select Committees Will Run Under COVID-19 Alert Level 3'. 30 March 2020. Accessed at: <https://www.parliament.nz/en/get-involved/features/how-select-committees-will-run-under-covid-19-alert-level-3>

⁷¹ New Zealand Parliament, 'FAQ: Parliament During COVID-19 Alert Level Four'.

⁷² New Zealand Government, 'New Zealand Moves to COVID-19 Alert Level 3, Then Level 4 in 48 Hours'. 23 March 2020. Accessed at: <https://www.beehive.govt.nz/release/new-zealand-moves-covid-19-alert-level-3-then-level-4-48-hours>

⁷³ Maryam Shah, "'All Clear": Sophie Grégoire Trudeau Thanks Well-wishers After Recovering from COVID-19'. *Global News*, 28 March 2020. Accessed at: <https://globalnews.ca/news/6747353/sophie-trudeau-covid-19-clear/>.

aid package to fund the COVID-19 response, with 32 Members returning to the House of Commons for the emergency sitting.⁷⁴

On 20 April 2020, the House of Commons adopted a motion to adjourn the House until 25 May, unless the four House Leaders agreed it should remain adjourned to a later date or the Speaker recalled the House earlier after consultation with the Government.⁷⁵

The House authorised the Chairs of the Standing Committee on Health and Standing Committee on Finance to convene videoconference or teleconference meetings in order to receive evidence relating to the COVID-19 pandemic during the adjournment.⁷⁶

In response to a request from the Leader of the Government in the House of Commons for advice about the House of Commons Administration's ability to support and facilitate virtual sittings, the Speaker instructed Digital Services and Real Property to ensure the House could hold virtual sittings by 6 May 2020. This work was to be undertaken in collaboration with public and private sector partners as well as in consultation with other legislatures, including the UK, Australia, New Zealand, USA, Taiwan and Brazil.⁷⁷

In investigating options for voting on bills and motions, the Institute for Research on Public Policy recommended Members receive a secure device on which they could cast their vote, as well as proper training in the process including the verification of their

⁷⁴ Tariq Ahmad, 'Continuity of Legislative Activities During Emergency Situations in Selected Countries – Canada'. *Law Library of Congress*, pp.16-18. Accessed at: <https://www.loc.gov/law/help/emergency-legislative-activities/emergency-legislative-activities.pdf>

⁷⁵ House of Commons Canada, 'Fact Sheet: Special Committee on the COVID-19 Pandemic (COVI)'. Accessed at: <https://www.ourcommons.ca/Content/Newsroom/Articles/Factsheet-Special-Committee-COVID-19-EN-FINAL.pdf>.

⁷⁶ House of Commons Canada, 'Fact Sheet: Virtual Committee Meetings', Accessed at: <https://www.ourcommons.ca/Content/Newsroom/Articles/FactSheet-VirtualCommitteeMeetings-0409-EN.pdf>

⁷⁷ The Hon. Anthony Rota MP, 'Letter from the Speaker to the Government House Leader on Virtual Sittings of the House'. House of Commons Canada, 8 April 2020. Accessed at: <https://www.ourcommons.ca/Content/Newsroom/Articles/COVID-19-SpeakerVirtualSittingsResponse-2020-04-07-e.pdf>

votes. The Institute also suggested the development of clear parliamentary procedures for situations of cybersecurity issues and voter errors.⁷⁸

On 28 April, a Special Committee on the COVID-19 Pandemic composed of all Members began physically meeting in the chamber one day every week and virtually over Zoom videoconference two days every week. Chaired by the Speaker, the committee meets to consider ministerial announcements, to allow Members to present petitions and to question Ministers, including the Prime Minister.⁷⁹

European Union

In the European Parliament, Members voted remotely via email to pass three emergency bills relating to COVID-19 in an extraordinary plenary session on 26 March 2020.⁸⁰ Members were emailed a voting paper, to be completed with a yes or no vote and the Member's signature, and returned from their official email address to a specific European Parliament email address. The President, assisted by Parliament's Secretariat, established the result of the vote, which was recorded in minutes and published.⁸¹ The Parliament will be able to vote using this method until 31 July, but it has come under criticism for its potential security and voter error risks.⁸²

In addition, plenary sessions are not being held in Strasbourg as usual, but in Brussels, which hosted the sessions on 16 and 17 April 2020. The Parliament continues its Committees work via videoconference.⁸³

⁷⁸ Nicole Goodman and Aleksander Essex, 'Online Voting Entirely Possible for MPs During Times of Crisis'. *Policy Options*, 25 March 2020. Accessed at: <https://policyoptions.irpp.org/magazines/march-2020/online-voting-entirely-possible-for-mps-during-times-of-crisis/>.

⁷⁹ House of Commons Canada, 'Fact Sheet: Special Committee on the COVID-19 Pandemic (COVI)'. Accessed at: <https://www.ourcommons.ca/Content/Newsroom/Articles/Factsheet-Special-Committee-COVID-19-EN-FINAL.pdf>.

⁸⁰ European Parliament, 'Remote Voting in the European Parliament and National Parliaments'. Accessed at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATA\(2020\)649348_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATA(2020)649348_EN.pdf).

⁸¹ Euractiv, 'European Parliament to Roll Out "Distance Voting" Technology for MEPs'. Accessed at: <https://www.euractiv.com/section/digital/news/european-parliament-to-roll-out-distance-voting-technology-for-meps/>.

⁸² Natasha Lomas, 'EU Parliament Moves to Email Voting During COVID-19 Pandemic'. *Techcrunch*, 24 March 2020. Accessed at: <https://techcrunch.com/2020/03/23/eu-parliament-moves-to-email-voting-during-covid-19/>.

⁸³ Jacopo Barigazzi, Maïa de la Baume and David M. Herszenhorn, 'Coronavirus crisis hastens remote-control Europe'. *Politico EU*, 18 March 2020. Accessed at: <https://www.politico.eu/article/outbreak-forces-eu-to-innovate-on-virtual-meetings-and-decision-making/>

The President of the European Parliament defended the Parliament's move to digital technologies:

We had the possibility to use various tools that allowed our institution to remain open and to continue to work. We said that democracy shouldn't be stopped by a virus. We need the democratic process to help us overcome this emergency.⁸⁴

Brazil

The Brazilian Senado Federal (Federal Senate) has developed a unique remote deliberation and voting system that allows Senators to discuss and vote on matters in

... situations of war, social upheaval, public calamity, pandemic, epidemiological emergency, collapse of the transport system or situations of force majeure that prevent or make it impossible for the Senators to meet in person in the National Congress building or in another physical location.⁸⁵

The plenary sessions feature deliberations over videoconference and voting via a secure application, with two factor authentication comprising a username and password combination, verified photo identification and SMS message. Votes can be recorded simultaneously, with an ability to change votes and see how others have voted. Senators can also use the videoconference to vote, stating their votes one by one, which are then recorded separately.⁸⁶ Although this system was initially developed for corporate meetings, contractors took only eight calendar days to tailor the product for the Federal Senate in order to deliver the Senate Remote Deliberation System.

⁸⁴ European Parliament, 'How Parliament Works During a Pandemic'. 17 April 2020. Accessed at: <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20200408STO76807/how-parliament-works-during-a-pandemic>.

⁸⁵ Brazilian Federal Senate, 'Technology Transfer for Remote Parliamentary Sessions'. Accessed at: http://www.senado.leg.br/senado/hotsites/sdr/index_eng.html.

⁸⁶ Brazilian Federal Senate, 'Technology Transfer Handbook: Remote Deliberation System of the Brazilian Federal Senate'. Accessed at: http://www.senado.leg.br/senado/hotsites/sdr/pdf/SDR_SF_DS_V162_eng.pdf.

Maldives

In a world first, the 87 Members of the Parliament of the Maldives met online for their session on 30 March 2020 using Microsoft 365 and Teams videoconferencing technology. Whilst the Maldivian legislature adopted a measure for virtual proceedings in January 2019 ‘as a tool for collaboration due to its security features and its wide capabilities’, the unfolding global health crisis prompted it to fully migrate to virtual sessions.⁸⁷

In a chamber with no other Members, the Speaker physically chairs parliamentary sittings from the People’s Majlis, while other Members meet with him online. Votes, debates and committee meetings also continue online through Microsoft technologies.⁸⁸

The Speaker encouraged global Parliaments to look to the Maldives as an example of how to move forward during the COVID-19 pandemic:

One-quarter of humanity [are] under de facto house arrest or some other form of isolation, including countless lawmakers. But the world’s parliaments cannot just stop representing their people during this crisis. The institutions of democracy must continue to function. The Maldivian parliament will go on, meeting online, and all its work will continue unimpeded.⁸⁹

LEGAL REFORM: CONSTITUTIONAL CHALLENGES

One of the main considerations regarding a virtual Parliament in NSW is fundamental to our democracy—namely, the *Constitution Act 1902* (NSW). The NSW Constitution requires that Members assemble ‘together’ and that voting is carried out by those who

⁸⁷ ‘Keeping Legislative Wheels Turning During COVID-19’. *Microsoft Asia News Center*, 14 April 2020. Accessed at: <https://news.microsoft.com/apac/2020/04/14/keeping-legislative-wheels-turning-during-covid-19/>.

⁸⁸ Ali Shareef, ‘Maldives Holds World’s First Fully-digitalized Parliament Sitting’. *The Edition*, 30 March 2020. Accessed at: <https://edition.mv/news/15842>.

⁸⁹ Sidhant Sibai, ‘Maldives Parliament Goes Virtual as Social Distancing Becomes Norm to Fight Coronavirus’. *WION*, 28 March 2020. Accessed at: <https://www.wionews.com/south-asia/maldives-parliament-goes-virtual-as-social-distancing-becomes-norm-to-fight-coronavirus-289159>.

are ‘present’, which casts some doubt on the current legal validity of virtual proceedings.⁹⁰

In her examination of the federal situation in Australia, constitutional expert Anne Twomey has argued that while it might have been drafted in the 1800s, the Commonwealth Constitution is commonly interpreted to accommodate changes in technology, and therefore ‘there appears no reason why attendance may not, with the permission of the House, be by electronic means’.⁹¹

The NSW Constitution appears even more accommodating in one respect. Section 10 enables the Governor to fix the time and place for holding every Session of the Legislative Council and Assembly. Provided they give sufficient notice, the Governor ‘may change or vary such time or place as ... judge[d] advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof’.⁹²

In the corporate world, technology has so permeated the practices of board meetings that it is provided for in the governing legislation. Section 248D of the *Corporations Act* indicates that Board directors may meet using any technology consented to by all directors.⁹³ Sections 249S⁹⁴, 252Q⁹⁵ and 601JH⁹⁶ of the *Act* state that Members of committees and compliance schemes may meet using any technology that gives Members as a whole a reasonable opportunity to participate. NSW law governing meetings of Body Corporates similarly permits a voter to be present in person, by proxy or by written or electronic voting paper.

One can therefore easily argue that there is no need for a distinction between being ‘present’ in person as opposed to by videoconferencing or otherwise. It can likewise be argued that there are now different forms of legitimate ‘gatherings’ or ‘assemblies’ – both physical and electronic.

⁹⁰ *Constitution Act 1902 No 32* (NSW). Accessed at: <https://www.legislation.nsw.gov.au/#/view/act/1902/32/full>.

⁹¹ Prof Anne Twomey, ‘Government Accountability and Virtual Parliaments’. *Electoral Regulation Research Network*, 2 April 2020. Accessed at: <https://youtu.be/MvUfs5VZQdk?t=664>.

⁹² *Constitution Act 1902 No 32* (NSW) s 10.

⁹³ *Corporations Act 2001* (Cth) s 248D.

⁹⁴ *Corporations Act 2001* (Cth) s 249S.

⁹⁵ *Corporations Act 2001* (Cth) s 252Q.

⁹⁶ *Corporations Act 2001* (Cth) s 601JH.

While the framers of our NSW Constitution would not have foreshadowed an assembly by videoconference, terms such as ‘present’ and ‘together’ need to be given wider definition and scope today. Such an interpretation is consistent with an ‘ordinary, everyday meaning’ that has evolved over time through to the modern, electronic age.

However, a more conservative interpretation is that introducing a move to a virtual Parliament would require amendments to the NSW Constitution Act. As the relevant provisions are not entrenched, the required amendments would appear to be relatively straightforward. They could facilitate all Members’ ability to fully participate in proceedings. There is also scope to confirm the application of parliamentary privilege to virtual proceedings in any such amendments.

TECHNOLOGY AND LOGISTICS

Typically Parliaments have not enjoyed a reputation for championing innovative technologies. However, progress is being made to modernise Parliaments to encourage digital engagement with Members, staff and the public. The *World e-Parliament Report 2018* noted that:

- Plenary rooms were equipped for video conferencing in 22 percent of Parliaments;
- Committee rooms were equipped for video conferencing in 38 percent of Parliaments;
- 67 percent of Parliaments used some form of electronic voting methods in the plenary chamber, either exclusively or together with manual voting methods; and
- Only two Parliaments, Paraguay and Spain, had systems enabling Members to vote remotely in a plenary session.⁹⁷

Extemporaneous addresses and robust debate are key features of the NSW Legislative Assembly, affectionately known by many as ‘The Bear Pit’. Moving to a virtual Parliament would undoubtedly dampen free-spirited debate to a degree, as it is

⁹⁷ Inter-Parliamentary Union, *World e-Parliament Report 2018*, 2018, p. 50. Accessed at: <https://www.ipu.org/resources/publications/reports/2018-11/world-e-parliament-report-2018>.

difficult to see how spontaneous questions, remarks and points of order could be made by Members without confusing and impractically slowing down virtual proceedings.⁹⁸

While a more ordered debate, with fewer interjections, might lead to a longer-term improvement in the standards of behaviour of Members, that is not the aim of a virtual Parliament. In examining the pitfalls of migrating to a purely digital solution in the UK, Greg Power noted:

Although the bear-pit atmosphere of the Commons is often rightly derided as creating more heat than light, the sheer presence of the place when fully-occupied has a concentrating effect on ministers. And a ministerial ability to read the mood of the place and to hold the floor of the chamber – or not – has been a key factor in determining the outcome of numerous critical debates⁹⁹

Despite this, during a time of unprecedented Government action in response to a once-in-a-generation pandemic, a virtual debate offering Members and the public opportunities for Government scrutiny certainly trumps no parliamentary debate at all.

CONCLUSION

Today our citizens participate in virtual meetings, virtual church services, virtual social activities and other forms of virtual assemblies where people are very much present together and engaging with each other in the digital sphere. So why not have a virtual NSW Parliament?

The NSW Parliament should amend the *Constitution Act* to clearly enable this to occur. It should also introduce sessional orders that facilitate electronic attendance of Members, including for Question Time.

A virtual Parliament has been achieved in many other jurisdictions around the world, and NSW should stand alongside other jurisdictions determined to keep the wheels of

⁹⁸ White, *How Could a Virtual Parliament Work?*.

⁹⁹ Greg Power, 'Can Analogue Politics Work in an Era of Digital Scrutiny? The Negative Effect of COVID-19 on the Informal Politics of Westminster'. The Constitution Unit and Global Partners Governance, 22 April 2020. Accessed at: <https://constitution-unit.com/2020/04/22/can-analogue-politics-work-in-an-era-of-digital-scrutiny-the-negative-effect-of-covid-19-on-the-informal-politics-of-westminster/>

democracy fully turning in these uncertain times. Introducing a virtual Parliament option in NSW would assure citizens of solid representation and accountability in Parliament during a time of crisis. It is time to innovatively pursue a virtual Parliament that reinforces public trust in the NSW Parliament and democracy.

Polling in a Pandemic: Electoral Dynamics, Administration and Law*

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* Double-blind reviewed article.

Abstract The viral pandemic of 2020 has dislocated almost all aspects of social and economic life. Electoral democracy is no exception. How and when should elections to be held, under conditions of restricted movement and personal interactions, as well as against a backdrop of general fear and uncertainty? This article examines these issues from both a legal and administrative perspective. In doing so it draws on initial experience both in Australia and internationally. Some jurisdictions will be hampered more than others by lack of resources or contagion itself. But with sufficient bipartisanship and delegation of emergency rule-making power to electoral commissions, electors can be practically enfranchised, and sufficient campaign liberties be preserved, to ensure free and fair elections. Electoral politics, however, will be skewed by the pandemic in unpredictable ways.

INTRODUCTION

Within months of the start of 2020 a novel coronavirus, whose disease has been officially dubbed Covid-19, spread from its source in China across the globe. In that short time, it feels as if ‘All is changed, changed utterly’.² To the billions of us who have

¹ This article builds on online commentaries published in March and April 2020 by the author.

² W.B. Yeats, ‘Easter 1916’. Yeats would soon nearly lose his pregnant wife to the 1918 influenza pandemic: Elizabeth Outka, *Viral Modernism: The Influenza Pandemic and Interwar Literature*. New York: Columbia University Press, 2020, pp. 167-96.

been under stay-at-home orders, it can feel as if time has paused. Yet scan the news, and the world seems to be hurtling into an uncertain future. At best, politics and governance—alongside social, economic and work arrangements—are straining to adapt. At worst, they are lurching wildly.

Amongst such high concern and drama, what room is there for the ordinary functioning of electoral democracy? Elections serve two great roles. They are the seasonal regenerators of legitimacy in representative government. And they are great rituals, the only truly public gathering in a secular society.³ An unexpected contagion, and lockdowns in response, undermine each of these roles. Must elections be held, and if so when? How are they to be conducted, practically and fairly? In what follows, I will try to distil some of the principles at work and reflect on unfolding practice both near (in Australia) and far.

TO VOTE OR NOT TO VOTE: CONSTRAINTS ON POSTPONEMENTS

As to the ‘must’ and ‘when’, some elections are more constrained than others. The US presidential cycle, most obviously, is constrained by the need for there to be a new presidency every four years. The famous ‘Tuesday next after the first Monday in November’ date is not locked into constitutional stone.⁴ However, it would require an unlikely agreement between the Democrat-controlled House and the Republican-controlled Senate to delay it any deeper into winter. Even then, time would need to be left for electoral challenges, and for the Electoral College to formally cast its votes, before the terms of current the incumbents, Messrs Trump and Pence, expire on 20 January 2021.

Almost all nations seek, in some way, to fix the length of their legislative and executive terms. New Zealand, like the UK, has no entrenched ‘Constitution’. But even its three-year term, due to expire later this year, may only practically be extended with the approval of 75 percent of the Parliament.⁵ The Achilles heel of such flexibility is that the ‘when’ of an election becomes politicised. The New Zealand Labour Government

³ Graeme Orr, *Ritual and Rhythm in Electoral Systems*. Farnham: Routledge, 2015.

⁴ 3 US Code § 1 (‘time of appointing’ electors to Presidential electoral college).

⁵ *Constitution Act 1986* (NZ) s 17 (four-year term) entrenched by *Electoral Act 1993* s 286(1)(a).

is resisting calls from not just the Opposition, but its own coalition partner, to delay its September election date.

Sub-national elections are no less important at this time, than national ones. This is especially so in federalised systems, where power over health provision and movement restrictions lies with regional governments. In Australia, four-yearly general elections are due in 2020 in the State of Queensland and in the two mainland Territories, the Northern Territory and the Australian Capital Territory. In all three cases, a particular date in Spring is fixed in law. But in the two Territories, the dates are only loosely moored. Canberra's legislature can undo its election date.⁶ The Australian Parliament can re-jig the Northern Territory's cycle.⁷ (Safeguarding the health of vulnerable Indigenous communities, which make up a quarter of the Northern Territory, is a particularly vital concern.)

In contrast, Queensland is locked into an election later this year. Its Constitution allows the date to be postponed in 'exceptional circumstances', such as 'a natural disaster', provided the Leader of the Opposition agrees.⁸ But any delay is a one-off option and limited to a five-week hiatus. A longer postponement or cancellation would require a referendum,⁹ and it would be perverse to hold one state-wide vote simply to avoid another.

Local elections tend to be the least constrained in their timing. Indonesian authorities were initially determined to press ahead, in September, with regional polling for local governments and some provincial governors.¹⁰ But with electoral officials becoming infected, the polls were vacated in favour of a December 2020 date, freeing up scarce funds to address the more immediate problem of combatting the virus.¹¹ Local elections in the UK, including the London mayoral race, were postponed by an entire

⁶ *Electoral Act 1992* (ACT) s 100.

⁷ *Northern Territory Self-Government Act 1978* (Cth) s 17.

⁸ *Constitution of Queensland 2001* (Qld) s 19B.

⁹ *Constitution of Queensland 2001* (Qld) s 19I.

¹⁰ Ghina Ghaliya, 'Regional Elections to be Held as Scheduled Despite Covid-19 Pandemic: Govt'. *Jakarta Post*, 19 March 2020. Accessed at: <https://www.thejakartapost.com/news/2020/03/19/regional-elections-to-be-held-as-scheduled-despite-covid-19-pandemic-govt.html>

¹¹ Ghina Ghaliya, 'Govt, House Agree to Reschedule 2020 Regional Elections' Voting Day to Dec. 9'. *Jakarta Post*, 15 April 2020. Accessed at: <https://www.thejakartapost.com/news/2020/04/15/govt-house-agree-to-reschedule-2020-regional-elections-voting-day-to-dec-9.html>

year, rather than be held in May.¹² The Australian State of New South Wales followed suit.¹³ Parlous events in Great Britain have clearly vindicated the postponement there.

In these times, there are no crystal balls. New South Wales authorities would have fretted that a September polling date risked being engulfed by a late-winter, second wave of the virus. As it happens, Australia dramatically curtailed the first wave of the epidemic. In hindsight it would have been better to bring forward the elections there. The challenges for electoral planning, already significant, become immense if an election is already in train when the virus begins its exponential growth or re-growth. French municipal elections proceeded to their first round in March, to the chagrin of some electors. But almost immediately, the second round run-offs, which were due the following week, were put off by almost three months.

The French case is instructive as to the devilish choices to be weighed. With turnout down to around 45 percent (a 20 percent fall on the previous election),¹⁴ the freeness and representativeness of the first round of voting was questioned. Yet even with an ostensible pause in campaigning, the three-month delay has spoiled the momentum of challengers and heightened the benefits of incumbency. Can fair or informed local or regional elections sensibly take place, when public attention is swamped by national responses to an international crisis?

In contrast, Queensland ploughed on with local elections that were already in train when the first wave of the pandemic struck that State. (Its experience is described further below). In the scheme of things, local administration is of less importance in a pandemic than state and national leadership. Rather than proceeding with local elections, it may make sense to keep experienced local officials in place during challenging times, especially in countries where they are part-time officials. Similarly, postponing filling some seats in an upper house poses less legitimacy problems than

¹² *Coronavirus Act 2020* (UK) ss 59-70 (including executive power to postpone petitions for recall of Commons' MPs and by-elections for regional assemblies). 'Coronavirus: English Local Elections Postponed for a Year'. *BBC News*, 13 March 2020. Accessed at: <https://www.bbc.co.uk/news/uk-politics-51876269>

¹³ *COVID-19 Legislation (Amendment) Emergency Powers Act 2020* (NSW) Sch 2, cl 2.12 (empowering ministerial postponement). Heather McNab, 'NSW Local Elections Canned Due to Virus'. *The Canberra Times*, 25 March 2020. Accessed at: <https://www.canberratimes.com.au/story/6697699/nsw-council-elections-canned-due-to-virus/?cs=14231>

¹⁴ Manon Rescan, 'Elections Municipales: Une Participation "Faiblissime" au Premier Tour'. *Le Monde*, 16 March 2020. Accessed at: https://www.lemonde.fr/politique/article/2020/03/15/municipales-une-participation-faiblissime-au-premier-tour-de-l-election_6033168_823448.html

postponing general legislative elections. This has happened in the world's largest electoral democracy, for India's Rajya Sabha.¹⁵ And it has happened in one of the world's smallest, with the postponing *sine die* of periodical elections for two members of Tasmania's Legislative Council.¹⁶ (In Tasmania's case, the two district elections can *only* be triggered when the Public Health Director advises 'there is no longer a serious risk to public health that would make it undesirable' to hold them.)¹⁷ But to note, as we have, that fudges and delays are occurring with elections for local government or for upper house vacancies only highlights the magnified predicament when the timing of lower house, presidential or gubernatorial elections is threatened.

FINDING METHOD IN MADNESS

Enough of the 'when'. What of the 'how' of elections in these times? A scholarly assessment of the US mid-term elections held during the 1918 'Spanish Flu' pandemic noted that three issues are as important in any modern health crisis as they were a century ago: 1. neutral administration, 2. electoral law and electoral officials' emergency powers and 3. disenfranchisement of voters unable to attend the polls.¹⁸ To this we should add, of course, the overarching question of free and fair elections, including the ability to campaign.

The independence, professionalism and resourcing of electoral administration varies around the world. It does not always correlate with GDP, as patchwork US experience has shown. And whatever their funding, all electoral management bodies rely on an army of far-flung casual staff to conduct polling and the count at thousands of

¹⁵ 'Rajya Sabha Elections Postponed over Coronavirus Lockdown'. *India Today*, 24 March 2020. Accessed at: <https://www.indiatoday.in/india/story/rajya-sabha-elections-postponed-over-coronavirus-lockdown-1659005-2020-03-24>

¹⁶ The elections were postponed by ministerial order, under a general power to adjust timelines, even election dates otherwise set in the pre-existing *Constitution Act 1934* (Tas). However the minister's power did not extend to lengthening the terms of office of *elected* officials: *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 13 cf s 16. Parliament had to reconvene to formalise the position of the continuing incumbent MPs: *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 9.

¹⁷ *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 8.

¹⁸ Jason Marisam, 'Judging the 1918 Election'. *Election Law Journal* 9(2) 2010, pp. 141-152, p 142.

locations. This fact alone creates challenges for consistent application of workplace health and safety in a time of contagion.

Ultimately it is for Parliaments to decide which voting avenues will be available to electors. The great ritual of election day assumes in-person voting on a single, focused day when the polity can witness itself coming together. But viruses love mass gatherings. The simplest alternative to in-person polling would be an all-mail election. Such elections are almost unheard of at national level, although Australia managed an all-mail plebiscite in 2017, to legalise gay marriage.

All-mail balloting means a delayed count. It also raises some security issues. If every household receives ballots, the risk of fraud through ballot theft is magnified. There are also logistical challenges in the safety of the additional staff required and in handling the flood of extra paper. Each postal vote involves a physical delivery to the elector, then a physical delivery to the electoral authorities of a doubly enveloped ballot. Long ballots and multiple races add, literally, to the weight of the problem.

What of internet voting? In a few arts of the world, such as Estonia, there are well-established systems and legal protocols for all electors to vote via the internet, if they wish.¹⁹ In other parts, however, such infrastructure is lacking. Even where remote voting is available, it may have only been deployed as a limited option, not a central feature. Australia's most advanced e-voting platform is New South Wales's 'iVote system', offering internet and telephone voting. It was designed to be an adjunct to in-person voting, to assist electors who are disabled or outside the jurisdiction. Scaling up such systems (software, servers, helplines) to meet nationwide demand—whilst ensuring security (against hacking risks, and of the unique ID or password that each elector must receive)—would normally require years of planning, not months. In some countries, such an experiment in a time of uncertainty would stretch the public's trust. Voting from home, whether by the internet or post, may also endanger the secrecy of the ballot, especially for those in subordinate relationships.²⁰

Ultimately, elections in this pandemic will require 'mixed methods'. This will give options to voters who, depending on age, health or population density, have different needs and concerns. Legislating so that electors need not provide any reason to vote

¹⁹ Anna Greta-Tsahkna, 'E-Voting: Lessons from Estonia'. *European View* 12 2013, pp. 59-66.

²⁰ Jorgen Elklit and Michael Maley, 'Why Ballot Secrecy Still Matters'. *Journal of Democracy* 30(3) 2019, pp. 61-75.

early or by post is one way of diluting polling day turnout during a pandemic. But early voting is no panacea: predicting and managing early voting may present more safety issues than polling day itself. Offering multiple options to all is also costlier than focusing on a singular polling day.

Finally, partisanship may pollute such decisions. There is an unedifying wrangle in the US at present, and a spectre of state legislatures finagling electoral laws, in the name of accommodating the virus, to suit the party in power.²¹ A central focus of this wrangling is a deep spat between Democrats, who want to make postal voting an absolute right or even a norm, and elements of the Republican party who want to maintain constraints on it.²² In contrast, measures to maximise turnout appear to have multi-partisan support in Australia. Even Labor, which historically was wary of widespread postal voting, seems sanguine with its temporary extension to all.²³

As it happens, access to postal ballots for this year's US elections is expanding significantly. At the time of writing, 11 states, where postal voting requires a pro-active application citing an acceptable reason, had expanded such reasons to include concerns about contracting the virus. Another 12 had pledged to automatically send postal vote applications to all registered electors.²⁴ There is a difference, of course, in both security and likely turnout, between sending a postal vote application to everyone and an 'all mail' ballot where every elector *automatically* receives a ballot through the post. In an example of the latter, the US state of Nevada is holding a primary election

²¹ Zack Stanton, "'The Nightmare Scenario': How Coronavirus Could Make the 2020 Vote a Disaster'. *Politico Magazine*, 28 April 2020. Accessed at: <https://www.politico.com/news/magazine/2020/04/28/2020-election-coronavirus-disaster-impact-215559>. These risks come on top of electoral administration already challenged by resources constraints in parts of the US, by partisan manipulation of electoral boundaries and rules, by foreign misinformation campaigns: Rick Hasen, *Election Meltdown: Dirty Tricks, Distrust and the Threat to American Democracy*. New Haven: Yale UP, 2020.

²² Fears or hopes of significant partisan effects appear to be overstated: Lee Drutman, 'There is No Evidence that Voting by Mail Gives One Party an Advantage: Could that Change this Fall?'. *FiveThirtyEight.com*, 12 May 2020. Accessed at: <https://fivethirtyeight.com/features/there-is-no-evidence-that-voting-by-mail-gives-one-party-an-advantage/>

²³ Matt Wordsworth, 'Coronavirus May See Full Postal Vote for Queensland October State Election, Premier Says'. *ABC News*, 10 April 2020. Accessed at: <https://www.abc.net.au/news/2020-04-10/coronavirus-may-change-queensland-state-election-to-postal-vote/12138788>

²⁴ Elise Viebeck, 'The Pandemic Has Already Altered How Tens of Millions of Americans Can Cast Their Ballot'. *The Washington Post*, 24 May 2020. Accessed at: https://www.washingtonpost.com/politics/the-pandemic-has-already-altered-how-tens-of-millions-of-americans-can-cast-their-ballots-this-year/2020/05/23/0e3c3bf8-9532-11ea-91d7-cf4423d47683_story.html

where all electors are mailed a ballot. Although approved under a Republican governor, this move has been attacked by President Trump; it has also been upheld by a court.²⁵

ELECTORAL ADMINISTRATION: THE QUEENSLAND (AND OTHER) EXPERIENCES

In the Queensland experience noted earlier, local elections went ahead on 28 March 2020, in the face of rising numbers of infections. Although those numbers were subsequently and quickly quelled, that was not knowable at the time. The election also took place at a time when stay-at-home orders were in place (except for essential business, work and shopping). Polling day itself took place just ten days after Queensland's Chief Health Officer gave broad orders to restrict movement to counteract the virus, including limiting gatherings in public to just two unrelated people, except where necessary for work.

Almost two months earlier, Queensland had been the first state in Australia to issue an order declaring the virus to be a 'public health emergency'. At the time, few hackles were raised. The emergency order was gazetted in three short paragraphs, unassumingly tucked away after a notice decreeing that Elton John's 'Farewell Yellow Brick Road' concert was to be a 'major sports facility event'.²⁶ Awareness of the virus only slowly crept up, like the virus itself. Citizens responded, including by seeking out early and postal voting options, accelerating pre-existing trends to convenience voting.

There were democratic reasons for these elections proceeding. Two local government areas needed to come out of administration. In deciding to proceed, the government heeded medical advice that queuing to poll was safer than buying groceries. Whilst

²⁵ Brett Neely, 'Trump Repeats Unfounded Claims About Mail-in Voting, Threatens Funding to 2 States'. *NPR*, 20 May 2020. Accessed at: <https://www.npr.org/2020/05/20/859333693/trump-repeats-unfounded-claims-about-mail-in-voting-threatens-funding-to-some-states>. *Paher v Cegavske* (US District Court, District of Nevada, No 3:20-cv-00243-MMD-WGC, 30 April 2020) held that automatic delivery of all-mail ballots was a reasonable measure to safeguard health and protect the franchise, and that speculation about possible electoral fraud was just that.

²⁶ Steven Miles MP, 'Public Health Emergency Order'. *Queensland Government Gazette*, vol. 383(25), 21 January 2020, p 97. The 'Farewell' concert went the way of all gatherings during the pandemic.

this caused angst in parts of the media and community,²⁷ it is fair to say there are few more orderly places than an Australian polling booth under the secret ballot.

As in the national elections in South Korea held in April, there has been no statistical evidence of a spike in infections due to the polling in Queensland. South Korea's public health authorities stated that 'not one case' attributed to the election was reported during the incubation period.²⁸ Unlike in Queensland, South Korean authorities had not instituted home confinement orders as such, so holding public polling there did not risk sending out contradictory signals. The Korean National Electoral Commission disinfected polling stations, required voters to wear masks, provided gloves and administered temperature checks. Its stated objectives were to guarantee suffrage (including of those in quarantine or overseas) whilst not exacerbating the virus.²⁹

Queensland's measures were a little more rudimentary, with some hand sanitiser provided, physical distancing practised and electors encouraged to 'bring your own pen or pencil'. In contrast, things were less sanguine in Wisconsin's primary day election, on April 7, when the virus was entrenched. Polling there was marked by chaos and queues. Voters in Milwaukee, its major city, were restricted to just three polling stations, leading to huge queues and a disparate and negative impact on ethnic minority and poorer electors.³⁰ On the other hand, evidence of a spike in infections due to in-person polling in Wisconsin is so far equivocal.³¹ The lesson seems to be that safety in running an election during a pandemic is a mixture of good election administration, good governance of the contagion in the country or state concerned, and good fortune.

²⁷ Ben Smee, 'Queensland Elections: Coronavirus Poses "Lethal" Risk to Voters, Experts Say'. *The Guardian* (Australia), 27 March 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/mar/27/queensland-elections-coronavirus-poses-lethal-risk-to-voters-experts-say>

²⁸ 'South Korea Records No New Domestic Cases Due to Covid-19 for First Time Since February'. *The Guardian*, 30 April 2020. Accessed at: <https://www.theguardian.com/world/2020/apr/30/south-korea-records-no-new-domestic-cases-of-covid-19-for-first-time-since-february>

²⁹ National Election Commission of the Republic of Korea, *Election Management in Response to COVID-19*. Seoul: National Election Commission, 11 May 2020, p. 2.

³⁰ Shruti Banerjee and Megan Gall, 'COVID-19 Silenced Voters of Colour in Wisconsin', *Demos.org*, 14 May 2020. Accessed at: <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>

³¹ Alana Watson, 'Did the April 7 Election Impact Covid-19 Cases in Wisconsin? Researchers Have Mixed Views'. Wisconsin Public Radio, 20 May 2020. Accessed at: <https://www.wpr.org/did-april-7-election-impact-covid-19-cases-wisconsin-researchers-have-mixed-views>

National elections in Mali also proceeded in March and April,³² using the two-round system, with the decisive second-round on April 19. Polling went ahead with in-person voting, overshadowed as much by the kidnapping of the Opposition Leader as by the early stages of the virus outbreak. Again, the democratic instinct trumped health fears. After being long delayed by civil unrest, Mali's elections were seen as crucial for hopes of a return to political stability.

Elections, as with much else in government in a pandemic, require deft and swift executive agency rulings. Giving electoral officials emergency powers involves embracing enhanced administrative discretion and powers of direction. In ordinary times, electoral commissions would run a mile from such powers, to preserve their perceived independence. They tend to see themselves as administrators rather than regulators: as umpires implementing detailed rules laid down by parliaments, not as designers of the game. To make electoral rules is to invite criticism, especially when the rules have (unintended) partisan effects or (inevitable) impacts on liberties.³³ But when expertise and a rapid response is required, delegating specific powers to commissions, rather than relying on parliaments to legislate, can enhance the law-making process rather than detract from it.

In any crisis situation, rule of law issues arise. Normal law-making processes are considered, considerate of public consultation, and accountable to elected representatives. In a health emergency, these ideals are upended. Executive power reigns supreme, but it is channelled through a complex chain of delegation and experts. In the case of Queensland's local elections, hurried legislation delegated some issues directly to Ministers, other specific issues directly to the Electoral Commission and, as a catchall, allowed other matters to be dealt as they arose through ministerial regulations.³⁴ Those regulations were permitted to have retrospective operation. If necessary to the timely and safe conduct of the election, they could even override the

³² 'Polls Close in Mali amid Coronavirus Threat, Security Fears'. *Al-Jazeera*, 30 March 2020. Accessed at: <https://www.aljazeera.com/news/2020/03/polls-open-mali-coronavirus-threat-security-fears-200329081850465.html>

³³ Michael Maley and Graeme Orr, *Developing a Legislative Framework for a Complex and Dynamic Electoral System*. Melbourne: Electoral Regulation Research Network (Working Paper No 64), November 2019, paras 1.4 and 3.14-3.15.

³⁴ *Local Government Electoral Act 2011* (Qld) Pt 9A.

electoral act itself, Henry VIII-style.³⁵ Such regulations either take the form a ministerial decree on a topic, or they could delegate power (subject to conditions) to the Electoral Commission.³⁶

Alongside this, the public health emergency order awakened the broad powers of the Chief Health Officer: she quickly issued a detailed public health direction for the election.³⁷ All of this, like much in any emergency, was necessarily *ad hoc* and variable. Even a seasoned lawyer or electoral official would have found it difficult to trace and keep up with the various changes to the law and their sources.

An example of an Electoral Commission directive governing the Queensland local elections was a strict limit on all campaign activities, and paraphernalia, at polling places.³⁸ Although a staple of Australian campaigning, such paraphernalia had come to be seen by many voters as wasteful, even prior to present concerns about viral transmission via the handling of such material. As a result, few eyebrows were raised at what, in normal times, could have been seen as an unconstitutionally draconian limit on political communication. A second Electoral Commission directive was issued to candidates and scrutineers.³⁹ To the upset of some candidates, this directive limited scrutineering, to maintain safe physical distancing at the election night count.

Around the same time, Ireland's Seanad elections proceeded.⁴⁰ These are generally low-key affairs: they do not involve a mass electorate and have long been by postal vote. But one Irish innovation of note during that country's first wave of the virus was how the counts, from Dublin Castle and the two university constituencies, were streamed live over several days. Whilst a soporific to the average viewer, the streaming

³⁵ *Local Government Electoral Act 2011* (Qld) ss 200A, 200L.

³⁶ *Local Government Electoral (2020 Quadrennial Election) Regulation 2020* (Qld).

³⁷ *Local Government Election and State By-Election Direction (No. 2)* (Qld), 27 March 2020. This updated and replaced a first direction issued just 5 days earlier.

³⁸ Electoral Commission Queensland, *Direction about Display of How-to-Vote Cards and Election Material*, Version 3, 25 March 2020.

³⁹ Electoral Commission Queensland, *Direction about Candidates and Scrutineers at Polling Places*, Version 1.3, 29 March 2020. In what may have been a typographical error, the direction was said to apply from midnight *after* polling day.

⁴⁰ Houses of the Oireachtas, 'Seanad General Election 2020'. Accessed at: <https://www.oireachtas.ie/en/elections/seanad-general-election-2020/>

of the counts was accompanied by explanations from the returning officers and offered a visual token of the public openness of the electoral process.

FREE AND FAIR ELECTIONS: THE FRANCHISE AND THE CAMPAIGN

To focus on the nuts and bolts of the when and how of elections, as we just have done, is one thing. But it can risk losing sight of the broader question of what makes an election ‘free and fair’. As Mackenzie wrote in the 1950s, this question can be answered in this way: ‘the election depends on the voters’ choice’.⁴¹ As he also observed, there is no ideal way to conduct a free and fair election. Given the many contested conceptions of democracy, people typically can only agree on ways to prevent the machinery of elections going wrong, rather than on a single right way to conduct elections.⁴² There is no ideal healthy democracy, but many pathologies to be avoided in practice.⁴³ How then can the franchise be ensured and, in particular, disenfranchisement be avoided, during a time of crisis?

Calling off an election would be the ultimate disenfranchisement. But holding one in an ongoing pandemic will affect turnout. It may be practically or psychologically harder for certain groups—the elderly, the afflicted, those in mandatory quarantine and those stuck overseas—to turnout to poll. Cynics might say that elections are already skewed by higher turnout amongst older citizens. But that sociological fact will not mollify the individuals who miss out. As mentioned earlier, a technologically simple option would be to broaden the entitlement to postal ballot to all electors or even to mandate that every elector receives a postal ballot. But how will all-postal voting pan out, in a time of high contagion? Will everyone feel safe venturing out to find that increasingly rare beast, the local post-box? Are younger people, stuck at home and relying on online shopping, growing more familiar with the old-fashioned postal service?

South Korea’s national election, mentioned earlier, was widely seen as a success. Turnout, at two-thirds of the electorate, was the highest for many years in that country.

⁴¹ W.J.M. Mackenzie, *Free Elections*. London: Allen and Unwin, 1958, p. 12.

⁴² Mackenzie, *Free Elections*, p. 169.

⁴³ Graeme Orr, ‘The Law of Electoral Democracy: Theory and Purpose’, in Alan Bogg, Jacob Rowbottom and Alison Young (eds.), *The Constitution of Social Democracy*. Oxford: Hart, 2020, pp. 161-177. This chapter generally explores the contested conceptions within the law of electoral democracy.

Given the pandemic, and that the election proved a no-contest, this speaks well of the resilience of that country's population. At Queensland's local elections, turnout was down 8 percent, but still reached just over 75 percent. Of that, nearly 50 percent voted early but in-person, 30 percent turned out in person on polling day and 20 percent voted by post.

Compulsory voting of course applies in Australia. Is such *forced* enfranchisement fair, where there may be personal risk? Seventy-five percent turnout for a mere local election demonstrates the power of compulsion to habituate voting. But the other quarter of the Queensland electorate will have to receive 'show cause' penalty notices for not turning out. The State's Deputy Premier at the time weighed in, expressing a hope that any registered elector citing virus concerns would have the fine for not voting waived.⁴⁴

Voting is the ultimate purpose, of any election. But it is the culmination, not the entirety, of the process. The campaign period is also important, and it serves a complex amalgam of purposes. Campaigning is meant to set the agenda. It may sharpen (as well as muddy) popular deliberation. It certainly enacts partisan antagonism. And it is a focal point for political expression. But like all other forms of social interaction, campaigning is both stymied and re-routed by epidemics.

We saw (above) a simple example of that from Queensland, with strict restrictions on the number of activists and type of paraphernalia permitted at polling stations. Such measures may do more than cast a quiet blanket over a polling place ritual. They impede the flow of information and advocacy that some electors, compelled to vote and to vote preferentially, may rely on, especially at non-parliamentary elections where party cues are typically absent.

Besides any direct electoral strictures, social distancing rules and norms will transform campaigning. Rallies and indeed any large-scale meeting will be deterred, if not prohibited, in a pandemic. In Queensland, street stalls and the inevitable waving of electoral corflutes (posters) from the side of roads proceeded as normal. But with both foot and road traffic low, stalls and posters ceased to be a cost-effective way of gaining attention. Doorknocking was almost non-existent. In severe lockdowns, such activities

⁴⁴ Matt Dennien, 'Trad Vows to Go into Bat for Queenslanders Who Failed to Vote in Council Poll'. *Brisbane Times*, 1 April 2020. Accessed at: <https://www.brisbanetimes.com.au/politics/queensland/trad-vows-to-go-in-to-bat-for-queenslanders-who-failed-to-vote-in-council-poll-20200401-p54g7l.html>

may even be subject to police restraint or fines, where they are not included in lists of permissible activities.

Australia has an implied freedom of political communication, crafted by the High Court, that provides protection for both expression,⁴⁵ and participation.⁴⁶ The freedom is not as broad as the first amendment liberty in the United States of America (USA). Australian courts instead apply a 'proportionality' test to see if restrictions on political communication are justified, rather than a 'strict scrutiny' approach.⁴⁷ Courts in any event may not be the ideal place for 'second-guessing' governments or Parliaments over scientific and economic advice.⁴⁸ This is especially so when assessments of risk are clouded in a pandemic, as they are epistemologically, by the economic and epidemiological difficulties of modelling and data collection, and inherently by the uncertain and shifting nature of a novel virus. Examples of such uncertainties include modes of transmission, medical effects and morbidity, and the dynamic interaction of governmental responses with human behaviour and vectors of contagion.

Yet a court *must* make a ruling, when asked to do so by a plaintiff whose ability to campaign or communicate politically is restricted by law or administrative practice. The German Constitutional Court recently held that freedom of association forbids any blanket ban on public protest during this pandemic.⁴⁹ Instead, such gatherings must be permitted on a case-by-case assessment, provided organisers cap the size of the gathering, given the physical forum available, to allow physical distancing between individual protestors to minimise the risk of viral transmission.⁵⁰ In the first case on point in the US, on the other hand, a federal judge upheld California's ban on mass gatherings. The case was brought by a candidate who wished to hold a political rally

⁴⁵ Adrienne Stone, 'Expression', in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution*. Oxford: OUP, 2018, pp. 952-78.

⁴⁶ Joo Cheong-Tham, 'Political Participation', in Saunders and Stone (eds), *Oxford Handbook*, pp. 979-1012.

⁴⁷ *McCloy v NSW* (2015) 257 CLR 178.

⁴⁸ Jonathan Liberman, 'COVID-19 and Administrative Powers in Australia'. adminlawblog.org, 30 March 2020. Accessed at: <https://adminlawblog.org/2020/03/30/jonathan-liberman-covid-19-and-administrative-powers-in-australia/>

⁴⁹ Bundesverfassungsgericht, 1 BvR 828/20, 15 April 2020 and 1 BvQ 37/20, 17 April 2020.

⁵⁰ Joseph Nasr, 'Germans Have Right to Protest During Coronavirus Pandemic: Court', *DW* (Deutsche Welle), 16 April 2020. Accessed at: <https://www.reuters.com/article/us-health-coronavirus-germany-protests-idUSKCN21Y220>

and an employee of a gun club who wished to hold a rally protesting gun law enforcement.⁵¹

Even if restrictions on physical distancing are lifted, face-to-face mobilisation will not spring back to previous levels. On top of any formal legal norms, there is the reality that people themselves will restrain their interactions voluntarily. Such inhibitions, whether legal or social, have indirect effects on political equality. Groups such as Get Up! and unions, which had turned to face-to-face political mobilisation in the past decade, will need to pivot to other forms of political outreach. Micro-parties, independents and community organisations that lack resources (and rely on face-to-face campaigning or physical manifestations to attract media attention) will also be particularly challenged.⁵² These restraints will also reinforce the ongoing trend towards electronic campaigning. On the upside this may encourage more creative use of social media; on the downside it may also prompt the bigger parties to direct an even larger share of their spending to broadcast and online advertising.

ELECTORAL POLITICS AMIDST RADICAL UNCERTAINTY

The account of the pandemic's challenges to electoral democracy given here is, at most, a preliminary one. International IDEA is currently compiling information about elections both delayed and proceeding, around the world.⁵³ Others more expert than I, such as Australia's chief psephologist Antony Green, are laying out templates for specific contexts.⁵⁴ My account is in any event rooted in the contours of the present epidemic in particular jurisdictions, most of them well resourced. It assumes

⁵¹ *Givens v Newsom* (US District Court, Eastern District of California, No 2:20-cv-00852-JAM-CKD, 8 May 2020). For criticism see Floyd Abrams and John Langford, 'The Right of the People to Protest in Lockdown'. *New York Times*, 19 May 2020. Accessed at: <https://www.nytimes.com/2020/05/19/opinion/coronavirus-first-amendment-protests.html>

⁵² So too will any laws designed to encourage such campaigning. An example is the very low expenditure limits at Tasmanian Legislative Council elections: *Electoral Act 2004* (Tas) s 160 (currently \$17,500 for a candidate, with no party spending).

⁵³ International IDEA, 'Global Overview of COVID-19 Impact on Elections'. Accessed at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁵⁴ Antony Green, 'How to Manage the Eden-Monaro By-Election in a Time of Covid-19'. 1 May 2020. <https://antonygreen.com.au/managing-the-eden-monaro-by-election-in-a-time-of-covid-19>

controllable paths of contagion and continuing social order, neither of which can be guaranteed.

It also leaves out broader political considerations. Chief amongst these is how something as all encompassing as a pandemic will skew electoral politics itself. Will incumbents enjoy an undue advantage in such times of upheaval, if electors become exceedingly risk averse and media outlets focus on the threat of the virus to the point that opposition voices are sidelined? There is evidence of this happening during the first wave of the virus. The South Korean Government was returned in a landslide. Not a single office changed stripe in the vast local government area that runs Queensland's capital of Brisbane. And the New Zealand Labour Government has enjoyed a 27 percent shift in its fortunes, relative to the Opposition National Party. Between those opinion polls, New Zealand managed to contain the virus as well as anywhere in the world. (This turnaround in polling may also explain why the New Zealand Government, as noted earlier, has no present interest in postponing the general election, whilst the Opposition does.)

An alternative scenario to such incumbency entrenchment involves antagonistic politics resuming relatively quickly. How quickly this may happen will differ depending on the political culture, level of government and stage of the outbreak concerned. Dissidence and critique in liberal democracies has already been evidenced in libertarian protests against lockdowns in the USA and in Germany, and in sharp investigative journalism into policy failings in the United Kingdom.⁵⁵ Where such disgruntlement is present, it is likely to intensify as the economic impacts of the virus and measures to control it depress economic activity.

Between the spectre of societies rallying round incumbents and the alternative scenario of their lashing out at them, lies a middle ground. Electors may reward administrations who, whether through good luck or good management, have seen the virus contained, whilst punishing those where its effects are most profound. Such a crude application of strict political accountability, however, would only highlight the virus's overweening effect on politics. What room is there for sustained public debate on other pressing issues, such as climate change, when the virus has spread through all aspects of social, medical, industrial and economic affairs? The answer may lie in the

⁵⁵ Jonathan Calvert, George Arbuthnott and Jonathan Leake, 'Coronavirus: 38 Days When Britain Sleepwalked into Disaster'. *The Sunday Times* (UK), 19 April 2020, pp. 6-7.

old line, 'Never waste a crisis'. Governments of different stripes, and lobbyists from different interest groups, are readying themselves to sell policy reforms as 'necessary' responses to the virus rather than as ideological choices.⁵⁶

The Plague (La Peste) has returned to the bestseller lists. Its author, Albert Camus, intended it as an allegory of Vichy France, rather than a study of life in a time of contagion. But Camus would have shared the melancholy many of us feel in the present, as fear washes through our days and radical uncertainties challenge our personal and societal choices. In the book, Camus wrote that 'each of us had to be content to live only for the day, alone under the vast indifference of the sky'.⁵⁷ This is the existential dilemma we all face, as individuals, at present.

Collectively, though, we live under far from indifferent systems of government, systems growing vaster as they seek to protect us and grapple with radical uncertainty. Whether this future will accentuate nationalism and authoritarianism, democratic socialism, or technocratic liberal-centrism, is hard to say. But one thing is certain, electoral democracy will play the ultimate role in deciding our political fates.

⁵⁶ Already, the Australian Government has flagged its intention to push deregulation in taxation and industrial relations, alongside its delayed October budget, issues not canvassed in its 2019 election platform. Elsewhere, administrations of different hues are contemplating making permanent some of the more social democratic measures that were introduced as interim protections and Keynesian stimulus to counter the initial shock wave of the virus.

⁵⁷ Albert Camus, *The Plague*, trans. Stuart Gilbert. Harmondsworth: Penguin, 1960, p. 63.

Electoral Administration and Aboriginal Voting Power in the Northern Territory: Reality and Potential Viewed from the 2019 Federal Election*

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* Double-blind reviewed article.

Abstract Due to population proportion, Aboriginal people have the potential to exercise electoral power in Australia's Northern Territory. Looking back from 2019, this paper explores the contribution of Aboriginal votes to federal elections in the Northern Territory. It argues that Aboriginal votes have made the Territory stronger for Labor, compared to regional areas of Queensland and Western Australia. It also notes low enrolment and turnout figures in House of Representatives divisions with high proportions of Aboriginal population, which suggests potential Aboriginal electoral power that is as-yet unused. Turnout and enrolment figures are related to developments in electoral administration since 1983, when enrolment was first made compulsory for Aboriginal Australians over 18, as for others. Whether compulsory enrolment and voting has yet been achieved by electoral administration in remote areas is discussed, as is the

¹ **Acknowledgements:** Marian Simms and Marian Sawyer encouraged me to contribute a 2000-word essay on the Northern Territory to a June 2019 Academy of Social Sciences Australia workshop of political scientists examining the 2019 federal election. From that little essay has grown a much larger one, covering issues of electoral administration in remote areas as well as Aboriginal voting. Thank you Marians for the encouragement to delve again into this important field. My other great debt is to officers of the Australian Electoral Commission who shared their knowledge with an academic who just phoned up and started asking them about some of the details of their administrative practice. While this detail was all on the public record, their assistance in guiding me to it was invaluable. Anonymous referees provided useful comments, which helped me tighten both the style of writing and the argument. Francis Markham and Rodney Smith also made useful suggestions during editorial processes. Many thanks to you all.

limited use in these areas since 2012 of new digital-age provisions for direct enrolment without claim that draws on information from other Government sources.

INTRODUCTION

It is often said that, as three percent of the Australian population, Aboriginal and Torres Strait Islander people have little if any electoral power.² While superficially reasonable, such statements both understate and overstate possibilities. By way of overstatement, they can imply that this three percent of votes could be mobilised and moved together. But diversity of Indigenous political attitudes, and geographic and socioeconomic circumstances, make this difficult. On the side of understatement, it could be noted that at particular positions and times within electoral systems, even one or two percent of votes can be crucial in determining results. Also contributing to understatement is a lack of attention to concentrations of Indigenous voters in some geographic divisions of electoral systems. It is this last form of understatement that informs this paper focusing on Aboriginal voting power in the Northern Territory, both real and potential, as viewed from the 2019 federal parliamentary election.

This paper generally uses the term Aboriginal, rather than Indigenous, because it does not address the electoral power of Torres Strait Islanders who are geographically concentrated in the Torres Strait and other parts of Queensland. While some Torres Strait Islanders have migrated to the Northern Territory and, over the generations, become locals, census data suggests that their numbers are small compared to numbers of people in the Territory identifying as Aboriginal.³ The terms federal and

² During the 2010 federal election campaign, Noel Pearson began one of his regular opinion pieces in *The Australian* as follows: 'No time confirms the democratic impotence of Aboriginal and Torres Strait Islander peoples in the Australian commonwealth more than federal elections. Australia's 500,000 indigenes, comprising 3 per cent of the national population spread thinly across the nation's electorates, count for nought in our democracy'. N. Pearson, 'Indigenes Still in the Political Wilderness'. *The Australian*, 7 August 2010.

A more recent example occurs in the November 2018 *Final Report* of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of the Commonwealth of Australia, Canberra, November 2018, p. 12. It quotes a submission from the National Congress of Australia's First Peoples as saying that as 'only 3 per cent of the Australian population', Aboriginal and Torres Strait Islander peoples are 'easily sidelined' and 'lack the political capital to push for substantial policy reform'.

³ Of the 58,248 people identifying as Indigenous in the Northern Territory in the 2016 Census, 744 identified as Torres Strait Islander and 1,699 as both Aboriginal and Torres Strait Islander. The vast majority (55,805) identified

Commonwealth are used interchangeably to refer to elections for the bicameral Australian Parliament in Canberra, comprised of the House of Representatives and the Senate. Some reference is also made to the single-chamber sub-national Parliament in Darwin, the Northern Territory Legislative Assembly (NTLA), elections for which have been on a fixed-date four-year cycle since August 2012.

The paper begins by focusing on the partisan results of federal elections in the Northern Territory over several decades; which candidates from which parties won, on the basis of which votes, including Aboriginal votes once enfranchised. The paper observes early that turnout of electors on the Electoral Roll in the Northern Territory appears to be in decline over the last decade. This raises questions about electoral administration, as well as Aboriginal voting. By the end of the paper, its focus will have shifted significantly in an administrative direction, including to the application of digital-age Federal Direct Enrolment and Update (FDEU) to Aboriginal people in remote areas.

FEDERAL ELECTIONS IN THE NORTHERN TERRITORY: BACKGROUND HISTORY AND STATISTICS 2001-2019

The Northern Territory elects just four representatives to the Australian Commonwealth Parliament, two Senators and two Members of the House of Representatives (MHRs). The two Senators are elected for three year terms, so there is no difference between half-Senate and double-dissolution elections in the Territory, unlike in the States. The two House of Representatives divisions cover Darwin and the satellite city of Palmerston (Solomon), and the regional and remote remainder of the Territory (Lingiari).⁴ This electoral geography dates from 2001, before which there was just one division for the House of Representatives, called Northern Territory and dating back to 1922. Senate representation for the Territory dates from 1975, having been much debated in 1973 and only passed through the joint sitting of the Australian

as Aboriginal and not Torres Strait Islander. See Table I02 Aboriginal and Torres Strait Islanders Peoples Profile, 2016 Census, Australian Bureau of Statistics.

⁴ A redistribution in February 2017 transferred approximately 3,000 electors and five outer suburbs within Palmerston Municipality from Solomon to Lingiari. Litchfield Municipality on the rural fringe of Palmerston was also transferred into Lingiari. Hence Solomon no longer covers all of Darwin and Palmerston. Conversely, Lingiari has acquired a small number of electors on the edges of the capital city.

Commonwealth Parliament after the 1974 double dissolution election.⁵ Hence having even four representatives in the Australian Commonwealth Parliament is relatively new for the Northern Territory, and two steps up from having just one representative from 1922 to 1974.⁶

Table 1. MHRs for the Division of the Northern Territory 1922-2001, by Party Affiliation

Member	Party	Period
H.G. Nelson	Labor	1922-34
Adair Blain	Independent	1934-49
Jock Nelson	Labor	1949-66
Sam Calder	Country	1966-74
	Country Liberal	1974-80
Grant Tambling	Country Liberal	1980-83
John Reeves	Labor	1983-84
Paul Everingham	Country Liberal	1984-87
Warren Snowdon	Labor	1987-96
Nick Dondas	Country Liberal	1996-98
Warren Snowdon	Labor	1998-2001

Source: https://en.wikipedia.org/wiki/Division_of_Northern_Territory

In party terms, the House of Representatives division of the Northern Territory proved a long-cycle swinger during its 80 years from 1922 to 2001. Long periods of dominance by Labor alternated with periods of a decade or more in which a Country Liberal or a conservative independent held the seat. From 1980 these swings between the major parties became more frequent, with three Country Liberal Party (CLP) wins and five Australian Labor Party (ALP) wins over two decades (see Table 1). Labor MHR Warren

⁵ See Michael Sloan, 'Representation of Commonwealth Territories in the Senate'. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop64/c07

⁶ The voting rights of that one MHR were also restricted until 1968.

Snowdon experienced four wins and a loss in the division of the Northern Territory after 1987, and in 2001 he opted for the new division of Lingiari. In 2019, Snowdon was re-elected in Lingiari for a seventh consecutive term, confirming this as a long-term safe Labor seat and Snowdon as an even longer-term political survivor (see Table 2).⁷ The division of Solomon, in contrast, has become a short-cycle swinger, changing between CLP and ALP three times in the seven elections since 2001 (see Table 3). In 2019 Luke Gosling retained Solomon for Labor for a second term, following two terms for the CLP's Natasha Griggs, one term for Labor's Damian Hale and two terms for the CLP's David Tollner.

Table 2. Division of Lingiari Electoral Statistics 2001-2019

Year	ALP First Preference Vote (%)	ALP Two Candidate Preferred Vote (%)	CLP First Preference Vote (%)	CLP Two Candidate Preferred Vote (%)	Votes Cast	Informal (%)	Enrolled	Turnout (%)
2001	47.8	55.3	39.2	44.7	45,973	4.9	57,077	80.6
2004	50.7	57.7	38.4	42.3	45,234	4.9	58,205	77.7
2007	54.0	61.1	34.7	38.8	49,084	4.9	60,404	81.3
2010	40.1	53.7	34.3	46.3	46,409	7.5	61,168	75.9
2013	39.8	50.9	38.2	49.1	49,715	7.4	65,916	75.4
2016	39.8	58.4	31.7	41.6	46,525	7.9	63,131	73.7
2019	44.8	55.5	36.9	44.5	51,009	5.1	69,994	72.9

Source: Australian Electoral Commission, 'Federal Elections'. Accessed at: https://www.aec.gov.au/Elections/Federal_Elections/

Senate elections in the Northern Territory are, in party terms, a foregone conclusion. Because the Droop quota for election of two Senators is one-third of formal votes cast, the CLP and ALP each safely win one place in the Senate. Table 4 shows that in primary

⁷ Snowdon is now the only serving MHR whose tenure reaches back to the 1987 election. Arguably, Snowdon has revived the historic pattern of long-term incumbent MHRs in the Territory after a period of changing short-term incumbents from 1980 to 1998.

Senate votes, Labor has fallen just below the quota once in recent years (2013). But to be in danger of losing, the major parties would need to fall to around half a quota, with a minor party increasing its vote up towards 20 percent. The Greens achieved 10.2% of primary Senate votes in the Territory in 2019, but as in past elections this just positioned Green voters as a significant proportion of the almost one-third of voters who do not contribute directly to the election of a Northern Territory Senator. The two-thirds of votes that do elect Territory Senators seem destined for the foreseeable future to be safely shared between Labor and the CLP.

Table 3. Division of Solomon Electoral Statistics 2001-2019

Year	ALP First Preference Vote (%)	ALP Two Candidate Preferred Vote (%)	CLP First Preference Vote (%)	CLP Two Candidate Preferred Vote (%)	Votes Cast	Informal (%)	Enrolled	Turnout (%)
2001	38.4	49.9	41.8	50.1	49,624	4.4	53,945	92.0
2004	38.5	47.2	48.8	52.8	49,912	4.0	54,725	91.2
2007	41.9	50.2	46.8	49.8	53,065	2.9	57,641	92.1
2010	36.1	48.3	46.4	51.8	53,672	5.1	59,891	89.6
2013	35.4	48.6	44.7	51.4	56,413	5.3	63,163	89.3
2016	40.9	56.0	44.0	44.0	58,665	7.0	69,998	83.8
2019	40.0	56.1	43.9	43.9	57,602	4.4	69,332	83.1

Source: Australian Electoral Commission, 'Federal Elections'. Accessed at: https://www.aec.gov.au/Elections/Federal_Elections/

Apart from these patterns of winning and losing between the two major parties, the other notable feature of Tables 2-4 is in the far right column, which shows votes cast as a percentage of enrolments. These turnout figures seem to be in gradual decline since 2007. Suggestions about how digital-age electoral administration may be contributing to these figures will be explored later.

Table 4. Northern Territory Senate Electoral Statistics 2001-2019

Year	ALP First Preference Vote (%)	ALP Two Candidate Preferred Vote (%)	CLP First Preference Vote (%)	CLP Two Candidate Preferred Vote (%)	Votes Cast	Informal (%)	Enrolled	Turnout (%)
2001	38.4	49.9	41.8	50.1	49,624	4.4	53,945	92.0
2004	38.5	47.2	48.8	52.8	49,912	4.0	54,725	91.2
2007	41.9	50.2	46.8	49.8	53,065	2.9	57,641	92.1
2010	36.1	48.3	46.4	51.8	53,672	5.1	59,891	89.6
2013	35.4	48.6	44.7	51.4	56,413	5.3	63,163	89.3
2016	40.9	56.0	44.0	44.0	58,665	7.0	69,998	83.8
2019	40.0	56.1	43.9	43.9	57,602	4.4	69,332	83.1

The 'fourth party' is the party other than the ALP, CLP and Greens that gained the highest number of votes at each election. The fourth parties were: United Australia Party 2019, Rise Up Australia Party 2016, Palmer United Party 2013, Australian Sex Party 2010, Citizens Electoral Council 2007, Australian Democrats 2004 & 2001.

Source: Australian Electoral Commission https://www.aec.gov.au/Elections/Federal_Elections/

THE 2019 CAMPAIGN EXPERIENCE, LINKS WITH NTLA ELECTIONS AND COMPARISONS

During the 2019 federal election campaign, the Northern Territory achieved prominence in the national media just once, when Prime Minister Scott Morrison and Opposition Leader Bill Shorten both visited on Tuesday 23 April.

The positive role of Morrison's visit was to support the CLP's two aspiring women candidates for the House of Representatives and their new number one woman Senate candidate, who was replacing retiring Senator, and Indigenous Affairs Minister of the previous six years, Nigel Scullion. In negative campaign mode, Morrison criticised the Gunner Northern Territory Labor Government, which had been elected in a landslide in August 2016 but by the end of 2018 was suffering defections over management of its large debt and budget deficit. Morrison called Michael Gunner's Government the 'worst in the country' and argued that 'if you can't manage money, you can't run a country'. The not-so-hidden implication was that poor money management was a problem for Labor that extended to Shorten and his federal team.

Shorten's task during his Territory visit was the more staid one of supporting two incumbent MHRs and a Senator seeking re-election. His rhetoric was about 'Territorians', 'looking to the future' and 'taking opportunities', as 'Territorians do'. One unfortunate event in the aftermath of Shorten's visit was the disendorsement of Labor's second Senate candidate, Wayne Kurnoth, over 'questionable social media posts'.⁸

Links between Commonwealth parliamentary elections and sub-national parliamentary elections in jurisdictions are often debated, but almost always inconclusively. When Labor retained its two Northern Territory House of Representatives seats in 2019, this was interpreted by local Labor faithful as a vote of confidence in the Gunner Government and as evidence that Morrison's criticisms of it had misfired.⁹ While this probably over-interprets the result, there is some evidence in Tables 2-4 that NTLA elections and federal parliamentary elections in the Territory can interact.

In the Commonwealth parliamentary election of July 2016, support for the CLP was at historic lows. Two-term MHR for Solomon, Natasha Griggs, lost her seat comprehensively with just 34.5% of first preference votes and 44.0% of the two candidate preferred count (see Table 3). In Lingiari in 2016, second-time CLP candidate Tina MacFarlane received 6.5% less primary votes than in 2013 (see Table 2). These 2016 federal election results probably reflected the disarray in the NTLA of the CLP Government, which had suffered both a change of Chief Minister and several defections since its convincing election win in August 2012.¹⁰ A month after Griggs' loss in the 2016 federal election, the CLP under Adam Giles lost the August 2016 NTLA election to Gunner's Labor in a similarly comprehensive fashion.

An earlier example that suggests less interaction between federal and NTLA elections is Kevin Rudd's federal win in November 2007, in which Labor gained historic high levels of voter support across the Northern Territory (see Tables 2-4). Nine months later, in

⁸ 'Labor Candidate Sacked Over 'Stupid' Memes'. SBS News, 29 April 2019. Accessed at: <https://www.sbs.com.au/news/labor-candidate-sacked-over-stupid-memes>

⁹ Jano Gibson, 'Northern Territory Labor Optimistic of 2020 Re-election after Federal Election Results'. ABC News, 20 May 2019. Accessed at: <https://www.abc.net.au/news/2019-05-20/election-results-give-nt-labor-optimism-for-re-election-in-2020/11131530>

¹⁰ B. Smee and C. Walsh, *Crocs in the Cabinet. Northern Territory Politics: An Instruction Manual on How Not to Run a Government*. Sydney: Hachette Australia, 2016.

August 2008, a Labor Government in the NTLA retained office for a third term by the barest margin.

The next election for the NTLA is due in August 2020. While it will, of necessity, be a test of the Gunner Labor Government criticised by Morrison during the 2019 federal election campaign, any links between the elections in May 2019 and August 2020 will be tenuous.

From a larger geographic perspective, one obvious question arising from the 2019 federal election is: why was the Northern Territory strong for Labor when regional areas of Queensland to the east and Western Australia to the west were so much more problematic? The political economies of these outlying regions based on resource extraction industries appear similar, but there is something different occurring in the Territory, electorally, compared to Queensland and Western Australia.

With its much smaller capital city in the north rather than the south, one difference is that the Northern Territory has a larger proportion of public administrators and other white collar professionals building careers in the jurisdiction but ultimately destined to leave. Gerritsen has called this 'the politics of the expatriates' and notes as a corollary that the 'Real Territorians' are the Aboriginal people for whom the Northern Territory is a long-term home.¹¹ This points to a second big difference from Queensland and Western Australia, the Indigenous proportion of the population in the Northern Territory.

Table 5 gives Australian Bureau of Statistics data from the 2016 Census, organised by divisions of the House of Representatives, to show the very different Indigenous proportions of population not only between Lingiari and Solomon in the Northern Territory, but also between Lingiari and the surrounding outback House of Representatives divisions of Kennedy, Maranoa and Leichardt (Queensland), Durack and O'Connor (Western Australia) and Grey (South Australia). With its population identifying as Aboriginal and/or Torres Strait Islander at a rate of between 41.7% and 46.6% in the 2016 Census, Lingiari stands out as the division of the House of Representatives with the highest Indigenous proportion of population by a significant margin. This is the one House of Representatives division where Indigenous Australians are a high enough proportion of the population to have clear electoral power. But what

¹¹ R. Gerritsen (ed.), *North Australian Political Economy: Issues and Agendas*. Darwin: Charles Darwin University Press, 2010, pp. 32-33.

do we know about Indigenous voting and how it might contribute to Labor's strength in the Northern Territory?

Table 5. Place-of-Enumeration Populations of House of Representatives Divisions in 2016 Census

	Total Population	Aboriginal and/or Torres Strait Islander (ATSI)	ATSI/Total (%)	Indigenous Status Not- Stated (ISNS)	ATSI/Total ISNS (%)
Lingiari	114,545	47,811	41.7	11,943	46.6
Solomon	114,120	9,752	8.5	11,214	9.5
Northern Territory	228,836	58,248	25.5	23,157	28.3
Durack WA	181,764	30,305	16.7	20,229	18.8
O'Connor WA	156,323	9,198	5.9	14,098	6.5
Leichardt Qld	175,449	29,086	16.6	15,683	18.2
Kennedy Qld	155,394	21,471	13.8	13,944	15.2
Maranoa Qld	149,266	8,898	6.0	12,234	6.5
Grey SA	143,526	10,403	7.2	10,113	7.8
Australia	23,401, 892	649,171	2.8	1,411,491	3.0

Source: Australian Bureau of Statistics, General Community Profiles 2016 Census Table G07. Accessed at: <https://www.abs.gov.au/websitedbs/D3310114.nsf/Home/Census?OpenDocument&ref=topBar>

WHAT WINS ABORIGINAL VOTES: PARTY PREFERENCE, ABORIGINAL CANDIDATES, AN ABORIGINAL PARTY?

Studies of Aboriginal voting in Australia are rare but some foundational work was done at the time of the 1984 election for the Australian Commonwealth Parliament, the first in which voting *and* enrolment were compulsory for 'aboriginal natives' as for other Australians over 18. Loveday and Jaensch conducted a 'street survey' of Aboriginal

political knowledge and voting intentions in north Australia in 1984 and also analysed election results in polling places known to have predominantly Aboriginal populations. One of their findings was that the 'major parties, Labor and the CLP, were relatively widely recognised' and that there was also quite good awareness of candidates for the 1984 House of Representatives election in the Northern Territory, who included former CLP Chief Minister Paul Everingham standing against incumbent Labor MHR John Reeves.¹² In voting intention, Loveday and Jaensch found a large majority supporting Labor (79%), but also noted some geographic variation (with Nguiu/Wurruyiyanga a low 49%) and some change since 1983.¹³ This prompted discussion about whether Aboriginal votes could be won away from Labor in significant numbers, particularly by Aboriginal candidates standing for existing parties, as Independents or by the formation of an Aboriginal party.¹⁴ Loveday and Jaensch hypothesised that, as new voters, Aboriginal voters in north Australia may not be deeply loyal to Labor by family or industrial history, but rather may be more instrumental and contemporary in their party preference, and hence potentially able to be won away. They foresaw more potential for an Aboriginal party to win such votes than Aboriginal candidates standings as independents or for other existing parties.

Here it is worth examining Warren Snowdon's long career as a non-Indigenous Labor MHR in Lingiari, the division with the highest Aboriginal proportion of population in Australia. In 2019, Snowdon faced a high profile Warlpiri woman candidate for the CLP, Alice Springs Town Council member Jacinta Price. While Price increased primary votes for the CLP by over five percent from 2016 (to 36.9%), this was not at Snowdon's expense, as he similarly increased his primary votes from the previous election to 44.8% (see Table 2).¹⁵ Whereas in May 2019 there were six candidates in the Lingiari election, in July 2016 there had been nine, including Yolgnu Independent Yingiya Mark Guyula who attracted 4.3% of votes and would a month later go on to be elected to

¹² P. Loveday and D. Jaensch, *Mobile Polling and the Aboriginal Vote: The Federal Election in the North 1984*. Darwin: Australian National University North Australia Research Unit, 1985, pp. 101-103. I was one of seven observers/interviewers who Loveday and Jaensch drew on for this study.

¹³ Loveday and Jaensch, *Mobile Polling and the Aboriginal Vote*, pp. 96-97.

¹⁴ Loveday and Jaensch, *Mobile Polling and the Aboriginal Vote*, pp. 109-114.

¹⁵ Price achieved this percentage increase despite the CLP still being in disarray after its 2016 NTLA election loss. Snowdon, by contrast, could call on a relatively stable and well-organised branch of the ALP across the Territory, including in remote areas.

the NTLA for the division of Nhulunbuy.¹⁶ Competition from Guyula probably contributed to Snowdon's low primary vote in the 2016 election (39.8%), but this had little or no negative effect on Labor's two candidate preferred vote, which was strong at 58.4% (see Table 2).

During his long tenure in Lingiari, Snowdon has faced high-profile competing Aboriginal candidates on a number of occasions. In 2007, these were Adam Giles (CLP 34.7%) and Maurie Ryan (Independent 2.6%). In 2010, they were Leo Abbott (CLP 34.3%), Barb Shaw (Greens 12.6%) and Ken Lechleitner (Independent 4.5%). In 2013 for a second time, they included Barb Shaw (Greens 7.8%) and Ken Lechleitner (Australian First Nations Peoples Party 2.9%). Of these three elections, it was in 2013 that Snowdon and Labor were pushed closest to losing Lingiari, due to a strong vote for first-time non-Indigenous CLP candidate Tina MacFarlane (38.2%), rather than significant competition for Snowdon from the two second-time Aboriginal candidates Shaw and Lechleitner. Rather than building their vote standing as candidates for a second election, Shaw and Lechleitner attracted a lesser proportion of votes in their second attempts. Lechleitner attracted more votes in 2010 as an independent than when he stood for the Australian First Nations Peoples Party in 2013.

Another take on patterns of support for Labor and Snowdon within Lingiari is contained in Table 6, which breaks down primary votes won by the six candidates in 2019 by five different polling booth types/locations. In the polling booths on the edge of Darwin, in Katherine and in Alice Springs, the CLP's Jacinta Price won over 40 percent of primary votes and clearly outpolled Labor's Snowdon. However, in the small towns and discrete Aboriginal communities serviced by Remote Area Mobile Polling (RAMP) teams, Snowdon's support levels rose dramatically and the CLP's fell commensurately. Almost 17,000 votes from these predominantly Aboriginal polling booths turned Lingiari from a potential win for the CLP and Jacinta Price to a repeat safe win for Labor and Snowdon. These geographic patterns of voting within Lingiari in 2019 reflect a phenomenon referred to in analyses of elections for the NTLA as the 'regional/outback divide', whereby the CLP wins more votes in regional towns and Labor more in the outback.¹⁷ These are strong major-party patterns of voting across parliamentary

¹⁶ W. Sanders, 'Comparing Northern Territory Elections, 1974-2016: Independent Success in a Strong Two-Party System'. *Australian Journal of Politics and History* (forthcoming 2020).

¹⁷ W. Sanders, 'Labor's Landslide, CLP's Tsunami: The 2005 Northern Territory Election'. *Australian Quarterly: Journal of Contemporary Analysis* 77(3) 2005, pp. 4-6.

elections at two levels of government, rather than being greatly affected by the Aboriginality of particular candidates.

Table 6. Primary votes (%) for six candidates in Lingiari election 2019, by polling booth location/ type

Polling booth location/type	ALP	CLP	Green	UAP	RUAP	Independent	Votes Cast	Informal
Darwin edge	29.4	49.1	7.3	3.8	3.1	7.2	12,125	5.2
Katherine	32.2	43.7	6.8	3.6	3.0	10.7	4,135	4.7
Alice Springs	37.1	44.7	12.7	2.0	1.2	2.5	11,933	3.5
Small towns	52.9	28.8	9.6	3.0	3.6	2.1	2,984	5.1
RAMP teams	71.9	17.3	4.0	1.5	3.8	1.6	13,816	6.8
All Votes	44.8	36.9	8.2	2.8	2.9	4.4	51,009	5.1

Source: <https://tallyroom.aec.gov.au/HouseDivisionPage-24310-306.htm>

Notes: 'Small towns' are Nhulunbuy, Jabiru and Tennant Creek. Some 6,000 votes are included in the 'All Votes' count but not in the five categories of polling booth locations/ types. These include Absent, Provisional, Declaration Pre-Poll and Postal Votes, plus 417 votes from Christmas Island.

The conclusion from Snowdon's long tenure in Lingiari seems to be that the Aboriginality of candidates has made little difference to recent Commonwealth parliamentary elections in the Northern Territory. In this one House of Representatives division in which there is such a significant Aboriginal population presence, Labor will no doubt think hard about an Aboriginal replacement candidate when Snowdon retires.¹⁸ But in the meantime Aboriginal voters have not moved away from Labor in large numbers to support Aboriginal candidates standing either as Independents or for other parties, including in 2013 for the Australian First Nations Peoples Party. In

¹⁸ It is possible after three decades that Snowdon's following is quite personal and that Labor will be far more vulnerable when he does retire. Snowdon's departure could be a good test of the party loyalty of Aboriginal Labor voters.

retrospect, Loveday and Jaensch in 1984 probably overstated the potential of an Aboriginal party to draw votes away from Labor.¹⁹ Loyalties of voters to the major parties seem to have prevailed over the years in the regional towns and remote Aboriginal communities of Lingiari, keeping this division Labor for seven federal elections, irrespective of the Aboriginality of competing candidates.

ENROLMENT AND TURNOUT: IS AEC ADMINISTRATION MAINTAINING ABORIGINAL VOTING AS ‘DE FACTO VOLUNTARY’ IN REMOTE AREAS IN THE DIGITAL AGE?

A more recent study of Aboriginal voting behaviour in remote Australia, by Lisa Hill and Kate Alport, was based on focus groups with Anangu women in the House of Representatives division of Grey in remote South Australia before the 2007 federal election. Drawing more on international literature than had Loveday and Jaensch, they focused on low voter turnout among Aboriginal people in remote regions, rather than for which parties or candidates Aboriginal people voted. They argued that accepted reasons for not voting in remote areas and a lack of enforcement meant that the ‘voting regime’ in remote Aboriginal communities was ‘*de facto* voluntary’ rather than compulsory.²⁰ Within this frame, Hill and Alport explained low voter turnout by a combination of low feelings of ‘political efficacy’ among remote Aboriginal voters and the ‘low salience’ of ‘first order’ elections for Commonwealth and State Parliaments. To demonstrate the latter, they quoted turnout figures in their field site of Indulkana that were higher for Anangu Pitjantjatjara Yankunytjatjara Council elections (853 in 2002, 595 in 2005), than for South Australian parliamentary elections (719 in 2002, 409

¹⁹ Elsewhere I have argued that the 2012 NTLA elections showed the prescience of Loveday and Jaensch’s idea that Aboriginal votes could be won away from Labor. These votes were mainly won by the CLP which in 2012 recruited some high-profile Aboriginal candidates in the NTLA’s seven ‘bush’ seats. Labor also contributed to its loss of Aboriginal votes in bush seats in the 2012 NTLA election by the imposition of local government reforms in remote areas over the previous four years. Two Aboriginal candidates for the new Australian First Nations Peoples Party attracted vote percentages in the teens in 2012, but had little or no effect on the final election result. W. Sanders, ‘Winning Aboriginal Votes: Reflections on the 2012 Northern Territory Election’. *Australian Journal of Political Science* 47(4) 2012, pp. 691-701.

²⁰ L. Hill and K. Alport, ‘Voting Attitudes and Behaviour Among Aboriginal Peoples: Reports from Anangu Women’. *Australian Journal of Politics and History* 56(2) 2010, p. 246.

in 2006) or for Commonwealth parliamentary elections (240 in 2001, 245 in 2004).²¹ To demonstrate low feelings of 'political efficacy', they noted that the Anangu women with whom they talked 'want to be involved in politics, ... especially voting', but want electoral officials to visit 'before an election is called' and to have 'the opportunity to speak with government representatives', either 'personally or through a town meeting' and 'in their own language'.²² The lack of these sorts of opportunities in 2007 and before was seen as contributing to low feelings of political efficacy among the women and a 'major psychological source of voting abstention'.²³

Hill and Alport's suggestions for stimulating turnout among remote Aboriginal electors were twofold, and in different time scales. In the short term, they emphasised electoral education. In the longer term, they suggested reserved Indigenous seats. On electoral education, they noted the abolition in 1996 of the Australian Electoral Commission's (AEC) Aboriginal and Torres Strait Islander Electoral Information Service (ATSIEIS) but also, at their time of writing in 2010, the establishment within the AEC of a new Indigenous-specific commitment focusing on electoral participation.²⁴ On reserved seats, they noted past Australian scepticism, both in official and academic inquiries, but suggested that this could be argued against and overcome.²⁵ Two years later, with another collaborator, Hill published an article on how reserved Indigenous seats in the Australian Commonwealth Parliament might play out, electorally and politically.²⁶

Another perspective on Indigenous electoral participation in remote areas can be discerned in Norm Kelly's 2012 discussion of 'professionalism and partisanship' in Australian 'electoral management'. Kelly noted low voter turnout as a particular problem of the Northern Territory compared to other Australian jurisdictions, and related this to proportion of potential voters who are Indigenous. He used the data reproduced in Table 7 to demonstrate that turnout against enrolment had for a quarter century been *lower* in NTLA elections than in federal elections in the Territory, contrary to Hill and Alport's idea that more local elections were more 'salient' and would attract

²¹ Hill and Alport, 'Voting Attitudes and Behaviour Among Aboriginal Peoples', p. 255.

²² Hill and Alport, 'Voting Attitudes and Behaviour Among Aboriginal Peoples', p. 248.

²³ Hill and Alport, 'Voting Attitudes and Behaviour Among Aboriginal Peoples', p. 249.

²⁴ Hill and Alport, 'Voting Attitudes and Behaviour Among Aboriginal Peoples', p. 249.

²⁵ Hill and Alport, 'Voting Attitudes and Behaviour Among Aboriginal Peoples', p. 257.

²⁶ G. Evans and L. Hill, 'The Electoral and Political Implications of Reserved Seats for Indigenous Australians', *Australian Journal of Political Science* 47(3) 2012, pp. 491-505.

higher turnout. Kelly's explanation of lower turnout focused on the shorter election period of just 18 days for NTLA elections, which meant that administrative processes had to 'meet tight deadlines'. A change to fixed date elections for the NTLA from 2012 was seen as alleviating this problem only slightly, as the election period was only extended to 19 days.²⁷

Kelly's argument in relation to federal elections in the Northern Territory was that turnout had fallen in the 2000s compared to the 1990s by an average of some 4.5% and he related this to the abolition of the AEC's ATSIEIS in 1996.²⁸ Kelly interviewed past Electoral Commissioners, one of whom believed that the abolition of ATSIEIS could be seen 'affecting the roll' over the next ten years.²⁹ Kelly also noted the Rudd Federal Labor Government's 2009 budget commitment of \$13m to a new Indigenous Electoral Participation Program (IEPP), which was intended to increase both enrolment and turnout levels among eligible Indigenous electors. Kelly judged this a 'well-intentioned response to the declining participation rates', but also one that could be judged partisan because of its 'electoral benefits for Labor'.³⁰ Ultimately, Kelly's argument was to remove all such budgetary decisions in electoral management from serving politicians to independent professional electoral administrators, in order to avoid any suggestion of partisanship in electoral management. However, as one of Kelly's former Electoral Commissioner interviewees reflected: 'No matter how independent you are, everybody is dependent on somebody for money'.³¹

In 2013 the three-year-old IEPP was 'redesigned' and a formal evaluation of it was conducted in conjunction with the August election for the Commonwealth Parliament.³² The major 'conclusion' was that the redesigned IEPP had 'helped to increase participation and reduce informality at the 2013 Federal Election'. A

²⁷ N. Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management*, Canberra: Australian National University Press, 2012, pp. 66-68.

²⁸ Kelly inserts an extra E for Education into the name and acronym of this program. While I believe this is incorrect, it is also understandable as the word Education was certainly in the name of Indigenous-specific programs of the Australian Electoral Office in the 1970s and early 1980s.

²⁹ Kelly, *Directions in Australian Electoral Reform*, p. 70.

³⁰ Kelly, *Directions in Australian Electoral Reform*, p. 71.

³¹ Kelly, *Directions in Australian Electoral Reform*, p. 70.

³² Australian Electoral Commission, *Federal Election 2013: Indigenous Electoral Participation Program Evaluation*, Canberra: Australian Electoral Commission, February 2014, p. 3

secondary conclusion ‘highlighted variations in the services delivered to Indigenous electors’ and suggested that ‘ongoing work’ was needed on ‘the IEPP objective of a well-managed national program delivered in a consistent manner by State and Territory offices’. Twenty-five recommendations made in the evaluation report were to be ‘a central focus of the 2014-15 IEPP Program Planning cycle’, to enable it ‘to build on its strengths and continue to improve Indigenous electoral participation’.³³

A parallel AEC evaluation report was undertaken on a ‘new model’ of Remote Area Mobile Polling trialled in the Northern Territory at the 2013 federal election in which an AEC technical officer worked alongside two staff members of the Department of Human Services/Centrelink for logistic support and community liaison. This took as its background a drop in turnout in Lingiari between the 2007 and 2010 elections of over five percent (see Table 2, right column). The evaluation found that the ‘revised model was able to stop this downward trend’, but not reverse it.³⁴

³³ Australian Electoral Commission, *Federal Election 2013*, p. 44.

³⁴ Australian Electoral Commission, *Federal Election 2013: Northern Territory Remote Voter Services Evaluation*. Canberra: Australian Electoral Commission, 2014, p. 23.

Table 7. Northern Territory Voter Turnout, 1983-2010

Year	Federal House of Representatives (%)	NT Legislative Assembly (%)
1983	81.4	81.6
1984	85.5	-
1987	79.9	71.2
1990	89.4	81.6
1993	88.8	-
1994	-	80.7
1996	89.1	-
1997	-	79.0
1998	90.3	-
2001	86.1	80.6
2004	84.3	-
2005	-	80.1
2007	86.5	-
2008	-	75.7
2010	82.7	-

Source: N. Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management*, Canberra: Australian National University Press, 2012, p. 67.

That Aboriginal electoral participation and mobile polling in remote areas were discussed and evaluated in tandem in 2013 was appropriate and also a repetition of history. It was this combination that sparked Loveday and Jaensch's study of the 1984 federal parliamentary election in north Australia. Three years later, they conducted

another 'street survey' and observed the 1987 federal election while reviewing the AEC's then Aboriginal Electoral Information Service.³⁵ Writing about that review a year later, Loveday reported that the 1987 survey had again suggested reasonable levels of political knowledge, but also the continuing need for a program of assistance for Indigenous people to address the complexity of voting. Loveday dwelt on the issue of enrolment and compulsory voting in a way that is still worth quoting:

Enrolment is another source of difficulty. All citizens are eligible to vote from age eighteen and in order to vote a citizen must be enrolled. Enrolment has been compulsory for all non-Aboriginal citizens for many years. When first enfranchised in 1962, Aborigines were not required to enrol, but if enrolled they were required to vote. In 1983, enrolment was made compulsory for them too. Levels of enrolment vary from area to area and indicative figures, obtained in the 1987 survey, suggest that enrolment is likely to vary from about sixty-six per cent to a little over eighty per cent of those eligible.

After further discussion of 'difficulties', Loveday concluded as follows:

The Aborigines themselves and the Electoral Commission therefore need help in both the enrolment and the voting phases of the work entailed by the electoral legislation. In the long run the hope is that the training given to Aboriginal Electoral Assistants will result in building up the knowledge of elections in Aboriginal communities to the point where the special program will no longer be needed. That day is a long way off.³⁶

Together with mobile polling in remote areas, the IEPP since 2010 has become a renewed focus within the AEC for addressing enrolment and voting difficulties for Aboriginal and Torres Strait Islander citizens. The new IEPP is a digital age refraction of the old ATSIEIS, abolished in 1996. It has focused on promotional materials in digital formats that can be used not only by AEC staff but also by 'partners',³⁷ such as Indigenous community organisations and remote-area local governments with high

³⁵ P. Loveday, A. Randall, W. Sanders and D. Jaensch, *The Aboriginal Electoral Information Service: Report of the Review 1987-1988*. Darwin: Australian National University North Australia Research Unit, 1988 (mimeo).

³⁶ P. Loveday, 'The Australian Aboriginal Electoral Information Service'. *Australian Journal of Public Administration* XLVII(4) 1988, pp. 343-50.

³⁷ Australian Electoral Commission, 'Indigenous Australians'. Accessed at: <https://www.aec.gov.au/Indigenous/>

proportions of Indigenous people among their elected Members and constituents. The AEC has also developed a focus on Indigenous people in its larger attempts to improve enrolment against population estimates, as advised by the Australian Bureau of Statistics.

Table 8. Enrolment in 151 House of Representatives Divisions Compared to Estimates of Eligible Population, March 2019

	>98%	>95 - 98%	>90 - 95%	>85 - 90%	>80 - 85%	75 - 80%
Number of House of Representatives divisions	54	52	41	1	1	2

Source: Australian Electoral Commission, '2019 Enrolment Rates by Division'. Accessed at: https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/rate-div/index.htm

During 2019, the AEC produced Tables 8 and 9 as part of its work on enrolment. In the 151 divisions of the House of Representatives grouped in Table 8, the two outlying divisions with an 'enrolment rate' compared to estimates of eligible population in the range 75-80% are Lingiari and Durack. These are also the two divisions with the highest proportions of Indigenous people in their populations (see Table 5). Table 9 involves a more speculative statistical exercise in which data from the Department of Human Services/ Centrelink has been used to estimate numbers of Indigenous-identifying people on the Electoral Roll. It suggests that the percentage of Indigenous Australians enrolled in Western Australia and Northern Territory may still be down around two-thirds. This level of Indigenous enrolment is as low or lower than Loveday and Jaensch estimated from their surveys back in 1984 and 1987—and may suggest the cost of losing the ATSIEIS in 1996. But the good news in the bottom line of Table 9 is that the AEC believes Indigenous enrolment had improved in 2018, from when it made similar estimates in 2017.³⁸ By contrast, Labor MHR for Lingiari Warren Snowdon put a

³⁸ This change from 2017 to 2018 is no longer discernible on the AEC website as the 2017 estimates have disappeared and 2019 estimates added. Estimates for 30 June 2019 show the Northern Territory Indigenous enrolment rate rising to 68.2% and the Australian Indigenous enrolment rate rising to 76.6%. See Australian Electoral

negative interpretation on these 2018 Indigenous enrolment figures and used them to criticise the AEC for lessening staff in the Northern Territory in 2017.³⁹

Table 9. Estimates of Indigenous Enrolment by State and Territory, June 2018

	Estimated Indigenous voting age population	Estimated Indigenous enrolled	Estimated Indigenous unenrolled	Enrolment rate (%)
New South Wales	164,845	143,891	20,954	87.3%
Victoria	36,358	27,775	8,763	76.0%
Queensland	135,642	98,357	37,285	72.5%
Western Australia	64,545	41,182	23,363	63.8%
South Australia	26,522	18,622	7,900	70.2%
Tasmania	18,004	15,150	2,854	84.1%
ACT	5,000	3,971	1,029	79.4%
Northern Territory	50,563	34,130	16,433	67.5%
Australia 2018	501,659	383,078	118,581	76.4%
Australia 2017	488,148	364,631	123,517	74.7%

Source: Australian Electoral Commission, 'Indigenous Enrolment Rate'. Accessed at: https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm

Commission, 'Indigenous Enrolment Rate'. Accessed at: https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm.

³⁹ Warren Snowdon, 'Government Cuts Leave Indigenous Enrolment Rates Lagging', 14 March 2019. Accessed at: www.warrensnowdon.com/2019/03/14/government-cuts-leave-indigenous-enrolment-rates-lagging/

Behind this recent AEC work on enrolment is a digital-age development in electoral administration, introduced by the Gillard Labor Government in 2012 through s103B of the *Commonwealth Electoral Act*, entitled ‘Enrolling unenrolled person without claim or notice from the person’. Known administratively as Federal Direct Enrolment and Update (FDEU), it allows the AEC to use information from other government sources to automatically enrol persons who it believes are eligible by age and other criteria, and are resident at an address in the ‘relevant Subdivision’. This is a major change from the previous 100 years of electoral administration, in which potential electors needed to lodge a claim for enrolment at a particular address. Recognising this major change, s103B (6) requires that, if FDEU is used, the AEC ‘must give the person notice in writing’ of ‘the person’s full name and address as entered on the Roll for the person’.

The AEC has been conservative in its use of these new enrolment possibilities over the last seven years. The sources of government information used to identify potential enrollees are currently limited to Centrelink/Department of Human Services, the Australian Taxation Office and the National Exchange of Vehicle and Driver Information Service. Also the AEC has chosen not to use FDEU in ‘mail exclusion areas’, where mail delivery is to a single community address rather than individualised street addresses. The AEC’s rationale for this approach relates to the requirement under s103B (6) to give notice to FDEU enrollees, which it argues may not always be timely or direct enough in mail exclusion areas.

Lingiari has many mail exclusion areas in remote Aboriginal communities, so effectively FDEU is not being used in much of this House of Representatives division. This raises questions about how electoral administration for remote areas may be diverging from the AEC’s developing digital-age administration in urban and regional areas. What other methods are being used both to encourage and to update enrolment in these remote areas, now that the AEC is becoming a more centralised, digital-age organisation?

While Tables 10 and 11 are not direct reproductions of AEC Tables (unlike Tables 8 and 9), they are based on enrolment information from the AEC website. Table 10 presents a time series of enrolment numbers and rates against estimates of eligible population at 30 June each year from 2010 to 2019, both for the whole of Australia and for the Northern Territory. Two things are notable in Table 10 relating to the new digital age of electoral administration since 2012. First, FDEU has increased enrolment rates across Australia steadily and significantly against estimates of eligible population from 90.6% in 2012 to 97.1% in 2019. Second, in the Northern Territory this increase in enrolment rates started from a much lower base (78.9% in 2012) and increased more

slowly (to 84.3% in 2019) and erratically.⁴⁰ Note the peaks in enrolment rates in the Northern Territory in the election years of 2013 and 2016 before declines the following year or two. This indicates reliance on an old claims-based system of electoral administration in which potential electors enrol when they know an election is coming up. At the national level this rise and dip effect has almost disappeared with FDEU, with no dip at all after 2013 and just the slightest dip after 2016. FDEU is clearly changing patterns of enrolment against estimates of eligible population across Australia, but less so in the Northern Territory than elsewhere.

The Northern Territory Electoral Commissioner responsible for NTLA elections, has recently expressed concerns about what is happening to enrolment and turnout in remote areas now that the AEC is moving to a more digital-age approach elsewhere. A year out from the 2020 NTLA election he argued that 25,000 people were missing from the Electoral Roll in the Northern Territory, 16,000 of whom are Aboriginal. While 'voter apathy' was his first target of criticism, a second was the AEC's FDEU system which 'works well in urban areas but doesn't operate in rural and remote areas'.⁴¹

These debates about the application of FDEU in Lingiari reflect a history of deeper concerns about electoral administration in remote Aboriginal communities. Table 11 adds to these debates by grouping the 151 House of Representatives divisions by turnout against the electoral roll in the federal election of May 2019, allowing votes cast to be compared with numbers enrolled. As in Table 8, the vast majority of House or Representatives divisions are in the left columns of Table 11, with turnout against enrolment over 90 percent. Just three divisions are in the right columns, with a significantly lower proportion of votes cast against numbers enrolled. Lingiari is the clear outlier, two categories (10 percent) lower than the next two divisions, which are Solomon in Darwin, and Durack in the Kimberley and Pilbara regions of Western Australia.

⁴⁰ While a 5.4% increase over seven years in the Northern Territory may not seem all that different from a 6.5% increase nationally, because the Northern Territory is starting from a much lower base it should logically increase more in percentage terms. Another way to think of this is that nationally FDEU has addressed about two-thirds of estimated under enrolment since 2012 (6.5% out of 9.4%), whereas in the Northern Territory it has only addressed about one quarter (5.4% out of 21.1%).

⁴¹ Northern Territory Electoral Commission, 'Apathy the Biggest Threat to Territory Democracy', 22 August 2019. Accessed at: https://ntec.nt.gov.au/__data/assets/pdf_file/0004/747013/22082019-One-Year-till-2020-Election.pdf

Table 10. Enrolment Numbers and Rates Compared to Estimates of Eligible Population, Australia and the Northern Territory, 30 June 2010-2019

	Australia	Estimated Rate (%)	Northern Territory	Estimated Rate (%)
2010	13,901,840	89.7	118,401	74.5
2011	14,141,503	90.9	121,919	78.4
2012	14,227,165	90.6	122,715	78.9
2013	14,504,561	91.4	126,934	81.1
2014	14,858,784	92.3	130,857	80.8
2015	15,195,017	93.2	129,133	79.3
2016	15,787,514	95.2	137,360	83.5
2017	15,882,788	95.1	137,773	83.1
2018	16,136,122	96.3	138,581	83.9
2019	16,472,999	97.1	140,064	84.3

Source: Australian Electoral Commission, 'National Enrolment Figures by State/Territory'. Accessed at: https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/national/index.htm

Clearly low voter turnout against enrolment is highly related to Indigenous proportion of division population, with Lingiari being the outrider division on this measure (Table 11) as well as one of four outriders on measures of enrolment compared to estimates of eligible population (Table 8). Multiplying together two participation measures of around 70 percent, it is possible to suggest that perhaps only half of eligible Aboriginal

citizens in Lingiari may be utilising their right to vote.⁴² The ‘difficulties’ for Aboriginal people arising from electoral legislation seem as present in 2019 as when Loveday wrote about them in 1988.⁴³ Let us hope that the new generation of AEC commitment to Indigenous electoral participation lasts for many years to come and tussles deeply with the particular challenges of remote areas.

Table 11. Votes Cast Compared with Enrolment in 151 House of Representatives Divisions, May 2019

	>95%	>90 - 95%	>85 - 90%	>80 - 85%	>75 - 80%	>70 - 75%
Number of House of Representatives divisions	1	126	21	2	0	1

Source: Australian Electoral Commission, ‘Turnout by Division’. Accessed at: <https://results.aec.gov.au/24310/Website/HouseTurnoutByDivision-24310-NAT.htm>

CONCLUDING ANALYSIS: FROM ABORIGINAL VOTING RIGHT TO ADAPTIVE ELECTORAL ADMINISTRATION

To conclude this analysis, let us recall that enrolment to vote for Aboriginal Australians was *de jure* voluntary until 1983. Amendments made to the *Commonwealth Electoral Act* in that year focused on public funding of elections and on the establishment of the AEC as a more independent statutory organisation than the previous Australian Electoral Office. While some attention was paid in those amendments to extending the voting franchise to itinerants, it is notable that the extension of the *compulsory*

⁴² The Northern Correspondent for *The Australian* newspaper wrote two articles on these issues after the Commonwealth and NTLA elections in 2016. See A. Aikman, ‘Less Than Half of Registered Voters Voted in Recent NT Elections’ and ‘Northern Territory: Closing the Voting Gap’. *The Australian*, 17 October 2016.

⁴³ One difficulty that Loveday detailed in 1988 was Aboriginal people possibly being enrolled twice under different names or spellings of one name. This potential for unintentional over-enrolment could help explain low voter turnout against the roll. However, it would also mean that under-enrolment against estimates of eligible population is even lower.

franchise to Aboriginal Australians was not a matter of debate.⁴⁴ This is all the more notable as, two decades earlier, when providing for *voluntary* enrolment for Aboriginal people, the Commonwealth Parliament had created offences of ‘undue influence’ and ‘bribery’ for inducing such enrolment.⁴⁵ At the time, the image was of Aboriginal individuals being informed and making up their own minds whether to enrol, against the background of historical exclusion. By 1983, this framing had faded in favour of a simpler compulsory equality approach, with little or no recognition of different historical paths.

These 1983 legislative provisions imposed a new obligation on the AEC to facilitate Aboriginal enrolment and voting. However there is also evidence that the AEC has balked at a punitive approach to compulsory Aboriginal voting in the years since. A decade ago Hill and Alport inventively labelled the voting regime for Aboriginal people in remote areas ‘*de facto* voluntary’, due to generous acceptance of reasons for not voting and a reticence around punitive enforcement. A decade on, I argue that not much has changed, although in my view this approach is as much the result of administrative practicalities and incapacities in the AEC as a deliberate choice.⁴⁶

This becomes evident if we think about what happens after a federal election in dealing with electors on the Roll who ‘appear to have failed to vote’. Under s245 of the *Commonwealth Electoral Act*, Divisional Returning Officers (DROs) are obliged to send a ‘penalty notice’ to the ‘latest known address’ of these electors, asking them to provide a ‘valid and sufficient reason’ for failing to vote, pay a \$20 penalty or, alternatively, to give ‘particulars of the circumstances’ of their voting.⁴⁷ If no response is received within the ‘prescribed time’, a second similar penalty notice must be sent which also notes that a response to the ‘previous notice’ was ‘not received’. Results

⁴⁴ In his second reading speech, Minister Kim Beazley simply said in passing that the amendments sought to ‘extend the right, and in the case of Aboriginals the obligation, to enrol and to vote’. Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1983, p. 2216.

⁴⁵ For a brief summary of these 1962 provisions in the Act see J. McCorquodale, *Aborigines and the Law: A Digest*. Canberra: Aboriginal Studies Press, 1987, p. 8.

⁴⁶ Administrative practicalities and the secrecy of casting a ballot have also led to common assumptions that informal voting is permissible and hence that compulsory voting in Australia is more generally an illusion. See H. Pringle, ‘Compulsory Voting in Australia: What is Compulsory?’. *Australian Journal of Political Science* 47(3) 2012, pp. 427-440.

⁴⁷ Section 245(4) identifies some limited circumstances in which DROs are not required to send penalty notices, for example, if they are satisfied that the elector is dead or was absent from Australia on polling day.

of s245 penalty notices to 453,600 apparent non-voters after the 2007 federal election are categorised in Table 12. While 13.0% paid their \$20 penalty and 41.1% offered a valid and sufficient reason for failing to vote, it is also notable that 25.8% simply did not respond and another 10.5% had their notices returned undelivered. For the AEC, there is not much they can do about this non-responding one-third of apparent non-voters, particularly when their addresses on the Electoral Roll are in 'mail exclusion areas'.

Table 12. Results of s245 Notices to Electors Who 'Appear to Have Failed to Vote', 2007 Federal Election

	Number	Percent
Total apparent non-voters sent notices	453,600	n/a
Incorrectly sent due to processing or procedural error	18,400	4.1
Provided valid and sufficient reason for failing to vote	186,400	41.1
Claimed to have voted	19,600	4.3
Warning letters issues	5,350	1.2
Notices returned undelivered	47,700	10.5
No response	117,000	25.8
Paid \$20 penalty	59,000	13.0
Prosecution due to non-payment of \$20 penalty	64	0.01

Source: Australian Electoral Commission, *Report to the Joint Standing Committee on Electoral Matters: Non-Voting and Multiple Voting at the 2007 Federal Election*. Canberra: Australian Electoral Commission, April 2009, p. 48.

More recent data on the results of s245 penalty notices than the 2007 federal election has proven elusive. So too has data on the results of s245 penalty notices broken down by House of Representatives divisions. My surmise is that in Lingiari the distribution of responses (and non-responses) to s245 penalty notices would be very different from the national pattern revealed in Table 12. As in Tables 8 and 11, Lingiari is likely an outlier division, with higher levels of non-response to penalty notices and return of penalty notices undelivered, due to extensive mail exclusion areas. As Hill and Alport

noted in South Australia's outback division of Grey over a decade ago, there is also likely greater use and acceptance as a 'valid and sufficient reason' for non-voting in remote areas of being several kilometres from a polling booth. I am also informed that return of the two s245 penalty notices from a mail exclusion area is not regarded as sufficient reason to remove people from the Electoral Roll, as is often the case in mail deliverable areas.⁴⁸

Table 12 suggests that in 2007 there were on average about 3,000 apparent non-voters per division of the House of Representatives (453,600/151). Comparing enrolment figures and votes cast in Tables 2-4, it is evident that in the Northern Territory in 2019 there were of the order of 31,000 apparent non-voters, 19,000 in Lingiari and 12,000 in Solomon. This disproportionate number of S245 penalty notices sent to apparent non-voters in the Northern Territory compared with other parts of Australia could be usefully analysed by the AEC and the parliamentary body which monitors its work, the Joint Standing Committee on Electoral Matters. Another useful analytic exercise would be to look back over several federal elections to see whether the disproportionate numbers of apparent non-voters in the Northern Territory are the same individuals repeatedly or whether non-voters change between elections. While the latter may suggest opportunistic voting and non-voting, which the AEC could possibly alleviate through service improvements, the former may suggest deeper causes of non-voting among categories of individuals that might be able to be discerned.

Current electoral administration seems a continuation of what Hill and Alport inventively labelled over a decade ago as a '*de facto* voluntary voting regime' in remote areas. This sustained administrative regime over many federal elections may help explain persistent low turnout in these areas, compared to a more rigorously enforced compulsory voting regime elsewhere. While figures in the far right columns of Tables 2-4 suggest declining turnout since 2007, I suggest that the longer-term reality since 1984 has been *persistent and variable low turnout* reflecting this administrative regime. Efforts by the AEC to improve Indigenous enrolment in recent years may ironically even contribute to decreasing turnout figures further, if new enrollees

⁴⁸ Under s105 of the *Commonwealth Electoral Act*, the Electoral Commissioner has powers to make alterations to the Roll, including removal. However non-response to penalty notices alone is not a reason for removal. Other confirmatory information is needed. Possibilities for double enrolment of Aboriginal people in remote areas, as noted in footnote 42, could still have some relevance today.

encounter restricted opportunities to vote and instead simply swell the ranks of apparent non-voters.⁴⁹ Enrolment rises, turnout falls, and not much actually changes.

To finish, I will engage in some inventive labelling of my own and call existing AEC practice in remote areas 'adaptive electoral administration'. I note that this adaptive electoral administration in remote areas is not all that different in the digital age of the early 21st century from when I first encountered it in the Northern Territory in the 1980s. The exercise of discretion by public service officers through the creation of defensible categories of practice, like 'mail exclusion areas', is an under-recognised professional skill which facilitates the work of public administration in hugely varied social contexts. The work of Australian electoral administration in facilitating Aboriginal enrolment and voting in remote areas is complex and nuanced, and calls for large amounts of professional administrative finesse. That the enrolment and voting regime for Aboriginal people in these areas is still somewhat less than compulsory after 35 years should neither surprise us nor be unduly problematized. While low enrolment and turnout lessen Aboriginal voting power, existing administrative practice could also possibly be thought of as due recognition that Aboriginal Australians have come to participation in elections via a very different historical path from other Australians. Arguably it is better that Aboriginal Australians choose to enrol and vote, rather than be compelled to do so by laws and administration that take little account of their particular historical and contemporary circumstances.⁵⁰

Aboriginal voting power in remote areas of the Northern Territory is real, by virtue of population proportion, and probably explains the different results in the Territory in 2019 compared to remote areas of Queensland and Western Australia. Enrolment and turnout figures suggest that such Aboriginal voting power may still have considerable unused potential. But it may be better that Aboriginal Territorians realise that

⁴⁹ An AEC study of voter turnout after the 2016 election noted that FDEU may also be having this effect. Turnout among those whose 'most recent enrolment transaction was via FDEU' was 83.1% in the 2016 election, 'compared with 94.2 per cent for all other electors'. Australian Electoral Commission, *Voter Turnout: 2016 House of Representatives and Senate Elections*. Canberra: Australian Electoral Commission, June 2017, p. 18.

⁵⁰ Back in the 1980s, Tasmanian Aboriginal activist Michael Mansell refused to enrol, arguing that this would be a recognition of settler sovereignty. As recently as 2012, Mansell repeated on radio that he does not enrol or vote and that he prefers to push for the recognition of Indigenous sovereignty (see Michael Mansell, 'Why I Don't Vote', Brisbane Blacks. Accessed at: <https://soundcloud.com/brisbane-blacks/michael-mansell-why-i-dont>). In a more recent major publication, Mansell seems to avoid explicitly advocating general Indigenous non-enrolment. See M. Mansell, *Treaty and Statehood: Aboriginal Self-Determination*. Annandale: The Federation Press, 2016.

potential willingly themselves, in conjunction with adaptive electoral administration, rather than being treated punitively for not adhering to compulsory enrolment and voting. Equally the AEC needs to be open to legitimate criticism of its existing practices in facilitating Aboriginal enrolment and voting, and to be willing always to further adapt its approaches.

One other possibility that needs to be foreshadowed is that the Northern Territory could yet lose its second House of Representatives division and return to the pre-2001 situation of having a single MHR for the whole Northern Territory as a single division. This almost happened in 2003 as the Northern Territory's Estimated Residential Population fell back just below 1.5 quotas.⁵¹ However, in that instance, debate over margins of error in these official figures from the Australian Bureau of Statistics allowed a legislative approach to be developed through which the Northern Territory retained its second House of Representatives division over the next six federal elections.⁵² If at some time in the future, due to changing population relativities, the Northern Territory does fall back to having just one division for the House of Representatives, the proportion of the population in that division who identify as Aboriginal would probably be around a quarter or a little more (see Table 5). This would suggest a lesser level of Aboriginal voting power than in the current division of Lingiari, but it would still be a significant concentration of Aboriginal electors and higher than in any of the surrounding remote-area House of Representatives divisions in Queensland, Western Australia or South Australia. The Northern Territory is destined by demography to be the centre of Aboriginal voting power in Australian federal elections, both in potential and in reality, for many years to come.

⁵¹ Joint Standing Committee on Electoral Matters. *Territory Representation: Report of the Inquiry into Increasing the Minimum Representation for the Australian Capital Territory and Northern Territory in the House of Representatives*. Canberra: Parliament of the Commonwealth of Australia, November 2003, pp. xxii, 18.

⁵² This is set out in the *Commonwealth Electoral Amendment (Representation in the House of Representatives) Act 2004* (Cth).

Independents in Tasmania's Legislative Council: Analysing strategies to achieve influence*

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Abstract Independent Members (IMLCs) have long dominated the Tasmanian Legislative Council (Council). They are expected to play a review and scrutiny rather than a policy-making role. However, this article presents research that finds that such Members are indeed able to achieve policy influence despite their lack of supportive party colleagues or a party structure. Current and former IMLCs, one Labor MLC, and one Member of the lower House of Assembly, were interviewed for this research. They were asked about the IMLC role as they see it, the strategies used, if in fact they are used, to gain policy influence, IMLC work and influence on committees, and the obstacles, including political obstacles, to IMLCs achieving influence. Our paper addresses the lack of studies of the legislative behaviour of Councillors, and establishes that, despite the review and scrutiny focus of their role, and the attribution of the policy-making role to the lower house, IMLCs do seek influence and use various means of achieving it.

‘Tasmania has been well served by an upper house dominated by independents – they are there to knock the rough edges off government’.¹

¹ Tony Mulder IMLC 2011-17, See G. Burgess, and E. Gramenz, ‘Fresh Calls to Curb the Powers of Tasmania’s Upper House’, *ABC News* 20 June 2017.

INTRODUCTION

Westminster upper houses are not known for their power to determine policy, indeed the literature typically suggests that to pursue such power would be to be seen to usurp the policy-making role of lower houses. However the (elected) Australian Senate initiates, reviews, and amends legislation and is thus extremely influential.² The parliamentary decline thesis, which sees Westminster Parliaments as dominated by the executive, is less persuasive in such circumstances, as it is, we suggest, in the case of Tasmania.³ Some question the legitimacy of Westminster upper houses like Tasmania's having any policy-making power or influence, beyond their roles in reviewing legislation and scrutinising the executive.⁴ There are clearly varying circumstances that impact in differing ways upon influence.⁵ Our focus is not upon context, process,⁶ or upper-lower house dynamics, but upon the influence that Tasmania's IMLCs have, or believe that they have, in their review, scrutiny and policy roles, in amending and proposing bills, and in operating in committee environments.

Whatever the context or make up of a Westminster upper house,⁷ there are two features that matter in terms of influence, namely whether the house has democratic legitimacy, as an elected body, and whether the government dominates its numbers. Westminster upper houses that are appointed, for example, the House of Lords and Canadian Senate, are arguably less legitimate and potentially less likely than elected upper houses to exercise a policy role. Some of their powers may be limited and some

² M. Russell, and M. Benton, '(Re)assessing Parliamentary Policy Impact: The Case of the Australian Senate'. *Australian Journal of Political Science* 45(2) 2010, pp.159-174.

³ B. Stone, 'Bicameralism and Democracy: The Transformation of Australian State Upper Houses'. *Australian Journal of Political Science* 37(2) 2002, pp. 267-281; A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. London: Yale University Press, 1999.

⁴ M. Stokes, 'The Future Role and Function of the Legislative Council', in A. Fletcher (ed.), *Operation of the Legislative Council: Discussion Brief*. Tasmania, Parliament of Tasmania, 1997, pp. 39-54.

⁵ M. Russell and P. Cowley, 'The Policy Power of the Westminster Parliament: The Parliamentary State and the Empirical Evidence'. *Governance* 29(1) 2016, pp. 121-137; M. Flinders and A. Kelso, 'Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis'. *British Journal of Politics and International Relations* 13(2) 2011, pp. 249-268.

⁶ G. Tsebelis, *Veto Players: How Political Institutions Work*. New Jersey: Princeton University Press, 2002.

⁷ J. Money and G. Tsebelis, 'Cicero's Puzzle: Upper House Power in Comparative Perspective'. *International Political Science Review* 13(1) 1992, pp. 25-43.

of their roles subject to review.⁸ On the other hand, being elected, Australia's Senate is democratically legitimate, and because it is elected by proportional representation, government rarely dominates. It also has a range of powers that enable Senators to play an active role and to influence policy.⁹

In Tasmania, the Council is democratically legitimate for being elected by a preferential system, even though elections are out of synch with general elections, funding is limited, campaigns are subdued, and party policies are not usually canvassed.¹⁰ These circumstances do, however, routinely see Independents returned. Indeed they have dominated the Council continuously, unlike in any other upper house in the world,¹¹ which predisposes them to being influential in ways that we will examine here. The Council can also send the lower house to an election without facing one itself,¹² and is thus extremely powerful. Tasmania's case is worthy of investigation, therefore, because it has such a Legislative Council; because it is, unusually, dominated by Independents; and because the legislative behaviour of the Independent Members of the Legislative Council (IMLCs) and their pursuit of influence is little known and worthy of investigation.

Our research is qualitative, and interview informed. We employ a variety of research techniques and materials: literature review, parliamentary statistics, various legislative examples, interviews, and we included a case study for analysis. Ours is a positivist study that makes no judgements of IMLCs' actions, although self-evidently some of these actions will be politically or ideologically based, and/or motivated by self-interest or the needs of constituents. We are agnostic as to whether influence is a legitimate activity for an IMLC in an upper house—this is beyond the scope of our inquiry. We sought qualitative evidence of influence by speaking with those who responded to our requests for interviews; that is, five IMLCs, one Labor MLC, formerly the Leader of the

⁸ Lijphart, *Patterns of Democracy*.

⁹ S. Bach, 'Mandates, Consensus, Compromise, and the Senate'. *Papers on Parliament* No. 48. Canberra: Parliament of Australia, 2008.

¹⁰ In 2019, the 15 Members of the Council include four ALP MLCs, two Liberal MLCs and nine IMLCs.

¹¹ L. Weeks, 'Parliaments Without Parties'. *Australasian Parliamentary Review* 30(1) 2015, pp. 61-71.

¹² N. Fewkes, 'Tasmania's Legislative Council elections: Is Reform Needed?'. *Australasian Parliamentary Review* 26(2) 2011, pp. 87-98.

Government in the Legislative Council, and one Member of Parliament (to gain the perspective of the Tasmanian Greens).¹³

Attempts were also made to represent the political spectrum, hence the inclusion of Green and Labor Members; however, no Liberal Member agreed to participate, so claims made by our interviewees about Liberal Members are not included in this article. The Tasmanian Forest Agreement (TFA) study is included in our analysis by way of offering a concrete illustration of the actions and influence of IMLCs; and because this was the most complex and politicised bill that the Council has dealt with in recent times.¹⁴ It was the subject of a select committee and was heavily amended. There were claims of politicisation during this process. IMLC Paul Harriss, who opposed the TFA process, subsequently resigned, ran for the Liberals in the House of Assembly election, and, as a newly elected minister, abolished the TFA altogether.

Our work contributes a novel ‘independents and policy influence’ perspective to the literature on Westminster upper houses, parliamentary procedure, and policy development. The transferability of its findings may be limited, given its reliance upon the experiences of IMLCs in a small, regional parliamentary jurisdiction. However it adds in general to the body of knowledge about the roles of independents in Westminster upper houses, with its focus on parliamentary procedure in the areas of policy initiation (Private Members Bills), legislative review, and scrutiny of the executive. It identifies strategies of influence by IMLCs that could be more fully investigated by future broader research on MLCs, including those who are party members. We offer qualitative insight into the role of IMLCs that highlights the need for further research into the dynamics of the Tasmanian Parliament more broadly, given the historical dominance of independents in the Legislative Council.

¹³ Seven Members of the Tasmanian Parliament were interviewed: Hon. Rob Valentine - Independent MLC first elected 2011; Hon. Ivan Dean - Independent MLC first elected 2003 ; Hon. Sue Smith - Independent MLC first 1997-2013 and President of the Legislative Council 2008-2013; Hon. Ruth Forrest - Independent MLC first elected 2005; Hon. Jim Wilkinson - Independent MLC first elected 1995 and President of the Legislative Council 2013-2019; Hon. Craig Farrell - Labor MLC first elected 2011, Leader of the Government in the Legislative Council 2012-2014 and President of the Legislative Council 2019-present; Ms Cassy O'Connor - Greens MHA first elected 2008, Leader of the Tasmanian Greens and Cabinet Minister 2011-2014

¹⁴ Farrell Interview.

THE LEGISLATIVE COUNCIL: REVIEW, SCRUTINY AND INFLUENCE

The Legislative Council (Council) was established in 1825, predating the House of Assembly (Assembly); with equal powers to the Assembly once that was established in 1856.¹⁵ Each May, a number of councillors from single member electorates are elected by a preferential system for staggered six-year terms.¹⁶ This 'out of cycle' procedure with its emphasis on name recognition and local issues has favoured independents.¹⁷ The Council recently supported a motion (10:3) acknowledging that its ability to block Assembly budgets could be replaced with a suspensory veto, which could lapse after a month.¹⁸ However, it is currently constitutionally entitled, not to initiate money bills, but to reject them, with requests that they be amended and returned, without itself facing an election.¹⁹

The Council is therefore one of Australia's most powerful. Until recently, it was better known for its conservatism, and indeed for some MLCs' alignment with the Liberal Party, than for any more radical, Labor or Green leanings.²⁰ From its beginnings as an upper house, it was intended to check the democratic spirit of the masses, to guard against hasty and inconsiderate legislation, and to proceed as a conservative body, cautiously and deliberately.²¹ Despite the Council's conservative history, Kevin Bonham has identified a more recent 'left-biased' voting pattern in the Council, with IMLCs now leading reform debates on mandatory sentencing, transgender laws and

¹⁵ G. Griffith and S. Srinivasan, *State Upper Houses in Australia*. Sydney: NSW Parliamentary Research Service, 2001, p. 19.

¹⁶ C. Sharman, 'Limiting Party Representation: Evidence from a Small Parliamentary Chamber'. *Legislative Studies Quarterly* 38(3) 2013, pp. 327-348.

¹⁷ D. Hamer, *Can Responsible Government Survive in Australia?* Canberra: Department of the Senate, 2004. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/hamer

¹⁸ P. Chapman, 'Brave Move Must Trigger Reform', *The Mercury*, 2 February 2018.

¹⁹ It should be noted that changes to Tasmania's Constitution require only a simple parliamentary majority to do this. The Legislative Council has blocked supply only once, in 1948. Griffith and Srinivasan, *State Upper Houses in Australia*; T. Morling, *Report of the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament*, Hobart, Tasmania, Department of Premier and Cabinet, 1994.

²⁰ Griffith and Srinivasan, *State Upper Houses in Australia*.

²¹ Fewkes, Tasmania's Legislative Council elections; T. Newman, *Tasmania's Constitution and Bicameral Parliament*, Tasmanian Parliamentary Library, Parliamentary Research Service, Issue Brief 91/8 1991: 4-19. See also Tasmanian Parliamentary Library, 'Tasmanian Parliament'. Accessed at: <http://www.parliament.tas.gov.au/tpl/Backg/Parliament.htm>

police powers.²² If the Council had this composition during the Labor-Green Government (2010-14), it would likely have passed bills on marriage equality, voluntary assisted dying, and land returns to the Aboriginal community, and passed the TFA bill 'in very short order'.²³

However, the independent character of the Council does reduce the executive dominance that is characteristic of Westminster systems elsewhere. This is reflected in the observations by IMLCs about their roles. IMLC Valentine observed that the Council 'is not there to be a rubber stamp, it's there to examine and to pull apart, line by line, the [Government's] legislation and to make sure that there aren't any unintended consequences, that there is consistency'.²⁴ Of all our interviewees, only Valentine qualified the seeking of influence by IMLCs as seeking influence within the bounds of the agenda that is put before the Council by the government of the day. The other interviewees were all comfortable with influence seeking more generally; however, with most agreeing that, even though they represent single member electorates, any influence seeking must benefit the entire State.

Separate reports by Beaumont, Ogilvie, Morling and Nixon²⁵ confirm the review and scrutiny role of the Council.²⁶ The *review function* entails taking a 'second look' at government bills to: technically improve them; protect citizen liberties; and ensure that affected interests and opinions are accounted for.²⁷ We consider this role in terms of IMLCs' review and amendment of government bills, and in their initiation of Private

²² K. Bonham, 'Legislative Council Voting Patterns 2014-18', *Polling analysis blogspot*, 2018. Accessed at: <http://kevinbonham.blogspot.com/2018/03/legislative-council-voting-patterns.html>. See also G. Barns, 'Don't let Legislative Council become a Rubber Stamp', *The Mercury* 29 April 2019.

²³ O'Connor Interview.

²⁴ Valentine Interview.

²⁵ B. Beaumont, *Report of the Royal Commission into the Constitution Act, 1934, Tasmania*, Hobart, Parliamentary Library, 1982; G. A. Ogilvie, *Report of the Advisory Committee on the Proposed Reduction in the Number of Members Elected to Both Houses of the Tasmanian Parliament to the Premier the Honourable Robin Trevor Gray*, Hobart, Tasmania, Government Printer, 1984; Morling, *Inquiry into the Size and Constitution of the Tasmanian Parliament*; P. Nixon, *Tasmania into the 21st Century: Commonwealth State Inquiry into the Tasmanian Economy*, Hobart, Government Printer, 1997.

²⁶ See also Stone, 'Bicameralism and Democracy'.

²⁷ B. Stone, 'Changing Roles, Changing Rules: Procedural Development and Difference in Australian State Upper Houses'. *Australian Journal of Political Science* 40(1) 2005, pp. 33-50.

Members Bills, which have tended to be about refining processes.²⁸ The *scrutiny role* 'includes a range of parliamentary activities: scrutiny of administrative institutions and processes; investigation of particular administrative decisions; review of the administration of particular policies; and examination of public expenditure'.²⁹ We consider the roles played by IMLCs on committees, and their specific work in reviewing and revising the TFA. We asked our interviewees about IMLCs' *review and scrutiny* roles, the strategies they use to gain policy influence, their work and influence on committees, and the obstacles to their achieving influence. What follows here is a compilation, distillation and analysis of their responses.

AMENDMENTS AND PRIVATE MEMBER'S BILLS

There have been contrasting perceptions over time that the Council is both a rubber stamp,³⁰ and obstructionist for blocking government's agenda.³¹ What is less emphasised is the role that IMLCs themselves believe they play in terms of review, scrutiny and policy initiation and influence. Our interviewees suggest that the review and scrutiny role involves fine-tuning bills in order to ensure that they do what they intend; that they do not have unintended consequences; that they are 'tidied' up in terms of any flaws; and that they are the best they can be, at times 'tweaked' or re-thought in order to achieve better outcomes. Government bills may be amended for these or other reasons; however, IMLCs also introduce private Members' bills (PMBs) to influence procedures and policy.³²

Amending Bills

The Council has the constitutionally backed potential to form a blocking majority and the government therefore needs to secure its support to pass bills.³³ IMLCs may negotiate amendments in return for concessions if they enjoy a constructive

²⁸ With at least one notable exception - IMLCs Ivan Dean's Tobacco-Free Generation bill.

²⁹ Stone, 'Changing Roles, Changing Rules'.

³⁰ Chapman, 'Brave Move Must Trigger Reform'.

³¹ Smith Interview; Beaumont, *Report into the Constitution Act*.

³² N. Dixon, 'The Role of Private Members' Bills'. *Australasian Parliamentary Review* 19(1) 2004, pp. 88-115.

³³ Farrell Interview.

relationship with government;³⁴ however, horse-trading for support is frowned upon.³⁵ The Leader of the Government in the Council (LGLC) will look for common ground, recognising 'that sometimes getting seventy-five per cent of something is better than getting nothing'.³⁶ Given the lack of a supportive party political environment, personal relationships are important. This includes the need for an open door policy to all MLCs by the LGLC.³⁷ Government does not like its agenda being held up by the Council, and it may drop a bill if there are too many amendments proposed.³⁸

The Council has been relatively active in amending bills. David Hamer has claimed that in the past it amended 40 to 50 percent of bills, many heavily, and that Conferences of Managers from the two houses were used to resolve the resulting differences.³⁹ Statistics for the period 1947 to 1995 show that at such Conferences the government made 33 (27%) of concessions, the Council made 21 (17%), with 52 (42%) joint concessions, and that there were 16 (13%) failures to gain any resolution.⁴⁰ However, the Conferences of Managers were removed from Standing Orders in 1996. Table 1 demonstrates that from May 2014 to June 2018, of the bills passed by the Council, only about one quarter were amended.

Amendments may also be proposed on the floor of the Council, and be adopted by government. Amendments from the floor are more likely to succeed where the case is well put, and the Member is well respected by colleagues.⁴¹ IMLCs are 'lone voices'.⁴² They may not have caucused their bills. They do not vote in a block, so it is harder work than it is for party political members to gain support. They cannot pass work onto other colleagues.⁴³ The form of an amendment is important, but IMLCs do not have the resources of parties to draft amendments. Drafting assistance is at the discretion of government, following a written request from the LGLC. Past governments have been

³⁴ Smith Interview.

³⁵ Smith Interview.

³⁶ Smith Interview.

³⁷ Farrell Interview.

³⁸ Valentine Interview.

³⁹ Hamer, *Can Responsible Government Survive in Australia?*.

⁴⁰ Griffith and Srinivasan, *State Upper Houses in Australia*.

⁴¹ Smith Interview.

⁴² Forrest Interview.

⁴³ Dean Interview.

known to not allow this support, only to argue subsequently that the amended bill will not be supported because it is poorly drafted.⁴⁴

Table 1. Breakdown of results of *all* bills, government and non-government, introduced into Council from 2014-2018

	6 May 2014 to 30 June 2014	1 July 2014 to 30 June 2015	1 July 2015 to 30 June 2016	1 July 2016 to 30 June 2017	1 July 2017 to 28 January 2018	1 May 2018 to 30 June 2018
Introduced	10	46	57	72	26	8
Lapsed	-	-	-	0	5	0
Negated at Second Reading	-	1	1	0	3	0
Passed	5	45	50	58	30	5
Without Amendment	5	35	36	42	21	3
With Amendment	-	10	14	16	9	2
Number of Amendments	-	139	124	98	63	3

Source: Tasmanian Legislative Council' *Annual Report 2017-2018*. Hobart, Legislative Council of Tasmania, 2018, p. 18.

Strategies to influence policy through amendments can be seen in the passage of the Workplaces (Protection From Protesters) Bill 2014, which aimed to prevent protests that obstruct business operations.⁴⁵ In the Council committee stage, *Committee of the Whole*,⁴⁶ both Government and IMLCs proposed scores of amendments.⁴⁷ The LGLC in turn offered significant amendments, saying that the issues raised by IMLCs had caused the Government to adopt that course of action.⁴⁸ IMLCs proposed further substantive

⁴⁴ Forrest Interview; The Hon L Giddings MP, Tasmania, *Hansard*, House of Assembly, 18 November 2010, p. 68.

⁴⁵ B. Gogarty, 'Bob Brown Wins His Case, but High Court Leaves the Door Open to Laws Targeting Protesters'. *The Conversation* 18 October 2017. Accessed at: <https://theconversation.com/bob-brown-wins-his-case-but-high-court-leaves-the-door-open-to-laws-targeting-protesters-85742>

⁴⁶ This is 'the legislative stage that follows debate of the principles at the second reading', as explained in Stone, 'Changing Roles, Changing Rules'.

⁴⁷ Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 3-89.

⁴⁸ The Hon V Goodwin, Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 21.

amendments, including the narrowing of the bill's scope.⁴⁹ The Government supported these and the bill was ultimately accepted by the Council's *Committee of the Whole*.

Private Member's Bills

In the Council, 59 percent of sitting time in 2017-18 was spent on government business, 13 percent on government briefings, and 29 percent on non-government business.⁵⁰ Part of non-government business is the initiation of IMLC PMBs, six of which have been introduced to the Council since 2010.

- Electoral Amendment (Legislative Council Ballot Papers) 2010
- Constitution Amendment (Legislative Council Proceedings) 2011
- Public Health Amendment (Tobacco-Free Generation) 2014
- Electoral Amendment (Legislative Council Ballot Papers) 2015
- Fire Service Amendment (Fire Infringement Notices) 2015
- Legislative Council Electoral Boundaries Amendment 2017

Few such bills become law. Government support is key to their success.⁵¹ For example, IMLC Mike Gaffney's Amendment (Fire Infringement Notices) Bill 2015 was developed with the Government and became law. However, some bills are introduced in the knowledge that they will never become law.⁵² Instead, they put the Government 'on notice'⁵³ by profile raising and agenda setting.⁵⁴ IMLC Ivan Dean's Tobacco Free Generation Bil, has, for example, promoted tobacco control, even though his bill has thus far failed to achieve support.⁵⁵ Generally, 'governments just want to be the ones

⁴⁹ Tasmania, *Hansard*, Legislative Council, 5 November 2014, p. 26.

⁵⁰ Legislative Council, *Annual Report 2017-2018*.

⁵¹ Valentine Interview; Dixon, 'The Role of Private Members' Bills'.

⁵² O'Connor Interview; Forrest Interview.

⁵³ Wilkinson Interview.

⁵⁴ A. Brazier and R. Fox, 'Enhancing the Backbench MP's Role as a Legislator: The Case for Urgent Reform of Private Members Bills'. *Parliamentary Affairs* 63(1) 2010, pp. 201-211.

⁵⁵ O'Connor Interview; Forrest Interview.

who write the legislation and control it'.⁵⁶ But they are happy for an IMLC bill to test the waters, and may return to tobacco control in future.⁵⁷

In this way, a version of IMLC Jim Wilkinson's PMB became law. He introduced the Financial Management and Audit (Quarterly Reporting) Amendment Bill 2011 to increase scrutiny of the executive by requiring Treasury to release quarterly financial reports.⁵⁸ It passed the Council but was blocked by the Government.⁵⁹ The next year, the Government introduced its own Financial Management and Audit Amendment Bill 2012, which was largely consistent with the Wilkinson bill, but was presented as the Government's initiative.⁶⁰ Wilkinson suggested that his bill had strong support and had made a case for the change.⁶¹ Even though it was rejected, it subsequently had a direct influence upon government action.

COMMITTEES AND POLICY INFLUENCE

Committees are significant features of Westminster Parliaments,⁶² known for their scrutiny of government and influence over policy.⁶³ These roles are notable within Tasmania's Legislative Council.⁶⁴ Stone observes that the Council has a rigorous approach to the policy review of legislation by committee, with 'a mini-inquiry' conducted into 'every substantial or controversial piece of legislation'.⁶⁵ Such inquiries include government briefings and hearing from those supporting and opposing bills, which leaves the Council well informed and affords smoother passage for bills. Stone's

⁵⁶ O'Connor Interview; Brazier and Fox, 'Enhancing the Backbench MP's Role as a Legislator'.

⁵⁷ Dean Interview.

⁵⁸ Wilkinson Interview.

⁵⁹ Tasmania, *Hansard*, Legislative Council, 21 June 2012, p. 52.

⁶⁰ Wilkinson Interview; The Hon P Gutwein MP, Tasmania, *Hansard*, House of Assembly, 24 May 2012, p. 74-76.

⁶¹ The Hon Wilkinson MLC, Tasmania, *Hansard*, Legislative Council, 21 June 2012, p. 60.

⁶² J. Halligan and R. Reid, 'Conflict and Consensus in Committees of the Australian Parliament'. *Parliamentary Affairs* 69(2) 2016, pp. 230-248.

⁶³ Stone, 'Changing Roles, Changing Rules'.

⁶⁴ D. Monk, 'Committee Inquiries in the Australian Parliament and Their Influence on Government: Government Acceptance of Recommendations as a Measure of Parliamentary Performance'. *The Journal of Legislative Studies* 18(2) 2012, pp. 137-160.

⁶⁵ Stone, 'Changing Roles, Changing Rules'.

comparative review of upper houses does show, however, that the Council's committee system is compromised by its relative lack of adequate administrative support.⁶⁶

The Council also participates in formal committees, in Stone's view potentially compromising its independence, lessening its influence and undermining bicameralism.⁶⁷ MLCs sit upon Joint Standing Committees (covering Integrity, Public Accounts, Public Works and Subordinate Legislation), Sessional Committees (examining government bills and administration), *ad hoc* Select Committees, Estimates Committees, Government Business Committees and Joint Committees. In contrast to Stone's concerns, the IMLCs we interviewed identified instances of their policy influence in the Joint Public Accounts and Subordinate Legislation Committees, and in the Council's Select and Sessional Committees, including significant influence over the contentious Tasmanian Forest Agreement Bill.

Public Accounts (Joint) Committee influence?

The Public Accounts Committee (PAC) is established by statute, with equal numbers from each house, and can look at any issue pertaining to State finances (*Public Accounts Committee Act 1970*). It exercises influence by scrutinising the executive⁶⁸, and is considered by some to be 'probably the most powerful committee within the parliament in the world'.⁶⁹ In Tasmania, it can provide a check on a 'government heading in the wrong direction'.⁷⁰ The recent influence of the Committee can be seen in its review of the financial position of government-owned energy agencies following the 2015-16 energy crisis and the Treasurer's refusal to release relevant Treasury advice⁷¹. Despite this conflict, it is likely that a government will adopt the PAC's recommendations for transparency and improved responses to future crises.⁷²

⁶⁶ Stone, 'Changing Roles, Changing Rules'.

⁶⁷ Stone, 'Changing Roles, Changing Rules'.

⁶⁸ J. O'Dea, 'The Role of Public Accounts Committees'. *Australasian Parliamentary Review* 27(1) 2012, pp. 191-195.

⁶⁹ Dean Interview.

⁷⁰ Smith Interview.

⁷¹ Public Accounts Committee (PAC), *Report on the Financial Position and Performance of Government-Owned Entities*, Hobart, Tasmania, Parliament of Tasmania, 2017.

⁷² Dean Interview.

Subordinate Legislation (Joint) Committee influence?

Many Acts delegate to a Minister or agency the ability to make rules, regulations, and by-laws.⁷³ These do not require prior parliamentary approval, but are subject to retrospective review through the Subordinate Legislation Committee (SLC).⁷⁴ If the Committee finds a lack of compliance with the relevant Act, it can refer rules, regulation and/or by-laws to the Council or Assembly to be disallowed.⁷⁵ IMLCs sit on the SLC, exerting influence by scrutinising government action, but also in disallowing rules, regulations, and by-laws found to be non-compliant.⁷⁶ Furthermore, the Council may need to put the disallowance motion, if the government fails to do so.⁷⁷

Disallowance motions are rare; however, the SLC can be influential in more subtle ways.⁷⁸ For example, in 2013, it initiated an inquiry into the operation of a regulation providing for mandatory alcohol interlocks to be installed in the cars of repeat drink drivers (SLC, 2013). The SLC gave notice in the Council of its intention to disallow this regulation, should the responsible agency not satisfactorily amend it.⁷⁹ The SLC withdrew its notice of motion to dismiss the regulation once the changes had been made.⁸⁰ Attempts by IMLC Ruth Forrest to enhance the disallowance power to allow it to operate prospectively passed the Council but failed in the Assembly, possibly because they were seen to allow the Council to set policy. The Government's grounds were poor drafting, although Forrest had been denied drafting assistance.⁸¹

⁷³ G. Appleby and J. Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power'. *Oxford University Commonwealth Law Journal* 15(1) 2015, pp. 3-40.

⁷⁴ R. Laing, *Odgers' Australian Senate Practice: As Revised by Harry Evans* (14th ed.), Canberra, Department of the Senate, 2016.

⁷⁵ Office of Parliamentary Counsel, *Manual for the Preparation of Statutory Rules*, Hobart, Tasmania Department of Premier and Cabinet, 2010.

⁷⁶ R. Snell, H. Townley, and D. Vance, 'The Tasmanian Subordinate Legislation Committee—Lifting the Scrutiny Veil by Degrees'. *Deakin Law Review* 4(2) 1999, pp. 1-37.

⁷⁷ Forrest Interview.

⁷⁸ Snell, Townley and Vance, 'The Tasmanian Subordinate Legislation Committee'.

⁷⁹ Subordinate Legislation Committee, *Mandatory Alcohol Interlock: Final Report*, Hobart, Tasmania, Parliament of Tasmania, 2013.

⁸⁰ Subordinate Legislation Committee, *Mandatory Alcohol Interlock: Final Report*.

⁸¹ Forrest Interview; The Hon L Giddings MP, Tasmania, *Hansard*, House of Assembly, 18 November 2010, p. 68.

Legislative Council Sessional and Select Committee influence?

Whilst Council sessional and select committees are broadly similar, the former are established to deal with bills and government administrative matters referred to the Council, whilst the latter can be created on the Council's own initiative.⁸² The scrutiny that Estimates Committees provide in the Senate is crucial in holding the executive accountable for its budgets.⁸³ During the 2013 Tasmanian Estimates hearings, for example, IMLC Ivan Dean raised questions over high levels of overtime payments to prison staff.⁸⁴ The Minister then agreed to an inquiry that recommended significant changes, many of which were subsequently implemented.⁸⁵ Estimates Committees offer a useful process for an IMLC to gather information, identify problems and influence policy change, as well as to scrutinise government.

Influence is not apparent where government rejects recommendations, and fails to commit to others,⁸⁶ as it did with the recommendations of the IMLC initiated 2016 Inquiry into Built Heritage Tourism in Tasmania.⁸⁷ However, the literature suggests,⁸⁸ and our interviewees felt, that such reports may still influence policy at a later stage, as IMLCs' ideas re-emerge as government suggestions.⁸⁹

[The report] will be sent to the government and generally there is silence. But 18 months down the track you might see an amendment, a piece of legislation come in and you think 'hahaha', here is the end result. They have picked it up as their idea.⁹⁰

⁸² Smith Interview.

⁸³ J. Hogg, 'Throwing Light into Dark Corners: Senate Estimates and Executive Accountability'. *Papers on Parliament* No. 54. Canberra: Parliament of Australia, 2010.

⁸⁴ Government Administration Committee B, *Final Report on the Overtime Costs of the Tasmanian Prison Service*, Hobart, Parliament of Tasmania, 2013.

⁸⁵ Dean Interview; Government Administration Committee B, *Overtime Costs of the Tasmanian Prison Service*.

⁸⁶ P. Lobban, 'Who Cares Wins: Parliamentary Committees and the Executive'. *Australasian Parliamentary Review* 27(1) 2012, pp. 178-190.

⁸⁷ Valentine Interview; M. Groom, *Response to the Final Report on the Inquiry into Built Heritage Tourism in Tasmania*, Hobart, Tasmanian Government, 2017.

⁸⁸ Monk, 'Committee Inquiries in the Australian Parliament'.

⁸⁹ Forrest Interview.

⁹⁰ Smith Interview.

IMLC Sue Smith observed that the Council committee system is respected by governments for its fairness and independence from partisan politics, which increases the chance that its recommendations will be adopted. IMLCs also have influence for working more easily with government than if they were partisan players,⁹¹ as they capture evidence and public opinion to better inform decision-making.⁹² All interviewees agreed that committees are an influential processes, as was illustrated by their various descriptions of the role of IMLCs in resolving an outcome for the highly complex Tasmanian Forests Agreement bill. This bill had sought to break a deadlock between conservationists and forestry interests over the logging of contested areas with arguably high conservation value. Given the difficulties of achieving accord between these conflicting interests, the Labor-Green Government was keen for the bill to proceed quickly through the Legislative Council. However, by leveraging the committee process, and their roles within this process, IMLCs ensured that this did not occur.

Tasmanian Forests Agreement - Select Committee influence?

The Tasmanian Forests Agreement (TFA) was a contentious, complex government bill,⁹³ which was intended to end the forest wars by protecting high conservation value forests whilst ensuring industry viability into the future.⁹⁴ A Labor-Green Government initiated a bill, and its resolution was negotiated through a Council select committee process. This process provided a clear example of how IMLCs influence procedures and policy by leveraging the crucial committee process. At the time, the Council was seen by critics to be operating conservatively, in concert with the Liberal opposition, by resisting the TFA forest 'peace process',⁹⁵ the length and depth of its extensive review process, and the number of revisions it proposed to the bill.

But others, including IMLCs, argued that neither the delicate negotiations between conservation and forestry interests (the TFA signatories), nor the bill's passage through

⁹¹ Smith Interview.

⁹² Dean Interview.

⁹³ Details are archived at - <http://www.parliament.tas.gov.au/ctee/Council/Forests.htm>

⁹⁴ Farrell Interview.

⁹⁵ O'Connor Interview.

the Assembly, had allowed for sufficient consultation.⁹⁶ The Council therefore established a select committee to review the bill.⁹⁷ As IMLC Rob Valentine observed, 'They say they consult. Sometimes the Legislative Council says, "well yeah, you haven't consulted far enough"'.⁹⁸ This process was to 'inform us (the Council) and to ensure that we had all the evidence and information that we needed',⁹⁹ in order to propose what were in the end substantive amendments to the bill.¹⁰⁰

The Council established a select committee of the entire Council. It held hearings, working over Christmas, in order to produce a report for circulation, whilst being heavily lobbied, and at times threatened, over a quite 'horrendous' period.¹⁰¹ For the Greens, who supported the Labor minority Government and its forest peace process, this was a dishonest, delaying, 'wrecking process'.¹⁰² However, the Council's consultation and evidence gathering process, and its public airing of views, did deliver legitimacy that was previously lacking.¹⁰³ They enabled IMLCs to feel justified, in terms of the evidence they acquired, in heavily amending what had otherwise been a 'skeleton' bill.¹⁰⁴ LGLC Craig Farrell engaged constantly with the Council, offering government amendments to alleviate its concerns, even when the Government did not agree with them:¹⁰⁵ '(M)ore often than not [Farrell] would say, "Well, I will talk to the minister"'.¹⁰⁶

IMLC Ruth Forrest offered the most significant amendments, which had the greatest impact on the Government's version of the bill, including several pages of new clauses to create a framework to govern compensation schemes.¹⁰⁷ These were supported by

⁹⁶ J. Schirmer, M. Dare and S. Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process'. *Australian Journal of Political Science* 51(2) 2016, pp. 288-207.

⁹⁷ Valentine Interview; Tasmania, *Hansard*, Legislative Council, 13 December 2012, p. 56.

⁹⁸ Valentine Interview.

⁹⁹ Dean Interview.

¹⁰⁰ Valentine Interview.

¹⁰¹ Dean Interview.

¹⁰² O'Connor Interview.

¹⁰³ Schirmer, Dare and Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process'.

¹⁰⁴ Wilkinson Interview.

¹⁰⁵ Farrell Interview.

¹⁰⁶ Smith Interview.

¹⁰⁷ Tasmania, *Hansard*, Legislative Council, 26 March 2013, p. 1-65.

the Government, which saw them as strengthening the bill,¹⁰⁸ and by a majority of MLCs. However the Council's proposals very nearly did upset the delicate conservation-forestry balance, with the Government ultimately supporting the bill despite what Greens Leader Cassy O'Connor saw as some 'horrible amendments':

If we didn't pass it amended... the whole four years (of the TFA negotiation process) would have been a waste of time... So we had to pass a flawed piece of legislation rather than send it back upstairs (to the Legislative Council) where we were almost certain it would die.¹⁰⁹

IMLC Jim Wilkinson proposed amendments to improve the durability of the bill, despite his personal opposition to the TFA process.¹¹⁰ He recognised that the bill was likely to pass and wanted it to be the best it could be¹¹¹, as befits the Council's role of legislative review.¹¹²

Overall, the Council used the committee process to significantly flesh out the bill, making 58 successful amendments and adding over two hundred pages to what became the most heavily amended bill in the Council's history.¹¹³ This included the addition of two new Clauses, a new Part and seven new Schedules, showing clear evidence of legislative and policy influence.¹¹⁴ In this case, the influence afforded by the committee and review process involved not just IMLCs, although they were prominent, and not just those supportive of the bill. It is for other research to determine whether or not this influence was politically motivated.¹¹⁵ The forest peace process was certainly novel, negotiated by conservationists and the forestry industry, and legislated for by a government bill that was heavily amended in the Council.

¹⁰⁸ The Hon C Farrell MLC, Tasmania, *Hansard*, Legislative Council, 16 April 2013, p. 9.

¹⁰⁹ O'Connor Interview.

¹¹⁰ The Hon J Wilkinson MLC, Tasmania, *Hansard*, Legislative Council, 16 April 2013, p. 8.

¹¹¹ Wilkinson Interview.

¹¹² D. Chalmers, 'Looking Forward: Some Thoughts on the Operation of the Legislative Council in the Next Century', in A. Fletcher (ed.), *Operation of the Legislative Council: Discussion Brief*. Hobart, Parliament of Tasmania, 1997, pp. 5-15.

¹¹³ Legislative Council, *Annual Report 2012-2013*, Hobart, Legislative Council of Tasmania, 2013.

¹¹⁴ Legislative Council, *Annual Report 2012-2013*.

¹¹⁵ See Schirmer, Dare and Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process'.

DISCUSSION AND CONCLUSIONS

Literature describing the power of Tasmania's Legislative Council tends to focus on its staggered elections and its capacity to block budgets without having to face the electorate. There has been some recognition of, and focus upon, the independent nature of the Council, the implications for its accountability, and parties' sporadic attempts to pick up seats. However, nothing previously has been written about the means by which independent Members of the Legislative Council influence, in their view, policy and pursue their own agendas.¹¹⁶ It is clear from this research that such Members do use the Council's powers to influence policy, but also to primarily ensure that legislation, supported or otherwise, is of the highest standards.

For reasons of scope, we have limited our investigation into the influence of IMLCs. We have not undertaken analysis of the political or ideological considerations behind IMLCs' actions, for example, and instead considered the potential of those actions to influence policy and legislation. We have not been concerned with how politics is prosecuted in a Westminster house of review, therefore, but with opportunities for, and instances of, influence being pursued in the uniquely independent Legislative Council. Not surprisingly, these opportunities and instances arise in the course of the Council's normal review and scrutiny work, although some IMLCs strategies are more successful than others, as we have seen. And some take longer to be realised than others.

Obviously, independents may front for parties that are seeking influence and control of the Council, its Members and processes. Party aligned independents could then review government business, and initiate inquiries, in terms of party interests rather than electorate or state interests. They may alienate, marginalise or attempt to shut down any sign of true independence by an IMLC, such as by Ruth Forrest for example, who is active in speaking her mind, in particular in critiquing state finances and accountability processes.¹¹⁷ Conversely, Craig Farrell, previously LGLC and now

¹¹⁶ Despite the lack of previous qualitative research, historical description and information may be gleaned from the annual 'Tasmanian Political Chronicle' of the *Australian Journal of Politics and History*; W. A. Townsley, *The Government of Tasmania*. St Lucia: University of Queensland Press, 1976, pp. 81-84; and A. Scott and S. Young, *The Tasmanian Legislative Council as a House of Review: An Analysis of the Process of Review of Legislation by the Legislative Council from July 1989 to December 1993*, A Research Project commissioned by the Board of Inquiry into the Size and Constitution of the Tasmanian Parliament, Hobart, December 1994.

¹¹⁷ O'Connor Interview.

President of the Council, considers his independence to be critical, and unhindered by his membership of the Labor party.¹¹⁸

Our findings are that, despite its long held reputation as conservative and obstructionist, the data suggests that the Council plays a healthy but not obstructive role in amending legislation. It does not tend to amend bills extensively, although clearly the TGA bill was an exception. Private Members Bills appear to play a marginal but at times important role, less by their direct adoption and more by influencing government legislative initiatives at a later stage. IMLCs have a blocking majority in the Council, so it is crucial that government cultivates good, reciprocal working relations with them. In turn, where this is the case, an IMLC may secure a policy win just by having a conversation with a Minister;¹¹⁹ however, to do so, our interviewees stressed, the win had to be one for the State, not for personal gain.

We found that IMLCs use the committee process as intended, namely to scrutinise the executive, but that they can leverage this process aggressively against the wishes of government by seeking enhanced public deliberation and evidence gathering. While government may resist this, it invariably recognises the power of these committees, and respects, and very often implements, their recommendations. We found that it may also choose to ignore them, only to subsequently offer its own versions of these recommendations as its own initiatives. In all of their review and scrutiny work, IMLCs are sole operators, not supported by party colleagues or resources, and can be denied access to drafting services, so they are on their own and must build relations to gain support. However, most of our interviewees saw benefit in a lack of party alignment for affording a broad range of working relationships. We observed that government does not respond well to attempts by the Council to increase its powers. Whilst IMLC Jim Wilkinson's bill led to more regular reporting of financial data, IMLC Ruth Forrest's bill to scrutinise regulations before they were enacted failed.

There is much research still to be undertaken on the Council. The electorate work and priorities of MLCs are undocumented, as is the extent to which they follow through on campaign promises. The dynamics between IMLCs and other MLCs have not been explored. Our focus was on the opportunities for policy influence of IMLCs who dominate the Council. We asked IMLCs about their role, the strategies they use to gain

¹¹⁸ Farrell Interview.

¹¹⁹ Smith Interview.

policy influence, their work and influence on committees, and the obstacles to achieving influence. Virtually all of our interviewees see their role not only as reviewing and scrutinising government, but also as exerting initiative and influencing policy.

Room for Improvement: The Quality of Debate in Upper Houses in Australia*

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* Double-blind reviewed article.

'Policy, belief, courage and vision are essential elements in ensuring Australia's future and its role as global citizen. All these depend on our mastery of evidence and our capacity to define and debate. Without this, Australia will remain lost in a dark alley'.¹

INTRODUCTION

This article focuses on the quality of debate in Australian Parliaments. While much significant negotiating and persuasion happens outside of the Parliaments, the subject and method of debate within the chambers remains an important barometer of the health of parliamentary democracy in Australia. Is our democracy in rude health, or has it become another symptom of the 'crisis in democracy' engulfing much of the world?

The article begins with a brief review of the perceived state of democracy in the world and in our own Parliaments in Australia. The rest of the article is divided into two sections. The first discusses the current level of debate in Parliaments across Australia, particularly in upper houses during second reading debates and Committee of the Whole. I chose these forums because upper house second reading debates and Committee of the Whole stages are most likely to reveal Members' understanding of policy issues and legislation through testing their knowledge and ability to explain their views; and because they allow independent Members to be persuaded as to the merits of the legislation that major parties wish to pass. They are where interaction between

¹ B. Jones, 'The Death of Political Debate'. *The Saturday Paper*, 30 March 2019.

Members most reveals the quality of debate. The last section of the article considers several possible structural changes proposed to elicit discussion about improving the standard of Australian parliamentary debate. These proposals should be treated as catalysts for discussion, rather a blueprint for concrete reforms.

The article draws primarily on the views and experiences of five state upper house Clerks across Australia, as well as one current upper house crossbencher, Fiona Patten, the head of the Reason Party in Victoria's Legislative Council.² Their views were collected via face-to-face and telephone interviews throughout April 2019. This approach was taken because I wanted to gather insights from the professionals who work closely with elected representatives. I also wanted to test their reactions to hypothetical changes, as their answers would be instructive in revealing both the current strengths of our Parliaments and the worth of potential improvements.

Of course, quality is a subjective concept. For this paper, the quality of debate is measured using the experience of the professional observers. This includes their views on whether parliamentarians have the ability to display one or, ideally, more of the four following traits:

- Clearly expressing a thorough understanding of issues so as to argue their position coherently
- Interacting with each other in a way that proves comprehension of others' views
- Persuading and being persuaded by others
- Staying relevant to the topic.

The evidence I gathered shows that it is high time we had a debate about parliamentary debate if we are to improve trust in our democratic system.

² Patten is a particularly active Independent Member and strong presence in Victoria's Legislative Council, which may partly explain the attention she receives from the Victorian Government. Her views are her own and should not be taken as representative of other Independent Members in upper houses.

FINDING FAULT WITH DEMOCRACY

There is currently genuine concern about the health of contemporary democracy, to the extent that it is often said to be in 'worldwide crisis'.³ In Australia, a survey carried out in mid-2018 found that less than half of Australians were satisfied with the way democracy works, down from 86 percent in 2007.⁴ Around the same time in the United States of America, two respected pollsters, Jeremy Rosner and Brian Paler, provided the alarming warning that democracy 'may be heading toward a cliff'.⁵ Or consider this assessment of UK politics, from *Guardian* columnist Suzanne Moore: 'Politics is broken, we all know that. We are completely stuck. The two-party system strangles any innovation at birth. It has calcified in the last few years into total crisis. Representative democracy is not working in any meaningful way'.⁶

Yet a closer look at this 'total crisis' reveals that the public's dissatisfaction is not with democracy per se. For example, Rosner and Paler state that 'although there has been no fall-off in recent years in the public's overwhelming support for the *idea of democracy*, the level of dissatisfaction with our democracy's performance is alarming'.⁷ Further, in an article about the recent rise in populism, Peter C. Baker, a contributing editor at *Pacific Standard* magazine, argues that this rise is in part driven by structural weaknesses in democracy across the West. He writes of 'the abyss between the shining ideals of equality and responsive government implied by our talk about democracy and the tarnished reality of life on the ground'.⁸ Or as the historian Barbara Tuchman put it: 'When the gap between ideal and real becomes too wide, the system breaks down'.⁹

³ Max Boot, 'Democracy is in Crisis Around the World. Why?' *Washington Post*, 21 November 2018. Accessed at: https://www.washingtonpost.com/opinions/global-opinions/democracy-is-in-crisis-around-the-world-why/2018/11/21/ccb6423c-ecf4-11e8-8679-934a2b33be52_story.html?utm_term=.83ea3747cfe0.

⁴ Mark Evans, Gerry Stoker and Max Halupka, 'Australians' Trust in Politicians and Democracy Hits an All-Time Low: New Research'. *The Conversation*, 5 December 2018. Accessed at: <http://theconversation.com/australians-trust-in-politicians-and-democracy-hits-an-all-time-low-new-research-108161>.

⁵ Quoted in Karlyn Bowman, 'Democracy in Crisis'. *Forbes*, 15 August 2018. Accessed at: <https://www.forbes.com/sites/bowmanmarsico/2018/08/15/democracy-in-crisis/#324aaac55c6>.

⁶ Suzanne Moore, 'A Dose of Hard and Necessary Truth for Labour'. *The Guardian*, 18 February 2019. Accessed at: <https://www.theguardian.com/commentisfree/2019/feb/18/split-labour-writers-verdict-independent-group>.

⁷ Quoted in Bowman, 'Democracy in Crisis'.

⁸ "'We the People': The Battle to Define Populism'. *The Guardian*, 10 January 2019. Accessed at: <https://www.theguardian.com/news/2019/jan/10/we-the-people-the-battle-to-define-populism>.

⁹ Quoted in Patrick J. Deneen, *Why Liberalism Failed*. New Haven: Yale University Press, 2019, p. vi.

It seems that one source of the crisis is the institution built to deliver democracy: Parliament. It is true that how Parliaments and parliamentarians perform is only one of many ways of measuring the health of democracy and Parliaments vary widely. Yet I would argue that how they perform is vital because Parliament is the democratic edifice most visible to the electorate.

The foundation of this structure is the clash of ideas in Parliamentary debate. While words in Australian Parliaments may initially seem trivial in comparison with the ongoing chaotic actions of the United States and the United Kingdom, the vast majority of time in our Parliaments is devoted to debate. This article shows that there is both room for improvement in the current state of debate in Australian politics and a great appetite for that improvement to happen.

GREAT EXPECTATIONS

It is important here to remind ourselves exactly how we expect Parliaments in Australia to operate. At the 2012 ANZACATT conference, David Blunt listed what he saw as the five ‘great principles’ of the Westminster parliamentary system:

1. Public business shall be conducted in a decent and orderly manner
2. The minority is protected
3. Every member is able to fully and freely express their opinion
4. Full opportunity is provided for the consideration of every measure
5. Heedless or impulsive legislative action is prevented.¹⁰

In a majoritarian Parliament, the right of the government of the day (the majority) to legislate its agenda is balanced by the responsibility of non-government Members (the minority) to hold the government to account in a context in which they genuinely have their voices heard. Steven Reynolds describes bicameral Parliaments as ‘a struggle between the “executive” model which focuses on facilitating the passing of the

¹⁰ D. Blunt, Parliamentary Traditions, Innovation and ‘The Great Principles’ of English Parliamentary Law. Paper presented at ‘Parliamentary Traditions and Procedural Innovation: What Works for Parliamentarians as Legislators in the 21st Century?’, a professional development seminar of the Australian and New Zealand Association of Clerks-at-the-Table (ANZACATT), Canberra, 22-24 January 2012.

government's legislative agenda, and the "liberal" model which emphasises the role of Parliament to scrutinise the performance of government'.¹¹

In this way, Parliaments 'are capable of creating exceptional forums in which to conduct in-depth examination of major social issues'.¹² Baker refers to the idea of 'agnostic pluralism', which he defines as 'a state in which opposition and disagreement are accepted as the norm, and in which people maintain the capacity to disagree intensely without demonising each other, or descending into war'.¹³

Ideally, Blunt's five principles are highly visible when Parliaments, and in particular upper houses where governments increasingly lack a majority, engage in high-quality debate. We avoid descending into war through a dialectical use of words in parliamentary chambers.¹⁴ Conversely, those principles fade when an antagonistic upper house does not hold governments to account through reason and constructive debate but rather simply tries to paint the government as incompetent through negative language.¹⁵

Debate is a key measure of democracy's performance in Westminster systems. We view Parliament, in part, as a battle of ideas, a place where our elected Members use oratory and their skills of persuasion to elicit the support of other Members and the wider public. However, as Blunt notes, the Australian style of deliberative democracy does not preclude a clash of ideas in order to enable consensus, as the majority must eventually prevail. Rather, Blunt quotes John Uhr in stating that governments must openly debate and defend their ideas while delivering 'equality of opportunity so that all representatives can contribute to public debate and to the collective determination of legislative proposals'.¹⁶

¹¹ S. Reynolds, 'Making Honey in the Bear Pit: Parliament and its Impact on Policymaking'. *Australasian Parliamentary Review* 31(2) 2016, p. 183.

¹² Jacques Carl Morin, 'The Importance of Debating Major Social Issues in Parliament: The Example of Quebec's Act Respecting End-of-Life Care'. *Canadian Parliamentary Review* 37(3) 2014, p. 1.

¹³ Baker, "'We the People'".

¹⁴ Clausewitz famously described war as the continuation of politics by other means. Carl Von Clausewitz, *On War*, edited and translated by Michael Howard and Peter Paret. New Jersey: Princeton University Press, 1976, p. 605.

¹⁵ Constitution Commission Victoria, *A House of Review: The Role of the Victorian Legislative Council. Issues and Options for the Victorian Community*. Melbourne: Constitution Commission of Victoria, 2001, p. 24.

¹⁶ D. Blunt, Parliamentary Speech and the Locations of Decision Making. Paper presented at the Australasian Study of Parliament Group 2014 National Conference, Sydney, 2 October 2014.

In a parliamentary democracy, Uhr's idea can be observed in action when minority groups in an upper house propose and debate amendments that improve a Bill, rather than merely opposing it, and those amendments are either agreed to by the government or defeated using well-reasoned argument. Such inclusive deliberation is seen by some as a 'central pillar' of democracy, one that improves decision-making and legitimates the democratic system.¹⁷

It is not difficult, then, to understand why our buildings are (metaphorically) beginning to shake, such is the standing of Parliament among the electorate. It would be hard to contain the length of this paper should it include just a small portion of the negative views politics currently elicits, so the following will have to suffice.

For example, in an article in *The Conversation*, Professor John Dryzek refers to Edmund Burke's description of Parliament as a 'deliberative assembly'. Yet according to Dryzek, politics in Australia is currently being damaged by politicians who are disciplined enough to justify their parties' beliefs and policies, while being poor at reflecting on and being persuaded by others' arguments.¹⁸

Former Australian Federal Minister Barry Jones is just one of many retired parliamentarians to express a critical view of the current standard of parliamentary debate in Australia. Those politicians unlucky enough to have found themselves on the wrong side of Jones during his parliamentary career will recognise the biting tone of his summation:

There is policy paralysis. A significant failure of nerve by those who purport to be leaders, largely because they have little or no grasp of how to frame a debate. The last serious debate in parliament on the republic was in 1998, on human rights in 2001, on the environment in 2009 Many MPs rely on a page of dot points they have been handed, with no understanding of or interest in a contrary point of view. They simply declaim the material

¹⁷ N. Kersting, A. Reiberg and P. Hocks, 'Discourse Quality in Times of Populism: An Analysis of German Parliamentary Debates on Immigration Policy', *Communication & Society* 31(3) 2018, pp. 77, 80.

¹⁸ J. Dryzek, 'The Proposed Senate Voting Changes Will Hurt Australian Democracy'. *The Conversation*, 25 February 2016. Accessed at: <https://theconversation.com/the-proposed-senate-voting-change-will-hurt-australian-democracy-55297>

they have been given, ‘staying on message’ and repeating mantra after mantra ad nauseam.¹⁹

STATE UPPER HOUSES: THE CURRENT STATE OF PLAY

We need, then, to negate the constricting effects of party discipline and the curse of dot point ‘debates’ if we are to improve standards of debate in Australian democracy. The ideal place for this improvement is the upper house.

The ongoing evolution and increasing diversity of upper houses across Australia has lead one Clerk interviewed for this research to state: ‘The upper house is not a known beast’. Yet the upper house remains the best place to debate complex long-term issues that lead to policy and legislative reform. Ideally, all upper houses recognise that governments are required to implement their election policies (their specific mandate) and to govern (their general mandate). Constitution Commission Victoria, a temporary body set up in 2001 to investigate ways of improving governance in Victoria, viewed these mandates as vital components of effective government that must be respected by upper houses while they review the policies and performance of governments.²⁰

As one Clerk noted, ‘The public elects parliaments not governments’.²¹ The view that electorates elect Parliaments and not governments is interesting. Modern voting patterns suggest that if the electorate considered upper houses inherently recalcitrant, the vote for major parties in upper houses would be increasing not decreasing. The fact is that state electoral systems and the results of elections prove that the public wants government policies tempered by strong upper houses.²² As one Clerk put it: ‘The upper house has a mandate from the same democratic system as the lower house’.

¹⁹ B. Jones, ‘The Death of Political Debate’, *The Saturday Paper*, 30 March 2019.

²⁰ Constitution Commission Victoria, *A House of Review: The role of the Victorian Legislative Council. Issues and options for the Victorian Community*, Melbourne: Constitution Commission of Victoria, 2001: 7-8; 29.

²¹

²² A view exists among some commentators that having a Minister in upper houses prevents Members of the Minister’s party from speaking freely. However, the Clerks rejected this idea, all believing that party discipline would still control what Members said. Patten also noted: ‘Ministers don’t inhibit speech, parties do’.

This is not to negate the point made above regarding a government's mandate to enact its legislative agenda. Indeed, all those consulted for the research reported in this paper pointed out that the vast majority of legislation does in fact pass upper houses with very little comment or disagreement. Instead, it reminds us of the idea of deliberative democracy, which suggests that democracy works best when political arguments are won by ideas and debate—with attention focused on both content and tone²³—rather than simple majoritarian political power. This is particularly important in increasingly fragmented societies whose citizens want a range of views to be not just heard but acknowledged.²⁴

The varied political make-up of modern upper houses in Australia, therefore, makes the quality of debate particularly important. One of the most common criticisms of debate is the amount of time Members spend speaking on issues that do not need lengthy commentary. The curse of speaking points leads to dull repetition from Members who are only filling time.

Such filibustering happens when Members simply run out of things to say. They are filling time because the time is there to fill. It is also easier to fall back on antagonism that provokes further negativity than summon the intellectual intent required to be constructive. Equally guilty are governments taunting oppositions during general business and oppositions who believe their only job is to oppose.²⁵

One Clerk interviewed for this research raised the United Kingdom as a positive example. Westminster has a comparatively large number of Members without the same amount of time to speak on subjects as Australian Members. The result is that when they do, their contributions tend to be more thoughtful. In contrast, the Clerk believed, many Australian Parliaments have too few Members with too much time to fill, hence the prevalence of repetition and language that aims simply to aggravate.

Another Clerk provided an example of a Member speaking for 22 hours on a recent Bill. 'This doesn't happen so much anymore, though,' they said. 'Family friendly hours and a greater diversity of Members have seen a genuine cultural change. And major parties

²³ L. Cobb, 'Adding Value to an Arena Legislature? A Preliminary Examination of Topical Debates in the British House of Commons', *The Journal of Legislative Studies* 15(4) 2009, p. 536.

²⁴ Blunt, Parliamentary Speech and the Locations of Decision Making.

²⁵ This view can be traced back to Edward Stanley, who in 1841 told the House of Commons that the Opposition was responsible for nothing more than 'to oppose everything and propose nothing'.

are increasingly agreeing that they don't need the same speaking points read out repeatedly'.

There has been some hope that the increase in crossbench numbers in upper houses would moderate behaviour in the chamber. Major parties would have to respect and respond to the views of minor parties and independents to ensure their legislation is passed. Yet every Clerk agreed that this has not occurred to the extent expected. This is in part because minor parties and Independents lack the resources of major parties that enable their representatives either to understand the large number of bills that cross their desks or at least construct a uniform position.

The turnover of Independents at each election also causes a loss of corporate knowledge of how to debate well in the chamber. Members are lacking, initially at least, what one Clerk summed up as 'the time, opportunity and inclination' to debate well.²⁶ Another Clerk thought that in many ways quality comes down to good fortune: that is, we just have to hope that political parties, particularly major parties, offer the electorate talented people to vote for and then mentor them accordingly.²⁷

Hope seems a good word. As one Clerk observed:

The quality of debate depends on the individuals. Fewer people are joining political parties. As well, fewer people want to become politicians because media intrusion in private lives now goes beyond serving the public interest. There simply aren't as many people to choose from as in the past.

This declining level of debate undoubtedly contributes to the electorate turning away from Parliament and creating the feeling of a 'crisis in democracy'. Politicians shouting during Question Time or second reading debates inspires nothing more than that frequently heard condemnation: 'I'm not interested in politics because they're all the same'.

²⁶ Despite this, many upper house crossbenchers have been shown to be fast learners. One Clerk was of the opinion that while upper houses may not display the same intellectual rigour as in the past, there is a wider breadth of knowledge on show as more issues are being debated. Another made the point that as society becomes more complex, so too does the legislation that Members of Parliament must consider.

²⁷ A further line of research here might focus on the comparative ability of different chambers to self-regulate their behaviour, particularly in the expectations they proffer to new Members.

DECISION-MAKING INSIDE AND OUTSIDE THE CHAMBER

Before discussing the possibilities for improving debate in upper houses, this paper must address the quality of decision-making that occurs outside the chamber both and while legislation is debated within the chamber. In Franz Kafka's novel *The Trial*, the painter Titorelli tells Josef K that the Court is impervious to proof presented in the Courtroom itself. It is, however, very much open to being persuaded outside the Court, in consulting rooms, lobbies and, indeed, Titorelli's own studio. Describing the current state of parliamentary democracy in Australia as Kafkaesque may—or may not, depending on one's experiences—be a stretch, but there is a point here. Politicians constantly negotiate outside the chamber prior to legislation being introduced, with those negotiations sometimes continuing while debate happens on the floor. Blunt gives the New South Wales example of the Police Death and Disability Bill 2011, which saw a two-week period between the Bill being introduced and debate resuming. He writes:

During the intervening period there was clearly a great deal of activity, lobbying and negotiations, particularly involving the Police Association. Indeed throughout the final sitting week of the year, a negotiating team from the Police Association were frequently seen in the parliamentary cafeteria between meetings with cross bench members and government officials.²⁸

The upper house Clerks consulted as part of investigations for this paper reported similar experiences. One said: 'Everyone has nailed their colours to the mast before the debate, so we mostly know what to expect'. The word 'mostly' is telling, though. It is true that very little persuasion happens inside the chamber in terms of whether crossbenchers whose numbers are needed will support or oppose legislation,²⁹ but crossbenchers may reserve judgement on specific amendments until they have heard arguments for and against within or outside the chamber. As such, they are willing and able to be persuaded by the quality of the debate.

²⁸ Blunt, Parliamentary Speech and the Locations of Decision Making.

²⁹ Although, during sittings of the current Legislative Council in Victoria, the President has remarked more than once on the raucous 'meeting room' that the 11 member strong crossbench area becomes when voting on a Bill is imminent.

In Victoria, the Leader of the Government in the Legislative Council, Gavin Jennings, began the 59th Parliament with a wish to work more with non-government Members outside the chamber. Jennings stated that the old way of debating legislation had failed, producing only disharmony and that a 'new paradigm' was needed:

I am interested in sessional orders that may change the way in which this chamber may work in light of being bipartisan or allowing for views to be shared ... I am happy to discuss with opposition parties, discuss with you, discuss with the crossbench the intentions of the government before they are introduced into the Parliament so in fact no-one is surprised and something does not actually turn up on the notice paper one day and is debated the next. Ultimately that is an old paradigm of doing work I actually think it is an inefficient way of doing work. It leads to conflict and division and apprehension across the Parliament, and that is a very old-fashioned way.³⁰

This approach accords with former New South Wales and Federal Independent MP Rob Oakeshott's conclusion that governments achieve more if they negotiate with Members prior to introducing legislation into the chamber. He said: 'You can have a formal agreement that looks bipartisan, but the real politics is happening somewhere else'.³¹

Therefore, it could be argued that what happens in the chamber during, for example, the second reading is not actually debate. In fact, it may be more accurate to rename this procedure 'second reading statements'. It could even be considered a form of ongoing electioneering. Proponents of legislation must explain what a Bill is trying to achieve and opponents must explain why they disagree. As one Clerk interviewed for this study stated: 'It's important for elected members to have accountability to their electorates and the wider public. The community has to know what parties believe and they learn this from what is said in Parliament'.

Terminology aside, there is no denying the potential importance of second reading debate in the chamber in terms of accountability and persuasion. Blunt provides an example of the latter, referring to crossbenchers in the New South Wales 51st

³⁰ Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Council, 20 February 2019, p. 258.

³¹ Quoted in B. Prosser and R. Denniss, 'Minority Government: Non-Ministerial Members Speak about Governing and Democracy'. *Australasian Parliamentary Review* 31(1) 2016, p. 92.

Parliament from 1995-1999 who had been influenced by the ‘persuasive efforts of the great orators in the Legislative Council at that time’.³² The importance of persuasion is, as Blunt states, implied by second reading conventions:

[C]onventions, such as that prior to speaking in debate members should be in the chamber to listen to the contribution of the preceding speaker, so as to be able to respond to that speech, and the following speaker, so as to listen to any responses to their speech, are premised upon parliamentary debate being dynamic and deliberative rather than a series of set piece contributions.³³

Another persuasive element of second readings is that Members speaking later in a debate respond to previous speakers. This is especially relevant for Ministers, who take the opportunity to address the concerns of other Members when summing up the second reading.

IMPROVING UPPER HOUSE DEBATES

The quality of debate around legislation depends on factors as varied as the way Parliament is structured and the capability of elected Members. Short of requiring Members to pass an entrance exam before they are allowed to take their seats, we are forced to look elsewhere for ways to improve outcomes whenever politicians engage with each other. This paper turns to procedural and structural changes to address debate in our upper houses. It looks at two features of our upper houses where a high standard of debate often occurs—parliamentary committees and Committee of the Whole—and asks whether these processes can be used more frequently or in different ways. It then discusses hypothetical structural changes to how upper houses are constructed and the electoral methods used to choose representatives in these chambers.

³² Blunt, *Parliamentary Speech and the Locations of Decision Making*.

³³ Blunt, *Parliamentary Speech and the Locations of Decision Making*.

THE POWER OF COMMITTEES

Parliamentary committees have a long and distinguished history in Westminster systems. They are widely acknowledged as forums for constructive debate where multilateral agreement is regularly—and relatively peacefully—achieved. In Westminster itself, select committees currently review all Bills before they are introduced and scrutinise government departments, a process Cobb considers a ‘deeply ingrained and successful feature’ of parliamentary democracy in the United Kingdom.³⁴

Committees both hold the executive to account and offer Members an opportunity to investigate issues away from the heat of the chamber. They are a transparent mechanism for Members ‘to receive evidence together and engage in a collective process of reasoning in the light of that evidence’.³⁵ Independent MP Rob Oakeshott reflected that he ‘got deeply involved in any committee I could get my hands on [as a result of which] I knew more about what was going on than most’.³⁶

Committees are also forums where Members can be persuaded to change their minds by evidence-informed debate. In Victoria, Cesar Melhem, a Member of the Legislative Council’s Legal and Social Issues Committee in the 58th Parliament, spoke about the impact that Committee’s inquiry into legalising assisted dying had on his own view. Speaking in the Legislative Council, he said:

When the inquiry started I had one view in relation to this subject—I was in the ‘No’ camp. I was in the camp of, ‘No, we don’t need to look at euthanasia or assisted dying in this state’. That was my view. But then on the evidence and from hearing the arguments of various people, and great people—we heard from a lot of individuals in the state of Victoria and a lot of professionals and organisations, and we also visited various jurisdictions around the world—my view was actually changed. My view now is that I

³⁴ Cobb, ‘Adding Value to an Arena Legislature?’, p. 536. In Australia, select committees are becoming increasingly important for Independent and minor party parliamentarians who are unable to be represented on as many standing committees as parliamentarians from the major parties.

³⁵ Blunt, *Parliamentary Speech and the Locations of Decision Making*.

³⁶ Quoted in Prosser and Denniss, ‘Minority Government’, p. 84.

support the majority report on the inquiry to provide Victorians with self-determination.³⁷

Constitution Commission Victoria stated that

... when public hearings by committees reveal weaknesses in proposed legislation, even those committed to their party's stance have changed their minds, and modified their party's policy before the final debate in the House.³⁸

This can lead to modified legislation returning to the lower house where it is accepted by the government. One Clerk said: 'Legislation committees can have a big influence on Bills. Even if the government has a majority, they can accept opposition amendments that improve what the legislation is trying to achieve'.³⁹

One question that naturally follows from these positive views of committees is whether sitting weeks could be altered to allow Members to spend more time in committee meetings and holding public hearings and less time in the comparatively less effective chamber debates.

Support for such a change already exists. For example, many submissions to Victoria's Constitutional review in the early 2000s described the benefit of allowing Legislative Council Members to spend more time on committees and less in the chamber.⁴⁰ Federally, the Senate by leave can allow committees to meet while the Senate is sitting, albeit with safeguards in place to ensure all Members agree to meet.⁴¹ In Tasmania, the upper house is able to adjourn debate on the motion of a Member in order to receive a government briefing on the legislation being debated. This leads to a more informed debate for the Members.⁴²

³⁷ Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Council, 9 June 2016, p. 2827.

³⁸ Constitution Commission Victoria, *A House of Review*, p. 18.

³⁹ Amendments to a bill should still be debated in the chamber because different groups of crossbenchers may not be members of the committee looking at that legislation. The Senate is able to adopt recommended amendments from Committee reports. However, this has not happened since the early 1990s

⁴⁰ Constitution Commission Victoria, *A House of Review*, p. 51.

⁴¹ It can also be logistically problematic when there many inquiries occur at one time.

⁴² This happened 26 times in 2017/18.

The views of the Clerks consulted for this paper were mixed on this question. One agreed it was a good idea, even suggesting that the upper house, by leave, could allocate several hours each sitting day to committee work. Any concerns about Members missing divisions would be eased by dedicating a set time at the end of each sitting week to vote on divisions collated during the week, rather than as and when they arise. However, a Clerk from a jurisdiction that does allow committees to meet while the house is sitting described the process as ‘difficult [because] not many Members actually like it or want it to happen’.

One Clerk argued that even though committees undoubtedly do very good work, it would be difficult to convince the public of the merit of altering sitting weeks in such a way. He believed many people would think that Members are working less because they are not physically in the chamber. Another Clerk countered this with the suggestion of broadcasting public hearings and committee meetings:

It would help to show in public what happens in private. Committees actually function exactly how the public expects politicians to be working when they see Members in the chamber. I think showing the type of informed debate that leads to Members forming and altering their views would be very helpful.

COMMITTEE OF THE WHOLE: A HIGHER LEVEL

Another feature of upper houses that facilitates a high level of debate is Committee of the Whole. This would seem to be because the process is structured to allow a ‘to and fro’ between Members and the Ministers responsible for the legislation being discussed. Members can focus on legislation with an often forensic focus on clauses that they want to see refined and improved.

The standard in one upper house is such that its Clerk said:

Committee of the Whole is where debate in this chamber is most effective. It’s not unusual for a government to amend legislation based on the contributions of other Members, so it’s a great way of achieving what the chamber wants.

All Clerks were open to the idea of allocating more time in their respective chambers to Committee of the Whole. On the other hand, they all agreed that time limits, for example on questions, were important, to avoid filibustering by Members, with the proviso that standing orders should be able to be suspended to allow Members with genuinely complicated amendments more time to speak (as happens in Tasmania). Those Clerks operating without time limits referred to an important convention of

Chairs ‘encouraging’ Members whose thoughts may be meandering slightly to refocus their contributions.

Time limits on questions keep Members from abusing the process by making statements or repeating second reading debate contributions.⁴³ It is also worth considering whether the Committee of the Whole process in upper houses would be improved by allowing the responsible minister from the lower house to enter the chamber to answer questions. This possibility is based on the valid point that ministers would be attending as members of the executive, not as Members of the lower house, thereby not breaching the convention of comity.⁴⁴ However, nobody consulted for this paper thought that this practice would be adopted soon.

Another Clerk suggested that the Committee of the Whole process would be streamlined by allowing ministerial advisers to sit at the table, as occurs in Tasmania. Ministers could currently walk to the edge of the chamber for advice in their house but a Tasmanian style system of ‘allowing advisers at the table would improve the process’.

A MATTER OF CONSCIENCE

Those Clerks consulted for this paper were also asked to imagine the impact of making every vote in the upper house a free (or conscience) vote. Obviously, it would be impossible to police such a system without reading each Member’s mind to ensure they were acting freely. However, if such clairvoyance were available to us, would free votes improve the quality of debate in our upper houses?

Blunt quotes Griffith’s positive view on free votes, stating that they produce

... a more open, interesting and vigorous deliberation which is less formulaic and partisan in character. With free votes there is more occasion and inclination to listen to the views of others, to acknowledge and even accommodate arguments which a member may not agree with at first.⁴⁵

⁴³ Preventing filibustering without discouraging debate is a difficult balancing act.

⁴⁴ In Tasmania, Ministers who are Members of the Legislative Council house have the freedom to attend question time in the Assembly in order to answer questions.

⁴⁵ Blunt, *Parliamentary Speech and the Locations of Decision Making*.

The Clerks were unsure whether free votes would improve the quality of debate in their chambers. One thought that it may lead to party backbenchers developing contributions that are more erudite, perhaps even introducing views that had not cleared party rooms. However, they did include the caveat: 'Only the courageous would exercise that freedom'.

Generally, the free votes that the Clerks had witnessed during their parliamentary careers were described as involving a higher level of debate than those preceding 'whipped' votes. It was thought this was mainly because the topics traditionally linked with free votes are in themselves more sensitive and complex than most other topics. They invite more nuanced contributions, closely linked with Members' personal beliefs and ethics.

The reality is that most legislation is technical and difficult to comprehend for a non-expert. This, combined with the large volume of legislation passed in any Parliament, means that Members often lack the 'time, opportunity and inclination' mentioned above to make strong contributions to debates. Having a free vote would not change this reality.

One Clerk did wonder whether taking away the power of upper houses to defeat bills would encourage more constructive debate. This would essentially make them an 'opinion house', with government Members able to debate more freely and suggest more amendments than at present. The Clerk said:

The lower house would then be able to ignore or accept the amendments. They can do this anyway, to a certain extent, of course, but this way the amendments would have come from a wider range of Members, be less 'political' and may therefore attract more public support.

MECHANISMS TO GUARANTEE MORE VOICES

The diverse membership of upper houses is one of their main strengths. Is there a way of guaranteeing this diversity through viable electoral reform?

One way of doing this would be allocating 50 percent of upper house seats to major parties and 50 percent to minor parties and independents. Weeks writes that in the 18th and 19th Centuries parties were viewed as negative influences on democracy that placed their own interests ahead of the nation's. An Independent Member, by contrast, was considered 'the highest state of being for any true democrat; it implied that a politician could make a decision based on his own personal judgement, free of

pressure from any external influence’.⁴⁶ It is a relatively recent trend, Weeks argues, for strict party control to be so closely aligned with the idea of stable government.⁴⁷

The proposal for an even split in the upper house is practically problematic, not least because defining the meaning of ‘minor party’ would be an unresolvable debate. Nonetheless, the proposal elicited some interesting thoughts. Fiona Patten, whose Reason Party is one of eight parties currently occupying the crossbenches in Victoria’s Legislative Council, believes the wide range of views these parties represent naturally creates a wide range of amendments that improve legislation: ‘Diversity changes debate, as you hear views that you wouldn’t otherwise hear. It’s important for governments to be exposed to these views’.

Clerks consulted for this paper were mostly of the view that a predetermined 50/50 split would increase the government’s workload, either in having to prosecute their case more effectively in the house or in writing legislation in a more consultative manner before it reaches the house.⁴⁸ One Clerk added: ‘Having a large number of independents in the upper house is a good outcome from an election, not the least because the major parties no longer have the power of majority to throw around. Everyone has to cooperate’.

Several Clerks raised the concern that beyond the issue of debate, there would be an increased risk of governments not getting legislation passed. Resulting delays would then reflect badly on the public’s perception of the efficiency of government and the obstreperous nature of upper houses and, in turn, parliamentary democracy.

One Clerk said:

There would be a risk of fringe politics damaging the credibility of the upper house. You do not want upper houses with a sense of entitlement to undo the government’s agenda. It’s legitimate to put the government under pressure to justify its legislation, but we still need a functioning government for the public to keep faith in our system.

⁴⁶ L. Weeks, ‘Parliaments without Parties’. *Australasian Parliamentary Review* 30(1) 2015, p. 63.

⁴⁷ Weeks, ‘Parliaments without Parties’, p. 64.

⁴⁸ Several Clerks observed that the declining support for major parties meant that most upper houses are naturally heading in that direction.

An alternative approach to a 50/50 quota would be to consider whether a move to mixed member proportional (MMP) representation voting to elect upper houses would change their make-up and, therefore, the quality of parliamentary debate.⁴⁹ The proportional representation (PR) systems used to elect upper houses in Australia are regularly refined, raising the possibility that introducing a slightly different method would be an improvement.

The Clerks consulted for this paper were unanimous in their belief that while MMP works well in unicameral Parliaments such as New Zealand, where it is seen as effective in ensuring diversity in elected Members, it would not have a noticeable effect on upper houses in bicameral Parliaments. This is because the current PR systems are felt to work well in Australia.⁵⁰ Any change to MMP would not improve debate. As one Clerk put it: 'Proportional representation provides a majority that gives legitimacy to the passing of legislation'.⁵¹

CONCLUSION: CAUSE FOR OPTIMISM?

Towards the end of 2018, Katharine Murphy wrote several articles on the philosophies of Australia's two major parties. In them, she quotes Labor NSW MHR Anthony Albanese and Liberal Senator for Victoria Scott Ryan. They both stated that if faith in Australia's political structure is to be restored, politicians must improve their skills of persuasion and make good use of debating time in the chamber rather than simply

⁴⁹ In mixed member proportional systems, voters cast two ballots, one for a preferred individual to represent their district and one for the party list they prefer more generally. The two ballots ensure local representation as well as an overall result that proportionally reflects levels of party support. For the New Zealand example, see New Zealand Electoral Commission, 'What is MMP?'. Accessed at: https://elections.nz/democracy-in-nz/what-is-mmp?gclid=EAlaIqobChMlvMrW3ae_6QIVA7eWCh20YQwaEAAYASAAEgIVyD_BwE

⁵⁰ Strong proponents of PR in Australia can be traced back over a century. For example, Catherine Helen Spence, who in 1897 became Australia's first female political candidate, believed that PR guaranteed that the voices of minorities would be heard in a way that tempers the power of strong parties without blocking the will of the majority.

⁵¹ There has been a great deal of comment over recent years about candidates 'gaming' the PR system in order to be elected with a miniscule number of votes. The system is designed to provide diversity of representation in the upper house without being dominated by single-issue candidates. If the quota is too high, diversity suffers; too low and there is a risk of electing candidates who focus on issues of little or no concern to the wider community. The recent changes to the Senate voting system designed to prevent this 'gaming' are being reviewed with interest. See, for example, Dryzek, 'The Proposed Senate Voting Changes Will Hurt Australian Democracy'.

relying on the power of a majority.⁵² It is important for a culture to exist where politicians are willing to be persuaded by their colleagues on both sides of the house and, just as importantly, that a mature electorate allows such a culture to exist.

Australia's present parliamentary system predates the rise of tightly structured and disciplined political parties. As Australia becomes less homogenous, many voters identify more with special interest groups—focused on the environment or human rights, for example—than with the major parties.⁵³ This fracturing of the electorate may in fact simply be the electorate coming full circle in expecting elected Members to debate with more freedom and to a higher standard than party discipline currently allows.

Some of the ideas about the role and quality of debate in our upper houses presented in this paper may be no more than interesting thought bubbles. As Judith Brett points out, however, the rest of the world has often cast an envious eye at Australian parliamentary democracy. She writes that Australia is a country of 'incremental innovation' because we are not afraid of being a 'laboratory for new ideas about democracy, and new methods of achieving them'.⁵⁴ The willingness of politicians and parliamentary staff across Australia to discuss even hypothetical questions in great depth proves that the appetite for innovation remains strong. Hope can also be found in the fact that both Albanese—in reference to the Hawke-Keating economic reforms—and Ryan—in reference to the Howard-Fischer gun law reforms—acknowledge the importance of engaging with others and being willing to compromise and negotiate. In the words of Oakeshott, 'Compromise and negotiation in politics is a strength, not a weakness'.⁵⁵ Perhaps, then, there is cause for optimism. Perhaps Australians can create and support a political culture in which politicians know both how to talk and how to listen.

⁵² 'Progressive Side of Politics Must Not Retreat into Comfort Zone, Albanese Warns', *The Guardian*, 15 November 2018; 'Why Parliament Still Tolerates Thuggery not Acceptable in Broader Society', *The Guardian*, 28 November 2018.

⁵³ Constitution Commission Victoria, *A House of Review: The role of the Victorian Legislative Council*, pp. 8-9.

⁵⁴ J. Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting*. Melbourne: The Text Publishing Company, 2019, pp. 8, 176.

⁵⁵ Quoted in Prosser and Denniss, 'Minority Government', p. 92.

Book Reviews

Australia's Human Rights Scrutiny Regime. Democratic Masterstroke or Mere Window Dressing?, by Adam Fletcher. Carlton: Melbourne University Press, 2018. pp. 427, Paperback RRP \$49.99. ISBN: 9780522874105

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In 2008, Australia's federal government established a National Human Rights Consultation Committee (NHRCC) tasked with consulting the Australian community on the subject of human rights and reporting on how best to enhance and protect those rights. The NHRCC reported in 2009. In 2010, federal Attorney-General Robert McClelland launched a National Human Rights Framework, encapsulating the Government's response to the NHRCC report.

Despite the NHRCC's endorsement, the Framework did not include a statutory bill of rights or provide for judicial oversight. The Attorney-General said that this was done in order to minimise divisiveness and preserve parliamentary sovereignty. Instead, a *Human Rights (Parliamentary Scrutiny) Act 2011* (Scrutiny Act) was passed. Broadly speaking, it aims to enhance the recognition of human rights in policy and legislative development, and in parliamentary debate. Reflecting NHRCC recommendations and the Government's Framework, the *Scrutiny Act* requires a statement of compatibility (SOC) to be prepared and presented for bills introduced into Parliament, and for disallowable legislative instruments. SOC's must include an assessment of whether the bill or instrument is compatible with 'human rights' found in seven core international human rights instruments. The *Scrutiny Act* also provides for the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR's tasks include reporting to Parliament on bills, legislative instruments, and Acts for compatibility with prescribed human rights. It has no power to conduct 'own motion' inquiries outside this framework.

Australia's Human Rights Scrutiny Regime. Democratic Masterstroke or Mere Window Dressing? joins a number of scholarly assessments of this unique bipartite scrutiny regime and makes significant contributions to the literature. It is detailed, wide-ranging and highly readable, making it an important resource for scholars and students

in disciplines such as political science and law, as well being accessible to the interested general reader.

In Chapter 1, Fletcher sketches the *ad hoc* nature of rights protections in Australia and what Hilary Charlesworth has called the nation's 'reluctance about rights'.⁵⁶ Chapter 2 describes the Framework and the *Scrutiny Act* and considers the potential constitutional issues associated with a tripartite dialogue model, and the potential strengths and weaknesses of a bipartite dialogue scheme. This material provides important contextual information for the assessments contained in Chapters 3, 4 and 5.

In Chapter 3, Fletcher examines SOC's in the period 2012–2015. Here he makes a number of significant contributions. These include analysing 239 SOC's that accompanied bills, devising a ranking scheme, and identifying trends in quality. Usefully, too, he interviews public servants responsible for drafting SOC's or responding to PJCHR requests for further information. While he acknowledges improvements in SOC's, he ranks 50% or more of them in each year studied as substandard. In the period under review, Fletcher observes that public servants were increasingly accepting of the regime. However, they also highlighted the need for ongoing human rights training to assist with the preparation of SOC's and requests from the PJCHR. Fletcher notes that funding for community and public sector education and training, promised in the Framework and initially delivered, was removed in the 2014 Budget.

The PJCHR is regarded by Fletcher as 'arguably the most important element of the [scrutiny] regime'. In Chapter 4, he subjects its resourcing and work, as well as the activities of its chairs and members, to close analysis. Like other scholars, he acknowledges the quality of PJCHR reports, describing them as generally 'detailed, comprehensive and, at times, surprisingly forthright'. Fletcher also praises committee initiatives designed to make its work more accessible and informative. These include providing tabling statements, annual reports, and guidance notes for public servants. He concludes that it has been diligent in pursuing unsatisfactory SOC's. Nevertheless, he identifies a number of failures including lack of timeliness in reporting and infrequent use of public hearings. Further, he argues that the PJCHR's divergence from a technical, consensus model of reporting in the 44th Parliament constituted a risk to

⁵⁶ Hilary Charlesworth, 'The Australian Reluctance about Rights'. *Osgood Hall Law Journal* 31(1) 1993, pp. 195-232.

its reputation and influence. However, the effectiveness of a technical scrutiny model and the place of dissent in PJCHR reports deserve further consideration by scholars.

In Chapter 5, Fletcher's assessment of the PJCHR's impact on policy making and legislation is enhanced by interviews with public servants and PJCHR members, and by an analysis of the tone and content of Ministerial responses to the committee's requests for further information. He acknowledges that making impact assessments is fraught with difficulty. And perhaps not surprisingly, he finds little evidence of legislative change directly attributable to the PJCHR, few references to its reports in parliamentary debate and minimal engagement with the media or the public. In addition, he notes that, on balance, the Ministerial responses to requests for further information that he studied were 'perfunctory, dismissive and even impolite'.

Fletcher also points out that the PJCHR's impact is undermined by the fact that its members lack seniority and contrasts this with influential committees such as the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Further, he finds that the committee's influence has suffered because of the failure of most of its chairs and members during the period of review to champion its work in Parliament or publicly. Instead, some have denigrated it.

Assessments of the period 2016–2018 in a recent volume, edited by Julie Debeljak and Laura Grenfell, reaffirm earlier research and Fletcher's own views about the impact of the PJCHR.⁵⁷ However, as Laura Grenfell and Sarah Moulds⁵⁸ and Zoe Hutchinson⁵⁹ have suggested separately, the PJCHR's influence on other parliamentary committees, such as the PJCIS, warrants further investigation.

Chapter 5 is also bolstered by comparative assessments of parliamentary committee influence in Australia and in selected overseas jurisdictions, enabling Fletcher to identify potential mechanisms for improvement in the scrutiny regime. Building on his earlier chapters, Fletcher concludes that the scrutiny regime alone is insufficient to create a rights-respecting culture. He identifies features of the Australian political

⁵⁷ Julie Debeljak and Laura Grenfell (eds.), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*. Sydney: Lawbook Co, 2020.

⁵⁸ Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia'. *UNSW Law Journal* 41(1) 2018, pp. 40–79.

⁵⁹ Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years'. *Australasian Parliamentary Review* 33(1) 2018, pp. 72–107.

process—including executive dominance in the House of Representatives, party discipline, horse-trading, bipartisanship, majoritarianism and, in the case of national security legislation, claims of ‘urgency’—as helping to undercut the regime. Fletcher argues that the ‘nature of politics’ and legislative process ‘militates against the effectiveness of parliamentary rights review’ and that the scrutiny regime’s effectiveness would be enhanced if Australia had a human rights act coupled with some form of judicial oversight. Nonetheless, he concludes that the differences in impact of other scrutiny regimes cannot be ascribed solely to judicial involvement in those jurisdictions. His examination of those regimes thus provides useful suggestions for improvements to the federal scrutiny system.

The scrutiny regime was intended to promote human rights dialogue between the executive and Parliament, inform and improve policymaking and legislation and, through the committee process, enhance participatory democracy. Given Australia’s ‘reluctance about rights’ and the lack of bipartisan support for the *Scrutiny Act*, these were ambitious goals. Fletcher credits the PJCHR with producing impressive reports. However, he says that while dialogue between the executive and the PJCHR has occurred, this dialogue has not extended to Parliament as a whole. He also finds that the regime has not significantly enhanced legislative consistency with human rights obligations. Nor has it, for the most part, facilitated public engagement in committee processes.

Fletcher considers that only structural change can address fundamental problems with a bipartite scrutiny regime. Nonetheless, he argues that useful enhancements could be made to the existing regime. These are found in Chapters 3, 4 and 5, and are broadly summarised in the concluding chapter. In particular, he recommends amending the *Scrutiny Act* to require detailed compatibility assessments as well as incompatibility assessments of bills and all legislative instruments, involving the PJCHR in pre- and post-legislative scrutiny, re-introducing human rights training for public servants, and providing training for parliamentarians and parliamentary staff. Additionally, Fletcher suggests allowing a minimum time for PJCHR review before bills can be debated in Parliament, and he proposes sensible changes to the PJCHR’s mandate, powers and composition.

A few small steps have been taken since the book’s publication. The PJCHR has attempted to prompt timely responses from legislation proponents by establishing a register of correspondence. It has also instituted a Statement of Compatibility project that aims to improve SOC’s through the provision of more guidance materials, liaison with government agencies and training of officials. Further, the committee’s reports are now available on Austlii.

If pursued, these are welcome initiatives but do not detract from Fletcher's pessimistic conclusions or his view that the bipartisan support at senior political levels, which is essential if the PJCHR is to be 'truly effective', is unlikely at present. He does not dismiss the possibility that a government more receptive to human rights may be elected in the future. However, this may be some way off. In 2011 the federal Opposition, which is now in government, failed to support the Scrutiny Act. And, during debates in October 2019 on a private Senator's Human Rights (Parliamentary Scrutiny) Amendment (Australian Freedoms) Bill 2019, old criticisms of the legislation and the 'human rights industry' resurfaced, including from a former PJCHR member. If the political climate does change, there should be a review of the regime as was originally planned but never undertaken. Fletcher's book would be an important resource for any review that occurs.

***Dead Man Walking: The Murky World of Michael McGurk and Ron Medich*, by Kate McClymont with Vanda Carson. Melbourne: Vintage Australia, 2019. pp. 400, Paperback RRP \$34.99. ISBN: 9780143795247**

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Kate McClymont has followed her expose of the misdeeds of former NSW Member of the Legislative Council Eddie Obeid and his associates (*He Who Must Be Obeid: The Untold Story*, Random House, 2014) with *Dead Man Walking*, an account of the life and crimes of psychopathic stand-over man Michael McGurk and corrupt developer Ron Medich, initially McGurk's employer and finally murderer. McClymont writes vividly and engrossingly about her subjects and their low-life, bottom-feeding hangers-on. She reconstructs intricately the dark, byzantine world of McGurk and Medich's deals-within-deals and get-rich-quick schemes. Legality, decency and morality were non-existent concepts for them.

McClymont also adds fascinating personal details about her role as an investigative journalist pursuing these stories: sieving through the plethora of leads from dubious sources, communicating with underworld figures without being compromised, delicate relations with the police, legal intimidation, death threats. At one stage she staked out Medich's home for hours posing as a dog-walker.

Ron Medich emerges as an egotistical incompetent who made a fortune thanks to good luck and the acuity of his brother Roy. He was an obvious target for hyenas like McGurk. When the two fell out, Ron asked his associate 'Lucky' Gattellari to have him killed. A boxer, restaurateur, vigneron, enforcer, petty criminal, brothel-owner and chronically unsuccessful entrepreneur, 'Lucky' put together a comically inept murder plot. The drug and alcohol addled Haissam Safetli proved to be so incompetent at hiring a hit-man for Gattellari that he was forced to do the job himself. On 3 September 2013 McGurk was shot dead in front of his Cremorne home in the presence of his nine-year-old son.

Police soon uncovered the obvious trail left by the murderers who descended into an orgy of betrayal to save their skins. Medich, Safetli, Gattellari and their accomplices were all convicted for their role in McGurk's murder. Medich was sentenced to a minimum 29 years imprisonment while the others received more lenient treatment for co-operating with the police.

A problem with McClymont's book is that she can't seem to make up her mind about whether she is writing a serious study or a racy bestseller. It has no index and features expressions such as 'pissed off', 'dobbed in', 'shitstorm' and 'half-arsed'. We are melodramatically told throughout the book after some description of an activity McGurk was involved in that he was dead soon after. It works the first time but quickly becomes irritating. The book loses momentum in the final chapters with the over-detailed account of the various legal proceedings against the conspirators.

McClymont would have been better to resist the temptation to recount every last salacious story and evaluate more. She provides no analysis of the culture that allowed a violent criminal like McGurk to prosper or why the justice system was so ineffective in pursuing him. The book is silent on the bigger issue of dealing with the unchecked corruption in sections of the Sydney development industry that created the likes of Ron Medich. *Dead Man Walking* is a worthwhile work but would have been a more significant one if these subjects had been addressed.

