
The Franking Credits Controversy: House of Representatives Committees, Public Engagement and the Role of the Parliamentary Service*

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* Double-blind reviewed article.

Abstract The 2018-19 Commonwealth House of Representatives franking credits inquiry demonstrates the problems that can occur when public engagement in parliamentary processes is facilitated by parliamentarians acting with political motivations, rather than by the Parliamentary service, which fulfils an administrative mandate. The committee chair used a partisan third-party website to collect submissions and register attendees for public hearings, resulting in a high level of participation, but causing damage to public perceptions of the committee and the Parliament, at a time when Parliaments are struggling to rebuild trust. This paper looks firstly at what constitutes effective public engagement, through the theoretical lenses of participatory and deliberative democracy. It then draws on the work of theorists John Rohr, John Uhr and others to argue that that facilitating effective and ethical public engagement in committee inquiries is work best done by parliamentary departments (administrators, rather than politicians), many of which have yet to fully embrace this role.

INTRODUCTION

Parliaments in mature democracies around the world are grappling with how to rebuild trust and satisfaction in democracy. Over several decades, democratic and parliamentary theory has shifted from representative models of democracy to more participatory models, which seek to renew democracy through increasing citizen engagement in democratic processes. In this context, parliamentary committees

have become a key mechanism through which Parliaments seek to meaningfully engage citizens. If committees are to make a positive contribution towards rebuilding trust in democracy, the ways in which they engage with citizens must be both effective and ethical.

Adherence to conventional committee practice increases the likelihood that public engagement will be conducted in a fair and ethical manner. Conversely, when committees abandon 'clear and proper procedure',¹ the consequences for public engagement can be dramatic and negative. The 2018-19 franking credits inquiry demonstrates the problems that can occur when public engagement is facilitated by parliamentarians, rather than by the parliamentary service. Among other controversial actions, the committee chair used an apparently partisan third-party website to collect submissions and register attendees for public hearings. This resulted in a high level of participation in the inquiry, but also caused damage to public perceptions of the committee and the Parliament, at a time when Parliaments are struggling to build trust.

House of Representatives Standing Committees are historically known for conducting cooperative reference inquiries into policy issues, and producing bipartisan reports. Inquiries of this type have a great potential to act as deliberative forums. This article analyses the conditions required for inquiries to function as deliberative exercises, and looks at how and why the franking credits inquiry failed to meet these conditions. The analysis demonstrates the key role that the parliamentary service plays in facilitating genuinely deliberative public engagement. Despite the key role played by secretariats, research suggests that most do not have a strategic approach to public engagement, and most parliamentary departments lack dedicated public engagement policies or strategies.

The House of Representatives has historically demonstrated a strong interest in improving public engagement, with several key reports on the subject produced between 1999 and 2010. These reports show evidence of politicians and administrators working together on strategies and approaches to promoting and

¹ T. Smith, 'Speaker's Privilege Speech'. Commonwealth, *Hansard*, House of Representatives, 21 February 2019, pp. 14290-14291.

improving public engagement.² However, an absence of new work in this area in recent years suggests this focus may have waned. This article argues that parliamentary departments should not wait for parliamentarians to drive improvements in this key area. To serve better not only the Parliaments they support, but also democracy itself, parliamentary departments need to strengthen their approach to engagement by becoming more professionalised and strategic.

This article is divided into three parts: Part 1 looks at the franking credits inquiry and the engagement techniques employed. It considers how effective, and how ethical, these techniques were, and analyses their impacts. Part 2 considers citizen engagement in committee inquiries, including the franking credits inquiry, through the theoretical frameworks of participatory and deliberative democracy, especially that offered by James Fishkin. Part 3 uses the notion of ‘regime values’ developed by American scholar of administrative theory, John Rohr, to articulate this paper’s key proposition: that facilitating effective and ethical engagement is a role best performed by parliamentary servants and parliamentary departments, many of which have yet fully to embrace this role.

PART 1: THE FRANKING CREDITS INQUIRY

In September 2018, the Commonwealth House of Representatives Standing Committee on Economics, chaired by Liberal MP Tim Wilson, launched an inquiry into the implications of removing refundable franking credits; a policy that the Labor Opposition was intending to take to the next federal election. Over the course of the inquiry, a number of complaints were raised in relation to the ways in which the Chair was seeking to engage the public. The Opposition sought to refer the Chair to the Standing Committee of Privileges and Members’ Interests for a number of actions, including:

² See the House of Representatives Standing Committee on Procedure’s three key reports: *It’s Your House*, 1999; *Promoting Community Involvement in the Work of Committees*, 2001; and *Building a Modern Committee System*, 2010. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=proc/reports/pciwc/index.htm

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- using a private ‘third-party’ website, with a proforma functionality, to generate ‘campaign submissions’ opposed to the policy, and register witnesses for public hearings;
 - collecting witnesses’ personal information through the website and utilising it for non-committee purposes;
 - apparently scheduling a public hearing to coincide with a protest against Labor’s policy; and
 - reportedly allowing members of the committee to promote Liberal Party events and party membership to attendees at the committee’s public hearings.³

While not giving precedence to a motion to refer the Chair to the Privileges Committee, the Speaker, the Hon Tony Smith MP, made a statement reflecting on some of the practices employed by the Chair, and their wider implications. Speaker Smith did not identify a prima facie case that met the high threshold for contempt, but said:

I appreciate the concerns that may have been raised by the actions of [the Chair] and the actions could be seen to have caused damage to the committee’s reputation and the reputation of the House committee system more generally.⁴

In his reply on indulgence, the Chair was unapologetic, saying:

I just wanted to get up and ... make it clear that the objective of this inquiry at every point is to maximise and increase the participation of Australians in their parliament and make sure that people have the opportunity to have their say.⁵

The contrast between these two viewpoints is striking. There is no doubt that the inquiry engaged a much larger number of individuals than most parliamentary inquiries do, especially to give evidence in person. A close look at the inquiry,

³ T. Bourke, ‘Privilege Speech’. Commonwealth, *Hansard*, House of Representatives, 13 February 2019, pp. 13267-8.

⁴ Smith, ‘Speaker’s Privilege Speech’, p. 14291.

⁵ T. Wilson, Commonwealth, *Hansard*, House of Representatives, 21 February 2019, p. 14292.

however, and the fall-out it generated, suggests this engagement came at a significant cost.

The Inquiry

The Standing Committee on Economics is a long-standing committee of the Commonwealth House of Representatives. Like all House standing committees, it has a government chair and government majority. The franking credits inquiry represents a rare example of a House committee inquiring into an Opposition policy, rather than government policy, or broad policy issues. The Opposition considered this to be an inappropriate use of the committee's inquiry powers.⁶ While the Standing Orders allow a Minister to refer an inquiry into *any* matter that he or she sees fit to refer,⁷ it is arguable that the topic set the conditions for partisan conflict from the outset, directly impacting the nature and quality of public engagement that was to follow. The terms of reference were drafted in a way that presupposed opposition to Labor's policy. The terms of reference asked the committee to look into various positive impacts of franking credits, to consider how franking credit rebates 'support tax principles', and to explore the negative implications of their removal, including the 'stress and complexity it will cause for ... older Australians'.⁸ It is arguable that these terms of reference set the inquiry up to receive evidence from only one side of the debate, rather than encouraging input from a broad range of stakeholders with varying perspectives.

Official Committee Minutes, tabled with the report in the usual way, show conflict within the committee. The committee was required to divide (vote) on a number of disputed questions in relation to inquiry process and what would be included in the final report.⁹ This is unusual for House committees, which historically function in a

⁶ 'Labor Members Dissenting Report', in House of Representatives Standing Committee on Economics, *Report on the Inquiry into the Implications of Removing Refundable Franking Credits*, tabled 4 April 2019, p. 109.

⁷ Standing order 215(b) provides for a committee to inquire into and report on any matter referred to it by either the House or a Minister. House of Representatives, *Standing Orders*, p. 87.

⁸ The Terms of Reference are available on the Committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/FrankingCredits/Terms_of_Reference

⁹ House of Representatives Standing Committee on Economics, *Minutes of Proceedings Relating to the Franking Credits Inquiry*, tabled 4 April 2019. Available from the House of Representatives Table Office. See for instance pp.

bipartisan fashion and are generally consensus-driven.¹⁰ It is also unusual for the Economics Committee, which produced entirely bipartisan reports in the 44th Parliament, and rarely divided for the other inquiries it conducted during the 45th Parliament.¹¹

When the report was tabled, it recommended that refundable franking credits be retained.¹² According to the report, the committee published 1,777 submissions, and received 1,108 identical form letters, which were listed in the report, but not published. Alongside the usual practice of inviting specific individuals and organisations to appear and respond to questions, the committee allowed interested individuals to self-nominate and give evidence using a ‘town hall style’ format where speakers were given three minutes to talk.¹³ These contributions are listed in the report as ‘community statements’, and there are well over 400 reported across 19 public hearings.¹⁴ The raw statistics paint a picture of an inquiry that was highly successful in engaging private individuals. The Chair is quoted in *the Guardian Australia* saying:

The participation in this inquiry has been extraordinary—thousands attending hearings and making submissions—so much so the secretariat is struggling to publish them all ... Too many Parliamentary committees have low participation, and I am elated we have been able to provide a pathway for participation into Australia’s democracy.¹⁵

However, the statistics do not tell the whole story.

68-69. Note: Pages in the Minutes are not numbered. Page numbers used in this paper correspond to the numbering in the PDF provided by the Table Office.

¹⁰ J. Halligan, R. Miller, and J. Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles*. Carlton Victoria: Melbourne University Publishing, 2007, p. 243.

¹¹ A notable exception is the inquiry into the four major banks, which was also highly politicised. Further analysis of House committee reports is included in Part 2 of this paper.

¹² Economics Committee, Franking Credits Report, p. xii.

¹³ Economics Committee, Franking Credits Report, pp. 11-12.

¹⁴ Economics Committee, Franking Credits Report, pp. 67-75.

¹⁵ Tim Wilson MP, quoted in C. Knaus and N. Evershed, ‘Tim Wilson Helped Write 20% of Submissions to Franking Credits Inquiry’. *The Guardian Australia*, 28 March 2019. Accessed at: www.theguardian.com/australia-news/2019/mar/28/tim-wilson-helped-write-20-of-submissions-to-franking-credits-inquiry

Figure 1. Screenshot of Chair’s Facebook Post with Comment



Source: <https://www.facebook.com/stopheretirementtax/>, 7 February 2019.

Along with substantial public engagement, the inquiry inspired dozens of critical media articles, an attempt to refer the Chair to the Privileges Committee, and numerous complaints from members of the public. Critics suggested the inquiry was being used to recruit participants to a large-scale campaign against Labor’s policy.¹⁶ The comment by Christopher Stenton on the Chair’s Facebook page (see Figure 1) is

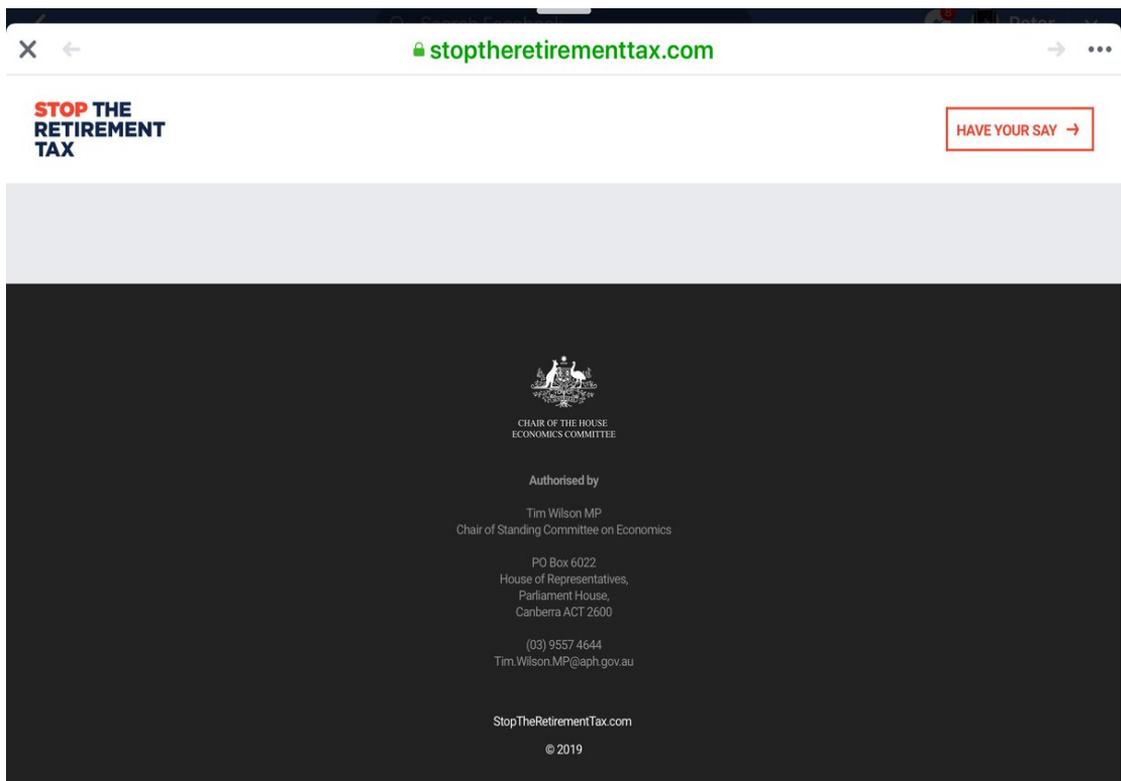
¹⁶ T. Bourke, *Hansard*, pp. 13267-8. See also C. Knaus and N. Evershed, ‘Tim Wilson Helped Write 20% of Submissions’; A. McKinnon, ‘Inside the Franking Credits Debate’. *The Saturday Paper*, 16-22 February 2019. Accessed at: www.thesaturdaypaper.com.au/news/politics/2019/02/16/inside-the-franking-credits-debate/15502356007466

similar to dozens of others. There are also comments in support of the inquiry, but highly-critical comments are more numerous and have significantly more ‘likes’.

The Website

The ‘Stop the retirement tax’ website, which was used to generate submissions and register attendees for public hearings, emerged as a key issue. In October 2018, the domain ‘stoptheretirementtax.com’ was registered and a website ‘went live’, which stated it was authorised by Tim Wilson MP in his capacity as committee Chair (see Figure 2).

Figure 2. ‘Stop the Retirement Tax’ Web Page



Source: stoptheretirementtax.com

Commentators have argued that Mr Wilson’s decision to ‘authorise’ the private website with his signature as Chair of the Economics Committee created potential confusion for the public, as it may have appeared to be an official committee website.¹⁷ The website provided an online pro-forma submission with pre-filled text opposing the franking credits policy, which participants could edit if they wanted to. However, critics argue that the ‘design features’ of the form, including the colour of the text in the editable section, discouraged participants from changing it.¹⁸ The website also facilitated registration for public hearings. These two functions are generally administered by secretariats and facilitated through the Parliament’s official website, which provides important information for witnesses about parliamentary privilege and about how committees and hearings work.¹⁹ The official website continued to function throughout the inquiry, with the ‘Stop the retirement tax’ website running in tandem.

It is not unknown for committee members to use their own websites or social media posts to facilitate greater input into inquiries. However, they generally direct participants to the official website to lodge their submissions, and provide contact details for the secretariat.²⁰ However, in the franking credits case, the Chair directed people to his private website and did not advertise the official parliamentary channels, as shown in Figure 3.

¹⁷ P. Karp, ‘Labor pushes to refer Tim Wilson to privileges committee’. *The Guardian Australia*, 13 February 2019. Accessed at: www.theguardian.com/australia-news/2019/feb/13/labor-pushes-to-refer-tim-wilson-to-privileges-committee; Economics Committee, Franking Credits Report, Dissenting report, p. 110.

¹⁸ A. Oboler, ‘Tim Wilson’s “Retirement Tax” Website’. *News: La Trobe University website*, 8 February 2019. Accessed at: www.latrobe.edu.au/news/articles/2018/opinion/tim-wilsons-retirement-tax-website.

¹⁹ See, for example, the Economics Committee website, which includes links to further information designed to inform and empower the public in dealing with committees: www.aph.gov.au/Parliamentary_Business/Committees/Getting_Involved_in_Parliamentary_Committees.

²⁰ In 2018, the ACT Legislative Assembly referred two of its Members to its Privileges Committee for using a third-party website to collect submissions to a committee inquiry. The Privileges Committee inquiry cleared the Members of contempt, but acknowledged that their use of the website may have led to confusion for submitters. The Legislative Assembly recommended guidelines be created to manage the use of third-party websites in future. ACT Legislative Assembly Select Committee on Privileges, *Newsletter Circulated by Two MLAs with Links to a Third-Party Website*, 2018, pp. 12-15. Accessed at: www.parliament.act.gov.au/__data/assets/pdf_file/0003/1213176/Newsletter-circulated-by-two-MLAs-with-links-to-a-Third-party-website.pdf

Figure 3. Screenshot of ‘Stop the Retirement Tax’ Facebook Page (web version), 13 March 2019

The screenshot shows the Facebook page for 'Stop the Retirement Tax'. The page header includes a navigation menu with 'Home', 'Posts', 'Reviews', 'Photos', 'About', and 'Community'. A green 'Create a Page' button is visible. The main content area features a post by Tim Wilson, a Federal Liberal Member for Goldstein, dated 13 March. The post text reads: 'If you live in Brighton or know somebody who does - make sure that they go along to the public hearing next Tuesday!'. Below the text is a promotional graphic for a 'Public Statements Welcome' event on Tuesday 19 March 2019, from 2:00pm to 3:30pm, at Brighton Town Hall. The graphic includes a registration link and a photo of a man holding a sign that says 'keep your HANDS OFF our SAVINGS!'. The post has 15 likes, 3 comments, and 1 share. On the right side of the page, there are sections for 'Political organisation', 'Community' (with 367 likes and 392 followers), 'About' (with a 'Send message' button and website link), and 'Page Transparency' (showing the page was created on 17 January 2019). A 'Related Pages' section at the bottom right lists 'Defenders of Self Fun...', 'Tim Wilson - Federa...', and 'Mark Latham'.

Source: <https://www.facebook.com/stopheretirementtax/>, 13 March 2019.

A number of participants appear to have gained the impression that they had to register through the Chair’s website to attend a public hearing. The inquiry minutes indicate that the committee responded to numerous letters complaining about this.²¹

²¹ Economics Committee, Minutes of Proceedings, pp. 71-72.

Privacy Concerns

Perhaps the most serious concern raised about the website was the way in which people’s data and information were collected and how they may have been utilised.²² Forms on the website included a preselected tick-box labelled, ‘I want to be registered for the petition against the retirement tax’. Having the box ticked was originally obligatory, as shown in Figure 4. This requirement was removed part way through the inquiry, with the Chair reporting it had been included accidentally.²³

Figure 4. ‘Stop the Retirement Tax’ Registration Page

The website was linked to private company, Wilson Asset Management Inc., which was spearheading the campaign against Labor’s policy. Wilson Asset Management and the website were the subject of an inquiry by the Office of the Australian Information Commissioner in 2019. The investigation found that Wilson Asset Management had downloaded data from the website seven times and used the

²² P. Karp, ‘Labor Pushes to Refer Tim Wilson’.

²³ A. Oboler, ‘Tim Wilson’s “Retirement Tax” Website’.

personal information collected through the website to contact submitters ‘on up to three occasions via email’. The Office was concerned that Wilson Asset Management ‘did not take reasonable steps to notify those individuals of the collection and use of the Personal Information as required by Australian Privacy Principle 5.2’. Ultimately, Wilson Asset Management was subject to an enforceable undertaking which included having to cease using, or destroy, much of the information it had collected.²⁴

The Fall-Out

Traditional media and social media commentators were highly critical of Chair’s choices during the inquiry, including the use of the website. There were dozens of critical media articles published across the six months duration. Eryk Bagshaw’s article in the *Sydney Morning Herald* provides a typical example:

The Coalition is using a taxpayer-funded inquiry into Labor’s franking credits policy to raise funds for the Liberal Party ... The inquiry, ordered by Treasurer Josh Frydenberg, is costing tax-payers \$160,000 in bookings, flights and accommodation for the MPs.²⁵

Bagshaw also reported that ‘[s]hareholders in Wilson Asset Management are concerned their details are being used for Liberal Party promotional material’.²⁶ A search on Facebook and Twitter reveals dozens of concerned posts, such as this from journalists Peter Logue and Matt Bevan:

²⁴ Office of the Australian Information Commissioner, ‘Wilson Asset Management: Enforceable Undertaking’, 28 June 2019. Accessed at: www.oaic.gov.au/privacy/privacy-decisions/enforceable-undertakings/wilson-asset-management-enforceable-undertaking/

²⁵ E. Bagshaw, E. ‘Coalition Exploits Franking Credits Inquiry to Raise Funds’. *Sydney Morning Herald*, 8 February 2019, p. 1.

²⁶ Bagshaw, ‘Coalition Exploits Franking Credits Inquiry’, p. 1.

Figure 5. Journalists' Twitter Posts about the Inquiry



The committee's report (somewhat surprisingly) acknowledges the controversy surrounding the Chair's actions, under the heading 'Privilege claim raised against the Chair, Mr Tim Wilson, MP'. The summary of the events is factual, includes sizable extracts from the Speaker's statement, and finishes by reiterating Mr Wilson's claim that the objective of the inquiry was 'to maximise and increase the participation of Australians in their parliament'.²⁷

PART 2: COMMITTEES AND PUBLIC ENGAGEMENT

Increasingly [Parliaments] have ... had to shift from being service providers within their institution, to service providers externally to the public. They have become promoters of the values and operation of parliamentary democracy, bringing about a cultural and attitudinal shift within each institution based on a recognition that the public are their core stakeholders equally as much as, if not more than, the elected members.²⁸

²⁷ Economics Committee, *Franking Credits Report*, pp. 8-11.

²⁸ Hansard Society, *Lessons from Abroad: How Parliaments Around the World Engage with Their Public*, 2009, p. 68. Accessed at: <http://archive.ipu.org/splz-e/asgp10/UK.pdf>

The franking credits inquiry came after three decades of work across Parliaments to modernise parliamentary processes and increase citizen engagement.²⁹ Two intersecting theories of citizen engagement have emerged to dominate recent democratic theory: participatory democracy, outlined by Carol Pateman in 1970, and deliberative democracy, originally emerging in 1980 with Joseph Bessette, and usefully defined by James Fishkin in 2009. Proponents of both participatory and deliberative democracy are interested in boosting the legitimacy and long-term sustainability of democratic systems of government by broadening and deepening citizen engagement in decision-making. Both schools of thought touch on the importance of empowering citizens through their engagements with democratic institutions. Committees have emerged as a key vehicle for citizen engagement in modern Parliaments, but research suggests they are not living up to their potential.³⁰ Deliberative democratic theory provides a useful foundation for analysing engagement in the franking credits inquiry. Viewed through a deliberative lens, the inquiry is exposed as a decidedly non-deliberative exercise.

Democratic Renewal Through Participation

Participatory democracy emerged in the 1960s as a reaction against the perceived limitations inherent in representative notions of democracy. Its proponents promote lay-citizen participation in decision-making right across social and political institutions.³¹ Perhaps its key proponent is Carol Pateman, whose ‘participatory model’ of democracy requires ongoing ‘input’ from citizens, well beyond voting; with the ‘output’ including both ‘policies’ and ‘the development of the social and political capacities of each individual’.³² Pateman calls for a greater share of power for citizens, arguing for ‘equality of power in determining the outcome of decisions’.³³

²⁹ Halligan, Miller and Power, *Parliament in the Twenty-First Century*, p. 241.

³⁰ C. Hendriks and A. Kay, ‘From “Opening Up” to Democratic Renewal: Deepening Public Engagement in Legislative Committees’. *Government and Opposition* 54(1) 2019, p. 25.

³¹ A. Florida, ‘Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections’. *Proceedings of the European Consortium for Political Research 14th General Conference*. Austria: University of Innsbruck, 2013, p. 4. Accessed at: [//ecpr.eu/Events/PaperDetails.aspx?PaperID=2844&EventID=5](http://ecpr.eu/Events/PaperDetails.aspx?PaperID=2844&EventID=5)

³² C. Pateman, *Participation and Democratic Theory*. Cambridge: Cambridge University Press, 1970, p. 43.

³³ Pateman, *Participation and Democratic Theory*, p. 42.

Florida critiques this focus, saying that deliberative and participative processes ‘may exercise some kind of influence’ in decision-making, but should not seek *equality* with the Parliament, which is the constitutionally and politically legitimate decision-making body. Florida argues that it is unrealistic ‘to assume (or demand) some kind of formal pre-commitment by institutions to “renounce” a share of their sovereignty or to “devolve” their powers’.³⁴

Largely superseding participatory democracy over the course of the 1980s, deliberative democratic theory is interested in creating spaces for meaningful deliberation, where citizens participate in forums ‘founded on the exchange of reasons and arguments’.³⁵ Discourse on deliberative democracy has grown to become the largest area of political theory, ‘both theoretical and empirical’, with its influence spreading ‘far outside universities’.³⁶ Deliberative democrats design and promote forums through which citizens may more fully participate in *existing* democratic institutions.³⁷ In his 2009 book on deliberative democracy, James Fishkin argues for renewing democracy through the use of forums that mobilise ‘refined’ verses ‘raw’ public opinion and provide participants with access to high-quality information to inform their decision-making.³⁸ Unlike participatory democracy, deliberative theories are generally interested in working within existing representative forms of democracy while improving and disrupting them.³⁹

Both deliberative and participatory theories argue for empowering citizens through meaningful engagement with political institutions. The committee systems prominent in Australian Parliaments fit more neatly with Fishkin’s concept of democratic renewal, which seeks to *improve* representative democracy, than with Pateman’s concept, which seeks drastic reform. Fishkin’s work offers a useful set of criteria with which to analyse public engagement practices employed by parliamentary committees, including in the franking credits case.

³⁴ Florida, ‘Participatory Democracy versus Deliberative Democracy’, p. 50.

³⁵ Florida, ‘Participatory Democracy versus Deliberative Democracy’, p. 2.

³⁶ C. Pateman, ‘APSA Presidential Address: Participatory Democracy Revisited’. *Perspectives on Politics*, 10(1) 2012, p. 7.

³⁷ Florida, ‘Participatory Democracy versus Deliberative Democracy’, p. 6.

³⁸ J. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*. Oxford: Oxford University Press, 2009, p. 13.

³⁹ Florida, ‘Participatory Democracy versus Deliberative Democracy’, p. 51.

Why Committees?

Halligan, Miller and Power's 2007 book, *Parliament in the Twenty-first Century*, is the foundational Australian text on the development of Australia's federal parliamentary committee system. The authors suggest committees can promote democratic renewal and offer the 'greatest potential for development in all types of parliamentary systems'.⁴⁰ In relation to citizen engagement in committee inquiries, Halligan, Miller and Power write:

As the parliament moves through the twenty-first century, these opportunities for 'outside' engagement may come to be of the highest significance for the functioning of the parliament as the leading institution of representative democracy in Australia.⁴¹

More recent work, such as Hendriks and Kay, echoes the view that 'opening up' Parliaments to more public participation through committees can promote democratic renewal.⁴² Key parliamentary texts, including *Odgers Australian Senate Practice* and *House of Representatives Practice*, also posit public engagement as a key function of committees.⁴³ This focus is mirrored around the world in the Parliaments of mature democracies.⁴⁴ The United Kingdom House of Commons, for instance, voted to make public engagement a 'core task' of the work of committees in 2012, and commissioned in-depth research into select committee engagement in 2014.⁴⁵

⁴⁰ Halligan, Miller and Power, *Parliament in the Twenty-first Century*, p. 5; see also I. Marsh and R. Miller, *Democratic Decline and Democratic Renewal: Political Change in Britain, Australia and New Zealand*. Cambridge: Cambridge University Press, 2012, p. 289.

⁴¹ Halligan, Miller and Power, *Parliament in the Twenty-First Century*, p. 238.

⁴² Hendriks and Kay, 'From "Opening Up" to Democratic Renewal', p. 3.

⁴³ H. Evans, *Odgers' Australian Senate Practice 14th Edition*. Rosemary Laing (ed). Canberra: Department of the Senate, 2016, p. 462; D. Elder (ed), *House of Representatives Practice*. Canberra: Department of the House of Representatives, 2018.

⁴⁴ Inter-Parliamentary Union and United Nations Development Program (IPU/UNDP), *Global Parliamentary Report 2012: The changing nature of parliamentary representation*, 2012, pp. 32-33. Accessed at: www.ipu.org/resources/publications/reports/2016-07/global-parliamentary-report-2012-changing-nature-parliamentary-representation

⁴⁵ House of Commons Liaison Committee, *Building public engagement: Options for developing select committee outreach: First Special Report of Session 2015–16*, 2015, p. 5. Accessed at: publications.parliament.uk/pa/cm201516/cmselect/cmliaisn/470/47002.htm

At their best, committees provide citizens with opportunities to participate in making decisions that affect their lives, above and beyond voting in elections. Sarah Moulds' work on the contribution of Commonwealth parliamentary committees to law-making in Australia finds that the committees studied have 'strong deliberative attributes', and:

The contribution of the committee system to the process of law making can also enhance the deliberative quality of decision-making in the Australian Parliament, providing a vital connection between the 'governed and the governors' on the development of laws and policies that may have a direct impact on their individual rights.⁴⁶

Deliberative Practice

The House of Representatives committee system emerged in a context informed by participatory and deliberative democracy, and exploratory policy inquiries dominate the work program of its standing committees.⁴⁷ Collecting submissions and hearing evidence in public represent an attempt to draw in 'refined' public opinion and create 'good conditions' for deliberation, in the sense outlined by Fishkin.⁴⁸ Fishkin offers five criteria for judging the quality of a deliberative process:

- 1) Information: The extent to which participants are given access to reasonably accurate information that they believe to be relevant to the issue.
- 2) Substantive balance: The extent to which arguments offered by one side or from one perspective are answered by considerations offered by those who hold other perspectives.

⁴⁶ S. Moulds, 'Committees of Influence: The Impact of Parliamentary Committees on Law Making and Rights Protection in Australia', *AIAL Forum* 97 2015, p. 14.

⁴⁷ The House administers a number of committees, including joint committees, which regularly conduct different kinds of inquiries, including Bill inquiries and those designed to scrutinise the executive. These kinds of inquiries may be less likely to be bipartisan, and less likely to facilitate significant public engagement, although there are exceptions. House Standing committees, however, most often conduct broad policy inquiries, and these, along with select committee inquiries, tend to be the inquiry types that are most suited to broad public engagement.

⁴⁸ Fishkin, *When the People Speak*, p. 13.

- 3) Diversity: The extent to which the major positions in the public are represented by participants in the discussion.
- 4) Conscientiousness: The extent to which participants sincerely weigh the merits of the arguments.
- 5) Equal consideration: The extent to which arguments offered by all participants are considered on the merits regardless of which participants offer them.⁴⁹

Conventional committee practices help committee inquiries achieve against these criteria. While not comprehensive, Table 1 captures some of these practices. These practices protect and enhance the ability of committees to provide a space for genuine deliberation by making conditions as fair and equitable as possible for all participants, including non-government committee members. However, because most of them are established by convention and through practice—not defined in rules or Standing Orders—these practices can be abandoned by committees, as was the case in the franking credits inquiry.

Partisanship: The Enemy of Deliberation

The extremely strong party discipline that characterises the Australian Parliament has an impact on the deliberative potential of committees.⁵⁰ To reduce this impact, House committees have traditionally conducted inquiries into issues upon which the parties do not have strong set positions. Exploratory policy inquiries create comparatively good conditions for deliberation and are more likely to produce bipartisan reports. However, to be clear, committees do not need to achieve bipartisan policy positions to be cooperative and function in a bipartisan manner. The presence of dissenting reports is not necessarily indicative of an overly partisan committee environment, but such environments inevitably result in dissents. Halligan, Miller and Power point to examples in which committees negotiating over Bills experience dissensus but are still cooperative, saying: ‘irresponsible conflicts can severely damage the functioning of a committee’, but dissensus that is anticipated can be handled ‘with maturity’.⁵¹

⁴⁹ Fishkin, *When the People Speak*, p. 160.

⁵⁰ J. Halligan and R. Reid, ‘Conflict and Consensus in Committees of the Australian Parliament’. *Parliamentary Affairs* 69(2) 2016, pp. 233-234.

⁵¹ Halligan, Miller and Power, *Parliament in the Twenty-first Century*, p. 243.

Table 1. Committee Practices That Boost the Deliberative Quality of Inquiries

| Fishkin's Criteria | Basic/Widespread Practice | Innovative/Novel Practice |
|----------------------------|---|--|
| <i>Information</i> | <p>Generally on website or via email:</p> <ul style="list-style-type: none"> ● About committee ● About inquiry ● About Bill ● About giving evidence/appearing ● Witness rights and responsibilities ● About parliamentary privilege ● Final report and government response published | <p>Generally on website or via email:</p> <ul style="list-style-type: none"> ● Discussion paper to guide submitter input ● Links to relevant background material, related documents and related inquiries ● Contact details for referral services, getting help, etc. ● Provision of information to participants after inquiry about outcomes <p>Generally in person:</p> <ul style="list-style-type: none"> ● Capacity-building for regular submitter groups |
| <i>Substantive balance</i> | <ul style="list-style-type: none"> ● Secretariat directly invites a range of stakeholders ● Adverse comment processes provide right of reply | <ul style="list-style-type: none"> ● Use of roundtables to allow debates among witnesses ● Secretariat proposes additional witnesses with alternative views |
| <i>Diversity</i> | <ul style="list-style-type: none"> ● Submissions called for and collected by secretariat ● Advertise on website ● Media releases ● Use of existing stakeholder lists | <ul style="list-style-type: none"> ● Public surveys ● Presentations to stakeholders to encourage participation ● Wider and deeper advertising ● Efforts to engage hard-to-reach publics, eg: youth, Indigenous |
| <i>Conscientiousness</i> | <ul style="list-style-type: none"> ● Consideration of all sides of argument in report ● Dissenting reports and additional comments ● Costing recommendations (such as by the Parliamentary Budget Office) | <ul style="list-style-type: none"> ● Recommendations are thoroughly researched and evidence-based ● Recommendations are tested with stakeholders prior to being included ● Members debate and are open to changing their positions |
| <i>Equal consideration</i> | <ul style="list-style-type: none"> ● Hearing programs formulated with input from all committee members ● Proportionate time to opposing sides, depending on value/merit ● Chair ensures hearings are conducted equitably ● Report consideration process involves genuine debate and compromise | <ul style="list-style-type: none"> ● Public surveys testing opposing viewpoints/options ● Secretariat researches key voices to ensure all are included ● Chair seeks input on recommendations from non-government members prior to finalising chair's draft report |

Committees lose their value as deliberative bodies when they cease to be cooperative and become dysfunctional. Hendrix and Kay observe: ‘the capacity of many committees to deliberate with the broader public interest in view can be compromised by the unchecked influence of interest group competition and party politics’.⁵² The referral of a politically divisive inquiry topic may encourage dysfunction from the outset,⁵³ and overly-partisan behaviour within the committee is likely to exacerbate this.⁵⁴ In 2010, the House Procedure Committee stated:

The Committee believes that the House committee system is unique. Its bipartisan nature and its focus on policy allow it to adopt a more progressive approach to the ways that it builds the bridges between the community and the Parliament, and the ways it engages the community in the work of the Parliament.⁵⁵

The committee draws a direct connection here between bipartisan cooperation and a ‘progressive approach’ to public engagement. This connection is borne out both in theory and in empirical examples.⁵⁶

Analysis of recent reports suggests House committees deserve their reputation as bipartisan and indicates that franking credits was an ‘outlier’. House standing and select committees tabled 56 reports during the 45th Parliament, with 45 of these being bipartisan (no dissenting report from the Opposition).⁵⁷ Of the 11 reports that were not bipartisan, seven were Economics Committee reports, with six of these showing indications of committee dysfunction and/or public dispute.⁵⁸ Committees

⁵² Hendrix and Kay, *Democratic renewal*, p. 12.

⁵³ Halligan, Miller and Power, *Parliament in the Twenty-first Century*, p. 244.

⁵⁴ Halligan and Reid, *Conflict and Consensus*, p. 3.

⁵⁵ House of Representatives Standing Committee on Procedure, *Building a Modern Committee System: An Inquiry Into the Effectiveness of the House Committee System*. Canberra: Commonwealth of Australia, June 2010, p. 43.

⁵⁶ One example was the 2018 Senate select committee stillbirth inquiry, which conducted public hearings around Australia, including in Katherine in the Northern Territory. The committee was cooperative, the report bipartisan, and the government response was timely and positive (all 16 recommendations were agreed to, or agreed to in principle). Stakeholder commentary indicates a high level of satisfaction with the process and the outcomes. See Stillbirth Centre of Research Excellence, *Stillbirth Senate Inquiry*, 2019. Accessed at: www.stillbirthcre.org.au/news/stillbirth-senate-inquiry).

⁵⁷ All committee reports and associated documents are available on the Parliament’s website.

in the 44th Parliament were even more cooperative, with 41 reports tabled, 39 of which were bipartisan and none of which suggested committee dysfunction.⁵⁹

Highly partisan inquiries also increase the risk that participants may be manipulated. Fishkin observes that providing misinformation, or one-sided information that seeks to impose a predetermined viewpoint, has the effect of manipulating participants, rather than involving them fully in democratic processes.⁶⁰ This prevents true deliberation, and may also leave participants feeling ‘used’. Fox observes that manipulative or poorly executed engagement can cause further damage to public perceptions of the Parliament and argues that tokenistic engagement is a waste of time and resources.⁶¹ To be deliberative, democratic processes must facilitate deliberation among participants who are ‘informed, engaged and attentive’.⁶² Some of the ways in which the franking credits inquiry failed to meet Fishkin’s criteria (see Table 1) are outlined below:

1. Information: Information provided to participants on the ‘Stop the retirement tax’ website was insufficient. Participants were not informed of their rights or provided with information on parliamentary privilege, and may have believed they were engaging with an official website when they were not.
2. Substantive balance: Evidence from individuals and organisations supporting the removal of refundable franking credits was minimal, despite such evidence being readily available.⁶³

⁵⁸ To identify committee dysfunction and/or public disputes, I analysed the Dissenting Reports, Deputy Chairs’ tabling speeches, and media coverage. All committees other than the Economics Committee appear to have functioned in a cooperative manner, even the Standing Committee on Health, Aged Care and Sport, whose inquiry into e-cigarettes resulted in a highly unusual situation in which the chair dissented from the final majority report. Most of the Economics Committee reports that related to disputes were released as part of the ongoing inquiry into Australia’s four major banks. Thus, while there are six reports related to disputes, these refer to only two inquiries—franking credits and Australia’s major banks.

⁵⁹ The two that were not bipartisan were Environment Committee reports in which, despite the lack of a bipartisan outcome, there was no indication of committee dispute or dysfunction.

⁶⁰ Fishkin, *When the People Speak*, p. 13.

⁶¹ R. Fox. ‘Engagement and Participation: What the Public Want and How Our Politicians Need to Respond’. *Parliamentary Affairs*, 62(4) 2009, p. 682.

⁶² Fishkin *When the People Speak*, p. 13.

⁶³ McKinnon, ‘Inside the Franking Credits Debate’.

3. Diversity: The overwhelming majority of participants who gave evidence to the inquiry were opposed to the removal of refundable franking credits, meaning that there was little diversity of opinion represented. The over 400 three-minute 'community statements' presented during the inquiry had strong similarities to each other, suggesting engagement was deep, but not wide. Proforma submissions also tend to be 'low quality', fail to provide 'balanced' evidence, and placed a high administrative burden on secretariats.⁶⁴
4. Conscientiousness: With its terms of reference skewed towards a predetermined outcome, and in a context of deep partisan division, there is little evidence that committee members were able to 'sincerely weigh the merits of the arguments'.⁶⁵
5. Equal consideration: There is evidence that those speaking in favour of the removal of refundable franking credits were booed and heckled at public hearings, with the Chair allowing this to occur.⁶⁶ Non-government members of the committee also claim that submissions and correspondence expressing alternative views were suppressed.⁶⁷

If the outcome of an inquiry is predetermined, information provided is incomplete, arguments, evidence and witnesses on one side of the debate are side-lined, and the committee is unable to consider the evidence in a meaningful way due to disharmony and dysfunction, the inquiry cannot be considered a 'deliberative' exercise.

John Uhr identifies that committee inquiries dominated by partisan division are often those that 'generate the most media publicity'.⁶⁸ These highly-politicised inquiries also tend to be 'less productive', making little contribution to policy or legislative improvement and suggesting that media coverage is a problematic indicator of

⁶⁴ P. Painter, 'New Kids on the Block or the Usual Suspects?: Is Public Engagement with Committees Changing or is Participation in Committee Inquiries Still Dominated by a Handful of Organisations and Academics?', *Australasian Parliamentary Review* 31(2) 2016, p. 72.

⁶⁵ Economics Committee, Franking credits report, Dissenting report, p. 109.

⁶⁶ McKinnon, 'Inside the Franking Credits Debate'; M. Koziol, 'This is a Sham': Chaotic Scenes as Man Ejected from Tim Wilson's Franking Credits Inquiry'. *The Sydney Morning Herald*, 8 February 2019. Accessed at: www.smh.com.au/politics/federal/this-is-a-sham-chaotic-scenes-as-man-ejected-from-tim-wilson-s-franking-credits-inquiry-20190208-p50wil.html

⁶⁷ Economics Committee, Minutes of Proceedings, p. 68.

⁶⁸ J. Uhr, 'Marketing Parliamentary Committees', *Canberra Bulletin of Public Administration* 98, 2000, p. 38.

success.⁶⁹ Far from being effective, Uhr explains, highly partisan inquiries ‘might simply annoy or for that matter flatter the powers that be’.⁷⁰ Discussing the inherent value in a cooperative committee, Uhr maintains:

When parliamentary committees mirror the partisan fault lines of the parliamentary chambers and replicate the worst excesses of adversarialism, then the committees have lost their value as community forums.⁷¹

The franking credits inquiry provides a stark illustration of the way partisanship reduces the capacity of a committee inquiry to act as a substantially deliberative forum. In the case of such inquiries, the number of participants is a poor indicator of successful engagement. *Who* is engaged and *how* they are engaged is ultimately more important than *how many* are engaged.⁷² Engaging large numbers of citizens in committee work that has no deliberative potential is an activity of questionable value. In the case of the franking credits inquiry, it appears that significant resources were expended to ‘make a political point’, rather than to collect evidence to inform genuine consideration of a policy question.⁷³

Procedure and Precedent

The ‘Stop the retirement tax’ website was clearly controversial; but was it against any formal rules? The House Standing Orders do not prescribe how committees will engage with citizens beyond granting standing committees the right to ‘call for witnesses and documents’.⁷⁴ The Houses of the Commonwealth Parliament (unlike houses in some other jurisdictions) do not have Codes of Conduct in place in relation

⁶⁹ Uhr, ‘Marketing Parliamentary Committees’, p. 39; see also M. Drum, ‘How Well Do Parliamentary Committees Connect with the Public?’, *Australasian Parliamentary Review* 31(1) 2016, p. 50.

⁷⁰ Uhr, ‘Marketing Parliamentary Committees’, p. 38.

⁷¹ J. Uhr, ‘Issues Confronting Parliaments’, *Australasian Parliamentary Review* 17(1) 2002, p. 125.

⁷² Uhr, ‘Marketing Parliamentary Committees’, p. 39; J. Morris and S. Power, ‘Factors that Affect Participation in Senate Committee Inquiries’. *Parliamentary Studies Paper 5*. Crawford School of Economics and Government, Australian National University, 2009, p. 2; and R. Kelly and C. Bochel, *Parliament’s engagement with the public*, London: House of Commons, 2018.

⁷³ Bagshaw, ‘Coalition Exploits Franking Credits Inquiry’, p. 6.

⁷⁴ House of Representatives, Standing Orders, SO 236.

to the behaviour of Members or Senators.⁷⁵ Procedures for dealing with witnesses have been adopted in slightly different forms by the House and the Senate, and these provide *some* protection for witnesses giving evidence to committees.⁷⁶ The resolutions adopted by the House of Representatives oblige committees to:

- use their powers to summons witnesses or order the production of documents only where ‘the circumstances warrant’
- ‘ensure that all questions put to witnesses are relevant to the committee’s inquiry and that the information sought by those questions is necessary for the purpose of that inquiry’
- provide opportunities for witnesses to request to have their evidence taken in camera, and provide an explanation and fair warning if the request is not approved
- provide notice of a proposed appearance, the right to be accompanied by legal counsel or advisers, and information about the inquiry and terms of reference
- investigate any claims that witnesses giving evidence have been ‘improperly influenced’ or threatened in relation to their evidence or participation in the inquiry
- in the House of Representatives resolution, the following: ‘Witnesses shall be treated with respect and dignity at all times’.⁷⁷

These resolutions were drafted to provide some protection for individual witnesses who appear before a committee. The use of the ‘Stop the retirement tax’ website in the franking credits inquiry could be argued to be counter to these procedures in the following ways:

- It is unclear that the ‘Stop the retirement tax’ website provided ‘a copy of the committee’s terms of reference’.

⁷⁵ I. McAllister, ‘Keeping Them Honest: Public and Elite Perceptions of Ethical Conduct among Australian Legislators’, *Political Studies*, 48(1) 2000, p. 26.

⁷⁶ House of Representatives, Standing Orders, September 2019, Resolution adopted 13 November 2013. For a detailed discussion on the adoption and function of these procedures, see: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter19/Witnesses

⁷⁷ House of Representatives, Standing Orders, pp. 125-127.

- Failure to provide information on parliamentary privilege and the right to give evidence in camera means the website can be seen to have breached the procedures relating to these witness rights.
- Recruiting participants to an inquiry through partisan channels, as opposed to through the secretariat-facilitated official channels, could potentially be seen as ‘improper influence’ in respect of evidence given. In fact, in his statement, Speaker Smith said he was ‘satisfied’ there was the ‘potential for interference with evidence given to the committee’. However, unless the interference prevented the committee from completing its work, contempt could not be established.⁷⁸
- It is also arguable that the privacy concerns created by the collection and subsequent use of data through the website breached the requirement to treat witnesses with ‘respect and dignity at all times’.⁷⁹

While it does not have the authority of Standing Orders or Resolutions of the House, *House of Representatives Practice* includes guidelines for the conduct of committee work that have relevance to how committees engage citizens. A list entitled ‘Responsibilities of the chair’ encourages committee chairs to:

- conduct proceedings in an orderly and fair manner;
- ensure the standing orders and any other relevant requirements of the House or the Parliament are applied appropriately;
- ensure that witnesses before the committee are treated fairly and respectfully; and
- respond promptly and comprehensively to any concerns raised by committee members.⁸⁰

These guidelines are not formally enforceable. However, failure to apply them often leads to conflict.

Another source of authority on practice and procedure is the Speaker and his or her rulings. *House of Representatives Practice* states that, while there is ‘rarely any scope

⁷⁸ Smith, ‘Speaker’s Privilege Speech’, p. 14291.

⁷⁹ House of Representatives, Standing Orders, pp. 125-127.

⁸⁰ Elder (ed), *House of Representatives Practice*, p. 681.

for the Speaker to intervene on committee procedures', Speakers' rulings on procedural matters 'are significant as precedents'.⁸¹ However, *House of Representatives Practice* makes it clear that Speakers' rulings have a limited ability to impact action taken by committees. The House itself must take action on any suggested breach of procedural rules, with the Speaker unable to act unilaterally. *House of Representatives Practice* also notes that 'no formal action has been taken by the House' in the past in relation to complaints about committee practices or procedure.⁸² The Speaker's statement on the actions of Mr Wilson in relation to the franking credits inquiry sent a strong message regarding the importance of 'clear and proper' committee procedure, but did not impose any consequences, nor can the Speaker's statement prevent such action happening again. The House did not choose to sanction the Chair or impose any penalty. In fact, Mr Wilson was re-appointed by the Prime Minister as chair of the House Economics Committee for the 46th Parliament.⁸³

Can Committees Contribute to Democratic Renewal?

If committees are to have a positive impact on citizen perceptions of the Parliament and democracy, they must engage in ways that are both effective and ethical. Studies that look at the success of committees in fostering positive public engagement almost universally conclude the same thing: for committees to contribute to democratic renewal, Parliaments must commit to implementing more strategic approaches.⁸⁴ Recent research, along with reviews conducted within Parliaments, suggests that parliamentary committees still lack the strategic framework, skills and capability that is necessary *consistently* to facilitate effective public engagement.⁸⁵

According to Hendriks, Regan and Kay, despite decades of discussion around engagement in committee work, resources and timeframes are still tightly constrained, innovation is still 'ad hoc and piecemeal', and secretariats are still

⁸¹ *House of Representatives Practice*, p. 681.

⁸² *House of Representatives Practice*, p. 682.

⁸³ C. Lacy and B. Butler, 'Wilson's Future a Grey Area'. *The Australian* 28 May 2019, p. 17.

⁸⁴ C. Hendriks, S. Regan and A. Kay, 'Participatory Adaptation in Contemporary Parliamentary Committees in Australia', *Parliamentary Affairs* 72(2) 2019, pp. 267–289; Kelly and Bochel, 'Parliament's Engagement with the Public'; Fox, 'Engagement and Participation', p. 682.

⁸⁵ Hendriks, Regan and Kay, 'Participatory Adaptation', p. 284.

limited by habit and risk-aversion.⁸⁶ All Parliaments should consider public engagement ‘a central issue’ and put in place formal mechanisms for improving committee practice.⁸⁷ If current issues are not addressed, it is possible that ‘public engagement in committees risks doing more harm to democratic renewal than good’.⁸⁸

PART 3: THE ROLE OF THE PARLIAMENTARY SERVICE

While numerous studies propose ways in which committees could improve public engagement, the existing literature overlooks the specific role of the parliamentary service. Authors make suggestions for improving practice, but do not distinguish between the role of parliamentarians, and the role of the parliamentary service.⁸⁹ This distinction is becoming more important over time. Parliamentarians serve set terms,⁹⁰ move in and out of formal positions, and are extremely busy.⁹¹ Committee members and chairs change frequently, resulting in a loss of ‘institutional memory’.⁹² Building trust among participants in deliberative forms of democracy takes time, consistency and sustained effort,⁹³ which the parliamentary service may be more able than parliamentarians to devote. Underpinning these practical considerations is a solid theoretical and statutory basis for the role of the parliamentary service. The

⁸⁶ Hendrix, Regan and Kay, ‘Participatory Adaptation’, pp. 284, 276.

⁸⁷ Hendrix and Kay, ‘Democratic Renewal’, p. 24; see also J. Langmore, ‘Introduction to Session One: Overview’. *Seminar Papers: 20th Anniversary of the House Committee System*, 15 February 2008, p. 17. Accessed at: www.aph.gov.au/Parliamentary_Business/Committees/House/20Anniversary

⁸⁸ Hendrix and Kay, ‘Democratic Renewal’, p. 25; see also Fox, ‘Engagement and Participation’, p. 682.

⁸⁹ Hendriks and Kay include references to committee secretariats in ‘Democratic Renewal’ (see, for instance, p. 16), but do not differentiate roles, or propose any specific action on the part of the parliamentary service.

⁹⁰ Parliamentarians face re-election approximately every three or six years, and recent parliaments have seen a high proportion of new Members and Senators commencing service.

⁹¹ Over 50% report working 12 to 15 hours a day, 6 or more days a week. S. Brenton. *What Lies Beneath: The Work of Senators and Members in the Australian Parliament*, 2009. Accessed at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/APF/monographs/What_lies_beneath

⁹² Hendrix and Kay, ‘Democratic Renewal’, p. 15.

⁹³ B. Head, ‘Community Engagement: Participation on Whose Terms?’, *Australian Journal of Political Science* 42(3) 2007, p. 450.

Parliamentary Service Act 1999 lays out this role. Public administration theory and work on public sector ethics, especially the work of John Rohr and John Uhr, provide further insights. These sources suggest that facilitating public engagement that is effective and ethical is a role to which the parliamentary service is uniquely suited.

Statutory Provisions

The *Parliamentary Service Act 1999* (Cth) constitutes the Commonwealth parliamentary service and outlines its role. Section 9(2) provides that the service ‘serves the Parliament by providing professional support’, ‘independently of the Executive Government of the Commonwealth’. Section 19 includes a provision designed to ensure the integrity and independence of the Clerk’s advice to Parliament and its committees. Its independence from the executive differentiates the parliamentary service from the public service, which is first and foremost responsive to the government of the day.⁹⁴ This provision arguably provides a justification for parliamentary servants to ‘push back’ when parliamentarians act in ways that are detrimental to the Parliament and Australia’s democracy.⁹⁵

Section 10 of the Act lays out the ‘Parliamentary Service Values’, including that the parliamentary service is ‘professional’, ‘objective’, ‘ethical’, ‘respectful’, ‘non-partisan’, ‘impartial’, ‘trustworthy’, that it ‘acts with integrity, in all that it does’, and ‘works collaboratively to achieve the best results for the Parliament’. In addition, the values specify that:

The Parliamentary Service respects the Parliament and all people, including their rights and their heritage. ... The Parliamentary Service performs its functions with probity and is openly accountable for its actions to the Parliament and the Australian community.

The Parliamentary Service Values do not clarify precisely what is meant by ‘ethical’. However, phrases such as ‘respects the Parliament and all people, including their rights’ and ‘is openly accountable for its actions to the Parliament and the Australian

⁹⁴ J. Templeton, ‘The Parliamentary Service Act’. *Canberra Bulletin of Public Administration* 97, 2000, p. 29.

⁹⁵ P. Grundy, ‘Parliamentary Committees—A Secretary’s Role’. *Australasian Parliamentary Review* 18(1) 2003, p. 100.

community' suggest that parliamentary service ethics are about equity and accountability to citizens.

Section 13 of the Act provides a 'Code of Conduct' by which all parliamentary servants are bound. The Code obliges parliamentary servants to 'behave honestly and with integrity', 'act with care and diligence', 'treat everyone with respect and courtesy, and without harassment', and

at all times behave in a way that upholds (a) the Parliamentary Service Values and Parliamentary Service Employment Principles; and (b) the integrity and good reputation of the Department in which he or she is employed and the Parliamentary Service.

In addition to the Act, the Department of the House of Representatives has a 'Service Charter', which commits the Department to:

... demonstrate high ethical standards; be professional, impartial and non-partisan; be open, honest and helpful; be responsive to [citizen] requests; treat [citizens] with respect and fairness; and treat any complaints seriously and respond to them.⁹⁶

'Regime Values' and Administrative Ethics

According to the American scholar of public administration, John Rohr, the concept that there is a dichotomy between politics and administration (the 'Wilsonian dichotomy') has been long discredited. However, practising bureaucrats continue to identify with the concept. Rohr recognises that administrators exercise discretion and, in doing so 'participate in the governing process of a democratic regime'.⁹⁷ Administrators exercise discretion when they 'advise, report, respond, initiate, inform, question, caution, complain, applaud, encourage, rebuke, promote, retard, and mediate in a way that has an impact'.⁹⁸ Rohr argues that administration can be

⁹⁶ House of Representatives, *Service Charter*, 2014. Accessed at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Department_of_the_House_of_Representatives/Service_Charter#standards

⁹⁷ J. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*. New York: Marcel Decker, second edition, 1989, p. 4.

⁹⁸ Rohr, *Ethics for Bureaucrats*, pp. 36-37.

removed from partisan politics, but cannot be rendered 'nonpolitical'. Bureaucrats who 'resist the idea that they have an impact on public policy' would be better to acknowledge their power and select, train and educate staff to use it for the good of democracy and the people.⁹⁹

Rohr's work provides a foundation for conceptualising bureaucratic ethics that is particularly useful for parliamentary servants in relation to facilitating public engagement on behalf of committees. Rohr identifies a set of underlying, fundamental values, which are derived from a constitutional mandate and provide a foundation from which ethical questions may be considered by administrators. In the United States, administrators 'take an oath' when they commence employment 'to uphold the Constitution', and to uphold what Rohr calls 'regime values'.¹⁰⁰ In Australia, the Parliamentary Service Act functions in the same way, obliging parliamentary servants to uphold the values inherent to Australia's political system. Rohr's concept of regime values starts with an understanding that 'the discretionary power of the bureaucracy in a democratic regime demands some kind of responsibility to the people'.¹⁰¹ Administrators may wonder 'what difference could my decisions make? I am nobody', but Rohr reminds us that 'the sheer volume of such decisions made in routine situations influences at least the dominant tone, if not the ultimate fate' of the regime.¹⁰²

For Rohr, the values of the United States regime are discoverable in the country's public law. The study of the decisions handed down by major United States courts offers material American bureaucrats can use to define and understand the values of their democracy. Just as jurisprudence changes over time, so do the values of the regime. Rohr describes the court as 'a contemporary institution in dialogue with its past'.¹⁰³ Judges and bureaucrats alike must exercise discretion in how they apply the law and policies. As the requirement to exercise discretion is unavoidable, Rohr argues for teaching bureaucrats how to make decisions about exercising their discretion in ways that conform to the values of the regime, rather than prescribing

⁹⁹ Rohr, *Ethics for Bureaucrats*, p. 50.

¹⁰⁰ Rohr, *Ethics for Bureaucrats*, p. 5.

¹⁰¹ Rohr, *Ethics for Bureaucrats*, p. 85.

¹⁰² Rohr, *Ethics for Bureaucrats*, p. 73.

¹⁰³ Rohr, *Ethics for Bureaucrats*, p. 78.

what the values are in a static, rigid manner. Rohr states that bureaucrats will have differing interpretations of the values of the regime, and this is not an issue: 'What is important is that they accept the moral obligation to put themselves in touch with the values' of their regime.¹⁰⁴

John Uhr applies Rohr's concept of regime values to the Australian context. In Australia, the values of the regime are suggested in the Constitution and further defined through a 'rich body of constitutional law that can be understood as defining the Australian people and their political values'.¹⁰⁵ These values can be broadly understood as a respect for: the notion of equity; the rule of law and independence of the judiciary; free political participation; freedom of political communication; freedom of religion; and 'uniformity, consistency and certainty' in the application of law for all citizens.¹⁰⁶ Upholding regime values when facilitating public engagement with committees means ensuring all citizens can participate, are treated equitably, and, as far as possible, ensuring that their experience is positive. Uhr describes the importance of implementing 'due process' and working to 'agreed standards' of procedure.¹⁰⁷

In Australia, responsible government means committees are 'inherently at tension' with classical Westminster-style parliamentary government.¹⁰⁸ As Halligan, Miller and Power argue, there is a danger that 'strongly partisan MPs' may use committees to 'serve partisan purposes'.¹⁰⁹ This can damage democracy, as seen in the franking credits case. Parliamentary servants have no such conflicts, are bound by the Parliamentary Service Values and Code of Conduct, and as such are well placed (and

¹⁰⁴ Rohr, *Ethics for Bureaucrats*, p. 84.

¹⁰⁵ E. Arcioni and A. Stone, A, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution'. *International Journal of Constitutional Law* 14(1) 2016, p. 61.

¹⁰⁶ Arcioni and Stone, 'The Small Brown Bird', pp. 60-75; see also J. Uhr, 'Ethics at Large: Regulatory Frameworks and Policy Lessons'. *Discussion Paper No. 74*, ANU Public Policy Program, 2000.

¹⁰⁷ J. Uhr, 'Be Careful What You Wish For', in J. Boston, A. Bradstock and D. Eng (eds.), *Public Policy: Why Ethics Matters*, Canberra, Australia: ANU ePress, 2010, p. 81.

¹⁰⁸ L. Longley and R. Davidson, 'Parliamentary Committees: Changing Perspectives on Changing Institutions', *The Journal of Legislative Studies* 4(1) 1998, p. 2.

¹⁰⁹ Halligan, Miller and Power, *Parliament in the Twenty-first Century*, p. 244.

even have a professional responsibility) to facilitate ethical engagement on behalf of the Parliament and its committees.¹¹⁰

The Need for 'Administrative Leadership'

In his statement on the franking credits inquiry, Speaker Smith highlighted the important role of committee secretariats in facilitating engagement on behalf of committees:

As members would be aware, it is quite properly the role of the committee secretariat to seek submissions to inquiries and make arrangements for public hearings on behalf of a committee, and committee members and other interested parties should be able to expect that these arrangements will be made without influence or interference.¹¹¹

The Speaker also took care to note that the secretariat of the Economics Committee had 'performed its role properly throughout [the] inquiry, acting appropriately and impartially in support of the committee's work and each of its members'.¹¹² While the franking credits inquiry demonstrates that parliamentary servants cannot prevent parliamentarians from conducting engagement in ways that damage democracy, the inquiry must be recognised as an anomaly. Most committee inquiries function in the conventional way, with secretariats actively facilitating engagement on behalf of committees, and individual parliamentarians providing input, promotion and in-person engagement at hearings. Most committees rely heavily on the secretariat for procedural advice and expertise in inquiry processes and practice. Research shows that Members and Senators on committees 'place a high value on public input',¹¹³ and have expectations that the secretariat will facilitate this outcome. While parliamentarians continue to hold formal power over *all* committee activity, in practice secretariats conduct most of the activities relevant to public engagement,

¹¹⁰ T. Winzen, 'Technical or Political? An Exploration of the Work of Officials in the Committees of the European Parliament', *The Journal of Legislative Studies* 17(1) 2011, p. 29.

¹¹¹ Smith, 'Speaker's Privilege Speech', p. 14291.

¹¹² Smith, 'Speaker's Privilege Speech', p. 14291.

¹¹³ R. Webber, 'Increasing Public Participation in the Work of Parliamentary Committees'. *ASPG Parliament 2000 - Towards a Modern Committee System*, 2001, p. 36; Hendriks and Kay, 'Democratic Renewal', p. 26.

and as such, have significant *actual* power to improve the way engagement is done.¹¹⁴

CONCLUSION

The parliamentary service cannot control the actions of parliamentarians—its power will always be limited. These limitations, however, do not change the fact that in practice the parliamentary service has a great deal of power over how the Parliament engages with citizens. To achieve lasting and widespread improvements in how committees engage, the parliamentary service needs to embrace its administrative leadership role. The service must become more professionalised and more strategic in how it approaches public engagement.¹¹⁵ Achieving this is likely to involve:

- developing and implementing fit-for-purpose engagement strategies and policies;
- clearly articulating guidelines, and setting specific, measurable goals;
- mandating engagement planning for all appropriate inquiries;
- routinely conducting evaluation of engagement practices and outcomes;
- promoting the further modernisation of Standing Orders to mandate fair and ethical engagement practices; and
- building the skills and capacity of Members, Senators and committee staff in relation to public engagement.

Most Parliaments have adopted some of these initiatives but few have applied a consistent approach.¹¹⁶ Instances of negative, manipulative or ineffectual public engagement represent a kind of ‘death by a thousand cuts’ for citizen satisfaction in democracy. Wider and deeper public engagement has been shown to be achievable, but it requires committed parliamentarians to be champions, and parliamentary servants to be skilled facilitators. Democracy is facing a serious crisis of legitimacy globally. In this context, the parliamentary service has more reason than ever to embrace its role as a defender of the regime and upholder of its core values. It could

¹¹⁴ Grundy, ‘Parliamentary Committees’, pp. 97-98.

¹¹⁵ Liaison Committee, *Building Public Engagement*, p. 8; Grundy, ‘Parliamentary Committees’, p. 98.

¹¹⁶ Hendrix, Regan and Kay, *Participatory Adaptation*, pp. 276, 285.

be argued that without corresponding action and support from parliamentarians, the efforts of the parliamentary service may have little impact on democracy's fortunes. This may be true, but *most* public engagement in committee work is conducted by administrators, so when it comes to improving citizen engagement, parliamentary servants should not sit back and wait for parliamentarians to 'make the first move'.