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Editor - Professor Rodney Smith

The Head of State in Fiji

Regulating Pork Barrelling in Australia

Committee Controversies

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The APR is the official journal of ASPG, which was formed in 1978 for the purpose of encouraging and stimulating research, writing and teaching about parliamentary institutions in Australia, New Zealand and the South Pacific (see back page for Notes to Contributors to the journal and details of AGPS membership, which includes a subscription to APR). To know more about the ASPG, including its Executive membership and its Chapters, go to www.aspg.org.au

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

This issue of the *Australasian Parliamentary Review* continues the emphasis of the last issue in presenting serious analysis of current issues related to Parliament. In the first article in this issue, Richard Herr uses the opportunity presented by the recent 50th anniversary of Fijian independence to deliver a critical analysis of the further adaption of the Westminster model to the Fijian context in the 2013 Constitution. He focuses particularly on relations between the Head of State and the Parliament, arguing that the 2013 Constitution has continued previous trends of diminishing the President's exercise of reserve powers via their codification and of increasing the power of the Prime Minister over the Parliament.

Given recent controversies over pork barrelling in sports and community grants schemes at both the national and state level in Australia, Susanna Connolly's detailed explanation of the current regulation of pork barrelling is most timely. Following a systematic review that covers electoral bribery offences, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, oversight by the Auditor-General and media coverage, she concludes with some suggestions for improving a regime that is 'limited by the absence of sufficient enforcement mechanisms'.

The next two articles focus on the roles of committees. Lynda Pretty analyses evidence on the current state of rights protection via legislation and committee scrutiny in Queensland. She notes the impossibility of effective rights protection when governments use their majorities in Queensland's Legislative Assembly to avoid committee scrutiny in the name of urgency—a practice that began before Covid 19 and has continued through the pandemic response—but also the potential of proper committee scrutiny for developing a more rights aware political culture in the sunshine State. Queensland's unicameral Parliament has, of course, just begun its first fixed four-year parliamentary term with the election of a majority government led by Premier Annastacia Palaszczuk.

The damaging effects of excessive partisanship and time pressures on committee work are also central themes of Emma Banyer's analysis of the House of Representatives Standing Committee on Economics' controversial 2018-19 inquiry into franking credits. Relating the inquiry to broader theories of Parliament, citizen

participation and deliberation, Banyer notes that 'the existing literature overlooks the specific role of the Parliamentary Service' in promoting participation and deliberation. She discusses this role and outlines a set of reform principles designed to avoid future 'negative, manipulative or ineffectual public engagement' by parliamentary committees.

Rebecca Burton considers recent instances of conflicts between the principle of parliamentary privilege and the integrity of investigations into criminal and corrupt acts required by the rule of law. Developments in surveillance mechanisms, including access to electronic metadata, have heightened this issue. Burton reviews current memoranda of understanding between parliaments and investigating agencies, arguing that

> … it is an opportune time to renegotiate existing memoranda of understanding to include protocols covering more advanced investigative techniques and better safeguards to ensure material subject to parliamentary privilege is treated appropriately.

She concludes her article with a set of options for improving these memoranda.

We conclude the articles by adding to the three articles by Jonathan O'Dea, Stephen Mills and Graeme Orr published in the last issue of the *Australasian Parliamentary Review* on the impact of Covid 19 on parliamentary and related politics. In this issue, Scott Prasser presents a critical assessment of the genesis, early operation and future of the National Cabinet established by Prime Minister Scott Morrison in March this year. Prasser concludes that the National Cabinet has, among other things, 'enhanced executive federalism' and 'extended executive power', while raising 'real concerns about the value and constitutional standing of Parliament in the Australian Westminster model'. We hope to continue assessments of the impact of Covid 19 responses on aspects of Parliament in future issues of the journal.

Articles

Powers of Fiji's Head of State: Some Considerations on the 50th Anniversary of Fiji's Independence*

Richard Herr

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* Double-blind reviewed article.

Abstract The Westminster model for parliamentary democracy has served as the template for one of the world's most widely used forms of responsible government. The model owes its popularity to its cultural adaptiveness, which stems largely from the original model's reliance on pragmatic conventions to resolve fundamental constitutional disputes. However, as Walter Bagehot noted 150 years ago, every replication can lead to 'copying errors'. Fiji's 2013 constitution was intended to restore Fiji to parliamentary democracy after the 2006 military coup. It has been controversial for many reasons including the significant changes it made to previous iterations of the Westminster model over the 50 years since Fiji's independence especially the 1997 constitution which was itself a consequence of a military coup. This article tests the relevance of Bagehot's concerns in contemporary Fiji as they appear in the 2013 Constitution, with a focus on Head of State-Parliament relations.

INTRODUCTION

On October 10 2020, Fiji celebrated the fiftieth anniversary of its independence, although regrettably the shadow of the Covid-19 pandemic muted the public celebration of this national milestone. Independence was itself necessary because 96 years earlier, a body of high-ranking Fijian chiefs under the leadership of Ratu Seru Epenisa Cakobau signed a deed ceding the archipelago to Queen Victoria, thus bringing it into the British Empire as a colony. Amongst the many influences imported into during the near century of colonial rule was the Westminster system of responsible government. This approach to democratic government has proved fairly durable, having survived three military and one civilian coups over the past 50 years.

This not to say that the democratic process and the Westminster were unscarred by these deep political and social upheavals. Nevertheless, as Fiji embarks on the next half century, the parliamentary system remains clearly Westminster in style. This article reviews some of the adaptations that have helped this introduced democratic form to survive through the lens of the changing relationship between the head of state and the Parliament.

Seven years before Cakobau signed the Deed of Cession, Walter Bagehot published his political classic, *The English Constitution*.[1] The work is significant as the first comprehensive political assessment of the Westminster parliamentary system and, as an analytical pathbreaker, helped to set public expectations for the last 150 years on how the Westminster model should operate. His work explained the strengths of Britain's constitutional monarchy in contrast with the American republican system. As a member of the Liberal Party, Bagehot supported the democratisation of Britain but with strong support for a Tory view of the evolutionary development of the state. He viewed the Westminster system through the lens of the unwritten conventions that served as the constitutional sinews linking the sovereign (head of state) with the executive and the legislative arms of government. Indeed, Bagehot argued that these conventions were so vital that he claimed 'hundreds of errors have been made in copying the English constitution' through not understanding their importance.[2]

The extent of the risks posed by adopting and adapting the Westminster parliamentary model without full regard for Bagehot's constitutional conventions can be debated. There are any number of historical, cultural and circumstantial reasons why the basic Westminster model has had to be modified to flower in foreign lands. Arguably, the success of the Westminster model as, perhaps, the most widely used parliamentary system across the globe is due to its flexibility and adaptiveness. A key analytic to test the validity of the translation of the Westminster conventions into black letter law (constitutional or statutory) is how well the codification preserves the objective of a convention or strengthens other equally important democratic aims. This paper tests the relevance of Bagehot's concerns today by reviewing the codification of his Westminster conventions in contemporary Fiji as they appear in

[1] Walter Bagehot, *The English Constitution*. New York: Dolphin Books, 1961 [1867].

[2] Bagehot, *The English Constitution*, p. 248.

the 2013 Constitution.[3] While this constitution is important as the precursor to enabling the 2014 election and return to parliamentary democracy, it sheds some useful light on Bagehot's 'copying errors' in the adaptation of the Westminster model to post-coup Fiji.

THE WESTMINSTER MODEL

From independence in October 1970, Fiji has retained the core elements of the Westminster model of responsible government, including a dual executive. The Westminster model's basic features include a popularly elected Parliament to which the executive is responsible. This description actually covers all 'responsible Government' systems where the executive arm of government is responsible to a legislature that enjoys constitutional supremacy. What distinguishes the Westminster model from other forms of responsible Government, such as that of Norway, for example, is the relationship between the legislature and the executive. From the Glorious Revolution of 1688, the convention has been accepted, and followed, that Ministers of the Crown could only be drawn from the membership of the legislature (the House of Commons and House of Lords). In Norway, Ministers may be drawn from outside the membership of the *Storting* (Parliament), although they remain responsible to it both individually and collectively. Moreover, Article 62 of the Norwegian Constitution requires that any Minister drawn from the *Storting* must leave the chamber and not take part in its proceedings. The parliamentary vacancy thus created is filled by the next available candidate from the party list.

In the Westminster model, Ministers not only must be Members of the legislature but they retain their parliamentary places and their voting rights in the chamber. The importance of this convention cementing the close relationship between the legislative arm and the executive can be seen in its treatment outside the United Kingdom. In most Westminster jurisdictions, this convention is codified as a constitutional provision. So, for example, Article 64 of the Australian Constitution

[3] The half century of Fijian independence has been marked by coups and extra-constitutional abuses of power which are too complex to cover in brief. Without belittling these influences, this article is primary concerned with the transition from the 1997 Constitution, which was the main motivation institutionally for the changes that came through the 2013 document.

states that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'. Of course, for the brief period where a Minister is trying to find a seat in the Parliament, they cannot exercise any of the rights of a Member, such as speaking on the floor or voting.

This provision has been a feature of every constitution of Fiji since 1970. The 1970 Constitution followed the Australian formula at s 74(4), stating that a Minister 'not a member of either House of Parliament at the date of his appointment as a Minister, he shall vacate his office as a Minister on the expiration of three months'. Article 95(1) of the 2013 Constitution puts the same provision more directly, stating 'a Minister must be a member of Parliament'. Significantly, this drafting did not leave open the option of a non-Member for even a limited, interim period. The different wording between the 1970 and 2013 constitutions invites further attention to the parliamentary qualification for a ministerial position. Under the 1970 and 1997 Constitutions, it was possible for a Government to secure ministerial 'talent' through appointments to the Senate. The only path to a ministerial office, except possibly that of Attorney-General,[4] under the present Constitution is through the ballot box.

The supremacy of Parliament is critical to any responsible Government system including the Westminster model. Basically, this means that the executive arm of government is obliged to answer to the legislative arm for its actions, which has the capacity to impose sanctions for perceived breaches. The 2013 Constitution makes the connection explicit: 'Governments must have the confidence of Parliament' (s 90). Any Government that is not supported by the Parliament loses office. The general obligation of accountability clear at s 91(2), which asserts 'Cabinet members are accountable individually and collectively to Parliament, for the exercise of their powers and the performance of their functions'. This obligation appeared in the 1970 Constitution as 'the Cabinet shall be collectively responsible to Parliament' [s 75(2)]. The responsibility to report to the Parliament is clear but the capacity of the Parliament to impose sanctions for any executive failures is not as certain.

[4] Section 96(3) provides for the appointment of a non-Member as Attorney-General under some circumstances.

Accountability is not the same as responsibility. Responsibility demands that there should be consequences if the Parliament does not like the account it receives from the Minister or the Government. The 2013 Constitution departs to some extent from Westminster conventions by making the Government as a whole responsible to the Parliament collectively through the Prime Minister but failing to provide for individual ministerial responsibility. None of the three ways that the Constitution sets out in s 95(3) for a Minister to lose office includes a vote of no confidence in the Minister. This was a continuation of the absence of constitutionally mandated individual ministerial responsibility in the 1970 Constitution (s 74). In both Constitutions, the only available specified sanction (want of confidence) was against the Government as a whole. The same constitutional arrangement has applied, for example, in Samoa, which was the first Pacific Island state to draft a post-independence Westminster system. The 1960 Constitution provides that Ministers can only be removed by the Prime Minister and all are removed when the Prime Minister resigns or is removed [art 33(3)].

DUAL EXECUTIVE—THE CROWN-IN-COUNCIL AND THE CROWN-IN-PARLIAMENT

All responsible Government systems separate the office of the head of state from that of the head of government. In the Westminster model, this distinction arose from the Parliament's gradual taking over the exercise of the sovereign's executive powers. As the monarch lost a capacity to exercise autonomous authority, the Parliament had to organise itself to carry out effectively and competently the responsibilities it took over from the crown. Conventions converged around a principal Minister, who, having the support of a majority of the Parliament, was able to deliver the finances to enable the sovereign to provide for the administration of the state. Thus, in the evolution of the Westminster system, two centres of executive authority became apparent—one that represented the permanence of the state and another that implemented the policies of the Government of the day. In order for this dual leadership arrangement to work, the sovereign as head of state was reduced to a largely ceremonial public role while the head of Government took on the practical day-to-day responsibilities of making and implementing policy. As Bagehot pointed out, the ceremonial and efficient distribution of authority in Westminster's dual executive contrasted significantly with systems such the United States where the two are combined in the single office of an executive head of state.

It is often overlooked that the evolution of parliamentary democracy in Great Britain by retaining a constitutionally limited monarch created a sovereign with two not-

always distinct crowns. In legal terms, the head of state has a role as the 'Sovereign-in-Parliament' as well as the more familiar role as the 'Sovereign-in-Council'.[5] The modern Westminster head of state's role as titular head of the executive arm of government (that is, as the Crown-in-Council) is today relative unproblematic politically. The executive powers of the head of state are exercised solely on advice. The advice in-Council is directive and formally comes from or through an institution headed by the Prime Minister usually called Executive Council. The Sovereign-In-Parliament, by contrast, involves the sovereign's separate role in passing legislation. Related to this is the area of discretion regarding the Parliament that the sovereign has retained under the prerogative powers of the Crown. Classically, these are located in what are commonly known as the sovereign's 'reserve powers'. Yet, despite the rarity of use in modern times, the reserve powers have proved contentious both in theory and in practice. Contemporary democratic theory struggles with the use of unaccountable public power. Indeed, translating these conventions into black letter constitutional provisions has proved particularly challenging for this reason.

Nevertheless, the existence of some independent discretion is a logical consequence of the separation of the two roles. If the reserve powers did not embody some discretion by the head of state, they would be subject to direction indistinguishable from in-Council advice. Australia's former High Court Chief Justice, Sir Harry Gibbs, has presented a simple and democratic case for why the reserve powers cannot be subordinated to Executive direction. He asserts that the reserve powers play an important role in preserving the institutional distinction between the legislative and executive arms of government in the Westminster system of responsible Government, writing:

> The 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the

[5] The precise terms will depend on the particular jurisdiction so may be identified as Queen-in-Parliament, President-in-Parliament, Governor-in-Parliament, etc. as appropriate. Basically, all are variations of the concepts of the Sovereign-in-Parliament and Sovereign-in-Council.

principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament.[6]

THE SOVEREIGN-IN-PARLIAMENT

Fundamental to Gibbs' argument is that the head of state retains some independent responsibilities for Parliament that should not be captured entirely by direction from the head of Government (the executive). The first point is fairly easy to establish for Fiji. The British sovereign's conventional role has been codified constitutionally in the definition of the Parliament. Section 30 of the 1970 Constitution stated that: 'There shall be a Parliament for Fiji which shall consist of Her Majesty, a House of Representatives and a Senate'. The 1997 Constitution's definition (s 45) was similar, allowing for the republican change, **'**The power to make laws for the State vests in a Parliament consisting of the President, the House of Representatives and the Senate'. The wording in s 46(1) of the 2013 Constitution for this relationship is couched in slightly different terms, 'The authority and power to make laws for the State is vested in Parliament consisting of the members of Parliament and the President'. The changed wording may not be significant in terms of the Westminster convention on the composition of 'the Parliament' but it presents something of a challenge for constitutional interpretation.

A few examples from Fiji's Westminster neighbours can help to illustrate the issue. Samoa's Constitution (art 42) states 'Parliament of Samoa, which shall consist of the Head of State and the Legislative Assembly'. Australia's constitutional definition (s 1) is 'the legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called *The Parliament*'. New Zealand's s 14(1) is almost identical with allowance for having a unicameral legislature defining the 'Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives'. The problem with Fiji's 2013 wording,

[6] The Rt Hon. Sir Harry Gibbs, 'Reserve Powers of the Governor-General and the Provisions for Dismissal'. Australians for Constitutional Monarchy, 20 August 1995. Accessed at https://norepublic.com.au/reserve-powers-of-the-governor-general-and-the-provisions-for-dismissal-2/.

which may have been the result of some casual drafting, is that it includes a definitional circularity.

At first glance, the law-making power being vested in 'Parliament consisting of the members of Parliament and the President' may not give cause for pausing. However, as the former Clerk of the New Zealand, David McGee, has written with regard to the New Zealand Parliament:

> The Parliament of New Zealand has only one function, and that is to make laws. Whenever 'Parliament' acts, its act has the force of law—as an Act of Parliament. There are communications between the Governor-General and the House of Representatives on other matters than laws, but the two constituents act together as Parliament only to make laws.[7]

The 2013 Constitution has no word anywhere in the document to describe the institution that exists when the President is not part of the Parliament; that is the set of institutions normally referred to as the legislature. All the definitions in the constitutions noted above have some such descriptors including the Fijian constitutions of 1970 and 1997. The significance of this drafting oversight is explained by McGee as follows: 'The functions of the Parliament and of the House are not identical. Each constituent part of the legislature has a different role from the other'.[8] And, in fact, these other functions, which Bagehot identified as the Parliament's 'non-legislative' functions,[9] are what most people believe the Parliament does, such as providing and supporting a Government, holding the Government to account, representing public opinion and informing the nation's debate on key issues. While the public is scarcely aware of the distinction that McGee makes, it is important that the legislature have an institutional appreciation of its own identity separate from the one it has including the head of state.

[7] David McGee (edited by Mary Harris and David Wilson, *Parliamentary Practice in New Zealand* (4th ed.). Auckland: Oratia Books, 2017, p. 2.

[8] McGee, *Parliamentary Practice in New Zealand*, p. 2.

[9] Bagehot, *The English Constitution*, pp. 171-5.

THE RESERVE POWERS AND THE SOVEREIGN-IN-PARLIAMENT

McGee's point about the House of Representatives not being the entirety of the New Zealand Parliament also applies to the head of state in its role as a component of the Parliament. Regrettably, public awareness of the role of the head of state has been captured by the historical struggle to democratise the monarchy, so that any continuation of real power tends to be portrayed as 'unfinished business'. The political puppetry of the Sovereign-in-Council serves as the model for expectations of the Sovereign-in-Parliament. Unsurprisingly therefore, in modern Westminster systems it can be difficult to switch perspectives to argue, as Sir Harry Gibbs does, and regard the Sovereign-in-Parliament as a protector for the legislative body against the executive. Yet the areas of discretion still owned by the head of state can be seen in precisely this light.

In the United Kingdom, the principal recognised reserve powers include 1) the appointment of a Prime Minister; 2) prorogation and summoning of Parliament; and 3) assent to legislation.[10] While the use of these powers is supported as convention in the United Kingdom, the same powers are generally constitutionally codified elsewhere. However, the use of these powers and the circumstances where they might be used by the head of state are subject to much the same conventions as in the United Kingdom. The 2013 Constitution also provides for the codification of these powers but the question that then needs to be addressed is the discretion available to the President for their use.

APPOINTMENT OF THE PRIME MINISTER

This role is not a power for the President under the 2013 Constitution, although it was in the 1970 and 1997 documents. Section 72(2) of the 1970 Constitution both codified the power and identified its use as discretionary, stating that:

> The Governor-General, acting in his own deliberate judgment, shall appoint as Prime Minister the member of the House of Representatives

[10] Gail Bartlett and Michael Everett, 'The Royal Prerogative'. House of Commons Library, Briefing Paper, Number 03861, 17 August 2017, p10. Accessed at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861

> who appears to him best able to command the support of the majority of the members of that House.

The 1997 Constitution's s 98 repeated this wording almost unchanged. However, when the 2013 Constitution treated this process, the selection of the Prime Minister did not involve the President at any level. If the general election returns a party with 'more than 50% of the total number of seats', s 93(2) specifies that the party leader 'assumes office as the Prime Minister by taking before the President the oath or affirmation of allegiance and office'. The President does not have any discretion although the same section provides that administering the oath cannot be delegated or refused by the President.

However, if the s 93(2) condition is not met, then s 93(3) provides that 'at the first sitting of Parliament, the Speaker must call for nominations from members of Parliament'. If there is only one nomination, no election is needed. Otherwise, the Members are balloted to see if any Member can secure 'more than 50%' support. There is a limit to the number of ballots that can be held. If no one can claim majority support after three votes, 'the Speaker shall notify the President ... and the President shall, within 24 hours of the notification, dissolve Parliament and issue the writ for a general election'. Even a vacancy does not create an opportunity for presidential discretion. Section 93(5) states that 'if a vacancy arises in the office of the Prime Minister under subsection (4), then the Speaker shall immediately convene Parliament and call for nominations from members of Parliament' where the post-election arrangements apply.

While the President is frozen out of any role in resolving disputed claims to the prime ministerial office, the lack of discretion has its own consequences for political parties. Unlike the recent experience in Australia with the revolving door to the prime ministerial office, internal party disputes over leadership in Fiji cannot be resolved without going through the constitutionally prescribed processes, should a party 'spill' cost a Prime Minister the support of his party. Section 93(6) appears to prevent any party spill imposing a resisted vacancy. It asserts that the 'Prime Minister shall serve for the full term of Parliament, unless dismissed in a motion of no confidence under section 94, and shall not be otherwise dismissed'. A Prime Minster who refused to resign on losing a party room leadership vote could not be dismissed by the President. Of course, the party could expel the loser to ensure that a Prime Minister who lost the vote was ineligible to sit in Parliament.

A 'PRESIDENTIAL' PRIME MINISTER?

The President's role with regard to other ministerial appoints is even more remote. As noted above and rather at odds with standard Westminster practice, Ministers are not directly responsible to Parliament. Moreover, s 92(3) states explicitly that the Prime Minister 'appoints' and 'dismisses' Ministers. This may not seem surprising at first blush, since generally it is accepted that Prime Ministers make these determinations around the Westminster world. However, its significance becomes clearer when contrasted with the more conventional wording regarding this relationship. For example, s 99(1) of the 1997 Constitution states, 'The President appoints and dismisses other Ministers on the advice of the Prime Minister'. Until the 2013 Constitution, Ministers were clearly Ministers of state, having received their appointments to office from the head of state, the Governor-General or the President.

Thus, technically, the usual Westminster description of the Prime Minister as 'primus inter pares'—the first amongst equals – does not apply in Fiji today. Arguably, under the 2013 Constitution, the Ministers are subordinates of the Prime Minister. In effect, formally Fiji's responsible Government system lies somewhere between a traditional Westminster system where all Ministers are formally equal in rank (but not in precedent or status) and the American system where all the political heads of departments are subordinates of the President. This locates the current Fijian parliamentary system in a hybrid grey area somewhere between the Westminster model and the American model of executive autonomy. It is closer to the Westminster model but clearly the 2013 Constitution has altered significantly the relationship between the legislative and executive arms of government and between both of these and the state of Fiji.

SUMMONING, PROROGUING AND DISSOLVING THE PARLIAMENT

The 2013 Constitution has codified the conventions regarding the head of state and the several stages of determining when a Parliament is convened and is dissolved. These powers are assigned to the President but with some significant qualifications on their use. Section 67(1) provides for the President to summon the Parliament but the discretion for using this power is limited to the obligation to issue the summons 'no later than 14 days after the announcement of the results of the general election'. The other occasion when the President might summon the Parliament is after a prorogation 'on the advice of the Prime Minister' but with the qualification that 'no longer than 6 months must elapse between the end of one session and the start of

another' [s 67(3)].

This provision does open the possibility that the President may be able use his powers without advice. While this provision appears prescriptive, there is an ambiguity about how the President might act if the Prime Minister failed to give the required advice within the required timeframe. The President could feel legally bound to honour the constitutional obligation on him to summon the Parliament back into session and so act without advice. Alternatively, the President might retreat behind the need to act only on advice and refuse to issue the summons. Presumably, the President's decision on such an occasion would hang on the circumstances as to why a Prime Minister would want to refuse the advice to recall Parliament. There is an argument that an internally divided Government that wants to have an extended period without the additional pressure of parliamentary scrutiny should be forced back into Parliament so that the head of state can be certain of the level of the support the Government enjoys in the chamber.

There is another constitutional empowerment for summoning the Parliament that appears completely obligatory. Yet, the circumstances when it might be used seems so controversial that it might be queried why the provision exists. Section 67(4) allows the Opposition to give directive advice to the President requiring him to summon a prorogued Parliament back into session. It states that if 'the President receives a request in writing from not less than one-third of the members of Parliament requesting that Parliament be summoned ... the President shall summon Parliament to meet'. The basis for petitioning the head of state would be 'to consider without delay a matter of public importance'.

The democratic virtue of s 67(4) is clear. A Government under stress may not wish to be forced to defend its decisions in Parliament. This provision offers a parliamentary path around executive obstructionism. The politics of using this provision could be fraught, nonetheless. A Prime Minister having a majority might regard the recall of the Parliament against his wishes as a loss of control over the chamber. Another possibility is that the request to the President may not be as directive as it appears. On prime ministerial advice or on his own cognisance, the President may decide that the petition lacks merit in raising a matter of *sufficient* public importance. A post-Cyclone Winston attempt to use this provision in 2016 demonstrated both its potential for political mischief as well as some resistance to regarding the presidential

response as automatic as its users might wish.[11]

The presidential power of prorogation is provided for under s 58(2) but using the power seems carefully circumscribed by the words 'acting on the advice of the Prime Minister'. Again, there is an 'however'. There is little doubt that a President could not use the power to prorogue without advice. The more important democratic issue may be whether the President can refuse advice to prorogue. There are examples where a Government under pressure has sought a prorogation in order to avoid parliamentary scrutiny and the head of state has resisted the attempt.[12] Interestingly, such a controversial exercise of discretion by the head of state may not even be subject to review by the courts. The proceedings of the Parliament are protected by privilege, which could deter the courts from giving a ruling on the constitutional validity of any action. If a court viewed the process of prorogation as a proceeding of Parliament, the decision might be privileged.

The President's power to dissolve the Parliament is again qualified by explicit reference to acting on prime ministerial advice but any scope for discretion is severely restricted by an extra time dimension that does not apply to prorogation. Section 58(3) allows the President to act on the advice of the Prime Minister to dissolve 'only after a lapse of 3 years and 6 months from the date of its first meeting after a general election of the members of Parliament'. Given a long-time practice of allowing Governments some flexibility regarding the precise election date, this limitation is scarcely likely to cause difficulties for either side.

ASSENT TO LEGISLATION

Given that this is the critical element in the identification of the concept of the

[11] See Vijay Narayan, 'Opposition Leader Calls on President to Call Parliament'. *FijiVillage*, 15 March 2016. Accessed at: http://fijivillage.com/news-feature/Opposition-Leader-calls-on-President-to-call-parliament-r5sk92; Bruce Hill, 'Fiji's President refuses to call special cyclone sitting of parliament'. *ABC Pacific Beat*, 17 March 2016. Accessed at: http://www.abc.net.au/news/programs/pacific-beat/2016-03-17/fijis-president-refuses-to-call-special-cyclone/7255914 .

[12] See Don Morris, 'The Perils of Defining the Reserve Powers of the Crown'. Paper presented at The Twenty Eighth Conference of The Samuel Griffith Society, 12-14 August, 2016. Adelaide, South Australia.

Sovereign-in-Parliament, it is scarcely surprising this convention is codified constitutionally in most Westminster jurisdictions. The President's assent to legislation has been incorporated in the 2013 Constitution in a way that appears to have obviated any discretion. Section 48 requires all Bills that have passed the Parliament to be presented to the President for assent. This section also stipulates that the President 'must provide his or her assent' within seven days or without his assent 'the Bill will be taken to have been assented to' after the seven days period. The value of a week's time for reflection appears to lack purpose. There may some political embarrassment if a President refuses assent but in which direction? Would the public reaction favour the Prime Minister or the President? Much would depend on the issue and the public's view of it and the two actors who had engineered the dispute. Presumably a dispute over assent would not arise in ignorance.

A Government should be aware of the President's views if the obligations of s 92(2) to 'keep the President generally informed about the issues relating to the governance of Fiji' is maintained properly. This section is what allows the President to exercise Bagehot's three rights of the head of state—the right to be consulted, the right to encourage, the right to warn.[13] The Prime Minister has no equals in the cabinet, especially under a constitution that makes subordinates of all his or her Ministers. Thus, there may be some democratic value for the dual executives discussing the affairs of state from their differing perspectives for the benefit of the nation. The power to refuse assent has not been used in the United Kingdom since Queen Anne in 1708, so the real benefit of this power cannot be in the threat of its use. Rather, it lies in the need to explain the Bill in the regular meetings leading up to the request for assent, where the head of state can use Bagehot's three rights to persuade a Government to avoid rash or ill-conceived legislation. The perfunctory role for the President in the assent process would appear to undermine the opportunity for the President to employ his independent authority to use consultations to encourage and to warn.

[13] Bagehot, *The English Constitution*, p. 124.

CONCLUSIONS

Walter Bagehot had grounds for his assessment that errors of consistency would be made in copying the Westminster constitution without properly understanding these unwritten conventions both in historical context and in relationship to the overall operation of the system. Nevertheless, all the deviations from the basic conventions of the Westminster model cannot be regarded as 'errors' just because, in some interpretation of Bagehot's view, the conventions have not been maintained in precisely the same way today across all Westminster jurisdictions. Historically, adaptation was necessary to meet the differing experiences, histories, and cultural foundations in the countries embracing the Westminster parliamentary model. Codifying the Westminster conventions regarding the traditional reserve powers of the Sovereign-in-Parliament has proved difficult in the localisation of the Westminster model. The process of decolonisation was generally more focused on the Sovereign-in-Council constitutional arrangements than those governing the Sovereign-in-Parliament. The perceived priority was to provide for stable Government rather than fine-tuning a relationship between the head of state and Parliament that few understood, assuming it was either uncomplicated or irrelevant.

Post-colonial attitudes generally continued to favour the executive arm of government over the Parliament. In consequence, public expectations have been fostered (especially by political leaders) that the head of state is essentially an executive office that democracy requires to be a mere ceremonial cypher acting only under the direction the Government of the day. Indeed, there appears to have been a progression in favour of the Government and against parliamentary oversight with each redrafting of Fiji's constitutional foundations. The 2013 Constitution demonstrates this trend rather clearly. The President's discretion as head of state with regard to the exercise of reserve powers has been significantly diminished. Sir Harry Gibbs' concern that the codification of the reserve powers of the head of state would diminish the capacity of the Sovereign-in-Parliament to protect to the Parliament from executive over-reach appears to be confirmed by the 2013 Constitution, although earlier constitutions had set the trend toward a totally ceremonial office.

The degree to which any of these developments matter to good governance comes back to the reasons why the Westminster conventions were developed. Historically, the objective has been to secure a balance between ruling authority and the interests of the people. Bagehot argued there was a need to find some stability between the continuing interest of the state and the more ephemeral interests of governments pursuing public popularity. The head of state moderated these tensions by lending

the legitimacy of the state to the acts of Government while serving to preserve some of Parliament's independence from complete executive dominance. The American solution was to divide the legislative and executive roles completely and so protect each so that each arm of government could check and balance the powers of the other. Sir Harry Gibbs supported Bagehot, arguing that the Westminster model worked as long as the head of state was able to preserve the conventions critical to the protection of the Parliament.

Has the constitutional weakening of the independent authority of the President in Fiji crossed a line? Bagehot would almost certainly respond 'yes' but his own argument could be used against him. The risks to the democratic balance depend on whether the strengthening of the executive has been offset by compensatory strengthening of the mechanisms for executive oversight and responsibility. This paper does not explore the possible non-parliamentary options for achieving such a democratic re-balancing. The argument herein is that some of the key traditional elements of parliamentary restraint on the executive have been altered in the 2013 Constitution, including even those limited checks that depend on the head of state. Further research will be necessary to assess whether legal and administrative machinery developed in the 2013 Constitution provides sufficient redress for these parliamentary losses.

The Regulation of Pork Barrelling in Australia*

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Abstract The recent sports grants scandal has again highlighted the enduring nature of pork barrelling allegations in Australian politics. Although excessive and blatant pork barrelling is widely condemned, there has been limited consideration of how pork barrelling is regulated in Australia and the effectiveness of this regime. This paper explores the interacting accountability mechanisms that regulate pork barrelling in Australia at the federal level including the offence of electoral bribery, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media. This regulatory regime provides oversight, contributes to systemically improving the administration of grants programs and provides a framework of standards to evaluate whether alleged pork barrelling conduct is either ordinary political conduct or the improper use of public resources for partisan purposes. However, the effectiveness of the current regime in deterring excessive pork barrelling is limited by the absence of mechanisms to enforce these standards.

INTRODUCTION

Allegations of pork barrelling, or the distribution of public resources to targeted electors for partisan purposes, are a recurring theme in Australian politics both at

[1] I am grateful to my supervisor, Graeme Orr, for his invaluable advice and feedback. I am also grateful to the anonymous reviewer for their insightful comments. An earlier version of this paper formed a submission to the Senate Select Committee on Administration of Sports Grants, Parliament of Australia.

state and federal level.[2] However, pork barrelling in Australia has received only limited consideration by legal scholars. As the sports grants scandal continues to unravel and allegations of pork barrelling again dominate the nation's headlines,[3] it is timely to comprehensively examine and evaluate the regulation of pork barrelling in Australia. This paper will explore the nebulous concept of pork barrelling and its practice in Australia, thoroughly examine the regulation of pork barrelling in Australia at federal level and briefly highlight options for further regulation.

PORK BARRELLING AS A NEBULOUS CONCEPT: DEFINITIONS, FORMS, CRITICISMS AND DEFENCES

The concept of pork barrelling is not novel. The term dates back at least two centuries, and the practice can be traced back even further.[4] Moreover, despite legal scholars giving only limited attention to pork barrelling, political scientists and economists have long been interested in targeted local-level spending for partisan purposes.[5] However, despite the longstanding interest, the concept of pork barrelling is nebulous and its regulation raises intractable questions. This part of the article will address these issues by first exploring the definition of pork barrelling and its

[2] Tim Prenzler, Bricklyn Horne and Alex McKean, 'Identifying and Preventing Gray Corruption in Australian Politics', in Peter Kratcoski and Maximilian Edelbacher (eds), *Fraud and Corruption.* Online: Springer, 2018, p. 63; Matt Dennien, ''Simply Made Sure': Minister Defends Sports Grants after Auditor Report'. *Brisbane Times*, 30 September 2020. Accessed at: https://www.brisbanetimes.com.au/national/queensland/simply-made-sure-minister-defends-sports-grants-after-auditor-report-20200930-p560hu.html; Michaela Boland and Greg Miskelly, 'NSW Deputy Premier John Barilaro, Don Harwin Accused of 'Pork-Barrelling' in Coalition Seats before State Election'. *ABC News,* 25 May 2020. Accessed at: https://www.abc.net.au/news/2020-05-25/nsw-ministers-accused-of-favouritism-in-arts-spending/12271392.

[3] Jack Snape, 'Federal Government Targeted Marginal Seats in Potentially Illegal Sports Grants Scheme, Auditor-General Reports'. *ABC News*, 15 January 2020. Accessed at: https://www.abc.net.au/news/2020-01-15/government-sport-grants-targeted-marginal-seats-audit-office/11870292; David Speers, 'Bridget McKenzie's Sport Grant Cash Splash Is a Particularly Brazen Example of Pork-Barrelling'. *ABC News*, 16 January 2020. Accessed at: https://www.abc.net.au/news/2020-01-16/bridget-mckenzie-saga-pork-barrelling-brazen-example/11874224; Andrew Tillet and Tom McIlroy 'Why the Sports Grants Scandal Won't Go Away'. *Australian Financial Review*, 3 February 2020. Accessed at: https://www.afr.com/politics/federal/sports-grants-scandal-refuses-to-go-away-20200203-p53x5a.

[4] Andrew Leigh, 'Bringing Home the Bacon: An Empirical Analysis of the Extent and Effects of Pork-Barrelling in Australian Politics'. *Public Choice* 137 2008, p. 279.

[5] Leigh, 'Bringing Home the Bacon', p. 280.

pejorative character. The different forms of pork barrelling in different electoral systems and the diverse types of 'pork' will also be considered. Subsequently, the paper will attempt to reconcile the ordinary political practice of pork barrelling in Australia with the conception of pork barrelling as an improper use of public resources for partisan purposes. This will involve consideration of the imprecise concept of 'public purpose' and 'partisan purpose' and the nature of politics more broadly. Finally, the adverse consequences of pork barrelling, even its less excessive practices, will be outlined to underline the need for regulation which promotes the proper management of public resources.

Definitional and Etymological Issues

Pork barrelling is a commonly used phrase; however, its definition is not self-evident. Hoare defines pork barrelling as the 'selective geographical allocation of publicly-controlled funds and resources for the purpose of gaining votes from electors in the locations so advantaged'.[6] Leigh similarly defines pork barrelling as 'the practice of targeting expenditure to particular districts based on political considerations'.[7] This paper defines pork barrelling as the distribution of public resources to targeted electors for partisan purposes. The geographic element of the definition has been excluded as electoral factors may incentivise demographic-based pork barrelling rather than traditional geographic-based pork barrelling. The proposed definition also recognises 'pork' can take many forms, and therefore adopts the broad term 'public resources'. Finally, the chosen definition avoids the broad concept of 'political purpose', and instead adopts the marginally narrower concept of 'partisan purposes'. The difficulty in disentangling public and partisan purposes in the distribution of public resources will be explored further below.

The pejorative undertone of the phrase 'pork barrelling' is a separate issue. The term is often thrown around sensationally by political opponents and commentators alike. The pejorative connotations may cause the phrase to obscure more than it informs and undermine efforts to constructively evaluate political conduct and its regulation. However, the phrase is common shorthand for 'distribution of public resources to

[6] Anthony Hoare, 'Transport Investment and the Political Pork Barrel: A Review and the Case of Nelson, New Zealand'. *Transport Reviews* 12(2) 1992, p. 134.

[7] Leigh, 'Bringing Home the Bacon', p. 279.

targeted electors for partisan purposes'. Therefore, the phrase will be used throughout the paper; however, the deprecatory aspects of the term are not endorsed.

Pork Barrelling in Different Electoral Systems

Different electoral systems produce different electoral incentives,[8] and therefore different forms of pork barrelling. In distinguishing between different forms of pork barrelling, Hoare presents a tripartite model that differentiates between pork barrelling targeted at individual seats, safe seats and marginal seats.[9] Individual seat pork barrelling involves politicians using their influence to direct public resources into their personal electorate to increase their likelihood of re-election.[10] Individual seat pork barrelling is most common where there is weaker party disciple and more individually powerful politicians, such as in the United States.[11] In contrast, safe seat and marginal seat pork barrelling are more common where there is strong party discipline, such as in Australia and the United Kingdom.[12] In these electoral systems, safe seat pork barrelling is more likely if the government holds a large majority, as the marginal electorates are of less importance to the election outcome.[13] Conversely, marginal seat pork barrelling is expected when the government holds only a slim majority, as parliamentary parties have a strong, collective incentive to secure support in marginal electorates, where small swings may dictate whether an election is won or lost.[14] Therefore, as Australia has a strong party system and tendency for slim majority governments, pork barrelling tends to focus on marginal electorates. However, instances of safe seat and individual seat pork barrelling still simultaneously

[8] Hannah Kite and Eric Crampton, 'Antipodean Electoral Incentives: The Pork Barrel and New Zealand's MMP Electoral Rule'. (Paper presented at the New Zealand Association of Economists Annual Conference, 27-29 June 2007), p. 1.

[9] Clive Gaunt, 'Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants'. *Australian Journal of Political Science* 34(1) (1999) 63, p. 65; Anthony Hoare, 'Transport Investment and the Political Pork Barrel', p. 134.

[10] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 66.

[11] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 66.

[12] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 66.

[13] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 66.

[14] David Denemark, 'Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants'. *The Journal of Politics* 62(3) 2000, p 898; Gaunt, 'Sports Grants and the Political Pork Barrel', p. 73.

occur as political parties wish to reward their loyal supporters and certain Ministers hold sufficient power to secure disproportionate public resources for their electorate.[15]

It has been suggested that the implementation of multi-member electorates may reduce pork barrelling as electors are uncertain which representative to reward for delivering 'pork' to their electorate.[16] However, preliminary research indicates that in Mixed Member Proportional (MMP) voting systems, such as New Zealand's, where each elector has one vote for a district representative and one vote for a party, district-elected politicians engage in geographic based pork barrelling, while party-elected politicians engage in demographic based pork barrelling.[17] This suggests rather than reducing pork barrelling practices, multi-member electorates merely change the form of pork barrelling. Fundamentally, pork barrelling involves self-interested politicians or governments seeking to maximise their likelihood of re-election.[18] Therefore, although different electoral systems may alter the form of pork barrelling behaviour, to the extent electioneering continues to be regarded as a competition for votes, perennial concerns of pork barrelling will persist.[19]

Types of Pork

The 'pork' distributed to targeted electors by politicians can take many forms. The pork may be infrastructure projects such as the construction of a hospital or school,[20] the relocation of a statutory agency into an electorate,[21] or the promise of jobs in the

[15] Denemark, 'Partisan Pork Barrel in Parliamentary Systems', p. 896.

[16] Leigh, 'Bringing Home the Bacon', p. 280.

[17] Kite and Crampton, 'Antipodean Electoral Incentives', p. 3.

[18] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 65.

[19] Graeme Orr, *Dealing in Votes: Electoral Bribery and Its Regulation in Australia* (PhD Thesis, Griffith University, 2004), p. 3.

[20] Stephanie Anderson, 'Sophie Mirabella's Wangaratta Hospital Claim a 'Staggering Revelation', Bill Shorten Says'. *ABC News,* 22 April 2016. Accessed at: https://www.abc.net.au/news/2016-04-22/mirabella-victorian-hospital/7350008.

[21] David Donaldson, 'Robbing Canberra to Pay Armidale: Cost Analysis Doesn't Support 'National Interest''. *The Mandarin*, 28 November 2016. Accessed at: https://www.themandarin.com.au/72996-robbing-canberra-pay-armidale-cost-analysis-doesnt-support-national-interest/.

lucrative construction of submarines.[22] However, a particularly prevalent form of pork barrelling is achieved through the administration of discretionary grant programs. Such programs tend to be regional in nature and provide Ministers with discretion in determining which applicants receive grant funding. Grants are also a significant aspect of government spending, with billions of dollars of public funds distributed via Commonwealth grants each year.[23] For these reasons, discretionary grants are an ideal vehicle for delivering pork. In fact, discretionary grants are almost synonymous with allegations of pork barrelling and overt partisan influence in the allocation of public resources.[24] Therefore, when examining the regulation of pork barrelling in Australia, this paper will focus on the use of such grants, and the regulation of the administration of grants programs.

Pork Barrelling: Ordinary Political Conduct or Improper Use of Public Resources

Pork barrelling is considered an ordinary aspect of electioneering in Australia. Yet certain incidences of pork barrelling are branded political corruption.[25] The difficulty reconciling these two facts highlights an intractable question when dealing with the regulation of pork barrelling: how can ordinary political conduct which represents an acceptable form of pork barrelling be distinguished from the improper use of public resources for partisan purposes which deserve sanction?

The nebulous concepts of 'public purpose' and 'partisan purpose' are largely responsible for the intractability of a delineation between proper and improper pork barrelling. In reality, it is doubtful any governmental decision is made in a vacuum free from partisan considerations. To expect otherwise, may require politicians to act as saints and 'renounce their very politicality'.[26] In relation to allegations of corrupt conduct, unrelated to pork barrelling, then Premier of New South Wales Nick Greiner

[22] Andrew Tillet, 'The States Slug It Out in Submarine Warfare'. *Australian Financial Review*, 9 August 2019. Accessed at: https://www.afr.com/politics/federal/the-states-slug-it-out-in-submarine-warfare-20190808-p52f8y.

[23] Auditor-General (Cth), *Development and Approval of Grant Program Guidelines*. Report No. 36, 2011-12, [1].

[24] Joanne Kelly, *Strategic Review of the Administration of Australian Discretionary Government Grant Programs*, *2nd Review*. Canberra: Commonwealth of Australia, 2008, p. 4.

[25] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia: The Discussion We Need.* Singapore: Springer, 2020, p. 12.

[26] Graeme Orr, 'The Australian Experience of Electoral Bribery: Dealing in Electoral Support'. *Australian Journal of Politics and History* 56(2) 2010, p. 240.

decried that it would be the 'death of politics' if it was illegal for a political party to make decisions in any way influenced by political considerations, such as 'paying particular attention to the needs of marginal seats'.[27] Further, many politicians regard securing and delivering 'pork' to their electorate as a function of representing and advocating for their electorate. However, while administration of public funds for pure public purposes may be unworkable and incompatible with political practice, at a minimum, the government can be expected to refrain from blatantly and excessively misusing public resources for partisan purposes.

The boundary between acceptable pork barrelling and improper and corrupt conduct may be crossed once a public purpose rationale for the distribution becomes untenable. Although there are no set criteria for when this occurs, relevant factors tend to include unjustified inconsistency with merit-based advice, excessiveness, brazenness, timing and appearances. Ministers frequently exercise discretion to depart from department advice on merits of applications. However, when this departure is unjustified, or the justification is implausible, the guise that partisan benefits are only an incidental consequence becomes dubious and concerns of impropriety are raised. The departure from advice is made more egregious when the distribution is excessively skewed towards marginal or targeted seats. Concerns are further compounded when the announcement or distribution of grants occurs in close proximity to an election, with even the Auditor-General warning that particular care should be taken in the lead up to a federal election.[28] Finally, concerns of impropriety are further heightened when the visuals are jarring, such as a candidate, yet to be elected, presenting a giant novelty cheque.[29]

It is apparent there is no easily defined distinction between acceptable pork barrelling and the improper use of public resources. If there was, it would likely be insensitive to the context and conduct of political realities. However, there is a limit. As outlined above, a judgement of impropriety may be more likely when a Minister disregards

[27] Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (1992), p. 92.

[28] Auditor-General (Cth), *The Design and Conduct of the Third and Fourth Funding Rounds of the Regional Development Australia Fund*, Report No. 9 (2014-15), [19].

[29] David Speers, 'The Sports Rorts Saga Has Become a Political Vulnerability That Can't Be Explained Away'. *ABC News*, 2 February 2020. Accessed at: https://www.abc.net.au/news/2020-02-02/morrison-bridget-mckenzie-sports-rort-political-vulnerabilty/11917884.

department advice on the merits of applications and unjustifiably favours applicants in marginal or targeted electorates, particularly when the distortion is excessive and a federal election is proximate. Such a judgement is also made easier by the presence of an apparent smoking gun, such as an erased whiteboard or a colour-coded spreadsheet. This article will later explore how the regulatory regime sets standards which can also inform judgements of the propriety of pork barrelling conduct.

Problematic Consequences of Pork Barrel Politics

Pork barrelling, even in its less excessive and blatant forms, is problematic. The practice inherently involves the disproportionate allocation of public resources to certain electorates. In this sense, pork barrelling can pervert electoral politics,[30] undermine balanced policymaking, waste public funds and undercut electoral concepts of equality of treatment and opportunity.[31] Further, the distribution of public resources for partisan purposes is unlikely to align with value for money objectives, and may result in the ineffective and inefficient application of public funds.[32] Therefore, it is important to explore the accountability mechanisms that regulate both ordinary and egregious pork barrelling practices.

AUSTRALIAN CASE STUDIES OF PORK BARRELLING

As outlined above, allegations of pork barrelling are an enduring and predictable element of Australian politics. According to Richard Mulgan, a quintessential Australian pork barrel scandal includes 'sensational newspaper headlines, mock outrage from the opposition benches, wounded protestations of innocence from ministers, and, at the centre, a trenchant report from [the] Auditor-General'.[33] These elements of pork barrelling controversies, in addition to other accountability

[30] Orr, *Dealing in Votes*, p. 217.

[31] Renaud Egreteau, 'The Emergence of Pork-Barrel Politics in Parliamentary Myanmar'. *Trends in South East Asia* 2017, pp. 4-5; Orr, *Dealing in Votes,* p. 217.

[32] Leigh, 'Bringing Home the Bacon'*,* p. 298.

[33] Richard Mulgan, 'Pork Barrelling to One Politician is Just Pragmatic Rule Bending to the Next'. *Canberra Times*, 1 May 2012. Accessed at: https://www.canberratimes.com.au/story/6170898/pork-barrelling-to-one-politician-is-just-pragmatic-rule-bending-to-the-next/.

mechanisms, will be explored through the use of two Australian case studies of pork barrelling.

Although there are numerous examples of brazen pork barrelling in Australia, the practice of pork barrelling is best analysed through the two sports rorts affairs. The 1993 and 2019 sports rorts affairs occurred on different sides of politics and epitomise excessive pork barrelling in Australia. Both incidents involved the alleged maladministration of regional community sports grant programs and had remarkable parallels in the alleged misconduct, exposure of the allegations and eventual consequences.

Sports Rorts 1.0: ALP and Ros Kelly

In 1993, the Labor government was embroiled in the original sports rorts affair for its administration of a $60 million Community Recreational and Sporting Facilities Grants Program.[34] The Minister responsible, Ros Kelly, famously used a whiteboard to record the grant assessment process. The timing of the program prompted initial suspicion, with allocations coinciding with federal elections.[35] Central in the ventilation of the scandal was a critical report by the Auditor-General that found the administration of the program was weak.[36] The report noted discrepancies in the distribution of grants, but was unable to make a finding in relation to partisan bias due to the inadequate decision-making records.[37] As is typical in pork barrelling scandals, Ros Kelly defended the disproportionate distribution of funding to Labor held seats as reflecting socio-economic needs rather than partisanship.[38] However, a subsequent statistical analysis found strong support that the allocation was based primarily on partisan rather than socio-economic considerations.[39] Following almost a month of controversy, the scandal ultimately concluded with Ros Kelly's resignation

[34] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 63.

[35] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 63.

[36] Auditor-General (Cth), *Community, Cultural, Recreational and Sporting Facilities Program*. Report No 9, 1993, p. vii.

[37] Auditor-General, *Community, Cultural, Recreational and Sporting Facilities Program,* p. vii.

[38] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 63.

[39] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 63.

as Minister.[40] However, Kelly maintained her denial of any wrongdoing and insisted there was no proof of political bias or corruption in the administration of the program.[41]

Sports Rorts 2.0: LNP and Bridget McKenzie

In 2019, allegations emerged that the Coalition Government had been involved in a remarkably similar sports rorts affair involving the administration of over $100 million in grants. Suspicions were again raised by the proximity of the grants administration to a federal election, coupled with a Liberal candidate handing over a giant novelty cheque while campaigning in the key seat of Mayo.[42] Again, an Auditor-General report was pivotal in providing legitimacy to the pork barrelling allegations. The Auditor-General's report concluded that the award of grant funding was not informed by an appropriate assessment process and the successful applicants were not those who had been assessed as most meritorious.[43] Instead, the Auditor-General found evidence of distribution bias, with applications from marginal and targeted electorates receiving more funding than if a merit-based approach had been followed.[44] Rather than a whiteboard, the Minister's office used a colour-coded spreadsheet that recorded the analysis of electorate status, including marginal and targeted electorates.[45] The second sports rorts scandal was particularly controversial as 43% of approved grant applications were in fact ineligible to receive funding.[46] Further, the lawfulness of the Minister's involvement in the allocation of the grants was questioned, as there was no apparent lawful authority for her interference in

[40] Keith Dowding, Chris Lewis and Adam Packer, 'The Pattern of Forced Exits from the Ministry', in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government.* Canberra: ANU E Press, 2012, p. 121.

[41] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 64.

[42] Patrick Durkin and John Kehoe, 'McKenzie Claims She "Reverse Pork Barrelled"'. *The Australian Financial Review*, 17 January 2020, p. 3.

[43] Auditor-General (Cth), *Award of Funding under the Community Sport Infrastructure Program*. Report No. 23, 2019-20, p. 6.

[44] Auditor-General, *Award of Funding under the Community Sport Infrastructure Program*, [24].

[45] Speers, 'The Sports Rorts Saga'.

[46] Tom McIlroy, 'Hundreds of Sports Projects Were Ineligible, Says Auditor-General'. *The Australian Financial Review*, 13 February 2020. Accessed at: https://www.afr.com/politics/federal/later-hundreds-of-sports-projects-were-ineligible-says-auditor-general-20200213-p540l7.

Sport Australia's administration of the program.[47] Finally, it was later revealed that the Minister sent a final list of projects for approval to Sports Australia after the election had been called and the Government had shifted to a caretaker role, which traditionally requires avoiding any unnecessary major expenditure decisions.[48] The second sports rorts affair gained significant traction with political commentators. Anthony Whealy QC, a former judge and current chairperson of the Centre for Public Integrity, commented that the conduct was a 'clear case of corrupt conduct by any reasonable standard'.[49] Again, after a protracted controversy, the Minister responsible resigned. However, like Ros Kelly, Bridget McKenzie maintained there was no impropriety in the distribution of the grants. McKenzie in fact alleged she engaged in 'reverse pork barrelling' to ensure the fairer distribution of grants.[50] Her eventual resignation was on the narrower conflict of interest ground of failing to declare her membership to a club that received funding.[51] Notably, there has been no admission by the Government of pork barrelling, let alone improper distribution of public funds for partisan purposes.

REGULATION OF PORK BARRELLING IN AUSTRALIA

There is no offence of pork barrelling in Australia. However, the use of government grants to target electors for partisan gain does not escape regulation. Many accountability mechanisms operate to constrain, and sometimes permit, pork barrelling. This article will now explore the role of electoral bribery offences, financial legislation and regulations, administrative law, ministerial standards, caretaker

[47] Anne Twomey, 'Ministers Like Bridget McKenzie Have No Discretion to Break the Rules'. *ABC News*, 2 February 2020. Accessed at: https://www.abc.net.au/news/2020-02-02/bridget-mckenzie-sport-grants-minister-rules/11922152.

[48] Paul Karp, 'Bridget McKenzie Gave Sport Australia Final List of Grant Projects in Caretaker Period'. *The Guardian*, 27 February 2020. Accessed at: https://www.theguardian.com/australia-news/2020/feb/27/bridget-mckenzie-gave-sport-australia-final-list-of-grant-projects-in-caretaker-period; Department of Prime Minister and Cabinet, *Guidance on Caretaker Conventions* (2018).

[49] Anthony Whealy, 'Sports Rorts Expose Coalition's Tame Corruption-Watchdog Plan'. *The Australian Financial Review,* 22 January 2020. Accessed at: https://www.afr.com/politics/federal/sports-rorts-expose-coalition-s-tame-corruption-watchdog-plan-20200121-p53tah.

[50] Durkin and Kehoe, 'McKenzie Claims She "Reverse Pork Barrelled"', p. 3.

[51] Jennifer Hewett, 'Bridget McKenzie's Head is a Start'. *The Australian Financial Review*, 3 February 2020. Accessed at: https://www.afr.com/policy/economy/bridget-mckenzie-s-head-is-a-start-20200202-p53wzw.

conventions, the Auditor-General and the media in regulating pork barrelling in Australia.

Electoral Bribery

The offence of electoral bribery is one mechanism that may regulate pork barrelling in Australia. Section 326 of the *Commonwealth Electoral Act 1918* (Cth) provides that a person shall not provide or receive, or offer to provide or receive, any kind of benefit with the intention of influencing the vote or candidature of a person at a federal election. Electoral bribery is a serious offence, with even a single briberous offer by a candidate potentially voiding their election.[52] However, the offence does not apply in relation to a declaration of public policy or a promise of public action.[53] The public policy exemption is said to recognise the reality of electioneering in Australia, which centres on giving, or promising to give, government-created benefits to electors.[54] Therefore, while government grants to targeted electors may arguably constitute providing benefit with the intention of influencing votes, the public policy exemption means pork barrelling will rarely, if ever, amount to electoral bribery.[55]

The case of *Scott v Martin* is an exception to this rule.[56] Mr Martin, the Labor Party candidate for Port Stephens in the 1988 New South Wales election, was unseated for engaging in excessive largesse using government grants. In the election petition, applying a civil standard of proof, Needham J of the New South Wales Supreme Court held Mr Martin had committed electoral bribery by engaging in pork barrelling. The pork barrelling was particularly brazen and continued until the morning of the election. Needham J, in his judgement, commented that:

> … unfortunately, in modern times, there seems to be an accepted view that public moneys are in the unrestricted gift of those in power. In some

[52] Orr, *Dealing in Votes*, p. 1.

[53] *Commonwealth Electoral Act 1918* (Cth) s 326(3).

[54] Colin Hughes, 'Electoral Bribery'. *Griffith Law Review* 7 1998, p. 210.

[55] *Commonwealth Electoral Act 1918* (Cth) s 326(3).

[56] (1988) 14 NSWLR 663.

> cases, the temptation is to use such resources for purposes of political party advantage.[57]

However, at the time, the New South Wale's electoral bribery offence did not have a public policy exemption and it is presumed this may have otherwise operated to exempt the conduct.[58] Further the correctness and the precedential value of the decision has been doubted,[59] and no further cases of pork barrelling have been successfully challenged in Australia under electoral bribery laws. Instead, the case can be regarded as a warning shot calling for more discrete or moderate pork barrelling.[60] Therefore, as a strict legal offence, the role of electoral bribery in regulating pork barrelling is limited.

However, 'metaphorical electoral bribery' rather than a strict legal conception may play a more valuable role in the regulation of pork barrelling. Graeme Orr suggests the power of electoral bribery can be its use as a powerful rhetorical device, rather than a formal legal offence, which can be 'applied as a pejorative to demark a species of electoral conduct that is not unlawful per se, but whose honour and desirability is questioned because of its functional resemblance to the offence of electoral bribery'.[61] Therefore, the offence of electoral bribery can meaningfully contribute to the regulation of pork barrelling by providing a serious legal context to debates of the ethicality and propriety of alleged pork barrelling practices.

Financial Legislation and Regulations

Pork barrelling is also regulated by financial legislation and regulations which govern the expenditure of public funds. The key components of the financial legislative framework for the purpose of grant-based pork barrelling are the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*) and the *Commonwealth Grants Rules and Guidelines 2017* (Cth) (*CGRGs*).

[57] *Scott v Martin* (1988) 14 NSWLR 663, 673.

[58] Hughes, 'Electoral Bribery', p. 213.

[59] Orr, *Dealing in Votes*, p. 219.

[60] Orr, *Dealing in Votes*, p. 223.

[61] Orr, *Dealing in Votes*, p. 230.

***PUBLIC GOVERNANCE, PERFORMANCE AND ACCOUNTABILITY ACT 2013* (CTH)**

In 2013, the Coalition Government introduced the *PGPA Act* which created a new overarching framework for financial regulation. The *PGPA Act* establishes general duties and obligations for all officials in relation to the use and management of public resources.

Relevant to the regulation of pork barrelling, section 71 of the *PGPA Act* provides a Minister must not approve a proposed expenditure unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of the relevant money. 'Proper' is defined as 'efficient, effective, economical and ethical'.[62] On balance, it is unlikely the disproportionate favouring of applicants in targeted electorates, contrary to merit-based advice, particularly when those applicants have been deemed ineligible, would satisfy the criteria of 'efficient, effective, economical and ethical' expenditure of public expenditure. Therefore, excessive pork barrelling may breach s 71 of the *PGPA Act*. However, the consequences of a Minister breaching this obligation are limited.

There are no civil or criminal penalties under the *PGPA Act* for breaching the relevant duties. Employment-related sanctions are possible for public servants,[63] secretaries of departments, heads of executive agencies,[64] and officials of a corporate Commonwealth entity.[65] However, the same is not true for Ministers. Further, accountable authorities are only required to report 'significant non-compliance' with the *PGPA Act* to the relevant Minister and Finance Minister.[66] Depending on the structure of the grants program, this reporting requirement may or may not be enlivened.

Overall, s 71 of the *PGPA Act* sets a standard for ministerial decision-making in relation to public funds, requiring Ministers to be satisfied expenditure is effective, efficient, economical and ethical. However, the limited consequences for breaching this obligation mean the utility of the law is in its assistance in informing judgements on the propriety of Ministers' conduct, rather than in its strict legal application.

[62] *Public Governance, Performance and Accountability Act 2013* (Cth) s 8 (definition of 'proper').

[63] *Public Service Act 1999* ss 13(4) and 15.

[64] *Public Service Act 1999* ss 59, 67 and 29.

[65] *PGPA Act* s 30.

[66] *Public Service Act 1999* s 19.

While legal consequences are unlikely to flow from a pork barrelling related breach of the *PGPA Act*, the breach of these standards gives more force to criticisms of pork barrelling practices and strengthens allegations that the conduct was improper or corrupt.

***COMMONWEALTH GRANTS RULES AND GUIDELINES 2017* (CTH)**

Pork barrelling administered through government grants is also regulated by the *CGRGs*, a legislative instrument made under subsection 105C(1) of the *PGPA Act*. The guidelines are a recent innovation in the regulatory framework. The earliest version of the guidelines, then titled the *Commonwealth Grant Guidelines: Policies and Principles for Grants Administration (2009)* (Cth), were introduced by the Rudd Government in 2009 following the 2008 Strategic Review of the Administration of Australian Government Grant Programs.[67] The federal grant guidelines have significantly enhanced the framework of grants administration, promoting proper use and management of public funds and establishing transparent and accountable decision-making processes.[68]

The current guidelines include both mandatory requirements and best practice guidelines in the administration of Commonwealth grant programs. Consistent with s 71 of the *PGPA Act*, the *CGRGs* provide that the purpose of grants administration is to promote the proper, or efficient, effective, economical and ethical, use and management of public resources.[69] The guidelines also recommend the use of competitive, merit-based selection processes based on defined selection criteria.[70] This recommendation is significant in the regulation of pork barrelling, as competitive, merit-based selection processes constrain ministerial discretion and reduce the opportunity of partisan purposes to influence the selection process. The *CGRGs* also require the reasons for the approval of grant applications, relative to the grant guidelines and value for money principles, to be recorded in writing.[71] This

[67] Peter Grant, *Strategic Review of the Administration of Australian Government Grant Programs, 1st Review*. Canberra: Commonwealth of Australia, 2008; Joanne Kelly, *Strategic Review of the Administration of Australian Discretionary Government Grant Programs, 2nd Review.* Canberra: Commonwealth of Australia, 2008.

[68] Auditor-General (Cth), *Development and Approval of Grant Program Guidelines*. Report No. 36, 2011-12, [1]; Auditor-General (Cth), *Third and Fourth Rounds of the Regional Development Australia Fund*, [31].

[69] *Commonwealth Grants Rules and Guidelines 2017* (Cth) reg 2.1.

[70] *CGRGs* reg 11.5 and 13.10.

[71] *CGRGs* reg 4.5 and 4.10(b).

promotes transparency of reasoning in grants administration and should moderate the blatancy of pork barrelling practices. It also prevents Ministers escaping scrutiny by recording reasons on a whiteboard that are later erased.[72]

Particularly protective against pork barrelling, the *CGRGs* also require (a) the development of guidelines for grant programs, (b) the provision of written advice on the merits of applications and (c) special reporting requirement in situations that may raise concerns of partisan purposes.

Requirement to develop guidelines

The *CGRGs* mandate the development of grant opportunity guidelines for all new grant opportunities.[73] These guidelines should be clear, consistent, well documented and include the grant's objectives and purpose, eligibility criteria, clear assessment criteria, weighting of assessment criteria and the approval process.[74] Depending on the form of guidelines adopted, this requirement can constrain the discretion available to award funding to applications based on their electorate rather than merit. The presence of clear guidelines also improves transparency and accountability, and facilitates later analysis of approved applications in relation to these guidelines.

Requirement to receive written advice on merits of applications

The *CGRGs* require that prior to a Minister acting as a decision-maker in the administration of grants, the Minister must first receive written advice on the merits of the grant applications.[75] The written advice must include, at a minimum, the merits of the proposed grants in relation to both the grant guidelines and value for money principles, [76] and whether the application fully, partially or in no way satisfies the guidelines.[77] This requirement again facilitates transparency and accountability, and enables an analysis of discrepancy between approved grant applications and those recommended for approval by departments based on a merit-based assessment.

[72] Gaunt, 'Sports Grants and the Political Pork Barrel', p. 63.

[73] *CGRGs* reg 4.4(a).

[74] *CGRGs* reg 8.6.

[75] *CGRGs* reg 4.10(a).

[76] *CGRGs* reg 4.6 and 4.10(a).

[77] *CGRGs* reg 4.7.

Special reporting requirements

The *CGRGs* impose additional reporting requirements on Ministers approving grants either in their own electorate or contrary to department advice, two classes of conduct which traditionally raise suspicion of pork barrelling.[78] The guidelines maintain the freedom of Ministers to approve grants in their own electorate and contrary to merit-based advice, but require the reporting of both instances to the Finance Minister and, when deviating from department advice, the recording of reasons for the different conclusion.[79] This framework recognises that Ministers, departments and expert panels may reasonably disagree on the merits of projects relative to guidelines and preserves the ability of Ministers to exercise their lawful discretion in the allocation of grants. However, the requirements act as a safeguard reporting process that provides greater transparency on the occurrence of such decisions and allows scrutiny of the reasons for departing from merit-based advice.

Overall, the *CGRGs* provide a robust framework for informed, transparent and accountable grant administration. The framework recognises Ministers may legitimately disagree with department advice. However, compliance with the *CGRGs* is not enforced and consequences do not necessarily follow non-compliance. Again, the utility of the *CGRGs* appears to be in its assistance in informing judgement on the ethicality of alleged pork barrelling conduct, rather than in its strict enforcement. The *CGRGs* also provide a framework that facilitates systemically better decisions.

Administrative Law

The practice of pork barrelling is also regulated by administrative law. The administrative decision of a Minister to award or deny government funding may be challenged by judicial review.[80] Administrative decision-makers, including Ministers, must act within the scope of their legal powers, or their decision will be ultra vires. Decision-makers must have lawful authority, act for a proper purpose, take into consideration relevant factors and ignore irrelevant factors, and act reasonably. Further, they must afford procedural fairness and impartiality. The enabling legislation and legislative instruments may influence the considerations that can be

[78] *CGRGs* reg 4.11(a) and 4.12(a).

[79] *CGRGs* reg 4.11(a) and 4.12(a).

[80] *Australian Constitution* s 75; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 39B.

taken into account and the purposes for which the grants can be made. While also relevant, soft guidelines developed by departments are non-binding. Although the *CGRGs* are a legislative instrument, their relevance in interpreting proper purposes and relevant considerations will depend on the specific grants framework, including the enactment it is made under and whether the requirements are incorporated in any way. Therefore, the relevance of administrative law in regulating pork barrelling will depend in each case on the specific grant programs legislative framework and alleged conduct. However, in egregious cases, where it can be established the decision-maker considered partisan interests and electorate status or acted for partisan purposes, administrative law may be capable of intervening to regulate pork barrelling.

The Bridget McKenzie sports rorts affair may provide a test case for the role of administrative law in regulating pork barrelling. Both Slater and Gordon and Maurice Blackburn have indicated proceedings may be commenced on behalf of unsuccessful grant applicants.[81] The possible grounds would include the apparent lack of legal authority for Bridget McKenzie acting as decision-maker,[82] and considering electorate and partisan gains as an irrelevant consideration and improper purpose.[83]

However, although judicial review can be used as an accountability mechanism, its function is likely to be limited. Judicial review requires a private plaintiff and private funding, many relevant guidelines are non-binding and the judiciary are traditionally reluctant to interfere with governmental decisions regarding allocation of scarce resources.[84] Therefore, the strict legal role of judicial review in the regulation of pork barrelling is uncertain, but likely limited. However, the grounds of judicial review can

[81] Paul Karp, 'Sports Clubs That Missed Out in $100m Grants Program Could Bring Class Action'. *The Guardian*, 19 January 2020. Accessed at: https://www.theguardian.com/australia-news/2020/jan/19/sports-clubs-that-missed-out-in-100m-grants-program-could-bring-class-action; Alison Eveleigh, 'Club Denied Funding Takes Legal Action in 'Sports Rorts' Scandal'. *Lawyerly*, 5 March 2020. Accessed at: https://www.lawyerly.com.au/legal-action-taken-in-sports-rorts-scandal; Samantha Hutchinson and Tammy Mills, 'Country Tennis Club Takes Legal Action After 'Sport Rort' Scandal'. *Sydney Morning Herald*, 4 March 2020. Accessed at: https://www.smh.com.au/national/country-tennis-club-takes-legal-action-after-sports-rort-scandal-20200304-p546xl.html.

[82] Auditor-General (Cth), *Community Sport Infrastructure Program,* [8], [13] [2.14]- [2.19].

[83] Anne Twomey, Submission No 14 to Senate Select Committee on Administration of Sports Grants, Parliament of Australia, 20 February 2020.

[84] Peter Cane, 'The Function of Standing Rules in Administrative Law'. *Public Law* 1980, p. 312; Administrative Review Council, *The Scope of Judicial Review*. Discussion Paper, 2003, 3.18.

provide standards for proper administrative decision-making and inform debates about the propriety of Ministers' conduct.

Ministerial Standards

The Statement of Ministerial Standards (ministerial standards) further regulates ministerial conduct in possible pork barrelling.[85] Pursuant to the ministerial standards, Ministers must exercise their statutory powers in a lawful and disinterested manner,[86] make decisions unaffected by bias or irrelevant considerations such as considerations of private advantage or disadvantage,[87] and be prepared to demonstrate that the sole objective of their public actions and decisions were advancing the public interest.[88] The improper distribution of public resources to targeted electors for partisan purposes contravenes these standards of expected conduct. Significantly, if the Prime Minister determines a Minister failed to comply with the ministerial standards in a substantive and material manner, the Prime Minister may require the Minister to resign.[89]

Compared to the previous accountability mechanisms, an established breach of ministerial standards may result in a clear sanction through the loss of a ministerial position. Notably, Bridget McKenzie resigned her ministerial position following a revelation she had breached the ministerial standards, albeit on the narrow ground of conflict of interest. However, the reluctance of successive governments to accept any allegations of pork barrelling limits the likelihood that ministerial standards will be used to directly sanction pork barrelling, rather than a lesser, secondary breach. The ministerial standards present an enforceable mechanism to regulate pork barrelling conduct. However, even if not enforced, the ministerial standards can again inform a debate as to the propriety of alleged pork barrelling conduct.

[85] Department of Prime Minister and Cabinet*, Statement of Ministerial Standards,* 2018.

[86] *Ministerial Standards* cl 1.3.

[87] *Ministerial Standards* cl 3.2.

[88] *Ministerial Standards* cl 14.1.

[89] *Ministerial Standards* cl 15.1.

Caretaker Conventions and Election Period Promises

Caretaker conventions may also regulate, or fail to regulate, pork barrelling during election periods. Pursuant to caretaker conventions, following dissolution of Parliament and prior to an election, the government assumes a 'caretaker' role and must avoid making any unnecessary major policy decisions, making any significant appointments and entering major contracts or undertakings.[90] Therefore, the government is constrained from approving significant grants once the House of Representatives is dissolved prior to an election. This is evidenced in the controversy which surrounded the revelation that Bridget McKenzie's office sent an email to Sports Australia amending grant approval decisions after dissolution of Parliament in 2019.[91]

While the caretaker conventions prevent governments from entering a major undertaking to grant funding during the election period, the caretaker conventions do not proscribe promises or announcements of grants during the election period. In 1998, Colin Hughes raised the possibility of prohibiting either promising or making gifts in the election period.[92] However, Hughes emphasised this would not resolve all concerns of pork barrelling as the government would know when the election would be called, and therefore need only make the promises or announcements early enough to circumvent the new restrictions.[93] Nonetheless, prohibiting the announcement or promising of grants in the election period would likely reduce the electoral incentive of pork barrelling, as the salience of any promised grants in the electorate would reduce as their distance from election day increased.

While promises made in the election period are currently permitted, the grants must still be administered in compliance with the *PGPA Act* and the *CGRGs* outlined above. Therefore, the administering authority must create guidelines, record reasons, receive advice on the merits and comply with special reporting requirements. It is typically best practice for an election grant to be funded through a separate grant

[90] Department of Prime Minister and Cabinet, *Guidance on Caretaker Conventions* (2018), p. 1.

[91] Paul Karp, 'Bridget McKenzie Gave Sport Australia Final List of Grant Projects in Caretaker Period'. *The Guardian*, 27 February 2020. Accessed at: https://www.theguardian.com/australia-news/2020/feb/27/bridget-mckenzie-gave-sport-australia-final-list-of-grant-projects-in-caretaker-period.

[92] Hughes, 'Electoral Bribery', p. 213.

[93] Hughes, 'Electoral Bribery', p. 213.

opportunity to be used exclusively for administering election commitments.[94] This avoids the inequitable preferencing of election commitments over other applicants in an existing grant program.[95] This practice was used to deliver the Coalition's 2013 election promises of grants for CCTV and lighting in the first round of the Safer Streets Program. Predictably, the program was dogged by allegations of pork barrelling.[96] The Auditor-General conducted a performance audit and found the design of the closed, non-competitive program's guidelines to deliver the election commitments were sound.[97] However, the Auditor-General found the department made generous assumptions about the quality of the election commitment proposals, facilitating the approval of all but one of the election commitments.[98] This highlights how generous guidelines or generous merit-based assessments can undermine efforts to ensure the proper administration of public funds in compliance with the *CGRGs* when administering election promises.

Overall, caretaker conventions partially regulate pork barrelling through the proscription of final approval of grant funding during election periods. However, the bulk of pork barrelling involves promises and announcements of funding during election periods and this falls outside the remit of current caretaker conventions and are instead regulated like any other governmental discretionary grants.

Auditor-General

As evidenced in the two sports rorts scandals, the Auditor-General plays an integral role in the regulation of pork barrelling in Australia. The Auditor-General is an independent officer of Parliament who is protected with a ten-year statutory term and is supported by the Australian National Audit Office (ANAO).[99] The Auditor-

[94] Department of Finance, *Australian Government Grants—Briefing, Reporting, Evaluating and Election Commitments*, 2018, [38].

[95] Department of Finance, *Australian Government Grants,* [38].

[96] Richard Mulgan, 'Pork Barrelling and Failed Process: When Public Servants Defy the Rule of Law'. *Canberra Times*, 6 July 2015. Accessed at: https://www.canberratimes.com.au/story/6064827/pork-barrelling-and-failed-process-when-public-servants-defy-the-rule-of-law/digital-subscription/; Stephen Easton, 'Safer Streets? Audit Adds Meat to Pork-Barrelling Accusations'. *The Mandarin*, 9 June 2015. Accessed at: https://www.themandarin.com.au/37667-safer-streets-audit-adds-meat-pork-barrelling-accusations/.

[97] Auditor-General (Cth), *The Award of Funding under the Safer Streets Program*, Report No. 41, 2014-15.

[98] Auditor-General, *The Award of Funding under the Safer Streets Program*.

[99] *Auditor-General Act 1997* (Cth) s 8(1) and 39; *Auditor-General Act 1997* sch 1 item 1.

General is responsible for auditing Commonwealth entities, including conducting performance audits that examine the performance of government programs, particularly whether public resources are being used economically, efficiently, effectively and ethically.[100] It is typically performance audits that raise concerns of pork barrelling conduct.

The Auditor-General is given extensive powers under the *Auditor-General Act 1997* (Cth) to access documents and information in the performance of its functions. The Auditor-General may direct a person to provide any information, produce any documents in their custody or under their control, and attend and give evidence before the Auditor-General.[101] The Auditor-General may require a person verify the information they provide on either oath or affirmation.[102] Further, the Auditor-General may enter and remain on any premises occupied by the Commonwealth or certain related entities, and demand full access to any documents or property and examine and make copies of such documents.[103] Finally, the privilege against self-incrimination is abrogated in respect of the Auditor-General's investigative powers.[104] Gabrielle Appleby and Grant Hoole characterise the Auditor-General's powers as providing 'the most robust and flexible capacity to serve as an integrity-promoting institution … combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports'.[105]

The Auditor-General has published numerous performance audits that raise concerns of funding apparently skewed towards government-held electorates or marginal seats.[106] In this way, the Auditor-General has been vital in ventilating serious allegations of pork barrelling and uncovering government maladministration. In addition to the powers outlined above, the sheer resources the Auditor-General can direct to a performance audit is invaluable. The current Auditor-General Grant Hehir estimated auditors spent more than 3800 hours reviewing the Bridget McKenzie

[100] *Auditor-General Act 1997* (Cth) s 17.

[101] *Auditor-General Act 1997* (Cth) s 32(1).

[102] *Auditor-General Act 1997* (Cth) s 32(2).

[103] *Auditor-General Act 1997* (Cth) s 33(1).

[104] *Auditor-General Act 1997* (Cth) s 35.

[105] Senate Select Committee on a National Integrity Commission, *Report*. Parliament of Australia, 2017, [2.128].

[106] Auditor-General (Cth), *Third and Fourth Rounds of the Regional Development Australia Fund*, [16].

sports rorts grants.[107] The Auditor-General's independent and thorough reports provide credibility and legitimacy to otherwise unsubstantiated allegations of pork barrelling. Further, the media can then extract and publish the key findings of performance audits, informing the public of the allegations of pork barrelling. Beyond exposing individual instances of pork barrelling, the Auditor-General has also contributed to identifying systemic issues with the administration of grants and developing solutions, including through the *CGRGs*.

The Auditor-General is a crucial element in the pork barrelling regulatory regime, providing important institutional oversight on parliamentary spending, including detecting and exposing the improper distribution of public funds to targeted electors for partisan purposes. However, beyond recommendations and negative publicity, no significant deterrent necessarily flows from a critical Auditor-General report. Although the consequences of a critical audit report may be questioned, the Auditor-General provides critical oversight and its audits are an important touchstone which can be referenced by the public in evaluating the propriety of alleged pork barrelling.

Media

A free and independent media is an important component in the regulatory framework of pork barrelling in Australia.[108] The media promotes accountability through subjecting parliamentary conduct to close scrutiny and raising allegations of improper distribution of public funds. Rodney Tiffen asserts 'publicity in the media is how corruption is made visible to the public, but generally the media are secondary rather than primary in its exposure'.[109] Reflecting this, a central role of the media is publishing key findings of the Auditor-General performance audits that reveal pork barrelling concerns.

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[107] Tom McIlroy, 'Hundreds of Sports Projects Were Ineligible, Says Auditor-General'. *The Australian Financial Review*, 13 February 2020. Accessed at: https://www.afr.com/politics/federal/later-hundreds-of-sports-projects-were-ineligible-says-auditor-general-20200213-p540l7.

[108] Maurice Kennedy, *Cheques and Balances*. Canberra: Politics and Public Administration Group, Parliamentary Library. Research Paper No. 16, 2001-02, [2.354]. Accessed at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0102/02rp16

[109] Rodney Tiffen, *Scandals: Media, Politics and Corruption in Contemporary Australia.* Sydney: UNSW Press, 1999, p. 255.

To varying degrees, negative media coverage may deter pork barrelling practices. Critical and unrelenting media coverage of pork barrelling allegations can be the catalyst of ministerial resignations, as seen in the case of both Ros Kelly and Bridget McKenzie. Alternatively, coverage of pork barrelling may be minimal and amount to little, as seen in successive regional rorts programs.[110] This highlights the inconsistency of media as an accountability mechanism.[111]

The media provide an important oversight function in the regulation of pork barrelling, particularly through informing the public of suspected and substantiated pork barrelling allegations. However, the inconsistency of coverage and consequences means the media should not be a primary accountability mechanism for the regulation of pork barrelling.[112]

EVALUATION OF PORK BARRELLING REGULATION

Evidently, pork barrelling at the national level in Australia is regulated by various interacting accountability mechanisms including electoral bribery offences, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media. An evaluation of this regulatory regime must have regard to the intractability of a fixed boundary between proper political conduct and the improper distribution of public resources for partisan purposes. Nevertheless, although the boundary of proper political conduct may be imprecise, an effective regulatory regime should at least deter politicians from engaging in excessive and blatant pork barrelling. Therefore, this section will evaluate the pork barrelling regulatory regime through consideration of the incentives for, and deterrents against, engaging in excessive and blatant pork barrelling. There are strong, seemingly irresistible, incentives for politicians and political parties to maximise their likelihood of re-election by engaging in gross pork barrelling. Therefore, the regulatory regime must have sufficient deterrents to outweigh these significant political incentives. It is unclear whether the current regime achieves this difficult task.

[110] Tiffen, *Scandals,* p. 254.

[111] Tiffen, *Scandals,* p. 249.

[112] Tiffen, *Scandals,* p. 255.

Each element of the regulatory regime deters egregious pork barrelling conduct by different means. Electoral bribery can be used as a powerful rhetorical device to demark the seriousness of alleged pork barrelling. The *CGRGs* provide a robust, best practice framework for informed, transparent and accountable grant administration. Administrative law may be a useful mechanism to enforce proper decision making where there is an appropriate privately funded plaintiff. Ministerial standards provide further guidelines for the proper conduct of Ministers. Distinct from other accountability mechanisms, ministerial standards have an enforcement mechanism, whereby the Prime Minister can require the resignation of a Minister for a serious breach. Caretaker conventions also provide a modest deterrent against gross pork barrelling through the proscription of the formal approval of significant grants in the election period. The Auditor-General, arguably the most integral deterrent against gross pork barrelling, provides crucial oversight, investigating and ventilating allegations of excessive use of public resources for partisan purposes. Finally, media coverage can increase the likelihood of a political sanction, such as resignation of the Minister responsible.

Overall, a fundamental threshold in the regulation of pork barrelling is the initial determination that alleged pork barrelling falls beyond proper political conduct and is an improper use of public resources. The current regime provides important standards upon which such a judgement can be made. This is evidenced in the Bridget McKenzie sports rorts affair, in which the Minister's conduct was criticised for committing bribery, for breaching obligations under the *PGPA Act* and the *CGRGs*, for the potential unlawfulness of her decision under administrative law, for her non-compliance with ministerial standards and for her apparent contravention of caretaker conventions. An Auditor-General report provided thorough analysis of her conduct and made a finding of disproportionate allocation of funding. The media then publicised these allegations and eventually Bridget McKenzie resigned.

Therefore, the regulatory regime has important oversight institutions and provides a sound framework for debate surrounding the propriety of alleged pork barrelling, including clear standards and decision-making frameworks which promote accountability and transparency. However, the regime is limited by the absence of sufficient enforcement mechanisms. Considering the significant political incentives for engaging in pork barrelling, the absence of enforcement mechanisms is a critical defect in the current regulatory regime. The public is informed in its consideration of the propriety of pork barrelling allegations, but cannot expect consistent sanctions or even acknowledgment of wrongdoing. This raises concerns, similar to those of Rodney Tiffen, that 'public responses are dulled into an alienated and indiscriminate

weariness, into the belief that 'they all do it', an attitude which is detrimental to hopes of reform and corrosive of democratic accountability'.[113]

OPTIONS FOR REFORM

This section will briefly outline a number of options to strengthen the pork barrelling regulatory regime, including the extension of caretaker conventions, the enforcement of the *CGRGs* and the establishment of a federal integrity commission. The reforms highlighted are not comprehensive, and only seek to promote discussion surrounding options to reform the regulatory regime to achieve a better balance to combat the strong political incentives of gross pork barrelling. Further, while reform options are raised, it is recognised that the power to implement any proposed reform is held by those who will be regulated.[114]

Extension of Caretaker Conventions

As outlined above, it has previously been proposed that caretaker conventions could be extended to proscribe the promising of specific grants during the election period. Colin Hughes reasoned such an extension would not resolve concerns of pork barrelling, as the Government would know when the election would be called, and therefore need only make the promises or announcements early enough. However, a prohibition against the Government promising grants in the election period would likely reduce the electoral incentive of pork barrelling, as the political salience of promised grants would reduce as their distance from election day increases. Nevertheless, while caretaker conventions can restrict formal, Cabinet endorsed, Ministerial announcements, the implied freedom of political communication would leave the party in government at liberty to make equivalent campaign promises. Therefore, although the extension of the caretaker conventions may contribute to greater deterrence of gross pork barrelling, it is unlikely to result in a significant shift in pork barrelling practices.

[113] Tiffen, *Scandals,* p. 1.

[114] Orr, *Dealing in Votes*, p. 301.

Enforcement of Commonwealth Grants Rules and Guidelines 2017 (Cth)

A key limitation of the current regime is the absence of enforcement mechanisms. As emphasised above, the *CGRGs* are a significant element in the regulatory regime that provide detailed standards and a robust framework for informed, transparent and accountable grant administration. However, there are no consequences for ministerial non-compliance with the *CGRGs*. The strength of the *CGRGs* in regulating excessive pork barrelling may be enhanced through the addition of an enforcement mechanism. Amongst other options, this may be achieved through including a requirement in the ministerial standards that Ministers comply with the *CGRGs*. Under this model, a finding that a Minister has significantly breached the *CGRGs* would enliven the Prime Minister's power to require the Minister to resign for a substantive and material breach of the ministerial standards. The improper use of public funds through gross pork barrelling may, in itself, already constitute a substantive and material breach of the ministerial standards. However, the clear and objective requirements of the *CGRGs* means a finding of non-compliance with the *CGRGs* and subsequent finding of breach of the ministerial standards is subject to less discretion and more difficult to avoid. This is particularly useful in the context of government's traditional reluctance to accept any wrongdoing in relation to pork barrelling allegations. This model may shift the Prime Minister's discretion from the decision to make a finding of breach of ministerial standards to the decision to require resignation. This is likely a more difficult political position for the Prime Minister. Nonetheless, the discretion to require resignation remains with the Prime Minister, whose government has interests in evading political consequences surrounding its pork barrelling scandals.

Federal Anti-Corruption Commission

Ultimately, the concerns regarding the adequacy of the regulation of pork barrelling may be addressed through the implementation of a strong federal anti-corruption commission vested with sufficient jurisdiction, strong investigative powers and the ability to enforce standards of proper conduct. The Auditor-General provides meaningful institutional oversight, secured by its institutional independence, strong investigative powers and the provision of public reports.[115] However, a federal

[115] Senate Select Committee on a National Integrity Commission, Report. Parliament of Australia, 2017, [2.128].

integrity commission may go further, addressing concerns of enforceability and possibly achieving the impossible by deterring politicians from engaging in excessive and blatant pork barrelling.

However, the utility of any federal anti-corruption commission will turn on its design. If the commission is to serve any function in the regulation of egregious pork barrelling, it must be vested with sufficient jurisdiction in relation to Ministers and former Ministers. Further, corrupt conduct must be defined sufficiently broadly, without limitation to conduct that reaches a criminal threshold. This is highlighted by the refusal of the Crime and Corruption Commission Queensland's (CCC) to investigate allegations that Jeff Seeney, former LNP Deputy Premier and Minister for State Development and Planning, engaged in corrupt conduct through gross pork barrelling. In December 2015, the Queensland Auditor-General released a report which found LNP electorates were disproportionately favoured in the Royalties for Regions program and Seeney approved projects inconsistent with program guidelines.[116] ALP Treasurer, Curtis Pitt, then forwarded the Auditor-General's report to the CCC.[117] The CCC refused to investigate the allegations. It deemed its jurisdiction was not enlivened, as the former Minister's conduct would not, if proved, constitute a criminal offence.[118] Queensland's definition of corrupt conduct can be contrasted with the New South Wales equivalent, which includes as an alternative, that if proven, the conduct would amount to a significant breach of a parliamentary or ministerial code of conduct.[119] The New South Wales' definition is preferable, as it does not exclude the investigation of gross and blatant pork barrelling.

Further, the Independent Commission Against Corruption NSW (NSW ICAC) has helpfully set out the circumstances in which it would investigate allegations of egregious pork barrelling as corrupt conduct in its August 2020 submission to a

[116] Queensland Audit Office, *Royalties for the Regions*, Report 4: 2015-2016, December 2015.

[117] Chris O'Brien, 'Former Deputy Premier Jeff Seeney Referred to CCC Over Royalties for the Regions Funding Scheme'. *ABC News*, 4 December 2015. Accessed at: https://www.abc.net.au/news/2015-12-04/seeney-referred-to-crime-and-corruption-commission/7001886.

[118] Crime and Corruption Commission Queensland, *Media Release: CCC Will Not Investigate Conduct Relating to Royalties for the Regions Program*, 18 February 2016. Accessed at: https://www.ccc.qld.gov.au/news/ccc-will-not-investigate-conduct-relating-royalties-regions-program.

[119] *Independent Commission Against Corruption Act 1988* (NSW) s 9(1)(d).

parliamentary inquiry.[120] The NSW ICAC noted that ordinary pork barrelling, absent more, would not amount to corrupt conduct.[121] However, the NSW ICAC considered pork barrelling conduct by an elected official might be corrupt conduct if it breached public trust.[122] The NSW ICAC clarified that a breach of public trust may arise if a grant is allocated to advance a political objective or private interest, at the expense of, or without due consideration of, the public interest.[123] The following circumstances were also listed as conduct capable of amounting to a breach of public trust:

a) designing eligibility and selection criteria for the purpose of favouring a particular applicant, at the expense of the public interest;

b) intentionally misapplying, or directing a public servant to intentionally misapply, nominated selection criteria (including a direction to give preference to an ineligible grant application);

c) encouraging a public official to create false or incomplete records or to conceal the involvement of an elected official, or any other wilful suppression of information about a grants scheme; and

d) if the minister is not the appointed decision-maker, directing or urging a public servant to make a decision preferred by the minister.

The NSW ICAC's comments make it clear, that at least under the NSW framework, an independent corruption commission can be empowered to investigate cases of egregious pork barrelling conduct. Nonetheless, the efficacy of an anti-corruption commission should not be overemphasised. Despite its powers, the NSW ICAC has not made corrupt conduct findings in relation to grant schemes.[124] Overall, while a federal anti-corruption commission would not be a silver bullet to cure an age-old

[120] Independent Commission Against Corruption NSW, Submission No 92 to the Inquiry into Integrity, Efficacy and Value for Money of NSW Government Grant Programs, Parliament of New South Wales, 26 August 2020.

[121] ICAC NSW, Submission No 92, p. 7.

[122] ICAC NSW, Submission No 92, pp. 8-11.

[123] ICAC NSW, Submission No 92, p. 8.

[124] ICAC NSW, Submission No 92, p. 1.

problem of egregious pork barrelling, an appropriately designed commission could contribute to a more effective regulatory regime.

CONCLUSION

This paper has provided an insight into the regulation of pork barrelling in Australia. It is apparent that pork barrelling is a nebulous concept, in both its definition and forms. A meaningful evaluation of the regulation of pork barrelling must first grapple with the difficult distinction between ordinary political practice and improper use of public resources for partisan purposes. The 1993 and 2019 sports rorts affairs are useful case studies in examining the practice of pork barrelling in Australia and the strengths and limitations of the current regulatory regime.

There are diverse and interacting accountability mechanisms which regulate pork barrelling in Australia, including electoral bribery offences, financial legislation and regulations, administrative law, ministerial standards, caretaker conventions, the Auditor-General and the media. Each accountability mechanism in the regulatory regime serves different roles and has different limitations. Currently, the regulatory regime provides important oversight, contributes to systemically improving the administration of grants and provides a sound mechanism through which the propriety of alleged pork barrelling can be evaluated. However, the lack of enforcement mechanisms limits the effectiveness of the regulatory regime in deterring excessive pork barrelling. Options for reform to address these limitations include the extension of caretaker conventions, the enforcement of the *CGRGs* and the establishment of a federal integrity commission. Overall, this paper aimed to contribute to a more thorough understanding of the regulation of pork barrelling in Australia. The enduring nature of pork barrelling concerns in Australian politics means this understanding may be valuable in evaluating the seemingly inevitable next pork barrelling scandal.

Queensland's Scrutiny of Proposed Legislation by Parliamentary Committees: Do They Make for More Considered, Rights-Compatible Law?*

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* Double-blind reviewed article.

Abstract Rights scrutiny is not a new concept for Queensland: from the 1990s parliamentary committees of the Queensland Legislative Assembly have scrutinised proposed legislation for the application of fundamental legislative principles, as established by the *Legislative Standards Act 1992* (Qld) and the *Parliament of Queensland Act 2001* (Qld), and reported on their findings to the Parliament. Committees can recommend changes to a Bill prior to the Bill being passed as law. The government may respond to recommended changes by moving amendments during consideration in detail of the Bill during debate on the Bill in Parliament. The process is designed to require that all proposed legislation has *sufficient regard* to the common law rights and liberties of individuals, thereby holding governments accountable to produce better law. This article assesses the effectiveness of Queensland's established scrutiny system by parliamentary committees for rights compatibility and reports on a survey of government acceptance of committee legislative recommendations in relation to rights compatibility, looking at committee activity in two recent Parliaments of very different political composition. The survey confirms that other influences, in particular the political agenda of the government and the tactics employed by governments to pass legislation through Parliament without scrutiny, strongly affect committees' capacity to influence further legislative amendment. The findings of the survey and the scrutiny of proposed legislation for human rights compatibility since the commencement of Queensland's new *Human Rights Act 2019* (Qld) (HRA) indicate a new layer of human rights scrutiny does not necessarily make for better, more considered, rights-compatible law.

INTRODUCTION

This paper assesses the effectiveness of Queensland's scrutiny system for rights compatibility as established by the *Legislative Standards Act 1992* (Qld) (LSA) and the *Parliament of Queensland Act 2001* (Qld) (PoQA), and reports on a quantitative survey conducted of government acceptance of committee legislative recommendations in relation to rights compatibility by looking at committee activity in two recent Parliaments of very different political composition. The survey and its analysis confirms that other influences, in particular the political agenda of the government, strongly affect support committees' capacity to enable further legislative amendment.

The findings of the survey and the scrutiny of proposed legislation for human rights compatibility since the commencement of Queensland's new *Human Rights Act 2019* (Qld) (HRA) indicate a new layer of human rights scrutiny does not necessarily make for better, more considered, rights-compatible law in this state.

In Australia, individual rights and freedoms are protected by the *Australian Constitution*, the common law and federal and state laws.[1] Australia has international obligations to human rights treaties, including the United Nations' International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, Australia's common law provides a range of rights protections, including protection against trespass to the person and property, injury to reputation, breaches of confidence, and protection of rights through the principles of natural justice.[2]

There are federal laws that protect people from breaches of human rights.[3] The *Australian Human Rights Commission Act 1986* (Cth) established the Australian Human Rights Commission to oversee and report on the protection of human rights in Australia. The Act restates the obligations Commonwealth authorities have under

[1] Australian Government, Australian Law Reform Commission*, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*. Issues paper, 2014, p. 10.

[2] Australian Government, Attorney-General's Department, *Human Rights Protections*, 2019. Accessed at: https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Human-Rights-Protections.aspx.

[3] For example, *Privacy Act 1988* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).

key international human rights treaties.[4] In Queensland there are also a range of state laws that provide specific rights protection.[5]

All Australian jurisdictions have committees within their Parliaments that scrutinise proposed legislation. Some committees apply scrutiny principles to assist committees to consider the impact of the proposed legislation on personal rights and liberties.[6] However, there is much diversity across the nine Australian Parliaments in terms of approach to legislative scrutiny and focus.[7] Victoria, the Australian Capital Territory and most recently Queensland, have enacted human rights legislation that implement the rights recognised in the ICCPR and ICESCR to a limited degree. The human rights legislation in all these jurisdictions prescribes a process of parliamentary scrutiny for compatibility with rights prescribed in international treaties.

Parliamentary scrutiny for rights compatibility in proposed legislation is not limited to those jurisdictions with specific human rights legislation.[8] The Australian Parliament and the New South Wales Parliament employ a 'parliamentary model' of rights protection.[9] In the Australian Parliament, the Parliamentary Joint Committee on Human Rights (PJCHR) considers whether proposed federal laws comply with the ICCPR and the ICESCR. The New South Wales' Legislation Review Committee reviews all Bills introduced to Parliament and reports on the impact of proposed legislation on personal rights and liberties.[10] Queensland maintains a parliamentary model of rights

[4] Australian Human Rights Commission, *Human Rights in Australia*. 1 April 2016. Accessed at: https://www.humanrights.gov.au/education/students/get-informed/human-rights-australia.

[5] For example, *Anti-Discrimination Act 1991* (Qld), *Right to Information Act 2009* (Qld), *Information Privacy Act 2009* (Qld) and *Fair Trading Act 1989* (Qld).

[6] Parliament of New South Wales, Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987*, November 2018, p. 1.

[7] Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"', *Public Law Review* 26(1) 2015, pp. 19-20.

[8] In 2017, the Northern Territory Legislative Assembly introduced a scrutiny process whereby a Bill must be accompanied by a statement of compatibility and be reviewed by a scrutiny committee for human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). South Australia, Western Australia and Tasmania parliaments have no enhanced human rights scrutiny processes; Parliament of New South Wales, Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987*, Appendix 3.

[9] Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-Terrorism Laws', *Australasian Parliamentary Review* 31(2) 2016, p. 47.

[10] Parliament of New South Wales, *Legislation Review Committee*, 2019. Accessed at: https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=245.

scrutiny along with the human rights framework introduced by the HRA. A brief account of the evolution of the Queensland's unique arrangement is provided below.

Prior to 1989, Queensland legislation was 'almost exclusively the preserve of the cabinet',[11] and the passage of legislation through the Parliament was merely a formality.[12] Queensland has a unicameral legislature, unique among the states in Australia, having abolished its Legislative Council in 1922. This feature, along with malapportioned electoral districts that favoured country areas in Queensland, effectively ensured a long premiership for National Party Premier Sir Johannes Bjelke-Petersen, and had a 'profound impact' on the ability of the Queensland Parliament to carry out its functions and review the activities of the executive arm of government.[13] In 1989, the commission of inquiry headed by Tony Fitzgerald QC (the Fitzgerald Inquiry), drew attention to the central role of Parliament in the public administration of the state. The report of the Fitzgerald Inquiry revealed widespread corruption in the police force and the public sector, and identified the need to enhance the Parliament with all-party policy and investigatory committees, so that 'scrutiny of government legislative activity and of public administration is more effective as a consequence'.[14]

In 1992, the Queensland Electoral and Administrative Review Commission (EARC) recommended the existing Committee of Subordinate Legislation, operating within the Queensland Parliament since 1975, be replaced with a new Scrutiny of Legislation Committee.[15] Shortly after, the LSA introduced scrutiny of legislation for fundamental legislative principles (FLPs) to 'facilitate the achievement of a high standard of legislation in Queensland'.[16] Additionally, the Act established the Office of the Queensland Parliamentary Counsel to 'provide advice on the nature and

[11] David Solomon, 'A Comparison of the Queensland and the Commonwealth Approaches to the Legislative Process' *AIAL Forum* 35 1994, p. 35.

[12] Solomon, 'Comparison', p. 35.

[13] Electoral and Administrative Review Commission, Queensland, *Report on a Review of Parliamentary Committees*, Volume 1, 1992, p. 39.

[14] G.E. Fitzgerald (Chairman), *Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989, p. 124.

[15] Electoral and Administrative Review Commission, Queensland, *Report on the Review of the Office of the Parliamentary Counsel,* 1992, pp. 88-89.

[16] Legislative Standards Bill 1992 (Qld), *Explanatory Not*es, p. 2.

appropriateness of legislative proposals'.[17] The application of FLPs to drafting legislation was extended to the scrutiny of proposed legislation by a parliamentary committee, with the passing of the *Parliamentary Committees Act 1995* (Qld). This Act established a new Scrutiny of Legislation Committee, empowered to review 'all bills and all items of subordinate legislation in accordance with fundamental legislative principles'[18] as defined in the LSA.[19] Queensland's rights scrutiny system was reviewed in 1998 when the Legal, Constitutional and Administrative Review Committee conducted an inquiry on whether to adopt a Bill of Rights in Queensland.[20] In relation to legislative scrutiny, the committee found that 'the FLP process has been successful' as a layer of protection of people's fundamental rights.[21] The committee called it a 'new pre-legislative process which ensures, among other matters, that Queensland legislation has sufficient regard to individuals' rights and liberties is now an integral part of Queensland's legislative process'.[22]

Reforms occurred again in 2011 following a review of the Queensland parliamentary committee system by the select Committee System Review Committee. Consequently the *Parliament of Queensland Act (Reform and Modernisation) Amendment Act 2011* (Qld) established seven portfolio committees, with each committee assigned specific subject areas of responsibility, including the consideration of FLPs of any Bill referred to it, and any subordinate legislation within a committee's portfolio subject areas.[23] Section 93 of the Act currently requires committees to examine each Bill and item of subordinate legislation in its portfolio area for the application of FLPs to legislation.[24]

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[17] Legislative Standards Bill 1992 (Qld), *Explanatory Not*es, p. 2.

[18] *Parliamentary Committees Act 1995* (Qld), s 22.

[19] *Legislative Standards Act 1992* (Qld), s 4.

[20] Queensland Parliament, Legal, Constitutional and Administrative Review Committee, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?* November 1998.

[21] Queensland Parliament, *Preservation and Enhancement of Individuals' Rights*, p. 27.

[22] Queensland Parliament, *Preservation and Enhancement of Individuals' Rights*, p. 79.

[23] Portfolio committees do not include statutory committees: the Committee of the Legislative Assembly, the Parliamentary Crime and Corruption Committee and the Ethics Committee. In this article all references to committees are to portfolio committees.

[24] *Parliament of Queensland Act 2001* (Qld) s 93.

In December 2015, the Parliament directed the Legal Affairs and Community Safety Committee to consider whether to introduce human rights legislation to Queensland.[25] During the inquiry, the committee received several submissions about the value of Queensland's current system of legislative scrutiny. These submissions argued that, with the LSA and its framework for legislative scrutiny in place, and with common law protections, Queensland did not need human rights legislation.[26] The committee was unable to form a majority conclusion in its deliberations.[27] Government Members however, including the Chair of the committee, supported the introduction of human rights legislation in the future.[28]

On 31 October 2018, the Attorney-General and Minister for Justice Hon Yvette D'Ath MP introduced the Human Rights Bill 2018 (Qld). The Parliament passed the Bill on 27 February 2019.[29] The 23 rights set out in the HRA are primarily civil and political rights from the ICCPR, including recognition and equality before the law, the right to life, freedom of movement and freedom of expression.[30] The Act also protects two rights from the ICESCR—the right to education and the right to health services—as well as property rights drawn from the Universal Declaration of Human Rights.[31] Other rights not prescribed in the HRA are not limited by their absence in the Act,

[25] Queensland Parliament, Legal Affairs and Community Safety Committee, *Human Rights* Inquiry, 2016. Accessed at: http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/14-HumanRights.

[26] See for example, Office of the Information Commissioner (Queensland), Submission No 417 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland,* April 2016, p. 5; Bar Association of Queensland, Submission No 477 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland,* April 2016, p. 10; Queensland Council for Civil Liberties, Submission No 405 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland,* April 2016, p. 9; Anti-Discrimination Commission Queensland, Submission No 421 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland,* April 2016, p. 10.

[27] Queensland Parliament, Legal Affairs and Community Safety Committee, *Inquiry into a Possible Human Rights Act for Queensland*, June 2016, p. ix.

[28] Queensland Parliament, *Inquiry into a Possible Human Rights Act*, p. ix.

[29] Yvette D'Ath, Attorney-General and Minister for Justice, Queensland, *Parliamentary Debates*, Legislative Assembly, 27 February 2019, p. 478.

[30] *Human Rights Act 2019* (Qld) ss 15-23, 25-35.

[31] *Human Rights Act 2019* (Qld) ss 24, 36-37. Refer to *Human Rights Act 2019* (Qld) Part 2, Division 2 for a full list of civil and political rights articulated in the Act.

including rights prescribed in other laws.[32] Provisions within the HRA applying to committee scrutiny commenced in 1 January 2020.[33]

SCRUTINY OF LEGISLATION IN QUEENSLAND FOR RIGHTS COMPATIBILITY

Fundamental legislative principles that 'underlie a parliamentary democracy based on the rule of law'[34] are intended to be observed 'when drafting legislation' in Queensland.[35] The principles include requiring that legislation has 'sufficient regard to the rights and liberties of individuals and the institution of Parliament'.[36]

Fundamental legislative principles are neither exhaustive nor absolute; rather the principles reflect society's 'basic democratic values'.[37] The scrutiny established by the PoQA is designed to ensure FLPs underpin legislation and that any departure from the principles is explained and justified.[38] The intent is that, in having regard to FLPs, the highest standard of Queensland legislation may be ensured. After a Bill is introduced to the Legislative Assembly, it is usually referred to a committee for examination. Committees examine proposed legislation within a determined timeframe and report their findings to the Legislative Assembly. The committee will recommend whether the Bill be passed or not passed. The committee may make additional recommendations, for legislative amendment or on other policy matters. For all Bill inquiries, the committee will comment in its report as to whether the Bill would potentially breach fundamental legislative principles.

A committee may identify provisions that breach a matter of FLP, assess whether the legislation has 'sufficient regard' to FLPs,[39] and consider whether sufficient justification has been provided in the Bill's supporting documentation to support the

[32] Human Rights Act 2019 (Qld) s 12.

[33] *Human Rights Act 2019* (Qld), s 2.

[34] *Legislative Standards Act 1992* (Qld) s 4(1).

[35] Wayne Goss, Premier, Queensland, *Parliamentary Debates*, Legislative Assembly, 6 May 1992, p. 5003.

[36] *Legislative Standards Act 1992* (Qld) s 4(2), (3).

[37] Queensland Government, Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook,* 2008, p. 2.

[38] Queensland Government, *Fundamental Legislative Principles*, p. 2.

[39] *Parliament of Queensland Act 2001* (Qld) s 93(1).

breach.[40] If the committee regards a potential breach of FLP to be significant, the committee will make recommendations to amend the Bill in respect to those potential breaches.[41] If the committee makes a legislative recommendation the responsible Minister is required to provide the Legislative Assembly with a response to the committee report within three months.[42] The government may note the committee's recommendations, and either support or not support the amendments suggested by the committee.[43] Amendments to the Bill occur during the 'consideration in detail' stage of the passage of the Bill in the Assembly.[44] Amendments during consideration in detail are usually, except for urgent Bills or Private Members' Bills, prepared for the Parliament by the Office of the Queensland Parliamentary Counsel. Government departments are required to prepare supplementary explanatory notes for amendments to a Bill intended to be moved.[45]

Some Bills bypass full examination. Under Standing Order 137 and in accordance with the *Constitution of Queensland Act 2001* (Qld),[46] a government may introduce a Bill to the House and declare the Bill to be urgent. If a Bill is declared urgent, it may be referred to a committee for a period of less than six weeks, or the House may direct that the urgent Bill not stand referred to a committee, and move straight to the second reading stage.[47] The Legislative Assembly can declare a Bill urgent by an

[40] Queensland Parliament, *Factsheet 3.23 Fundamental Legislative Principles*, 2018. Accessed at: https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePrinciples.pdf.

[41] Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 2004, Standing Orders 131-136. See, for example, Education (Accreditation of Non-State Schools) Bill 2017.

[42] *Parliament of Queensland Act 2001* (Qld) s 107.

[43] See, for example, Local Government Legislation Amendment Bill 2014 (Qld).

[44] Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 2004, Standing Order 142.

[45] Queensland Government, *The Queensland Legislation Handbook: Governing Queensland*. 5th ed. 2014, 4.7.

[46] Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 2004, Standing Order 137; *Constitution of Queensland Act 2001* (Qld) s 26B(3).

[47] *Constitution of Queensland 2001* s 26B(3); Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 2004, Standing Order 137.

ordinary majority, whereby the government requires no more than its current majority in the House.[48]

From 1 January 2020, the HRA requires that a Member of Parliament introducing a Bill must prepare a statement of compatibility for the Bill.[49] An urgent Bill will require this statement, regardless of whether or not a committee will eventually examine the Bill. However, nothing in the HRA prevents a government from declaring a Bill urgent, such that the Bill is referred to a committee for consideration for a limited time, or not at all.[50]

Committees, when examining a Bill, must consider and report to the Parliament about whether the Bill is not compatible with human rights and consider, and report on, the statement of compatibility.[51] The HRA allows for human rights to be limited. Section 13(1) sets out how legislation may limit human rights, allowing for circumstances where a right may be reasonably limited under law and it can be demonstrated that the limit is justified in a 'free and democratic society based on human dignity, equality and freedom'.[52]

An 'override declaration' may be made by the Parliament to expressly declare an Act has effect despite it being incompatible with one or more human rights. The HRA requires a Member to make a statement to the Parliament explaining the circumstances that justify an override declaration.[53] The Act states that it is the intention of Parliament that an override declaration is only to be made in exceptional circumstances.[54]

The HRA amends s 93 of the PoQA to reflect the committees' new responsibilities to include considering Bills, subordinate legislation and other laws and matters as

[48] Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 2004, Standing Order 137.

[49] *Human Rights Act 2019* (Qld) s 38.

[50] Queensland Parliament, Legal Affairs and Community Safety Committee, *Report on Human Rights Bill* 2018, 2019, p. 62.

[51] *Human Rights Act 2019* (Qld) s 39.

[52] *Human Rights Act 2019* (Qld) s 13(1); Explanatory notes 16.

[53] *Human Rights Act 2019* (Qld) s 44.

[54] *Human Rights Act 2019* (Qld) ss 43(4), 44.

required for compatibility with human rights.[55] The provisions do not affect the established scrutiny of rights system prescribed by the LSA and the PoQA.

EFFECTIVENESS OF SCRUTINY: METHODOLOGY AND ANALYSIS

There is agreement among scholars that human rights scrutiny by parliamentary committees is an effective way of protecting human rights.[56] For example, Laura Grenfell and Sarah Moulds observed that, beyond protections provided by the *Australian Constitution* and the common law, parliamentary committees have an 'almost exclusive responsibility for directly protecting the rights of all members of the community'.[57]

However, Grenfell and Moulds also acknowledge the reality that parliamentary committees, dominated by the government and the government's political agenda, are 'seriously compromised' as forms of rights protection.[58] In searching for a positive impact of parliamentary rights scrutiny, they identified five factors relevant to assessing overall capacity to deliver rights protection: adequacy of time to conduct formal scrutiny; the attributes of committees to facilitate legislative influence, such as committee membership; the power and willingness of committees to facilitate public engagement; a culture of respect for the value of formal parliamentary scrutiny; and the generation of rights discourse in parliamentary debates.[59]

George Williams and Daniel Reynolds suggest that one way of measuring the effectiveness of human rights legislation is to consider the 'legislative impact' of the statutory framework on the quality of legislation from a human rights perspective; in other words, the extent to which the statutory framework results in improvements from a rights perspective to the legislative output of Parliament.[60] One example of

[55] *Human Rights Act 2019* (Qld) s 160.

[56] Jeremy Gans, 'Scrutiny of Bills under Bills of Rights: Is Victoria's Model the Way Forward?' University of Melbourne Legal Studies Research Paper 1, 2010, p. 1.

[57] 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, p. 40.

[58] Grenfell and Moulds, 'The Role of Committees in Rights Protection', p. 40.

[59] Grenfell and Moulds, 'The Role of Committees in Rights Protection', p. 44.

[60] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights', *Monash University Law Review* 41(2) 2015, p. 472.

legislative impact, according to Williams and Reynolds, would occur when a committee report leads to the amendment or retraction of a rights-infringing Bill.[61] Applying Williams and Reynolds' legislative impact assessment to committee work in Queensland, a quantitative survey was conducted of the number of times recommendations in committee reports on Bills directly resulted in legislative amendments to Bills on matters of FLP during the consideration in detail stage of the Bill's progress through the Legislative Assembly.

The quantitative survey compares committee scrutiny of Bills from the 54th Parliament, 15 May 2012 to 6 January 2015, to the 55th Parliament, from 24 March 2015 to 29 October 2017. At the commencement of the 54th Parliament in 2012, the Liberal National Party (LNP) formed government with Campbell Newman as Premier. The LNP held a majority of 78 seats to the Australian Labor Party (ALP)'s seven seats, with two Katter's Australia Party seats and two Independents. In March 2015, the ALP formed a minority government under the Premiership of Annastacia Palaszczuk after the state general election. The 55th Parliament consisted of 44 seats for the ALP, 42 seats for the LNP, with two Katter's Australia Party seats and one Independent.[62]

Under the PoQA, the size and political make-up of a committee reflects the number of non-government Members in the Parliament.[63] Committee activity, including committee findings and recommendations, is very much shaped by the committee's political composition. During the 54th Parliament, committees consisted of seven Members, of which at least one Member was a non-government Member of Parliament.[64] Reaching agreement with respect to the examination of Bills, and any consequential recommendations from that examination, was not a difficult outcome for committees during this Parliament. With the 55th Parliament consisting of more than 50 per cent non-government membership, committees consisted of six Members, with three government Members and three non-government Members.[65] Pursuant to the PoQA, a question put to the committee would be decided by a majority of the votes of Members present and if the votes on a question were equal,

[61] Williams and Reynolds, 'Operation and Impact', p. 488.

[62] Queensland Parliament, *Parliamentary Record 2015-2017: The 55th Parliament*. Queensland Parliament, 15th revised edition, 2018, p. 414.

[63] *Parliament of Queensland Act 2001* (Qld) ss 91-91C.

[64] *Parliament of Queensland Act 2001* (Qld) s 91A.

[65] *Parliament of Queensland Act 2001* (Qld) s 91C(5).

the question would be decided in the negative.[66] Therefore, during the 54th Parliament, government members of committees did not, by default, have the support of a majority of the committee to move recommendations.

The quantitative survey presented here draws on statistics produced by the Queensland Parliamentary Service:

- statistics on Bills introduced during a parliamentary term and referred to committees to examine, including number of legislative amendments recommended, and average duration of inquiries, published in the Queensland Parliamentary Service *Annual Reports,*[67] and available internally by parliamentary session (for example, the 54th Parliament, the 55th Parliament).
- the *Bills Register* for each Parliament,[68] providing the date Bills are introduced by parliamentary session, the stage reached for each Bill, and any government agreed amendments to the Bill during consideration in detail in the House.
- the biannual *Matters of Procedural Interest* bulletin which includes the number of Bills introduced to the House, referred to committees and declared urgent by the Legislative Assembly.[69]

The above resources do not provide insight into the number of times a Bill is passed by amendment as a result of committee legislative recommendations in relation to matters of FLP. To discern this, it is necessary to:

- examine the *Bills Register* for each Parliament.[70]
- for each Bill passed with government agreed amendment, refer to the report of the committee for the nature of the recommended legislative amendment.

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[66] *Parliament of Queensland Act 2001* (Qld) s 91C(7).

[67] Queensland Parliament, *Annual Reports*, 2018. Accessed at: http://www.parliament.qld.gov.au/explore/publications-and-reports/annual-reports.

[68] Queensland Parliament, *Bills Previous Parliament*, 2018. Accessed at: http://www.parliament.qld.gov.au/work-of-assembly/bills-and-legislation/previous-bills-register.

[69] Queensland Parliament, *Matters of Procedural Interest.* Accessed at: http://www.parliament.qld.gov.au/explore/publications-and-reports/chamber-and-procedural-publications/procedural-bulletin>; Queensland Parliament, *Statistics of the Assembly*. Accessed at: https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/work-of-the-house/work-of-house-current.

[70] Queensland Parliament, *Bills this Parliament*, 2018. Accessed at: http://www.parliament.qld.gov.au/work-of-assembly/bills-and-legislation/current-bills-register.

- refer to the government response to the committee's report to confirm the proposed amendments on matters of FLP were supported or not supported.
- refer to the *Matters of Procedural Interest* bulletins during the period under examination for the number of Bills declared urgent.

A survey of the above-described sources for the period under examination is presented in Table 1.

Table 1. Legislative Impact of Committee Activity, 2012-2017

Parliament	54th Parliament	55th Parliament
Bills introduced	203	192
Bills referred to committees	185	183
Bills examined by committees	161	143
Legislative amendments recommended	308	139
Legislative amendments accepted	162	118
Percentage accepted	52%	85%
Bills with recommendations or comments on matters of FLP supported/partially supported by government	27	22
Proportion of recommendations or comments on matters of FLP supported/partially supported by government of total legislative amendments accepted	16%	18%

The quantitative survey identifies considerable political influence on and within committees, by methods employed by governments to avoid committee scrutiny. Legislative outcomes over the two Parliaments under analysis indicate that, since the reforms of 2011, the Legislative Assembly regularly responds to scrutiny undertaken

by committees.[71] The data across both Parliaments for all committee legislative recommendations is encouraging in terms of positive impact. In the 54th Parliament, where the LNP held a large majority, and committees featured a majority of government Members, 52 per cent of all committee legislative recommendations were accepted by the Government.

The percentage of accepted recommendations was significantly higher in the 55th Parliament, at 85 per cent. The difference may be an indication that committee practice in this Parliament was more than a 'rubber stamp';[72] an indication the minority government and consequential balance of government to non-government Members in committees encouraged a practice whereby committees actively scrutinised and refined government Bills.[73] The difference in the number of Bills that attracted a committee recommendation in respect to matters of FLP, and were supported by the Government, was negligible between the two Parliaments under consideration (16 percent in 54th Parliament compared with 18 percent in 55th Parliament). This may be an indication that the political composition of the committee is inconsequential. However, taking a wider perspective, a significant difference between the legislative activity of the two Parliaments can be seen to be the limitations imposed on committees to properly examine legislation, as discussed below.

The reforms to Queensland's committee system in 2011 created a vital and active component of the Parliament. But it has been noted that the Parliament's committees are restrained from full and detailed legislative scrutiny by short reporting timeframes and heavy workloads.[74] The Clerk of the Queensland Parliament recently stated that the ideal referral period for Bills would be 12 weeks, giving enough time for stakeholders to 'prepare properly formulated submissions'

[71] Neil Laurie, 'Moving Towards the Entrenchment of Parliamentary Committees'. Paper presented at the 49th Presiding Officers and Clerks Conference, Wellington, 7-14 July 2018, p. 9.

[72] Ruth Barney, 'The Impact of Minority Government on Executive Dominance and Legislative Scrutiny in the 43rd Parliament'. Australian and New Zealand Association of Clerks-at-the-Table Conference, Melbourne, 23-25 January 2012, p. 7.

[73] Barney, 'The Impact of Minority Government', p. 7.

[74] Renee Easten, 'Queensland's Approach to the Scrutiny of Legislation'. Paper presented at Australia-New Zealand Scrutiny of Legislation Conference, Perth, 11-14 July 2016, p. 7.

and for the committee to undertake briefings, hearings and report.[75] However, reporting time is set down in the Queensland Constitution as a minimum of six weeks unless the Bill is declared urgent.[76] During the 54th Parliament, the average duration of committee inquiries into government Bills was 8.5 weeks, compared with 9.2 weeks during the 55th Parliament.[77]

The amount of time given to inquire into a Bill is beyond the control of the committee, and when legislation is passed quickly there is insufficient time to properly consider the implications of proposed legislation.[78] A 2015 Victorian Review identified a chronic lack of time available for the Scrutiny of Acts and Regulations Committee (SARC) to adequately investigate, engage with the public and report on all Bills. George Williams and Janina Boughey have since affirmed that the lack of time SARC is given to adequately carry out its functions is a 'key concern'.[79] In 2018, the Australian Human Rights Commission identified 'challenges' for the PJCHR, including that, due to time limitations, Bills often pass through Parliament before the PJCHR has released its view on a Bill's human rights compatibility, thus denying Members of Parliament access to the committee's findings on often complex human rights matters during debate on the Bill.

In the case of Queensland, during the 54th Parliament, the Government declared a significantly larger number of Bills to be urgent than during the 55th Parliament, as indicated in Table 2.[80]

[75] Laurie, 'Moving Towards Entrenchment', n 71, p. 11.

[76] *Constitution of Queensland Act 2001* (Qld) s 26B.

[77] Laurie, 'Moving Towards Entrenchment', n 71, p. 11.

[78] 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, p. 93.

[79] George Williams and Janina Boughey, Submission No 8 to Legal Affairs and Community Safety Committee, *Human Rights Bill 2018*, 2018, pp. 1, 2.

[80] Queensland Parliament, *Matters of Procedural Interest*. Accessed at:

http://www.parliament.qld.gov.au/explore/publications-and-reports/chamber-and-procedural-publications/procedural-bulletin

Table 2. Bills Declared Urgent in the 54th and 55th Parliaments

Parliament	54th Parliament	55th Parliament
Bills introduced.	203	192
Bills declared urgent under SO 137 and passed by the House in the same week introduced.[81]	15	2

During 2013 alone, ten Bills were declared urgent upon introduction and not referred to a committee.[82] Among the Bills declared urgent were three 'anti-bikie' laws. The Vicious Lawless Association Disestablishment Bill 2013, the Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 and the Tattoo Parlours Bill 2013 were passed the same day they were introduced, on 15 October 2013. The then Opposition Leader Annastacia Palaszczuk lamented the lack of time to examine the Bills during debate in the Legislative Assembly:

> … today this Queensland parliament has been presented with no fewer than three bills amounting to over 160 pages of laws that this government expects to ram through tonight—not tomorrow, not on Thursday, but tonight. How can any reasonable person be expected to get across the details of this legislation in two or three hours?[83]

Urgent Bills often concern legislation that impinges on personal rights and liberties, such as Bills concerning community safety.[84] Governments need urgently to pass legislation on occasion.[85] The doctrine of parliamentary sovereignty allows the

[81] In the 55th Parliament, one additional Bill was declared urgent with 22 days to report.

[82] Queensland Parliament, *Matters of Procedural Interest No.4—January to June 2013*, 2013. Accessed at: https://www.parliament.qld.gov.au/documents/TableOffice/bulletins/4-JantoJun13.pdf; *Matters of Procedural Interest No. 5—July to December 2013*, 2014. Accessed at: https://www.parliament.qld.gov.au/documents/TableOffice/bulletins/5-JultoDec13.pdf.

[83] Annastacia Palaszczuk, Opposition Leader, Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, p. 3158.

[84] Parliament of New South Wales, Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987*. November 2018, p. 23.

[85] Parliament of New South Wales, Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987*, p. 26.

Parliament to respond to emerging issues of public health or safety in a timely manner by passing legislation incompatible with certain rights.[86] However, as noted by the Law Society of New South Wales, it is undesirable for Bills to be identified as urgent simply for political purposes.[87]

During the 54th Parliament, an additional three Bills were introduced in 2013 and passed within a two-week period. One of them, the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, was introduced and referred to the Legal Affairs and Community Safety Committee on 19 November 2013 at 10.12pm, with a reporting date of 10.00am on 21 November 2013.[88] The committee was given less than 36 hours to inquire into the Bill, call for submissions, hold a public briefing and report back to the Legislative Assembly. Upon the Bill's introduction, the then Attorney-General Jarrod Bleijie MP stated: 'I am hoping as a sign of good faith the government is showing that we will send the bill off for at least a day so that committee members can get their teeth into it'.[89]

Of course, a shortened reporting time, or no time to examine legislation at all, prevents committees from identifying matters of concern and recommending legislative amendment. Tom Campbell and Stephen Morris' observation is pertinent:

> Committees do not have the power to control the will of democratic governments, which themselves are formed by a majority of the parliament and dependent on continued successful electoral outcomes.[90]

Laura Grenfell and Sarah Moulds considered the approach of governments to parliamentary scrutiny in regards the introduction of 'anti-bikie' legislation between 2009 and 2014, and concluded: 'Governments repeatedly devise strategies to

[86] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 2015, p. 174. Accessed at: https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/51/e2941ae24/report_final_charter_review_2015.pdf

[87] Law Society of NSW, Submission 4 to Parliament of New South Wales, Legislation Review Committee, *Inquiry into the Operation of the Legislation Review Act 1987*, November 2018, p. 4.

[88] Easten, 'Queensland's Approach to the Scrutiny of Legislation', p. 7.

[89] Jarrod Bleijie, Attorney-General and Minister for Justice, Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 2013, p. 3993.

[90] Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011', *University of Queensland Law Journal* 34(1) 2015, p. 25.

circumvent such parliamentary mechanisms, as is shown by the fast-tracking of bills and the shortening of timeframes'.[91]

Governments can and will introduce legislation and declare it urgent, justifying the declaration as being a necessary measure to protect the safety of the community. For example, upon the introduction of the Vicious Lawless Association Disestablishment Bill 2013, the then Attorney-General Hon Jarrod Bleijie stated that the Bill would 'increase public safety and security by the disestablishment of the [motorcycle] associations'. He also stated: 'It is imperative that this bill be passed as a matter of urgency to ensure the public is protected from the serious criminal activities of criminal associations'.[92]

Recent measures to legislate in response to the COVID-19 pandemic in 2020 illustrate that the Queensland Government has continued to use a similar tactic to pass legislation through the Parliament. On 4 February 2020, the first sitting day of the 2020 parliamentary calendar, Hon Steven Miles MP, Minister for Health and Minister for Ambulance Services introduced the Public Health (Declared Public Health Emergencies) Amendment Bill 2020 to the Legislative Assembly. The Bill, which included measures to restrict freedom of movement and extend a declared public health emergency, was introduced with a Statement of Compatibility in accordance with the HRA.[93] The Minister then moved that the Bill be declared urgent and not stand referred to a committee. The motion was agreed to by the House. The Bill was passed without amendment on 6 February 2020. As at 30 June 2020, the current Parliament has since introduced and passed a further four Bills declared urgent, all without committee scrutiny.

In considering the scrutiny role prescribed by the LSA and PoQA and performed by committees, analysis of the survey data shows that external forces such as time and political influence limit its effectiveness. The introduction of FLPs with the commencement of the LSA in 1992 was hailed as 'a significant step in the preservation and enhancement of individual rights and liberties'.[94] The Act was designed to ensure that better legislation was created. But it was observed just after

[91] Grenfell and Moulds, 'The Role of Committees in Rights Protection', p. 65.

[92] Jarrod Bleijie, Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, p. 3155.

[93] Steven Miles, Queensland, *Parliamentary Debates*, Legislative Assembly, 4 February 2020, p. 60.

[94] Legislative Standards Bill 1992 (Qld), *Explanatory not*es 2.

its commencement and since[95] that the LSA was not, nor ever intended to be, 'a mini Bill of Rights'[96] because the application of FLPs in the Act is neither enforceable nor absolute.

The principles set out in the LSA require that the Queensland Parliament determines whether legislation has *sufficient regard* to the rights and liberties of individuals. The Act allows governments to pass legislation that may breach FLP where required.[97] A non-compulsory framework allows for occasions on which people's common rights and liberties are limited or curtailed by legislative measures to protect society when necessary. The LSA merely requires that any departure from the principles are explained or 'justified' by the government that introduced them.[98]

With the doctrine of parliamentary sovereignty in place, the examination of proposed legislation by committees, and the government's response to committee recommendations, has never been contested in court. Legislation that may be considered a breach of human rights is more likely to be challenged in court for its constitutional validity, as was the case in *Kuczborski v Queensland* [2014] HCA 46, in relation to the *Vicious Lawless Association Disestablishment Act 2013* (Qld).[99]

Committees may identify matters of FLP but not recommend a legislative amendment, and governments can choose not to respond to recommended legislative amendments by committees, as was observed on occasion during the 54th and 55th Parliaments.

The Victorian Parliament is similarly unrestrained by the Victorian Charter from introducing emergency legislation. Proposed legislation would require a statement of compatibility to justify the limits imposed on people's rights by the emergency legislation.[100] The Parliament may pass the law, and by noting its incompatibility,

[95] George Williams, 'The Role of Parliament under an Australian Charter of Human Rights'. Paper presented at Australia-New Zealand Scrutiny of Legislation Conference, 8 July 2009, p. 5.

[96] Solomon, 'Comparison of the Queensland and the Commonwealth Approaches', 37.

[97] *Legislative Standards Act 1992* (Qld), ss 4(2), 23(f).

[98] Solomon, 'Comparison of the Queensland and the Commonwealth Approaches', p. 37.

[99] The High Court dismissed a constitutional challenge to the *Vicious Lawless Disestablishment Act 2013* (Qld) and other Queensland legislation introduced in 2013 in regards to motorcycle gangs; Queensland Government, Crown Law, *High Court Dismisses VLAD Challenge*, 18 December 2014. Accessed at: https://www.crownlaw.qld.gov.au/resources/publications/high-court-dismisses-vlad-challenge.

[100] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

would avoid the need to invoke an override declaration.[101] A 2015 review of the Victorian Charter considered the effectiveness of SARC's human rights scrutiny. The review found that SARC was 'cautious' about commenting on the incompatibility of Bills with human rights and whether limitations of rights are justified,[102] due largely to SARC's practice of paraphrasing statements from the government without committee comment.[103] The review also noted that SARC's constitution as a bipartisan committee, with a government majority and Chair, may sometimes result in partisan or perceived partisan commentary, a noted limitation of the Victorian model.[104] George Williams and Janina Boughey affirmed these findings in 2018, stating the impact of the Victorian Charter on parliamentary debate about human rights had been 'disappointing', in part due to SARC's political composition.[105]

To some observers, human rights legislation is in Queensland is a welcome improvement. According to the Anti-Discrimination Commission of Queensland, the HRA offers an additional layer of protection of human rights. Unlike the LSA, it will 'properly articulate' human rights so that at the earliest stage in the drafting of legislation, there is an opportunity to 'meaningfully identify human rights that are going to be impacted by legislation', take them into account and consider alternative ways to achieve the same purpose without impinging on human rights.[106]

An emerging culture of rights was observed after the introduction of human rights legislation in the ACT and Victoria.[107] Therefore the compulsory aspect brought by the Act could be beneficial in bringing human rights considerations to the attention of committees and the Parliament, and more broadly, foster a human rights culture in Queensland.

[101] Young, *From Commitment to Culture*, p. 200.

[102] Young, *From Commitment to Culture*, p. 176.

[103] Young, *From Commitment to Culture*, p. 177.

[104] Young, *From Commitment to Culture*, p. 177.

[105] Williams and Boughey, Submission No 8 to Legal Affairs and Community Safety Committee, p. 2.

[106] Scott McDougall, Evidence to Queensland Parliament, Legal Affairs and Community Safety Committee, Brisbane, 4 December 2018, p. 2.

[107] Young, *From Commitment to Culture*, p. 22; ACT Human Rights Commission, Submission No 434 to Legal Affairs and Community Safety Committee, *Inquiry into a Human Rights Act for Queensland,* April 2016, p. 13.

A potential duplication of the scrutiny process arises with the introduction of the HRA.[108] According to one observer, there is nothing in the HRA that 'does anything different to what is in the requirements under the LSA to ensure that regard is had to human rights at an earlier stage'.[109] But in terms of articulated rights, there are differences between the two. The rights in the HRA are more specific than the FLPs, but both sets of rights are not limited by their legislation and may encompass other unarticulated rights.

What is certain is that scrutinising legislation against both sets of rights will require committees to have sufficient resources to undertake the scrutiny and consider and report on both the Bill's statement of compatibility, and whether the Bill has regard for FLPs, in a timely manner. Time constraints are problematic for parliamentary committees in other jurisdictions with human rights legislation. The HRA does not allow more time to examine a Bill, nor does it ensure that the committee has completed its examination and reported on the Bill, prior to consideration in the Legislative Assembly. During the inquiry into the Human Rights Bill 2018, the Department of Justice and Attorney-General (DJAG) stated that the current timeframe provided to committees was 'adequate opportunity to consider the compatibility of a bill with human rights before the bill is debated'.[110]

The HRA does not restrain governments from employing tactics to curtail or avoid committee scrutiny to achieve their policy agendas. The provisions of the HRA do not prevent the Legislative Assembly from declaring a Bill an urgent Bill under the current Standing Order 137. The general limitations provision purports to set out a framework for deciding when and how a human right may be limited and demonstrably justified.[111] DJAG provided two implied legislative reasons for limiting rights:

- public interest considerations (including national security and community safety), and

[108] Luke Geurtsen, Evidence to Legal Affairs and Community Safety Committee, Queensland Parliament, Brisbane, 4 December 2018, p. 67.

[109] Geurtsen, Evidence to Legal Affairs and Community Safety Committee, p. 68.

[110] Letter from Queensland Government, Department of Justice and Attorney-General to Legal Affairs and Community Safety Committee, 3 December 2018, p. 45.

[111] Letter from Queensland Government, p. 41.

- protection of the rights of others (for example, children and domestic violence victims).[112]

Allowing rights to be limited for the purposes of community safety is strongly reminiscent of the reasons recent majority governments have introduced urgent legislation in Queensland, on the grounds that it is in the public interest to protect community safety.

The HRA restricts the use of the override declaration provision to 'exceptional circumstances', such as war, a state of emergency or immediate threats to public safety, health or order.[113] However, with the general limitations provision available, and the ability for governments to declare a Bill urgent by ordinary majority in the House, governments have little need to make an override declaration.[114] This is illustrated in 2020, with the requirement for the Queensland Parliament to legislate on a number of public health emergency matters in response to the COVID-19 pandemic: as at 30 June 2020, the Government had introduced five Bills and declared them urgent but had not evoked an override declaration under s 43(4) of the HRA in respect to any Bill.

CONCLUSION

A survey of Queensland's committee recommendations for legislative reform during the 54th and 55th Parliaments reveals modest responsiveness to committee recommendations, and little difference between the two Parliaments in terms of responsiveness on matters of FLP, despite the differing political composition of both the Legislative Assembly and the committees themselves.

Of note are the occasions in the Queensland Parliament under the established scrutiny system when a strident government has either declared a Bill urgent in order to bypass scrutiny of controversial legislation, or given a committee a very short timeframe to examine a Bill, on the pretext of addressing immediate matters of community safety. Taking into account the experiences of different jurisdictions

[112] Letter from Queensland Government, p. 41.

[113] *Human Rights Act 2019*, s 43(4).

[114] A situation recognised in the Victorian model. See Young, *From Commitment to Culture*, p. 198.

through the prism of Laura Grenfell and Sarah Moulds' assessment factors, the adequacy of time to examine and report properly on human rights compatibility of proposed legislation prior to debate in Parliament has been a major obstacle in scrutiny committees in Queensland under the established system, as it has been in other Australian jurisdictions.[115]

Employing Williams and Reynolds' method of assessment to Queensland's rights scrutiny arrangements, the application of the HRA from January 2020 has not resulted in a greater legislative impact by committees, or more rights compatible legislation.[116] The Act expressly allows for rights to be limited in respect to legislation incompatible with human rights. The government need only justify the offending provisions. With the political composition of committees reflecting the composition of the Parliament, a committee is unlikely to contradict major reform policy by finding a Bill to be incompatible with human rights. Sufficient time to consider proposed legislation is not expected to improve in Queensland without further amendment to the HRA or the Queensland Constitution. Of greater significance to rights protection in law making in Queensland, there is nothing in the HRA to prevent a government from limiting or bypassing committee scrutiny of proposed legislation by declaring a Bill urgent, and employing such tactics in the future. In addition, passing legislation declared urgent makes the override declaration provision in the HRA redundant.

However, the future is not entirely bleak. With sufficient time provided to committees to adequately examine rights compatibility of proposed legislation and encouraging public engagement, committees can contribute to the emergence of a human rights culture in Queensland. Building on the foundations created by the LSA and the examination of fundamental legislative principles, a rights culture can flourish where human rights are considered, articulated and promoted by the Parliament and government actions are properly explained, justified and endorsed.

[115] 'Moving Towards Entrenchment', n 71, p. 9.

[116] Williams and Reynolds, 'Operation and Impact', p. 488.

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 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 artcile 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

- 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/stoptheretirementtax/, 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

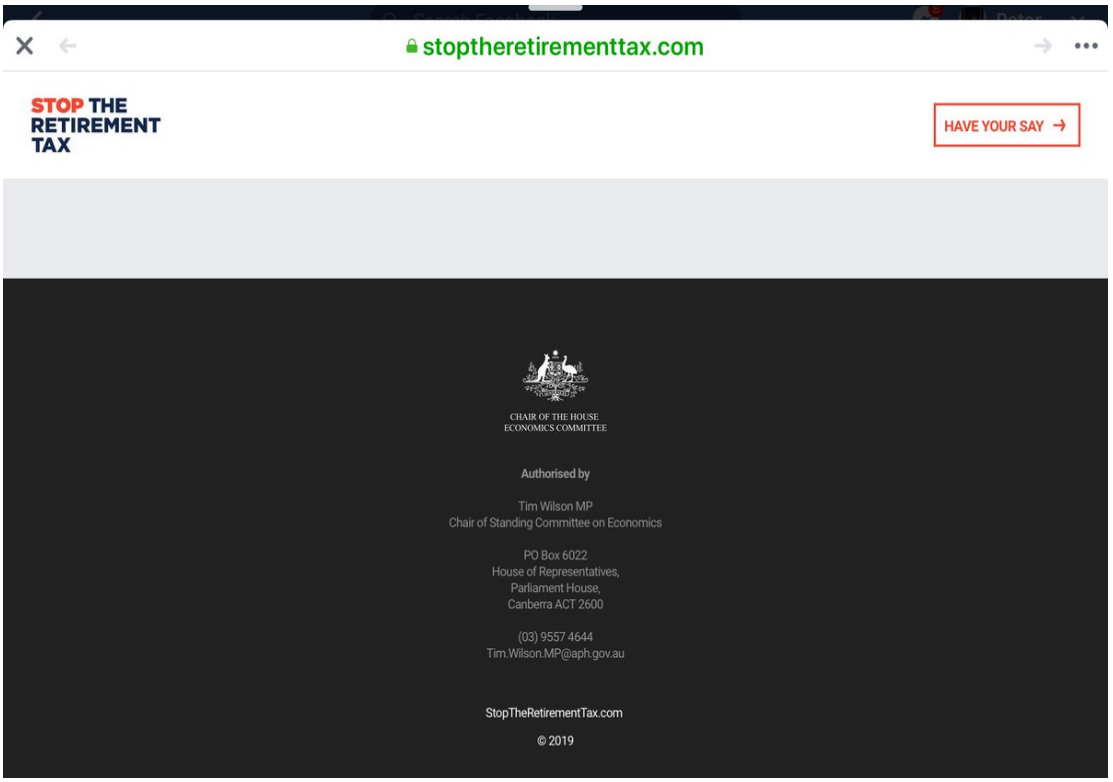
[16] T. Bourke, *Hansard*, pp. 13267-8. See also C. Knaus and N. Evershed, 'Tim Wilson Helped Write 20% of Submissions'; A. McKinnon, 'Inside the Franking Credits Debate'. *The Saturday Paper*, 16-22 February 2019. Accessed at: www.thesaturdaypaper.com.au/news/politics/2019/02/16/inside-the-franking-credits-debate/15502356007466

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.

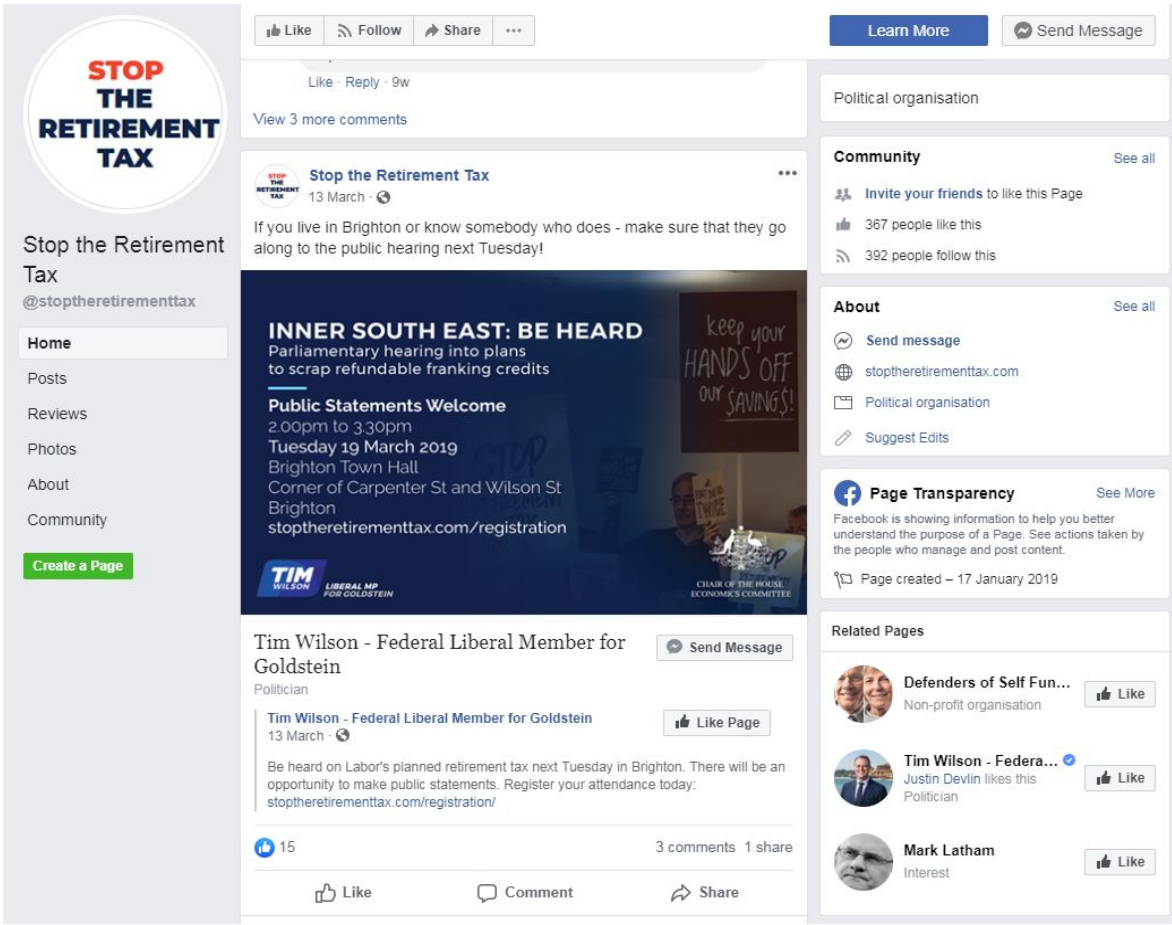
[17] P. Karp, 'Labor pushes to refer Tim Wilson to privileges committee'. *The Guardian Australia*, 13 February 2019. Accessed at: www.theguardian.com/australia-news/2019/feb/13/labor-pushes-to-refer-tim-wilson-to-privileges-committee; Economics Committee, Franking Credits Report, Dissenting report,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



Source: https://www.facebook.com/stoptheretirementtax/, 13 March 2019.

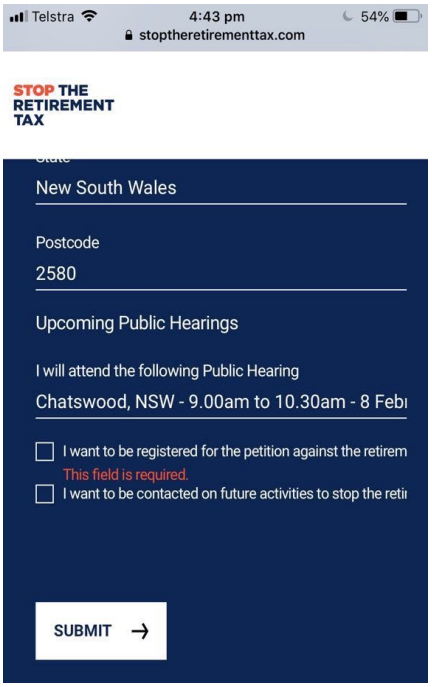
A number of participants appear to have gained the impression that they had to register through the Chair's website to attend a public hearing. The inquiry minutes indicate that the committee responded to numerous letters complaining about this.[21]

[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. Floridia, '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

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

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

Floridia 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] Floridia, 'Participatory Democracy versus Deliberative Democracy', p. 50.

[35] Floridia, 'Participatory Democracy versus Deliberative Democracy', p. 2.

[36] C. Pateman, 'APSA Presidential Address: Participatory Democracy Revisited'. *Perspectives on Politic*s, 10(1) 2012, p. 7.

[37] Floridia, '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] Floridia, '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]

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[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
Information	Generally on website or via email: • About committee • About inquiry • About Bill • About giving evidence/appearing • Witness rights and responsibilities • About parliamentary privilege • Final report and government response published	Generally on website or via email: • 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 Generally in person: • Capacity-building for regular submitter groups
Substantive balance	• Secretariat directly invites a range of stakeholders • Adverse comment processes provide right of reply	• Use of roundtables to allow debates among witnesses • Secretariat proposes additional witnesses with alternative views
Diversity	• Submissions called for and collected by secretariat • Advertise on website • Media releases • Use of existing stakeholder lists	• Public surveys • Presentations to stakeholders to encourage participation • Wider and deeper advertising • Efforts to engage hard-to-reach publics, eg: youth, Indigenous
Conscientiousness	• Consideration of all sides of argument in report • Dissenting reports and additional comments • Costing recommendations (such as by the Parliamentary Budget Office)	• 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
Equal consideration	• 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	• 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 inquires 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 ensuing 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'.

Parliamentary Privilege, Search Warrants and Intrusive Powers: Are Memoranda of Understanding Fit For Purpose?*

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*Double-blind reviewed article

Abstract The rule of law is a principle under which all citizens, including Members of Parliament, are subject to the same laws that are publicly promulgated and equally enforced. However, in order to effectively discharge their duties and preserve the independence of the legislature from other areas of government, Members of Parliament have special immunities under the law of parliamentary privilege. These special immunities, first enshrined by the Bill of Rights (1688), result in investigative and evidentiary restrictions involving parliamentary proceedings. This paper explores parliamentary privilege in Australia and how Australian jurisdictions have navigated the competing requirements of the law of parliamentary privilege and the rule of law. Recommendations to improve outcomes in light of new investigative techniques are proposed to ensure material subject to parliamentary privilege is treated appropriately and the independence and integrity of Parliament is maintained.

INTRODUCTION

Parliamentary privilege can be a shield against investigations by restricting access to material when investigating agencies execute search warrants and by prohibiting the use of material subject to parliamentary privilege being used in a court or other place

outside of Parliament.[1] Whilst parliamentary privilege is essential to preserve the independence of the legislature from the other arms of government, the special immunities conferred on the Parliament and its Members sit uneasily with the principle of the rule of law, which dictates that Members of Parliament should be subject to the same criminal law regime as ordinary citizens.[2]

There is an inevitable tension between the desire of investigating agencies to obtain all relevant evidence, and laws such as parliamentary privilege that result in investigative and evidentiary restrictions. This makes the investigation of Members suspected of having committed a criminal offence more complex and increases the likelihood of conflict between investigating agencies and Parliaments.

Australian jurisdictions have grappled with the best way to achieve transparency and preserve the integrity of investigations while upholding parliamentary privilege. Some jurisdictions have attempted to resolve this issue by entering into formal arrangements with law enforcement agencies outlining protocols for the execution of search warrants. This includes factors to be considered when determining if material is subject to parliamentary privilege, and how and who determines claims of parliamentary privilege. However, investigative techniques have progressed beyond what was contemplated in these agreements; namely through the use of covert surveillance and metadata collection.

This article outlines the source and scope of parliamentary privilege and the material covered by parliamentary privilege in Australia. Existing search warrant protocols in Australian jurisdictions and how these have been utilised in recent cases are reviewed. The development of more sophisticated investigative techniques and the intersection of their use by law enforcement agencies with parliamentary privilege will be explored. Finally, suggestions are made to optimise agreements for search warrant protocols in Australian jurisdictions, including incorporating provisions for covert and intrusive powers outlined in the Senate Privilege Committee Reports and

[1] S. Reynolds, 'Parliamentary Privilege and Searches by Investigatory Agencies'. Parliamentary Law Seminar, Sydney 9 June 2017, p. 2. Accessed at:

https://www.parliament.nsw.gov.au/lc/articles/Documents/Legalwise%20paper%202017%20-%20Parliamentary%20Privilege%20and%20Searches%20by%20Investigatory%20Agencies.pdf

[2] A. Sykes, 'The Rule of Law as an Australian Constitutionalist Promise', *Murdoch University Electronic Journal of Law* 9(1) 2002. Accessed at: http://www.austlii.edu.au/au/journals/MurUEJL/2002/2.html

establishing an independent adjudicator or Parliamentary Inspector to ensure each compulsory process adheres to agreed protocols.

SOURCE AND SCOPE OF PARLIAMENTARY PRIVILEGE

Parliamentary privilege refers to the powers and immunities from ordinary law possessed by Houses of Parliament in carrying out their parliamentary functions.[3] It protects the Houses of Parliament and participants in parliamentary proceedings from things said or done in connection with those proceedings.[4] The privilege is attached to a House of Parliament, rather than an individual Member; however, a Member may claim parliamentary privilege where to do otherwise would impede the functioning of the House.[5]

In Australia, parliamentary privilege originates from common law and Article 9 of the *Bill of Rights 1689* (UK), which states: 'That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.[6]

Except for New South Wales and Tasmania, Australian jurisdictions have given statutory force to parliamentary privilege by allowing Parliament to define their privilege in legislation.[7] The New South Wales constitutional legislation, most recently the *Constitution Act 1902* (NSW), is silent on parliamentary privilege and the definition and scope of privilege has evolved through common law.[8] Tasmania supplemented some of Parliament's powers through its general legislative power. The *Constitution Act 1934* (Tas) is silent on parliamentary privilege, except with

[3] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017,* May 2018, p. 9. Accessed at: http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/899D1306BAD8FB04482582890011F7F5/$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf

[4] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 9.

[5] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 10.

[6] Article 9, *Bill of Rights 1689* (UK).

[7] Reynolds, 'Parliamentary Privilege', p. 3.

[8] Reynolds, 'Parliamentary Privilege', p. 3.

respect to money Bills and the provision to declare absent Members' seats vacant. Any gaps in parliamentary privilege, for example the power to expel Members or define the parliamentary precincts, relies on principles derived from common law.

In Western Australia, the ability for Parliament to determine its own privileges was enacted in s 36 of the *Constitution Act 1889* (WA) and the *Parliamentary Privileges Act 1891* (WA) subsequently defined those privileges. Section 1 of the *Parliamentary Privileges Act 1891* (WA) provides that the privileges set out within it are in addition to all of the privileges, immunities and powers of the United Kingdom House of Commons as at 1 January 1989, to the extent that those Commons privileges are not inconsistent with the *Parliamentary Privileges Act 1891* (WA).[9]

Parliamentary privilege is essential in ensuring Houses of Parliament are able to carry out their core functions of legislating, debating and scrutinising the executive without undue interference. This includes protection for Members and other participants in parliamentary proceedings so that they can speak freely and provide all information and material without fear of recourse from external bodies.[10] However, this immunity may also be used to shield Members from scrutiny themselves, as it prevents material that is a proceeding in Parliament from being compulsorily disclosed or used as evidence in places outside of Parliament, including courts, Royal Commissions, quasi-judicial tribunals and anti-corruption agencies.

'PROCEEDING IN PARLIAMENT'

In order to determine if parliamentary privilege applies, the question turns on what is considered a proceeding in Parliament. The concept of a 'proceeding in parliament' is defined in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) as follows: '… all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee …'.

The courts have historically not provided any additional clarity on this definition. For example, in *Crane v Gething* (2000), which involved the seizure of documents over which Senator Crane claimed privilege from the Senator's office, French J noted that

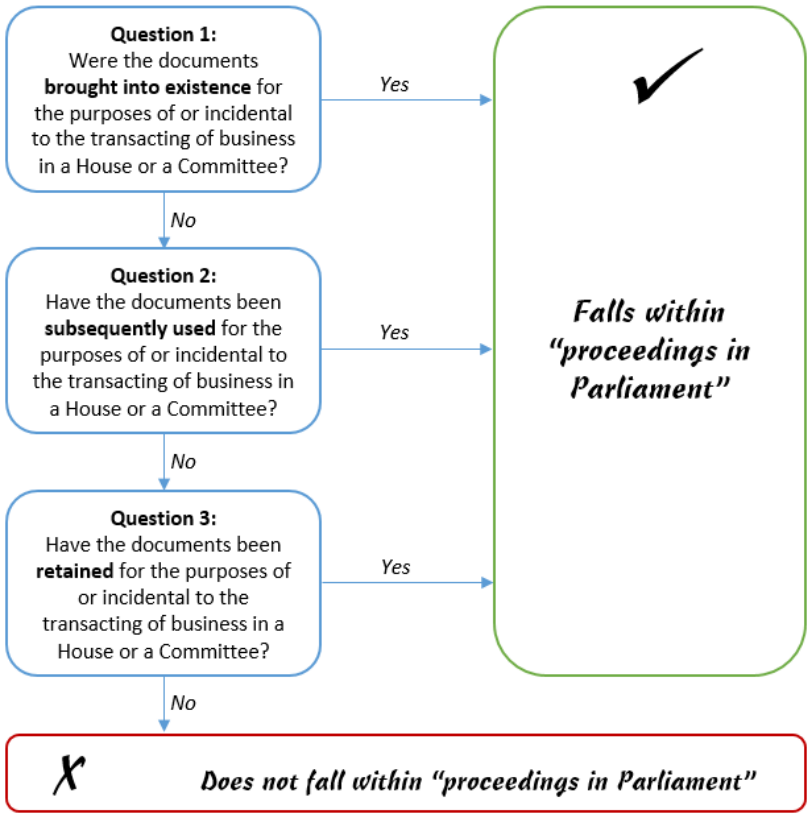
[9] *Parliamentary Privileges Act 1891* (WA) s 1; Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 16.

[10] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 16.

it was: '… not in the ordinary course for the courts to decide questions of privilege as between the Executive and the Parliament in litigation between the subject and the executive'.[11] In the absence of a court deciding the issue, it was up to the legislature and the executive to determine what constituted a proceeding in Parliament.

Following the seizure of material under search warrant from the New South Wales parliamentary office of the Hon Peter Breen MLC in 2003, the Privileges Committee of the New South Wales Legislative Council developed a three step test to assess whether the seized material formed part of a proceeding in Parliament (see Figure 1).

Figure 1. Three Step Test to Assess Whether Material is a Proceeding of Parliament



[11] *Crane v Gething* (2000) FCA 45. Accessed at: http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2000/2000fca0045

In this test, the purpose for the creation, use and retention of a document 'for purposes of or incidental to' proceedings in Parliament determines whether parliamentary privilege applies.[12] This three-step test draws upon the definition of proceedings in Parliament in the *Parliamentary Privileges Act 1987* (Cth)[13] and has set the benchmark for other jurisdictions faced with the same issue.[14]

AGREEMENTS BETWEEN PARLIAMENTS AND INVESTIGATING BODIES

Some Australian jurisdictions have formalised agreements with investigatory agencies outlining the process to follow when executing search warrants on Members' premises. These agreements are intended to preserve parliamentary privilege while maintaining the integrity of investigations. Figure 2 provides an overview of agreements in place in each jurisdiction at 30 November 2018 (for a full list of agreements, see Appendix A).

Those Parliaments that have entered into agreements with investigating agencies have chosen the format of a non-binding Memorandum of Understanding (MoU), with some MoUs including accompanying guidelines. Common themes in the agreements include:

- legal basis for parliamentary privilege;
- who is notified prior to executing a search warrant;
- how a Member may make a claim of privilege;
- how privileged material will be handled while the claim is assessed;

[12] Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC No. 2,* 31 March 2004, p. 8. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2059/No.%2028%20Parliamentary%20privilege%20and%20seizure%20of%20documents%20by%20ICAC%20No.%202.pdf

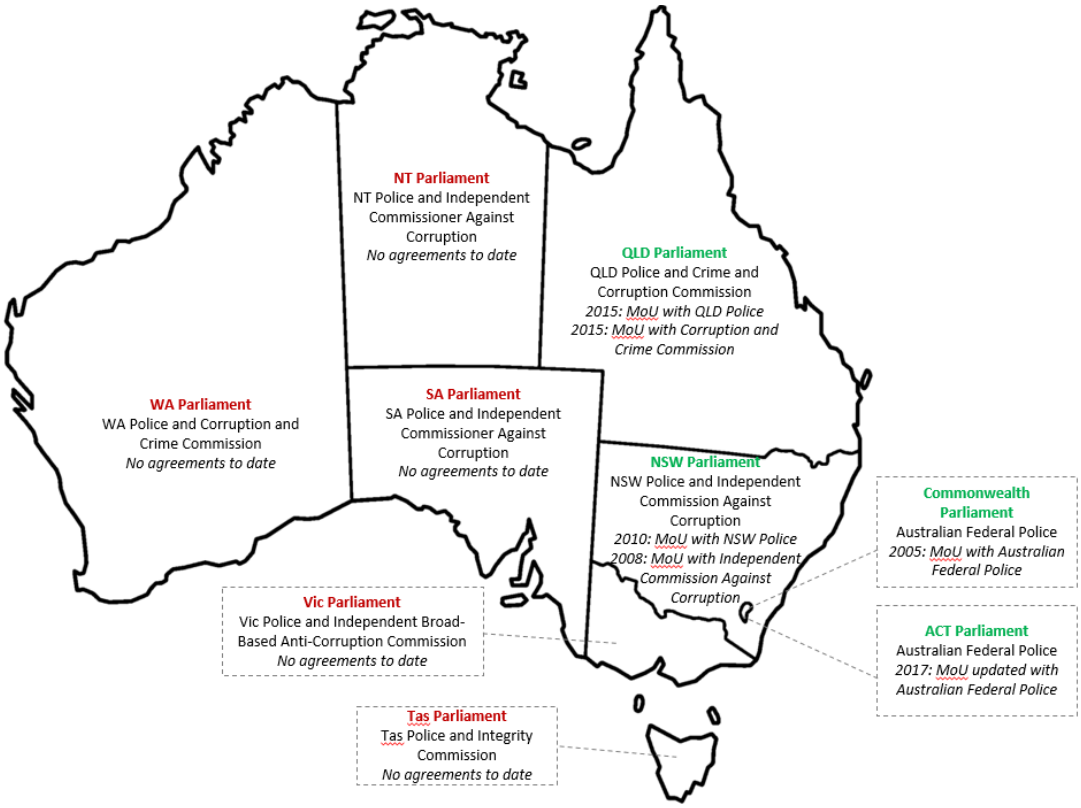
[13] Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC No. 2,* p. 4.

[14] See, for example, The Senate, Committee of Privileges, *Search Warrants, 164th Report.* March 2017, p. 6. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-2019/Documents_seized/Final_Report

- the timeframe a Member has to review the material;
- who determines the claim of privilege; and
- any recourse available to a Member for disputing the outcome.

Figure 2. Formalised Agreements between Parliaments and Investigatory Agencies



SEARCH WARRANT CASE STUDIES

The agreement between the Australian Federal Police (AFP), the Senate and the House of Representatives was tested in 2016 and 2018. The following case studies demonstrate that the agreement provides a valuable guide for handling material once a claim of privilege has been made. However, they also show a concerning gap between the pre-execution process to be followed by the AFP articulated in the agreement and what actually occurs in practice.

Case Study 1- Senator Stephen Conroy – Commonwealth: 19-20 May 2016

On 19 and 20 May 2016, the AFP executed search warrants at the Melbourne office of Senator Conroy and the Brunswick home of an Opposition staff member as part of its investigation into leaks to the media concerning the rollout of the National Broadband Network (NBN). On 24 August 2016, the AFP also executed search warrants on Department of Parliamentary Services servers in relation to the same matter.

Senator Stephen Conroy submitted a claim of parliamentary privilege over the seized material in accordance with the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (AFP Guideline).[15] The AFP delivered the material to the Clerk of the Senate on 24 August 2016, as required under the AFP Guideline. The matter was referred by the Senate to the Committee of Privileges for consideration on 31 August 2016 and the Committee reported on the matter in its 163rd and 164th Reports.[16] The Senate agreed to the recommendations and conclusions contained in the 164th Report on 28 March 2017.[17]

Contemporaneously, the House of Representatives' Privileges Committee considered a parallel claim of privilege made by the Hon Jason Clare MP on the seizure of materials by the AFP on 24 August 2016 from the Department of Parliamentary Services servers. The Committee recommended that the claim be upheld on the basis that the subject of the search warrants demonstrated a close relationship between the material seized and the nature of the Hon Jason Clare's duties as Shadow Minister for Communications.[18] The House of Representatives agreed with this recommendation on 1 December 2016.[19]

[15] Accessed at:

https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20for%20Execution%20of%20Search%20Warrants%20where%20Parliamentary%20Privilege%20involved.pdf

[16] The Senate, Committee of Privileges, *Status of Material Seized Under Warrant, Preliminary Report, 163rd Report*, December 2016. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-current/Documents_seized/Preliminary_Report; The Senate, Committee of Privileges, *Search Warrants, 164th Report*.

[17] The Parliament of the Commonwealth of Australia, Journals of the Senate, *No. 36*, 28 March 2017, p. 1209.

[18] House of Representatives. Privileges and Members' Interests Committee, *Claim of Parliamentary Privilege by a Member in Relation to Material Seized Under a Search Warrant*, November 2016. Accessed at:

Likewise, the Senate Committee of Privileges considered Senator Conroy's parliamentary duties closely corresponded with the scope of the warrants.[20] In assessing the claim of privilege, the Committee went further than the House of Representatives Committee of Privileges and recommended that the Senate empower the Committee to access and examine the material seized.[21] The Senate agreed to this recommendation on 1 December 2016 and the Committee subsequently examined the material.[22]

The Senate Committee of Privileges assessed whether the material seized was subject to parliamentary privilege by adapting the NSW Legislative Council three-step test to include the definition of proceedings in Parliament in the *Parliamentary Privileges Act 1987* (Cth).[23] Senator Conroy provided a detailed submission to the Committee, satisfactorily demonstrating how the material was used for the purposes of or incidental to transacting business in the Senate and therefore satisfied the test that the material fell within the definition of proceedings in Parliament.[24]

In reviewing the material seized and Senator Conroy's submission, the Senate Committee of Privileges noted that Senator Conroy satisfied step two in the three step test for determining whether or not material was considered a proceeding in Parliament.[25] On the basis that the scope of the warrants closely corresponded with Senator Conroy's parliamentary duties and that Senator Conroy demonstrated the materials seized formed a proceeding in Parliament, the Committee recommended that Senator Conroy's claim of privilege be upheld.[26]

The Senate Committee of Privileges noted that it also had a responsibility to consider whether or not the act of seizing the material improperly interfered with legislative

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https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/completed_inquiries

[19] The Parliament of the Commonwealth of Australia, House of Representatives, *Votes and Proceedings No. 27*, 1 December 2016, p. 428.

[20] The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 8.

[21] The Senate, Committee of Privileges, *Status of Material, 163rd Report*, p. 9.

[22] The Parliament of the Commonwealth of Australia, Journals of the Senate, *No. 23*, 1 December 2016, p. 767.

[23] The Senate, Committee of Privileges, *Status of Material, 163rd Report*, p. 8.

[24] The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 6.

[25] The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 7.

[26] The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 8.

activities. In the Queensland decision in *Rowley v O'Chee* (1997), McPherson JA highlighted that Members' sources must be protected and that any improper interference may result in a chilling effect on the provision of this information to Members.[27]

As the purpose of parliamentary privilege is to ensure the House, its committees and Members can carry out their duties and functions without interference, the Committee considered whether seizing the material amounted to a contempt.[28] For a contempt to be found, the Committee had to be satisfied that the person against whom the allegations were made intended to, or substantially did, interfere with the functions and duties of the Senate or Senator Conroy.[29] The Committee held that an improper interference occurred with the execution of the Melbourne search warrants; however, it refrained from a finding of contempt as the requisite intention to commit a contempt was absent.[30] This highlights a difficulty when intention must be proven in order to find contempt has occurred. The outcome of improper interference and arguable subsequent chilling effect is the same, regardless of the intention of the warrant being executed.

The Senate Committee of Privileges also considered Senator Conroy's claims that the seized material was not quarantined in accordance with the AFP Guideline and that knowledge of the material led to an adverse action against the person who provided him with the material.[31] The Committee reflected on the purpose for the search warrant guidelines and whether the manner in which the search warrants were executed upheld the spirit of the guidelines.[32] The Committee noted that the capacity for material to be reviewed by investigators and others at the time of seizure allowed for a third party to use the material in a manner that was not authorised by the warrants or consistent with the AFP Guideline. This led to NBN becoming aware

[27] The Senate, Committee of Privileges, *Status of Material, 163rd Report*, p. 9.

[28] The Senate, Committee of Privileges, *Status of Material, 163rd Report*, p. 10.

[29] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 17.

[30] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 18.

[31] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 13.

[32] The Senate, Committee of Privileges, *Status of Material, 163rd Report*, p. 10.

of an employee providing material to Senator Conroy and subsequently disciplining that employee.[33]

The Senate Committee of Privileges found that an improper interference occurred as the provision of information to Senator Conroy led to the imposition of a penalty on the person who provided that information. However, the Committee refrained from a finding of contempt on the basis that the guideline was silent on third parties being present when search warrants were executed, and the difficulty in proving that adverse consequences were intended at the time the action was taken. The Committee agreed with the AFP and NBN Co submissions that contempt could not be found 'where public officers are fulfilling their lawful public duties in good faith and for a proper purpose'.[34]

The Committee further noted that the transmitting of photographs to NBN Co of material seized was not in accordance with the guidelines, which stipulate that material that may be subject to parliamentary privilege must be sealed and delivered to the Clerk.[35] The Committee noted that the guidelines should be revised to include a provision that all parties present when a search warrant is executed must be made aware of the requirements of the AFP Guideline.[36]

Case Study 2 - Senator Louise Pratt – Commonwealth: 11 October 2018

On 11 October 2018, the AFP executed a search warrant on the office and home of an Australian Border Force (ABF) employee as part of its investigation into the leaks to media concerning Home Affairs Minister Peter Dutton's au pair saga. The ABF employee notified Senator Louise Pratt of the search and, following the process stipulated in the AFP Guideline, Senator Pratt submitted a claim of parliamentary privilege over the seized material about the same time as the AFP notified the Presiding Officer of the search. Later that day, the seized material was sealed and delivered to the Clerk of the Senate for safe keeping whilst the claim of privilege was assessed by the Senate. On 16 October 2018, the Senate referred the matter to the

[33] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 16.

[34] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 18.

[35] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 16.

[36] The Senate, Committee of Privileges, *Search Warrants*, *164th Report*, p. 20.

Senate Committee of Privileges for consideration. The Committee reported on the matter in its 172nd Report[37].

Senator Pratt's claim of privilege related to her role as the Chair of the Legal and Constitutional Affairs References Committee. This Committee inquired into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters. During the inquiry, Senator Pratt had contact with the ABF officer in her capacity as Chair of this Committee.[38]

The AFP furnished the Senate Committee of Privileges with copies of the search warrants, which identified a Senator and noted that seizure of information was conditional upon it relating to the inquiry into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters.[39] In the AFP submission to the Committee, the Commissioner of the AFP advised that the circumstances 'did not automatically, in our minds, give rise to an obvious claim of parliamentary privilege'.[40] The AFP also provided a list of material seized, with the subject matter noted as 'Senate inquiry into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters, or witnesses'.[41]

In assessing Senator Pratt's privilege claim, the Senate Committee of Privileges followed the three-step test described above.[42] While Senator Pratt was not provided with a list of items seized under the search warrants, her submission to the Senate Committee of Privileges detailed the items that she believed may have been seized. Senator Pratt confirmed that the items had been created for, or were subsequently used in, a proceeding in Parliament; that being 'transacting business with the Senate Legal and Constitutional Affairs References Committee'.[43] In doing so, Senator Pratt satisfied step one and two of the three-step test previously used by

[37] The Senate, Committee of Privileges, *Disposition of Material Seized Under Warrant, 172nd Report*, November 2018. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/Report

[38] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 2.

[39] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 2.

[40] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 8.

[41] The Senate, Committee of Privileges, *Disposition of Material*, pp. *172nd Report*, 2, 6.

[42] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 5.

[43] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 7.

the Committee to determine if the Conroy material fell within the definition of proceedings in Parliament.[44]

The Senate Committee of Privileges tabled its findings in its 172nd Report on 26 November 2018 and upheld Senator Pratt's claim of privilege over all of the material seized on the basis that the material could be regarded as proceedings in Parliament.[45] In this report, the Committee also signalled its intention to call the AFP Commissioner and the Acting Commander to provide further evidence and clarification in relation to a possible contempt arising from the execution of the search warrants.[46]

The Senate Committee of Privileges expressed concerns as to the manner of execution of the warrants and the stated purpose of the AFP Guideline. The Committee noted that the execution of the warrants may have amounted to an improper interference with the authority or functions of the Senator and/or the Senate Committee. The subject matter of the warrants referred to a Senator and a Senate Committee, which should have given rise to questions of parliamentary privilege. Despite these clear indicators, the AFP failed to follow the notification procedures outlined in the AFP Guideline and only notified the Presiding Officer of the execution of the warrants nearly three hours after the fact.[47] Had the ABF employee not contacted Senator Pratt directly, a claim of privilege may never have been made prior to the seized material being inspected by the AFP.[48]

A similar issue was raised in the execution of warrants relating to Senator Conroy and on that occasion, the Senate Committee of Privileges noted that a contempt should not be found 'where public officers are fulfilling their lawful public duties in good faith and for a proper purpose'.[49] In spite of the AFP's assurances that it followed the AFP Guideline in the Senator Conroy case, the Committee 'question[ed] whether the same circumstances apply' and stated it would call on the AFP for an explanation.[50]

[44] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 7.

[45] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 8.

[46] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 9.

[47] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 4.

[48] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 9.

[49] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 9.

[50] The Senate, Committee of Privileges, *Disposition of Material*, *172nd Report*, p. 9.

In Senator Pratt's case, as in Senator Conroy's case before it, the AFP did not comply with the requirements for notification outlined in the AFP Guideline. The AFP did not notify the Presiding Officer or the Senator named in the subject of the search warrants prior to the execution of the warrants. Lack of notification expressly negated the stated purpose of the AFP Guideline:

> This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.[51]

This substantially impeded the preservation of parliamentary privilege and caused privileged material that would otherwise not have been sighted by investigative agencies to be caught up in the search warrant net.

As signalled in the 172nd report, the Committee subsequently undertook a preliminary inquiry into whether or not the AFP's actions amounted to an improper interference with a Senator, Committee or the Senate. The Committee focussed its inquiry on two limbs:

1. whether the inclusion of the name of the Senate, Senate Committee and Senate Committee Inquiry in the scope of the warrants may have led to interference; and
2. whether the processes articulated in the AFP Guidelines were followed.[52]

The Committee formed the view that the terms of the warrants could have been written so that the material sought could have been obtained without reference to the name of the Senate, Senate Committee and Senate Committee Inquiry. The Committee noted in the AFP's submission that it was cognisant of the dates of the

[51] Accessed at:

https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20for%20Execution%20of%20Search%20Warrants%20where%20Parliamentary%20Privilege%20involved.pdf

[52] The Senate, Committee of Privileges, *Parliamentary Privilege and the Use of Search Warrants, 174th Report*, pp. 8, 9. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/174th_report

relevant Senate Committee Inquiry and sought to execute search warrants once the reference dates had expired so as not to interfere with parliamentary privilege.[53]

While the AFP did not comply with the AFP Guidelines regarding actions taken prior to the execution of warrants, the Committee formed the view that the processes articulated at paragraph 4.2 of the AFP Guidelines were sufficiently ambiguous that the Senate's Privilege Resolutions' requirements for intention on the part of the AFP could not be substantiated. The Committee noted its concern with the AFP's assertion in its submission that parliamentary privilege was a use immunity, where material seized during a search may be subject to parliamentary privilege, but that privilege is not impinged upon unless the seized material is produced in Court.[54]

The Committee drew the AFP's attention to the Senate's resolution of 6 December 2018, reiterating the powers of Parliament and the requirement for the executive and executive agencies to 'observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege'.[55] The resolution called for a new protocol to be developed for the execution of search warrants incorporating other intrusive powers. The Committee affirmed the Senate's view that the AFP Guideline should be amended to 'better deliver its stated purpose'.[56]

REVIEW OF EXISTING GUIDELINES AND CONSIDERATION OF COVERT AND INTRUSIVE POWERS

In light of the issues that occurred when the search warrant guidelines were tested in the Senator Conroy case, in November 2016, the Senate Committee of Privileges commenced an inquiry into the guidelines to ensure that they adequately protected Members in effectively carrying out their functions. At the same time, the Committee considered the implications of covert and intrusive powers of investigation and

[53] The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, p. 11.

[54] The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, pp. 11-12.

[55] The Senate, Journal of the Senate, No. 137, 6 December 2018, *p. 4485.*

[56] The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, p. 13.

whether or not sufficient oversight and reporting regimes were in place to preserve parliamentary privilege or if specific protocols should be developed.[57]

The Committee found that the existing search warrant guidelines sufficiently outlined the appropriate process to follow for claims of parliamentary privilege, however they were not always followed in practice. The existing guidelines did not contemplate the presence or possible involvement of third parties where search warrants were executed. The Committee noted that all parties present at a search warrant should be made aware of the requirements of the guidelines and that the AFP could address this matter in the short term by briefing all parties prior to the execution of a warrant.[58] Following consultation, this requirement might be incorporated in an updated guideline.[59]

The covert and intrusive powers in which the Committee was particularly interested included the power of investigating agencies to:

- enter and search premises and seize evidential material under search warrant;
- intercept live communications and conduct other electronic surveillance;
- access stored communications; and
- access telecommunications data (metadata).[60]

All of these powers, with the exception of accessing metadata, generally require a warrant.[61] A review of the existing oversight and reporting regimes revealed that there was no legislative requirement for oversight bodies to specifically identify when these powers had been exercised where parliamentary privilege may apply. The Committee also identified that there was no point at which Members could make a claim of parliamentary privilege or any process in place to resolve claims.[62]

[57] The Senate, Committee of Privileges, *Parliamentary Privilege and the Use of Intrusive Powers, 168th Report*, p. 1. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-current/intrusivepowers/Report

[58] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 24.

[59] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 25.

[60] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 2.

[61] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 2.

[62] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 17.

Moreover, while there were special provisions to protect journalists and their sources, there were no similar provisions for Members or in other situations where parliamentary privilege may arise.[63]

The existing search warrant guidelines are silent on the use of covert and intrusive powers. In their submission to the Committee, the AFP advised that it considered the existing arrangements allowed 'police to conduct covert investigations into serious criminal matters, while maintaining parliamentary privilege over any privileged material so obtained'.[64] The AFP asserted that the possibility for the use of these powers to have a chilling effect was minimal due to their secrecy and that parliamentary privilege was primarily concerned with protecting the use of the material outside Parliament.[65]

Submissions to the Committee from the President of the NSW Legislative Council and the former Clerk of the Senate went beyond the AFP's use immunity view of parliamentary privilege to encompass the purpose for the existence of parliamentary privilege, that being to enable the Senate to effectively carry out its functions.[66] The Committee considered that this principle should apply to all material obtained by investigative agencies, regardless of how that material is obtained. The use of covert and intrusive powers might still have a chilling effect on the provision of information to Members and thereby interfere with proceedings in Parliament, regardless of whether or how the material seized was later used.[67]

With respect to metadata in particular, the Committee noted the concerns raised by the United Kingdom House of Commons submission. Metadata is data about other data and does not contain the content of communication. It includes information about the parties to the communication, including where they are located, the telephone numbers, email addresses, chat names and IP addresses being used, when the communication occurred and the length of time of the communication. Metadata must be stored in Australia for up to two years by telecommunications

[63] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, pp. 5-6.

[64] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, Australian Federal Police Submission, p. 23.

[65] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 14.

[66] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 15.

[67] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 16.

agencies. Investigating agencies can currently access this metadata without a warrant, which demonstrates a lack of oversight of access to this highly sensitive information.[68] The House of Commons submission noted that metadata access has the potentially devastating effect of identifying whistleblowers, thereby inhibiting Members in their integral role of holding the Government to account.[69]

While parliamentary privilege is critical to protect against improper interference with Parliament, the Committee recognised that powers to access metadata are also necessary investigative tools. In an effort to balance parliamentary privilege and investigative integrity, the Committee suggested that any material or information garnered using these powers should be quarantined and subject to a claim of privilege in a manner similar to that in the existing search warrant guidelines.[70]

To ameliorate against an improper interference of the legislature by the use of the covert powers, the Committee suggested that, regardless of the information or material gleaned, the issuing authority must have regard to parliamentary privilege and that additional processes be established to address a question of privilege where it is raised.[71] The Committee recommended:

> … to ensure claims of parliamentary privilege can be raised and resolved in relation to information accessed in the exercise of intrusive powers and other investigative powers, the Presiding Officers, in consultation with the executive, develop protocols that will set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers.[72]

The Committee suggested that adequate oversight may be achieved by self-reporting of agencies to the relevant Presiding Officer or privileges committee of any instances where potentially privileged material is accessed in a manner contrary to the

[68] B. Grubb, and J. Massola, 'What is "Metadata" and Should You Worry If Yours is Stored by Law?'. *Sydney Morning Herald,* 6 August 2014. Accessed at: https://www.smh.com.au/technology/what-is-metadata-and-should-you-worry-if-yours-is-stored-by-law-20140806-100zae.html

[69] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, Clerk of the House of Commons (United Kingdom) Submission, pp. 2-3.

[70] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 26.

[71] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 28.

[72] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 29.

protocols. Finally, the Committee noted that relevant privileges committees should undertake an ongoing review of the guidelines.[73]

COVERT AND INTRUSIVE POWERS CASE STUDY: WESTERN AUSTRALIA

Due to the secretive nature of the use of covert and intrusive powers, there are few known instances where these powers have been utilised. Lessons should be learnt from an occasion where these powers have interfered with parliamentary privilege in Western Australia.

Hon Shelley Archer MLC: 28 February 2007

On 28 February 2007, the Western Australian Corruption and Crime Commission (CCC) was conducting a public hearing into political lobbyists. Counsel Assisting the CCC announced their intention to focus on approaches made by former Premier and now lobbyist Mr Brian Burke to the Legislative Council's Standing Committee on Estimates and Financial Operations about commencing an inquiry into the State's iron ore policy. Counsel Assisting intended to question the Hon Shelley Archer MLC about her role in the deliberations and decisions of the Committee.[74] Prior to this announcement being made, the Presiding Officers were unaware that any confidential parliamentary material was to be examined by the CCC. This announcement was of considerable concern to Parliament and the public hearing was adjourned later that day.[75]

The Commissioner of the CCC wrote to the President of the Legislative Council on 12 March 2007, advising the nature of the investigation and requesting access to parliamentary material for the purposes of the investigation. The President and the Procedure and Privileges Committee advised the Commissioner that the House had

[73] The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 30.

[74] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017*, May 2018, p. 48. Accessed at: http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/899D1306BAD8FB04482582890011F7F5/$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf

[75] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 49.

the power to release the material but any release did not abrogate the rights enshrined in Article 9 of the *Bill of Rights 1689*.[76] The House subsequently released certain material and allowed Council officers to give evidence to the CCC, provided that the CCC did 'not act in breach of the powers, privileges, rights and immunities of this House'.[77]

On 21 March 2007, the Legislative Council formed a Select Committee of Privilege to commence its own inquiry into breaches of parliamentary privilege and possible contempt arising from approaches made by lobbyists to Members. The CCC assisted by providing surveillance material, which enabled the Committee thoroughly to investigate the matter and provide recommendations to the House.[78]

In its report, the Committee noted that 'the CCC has access to the most advanced investigative techniques, including undercover operatives, telephone intercept devices and surveillance devices'.[79] On this occasion, the CCC accessed parliamentary material through these advanced investigative techniques. Parliament was only made aware of this access through a public hearing, when the CCC already intended to use the material without any consideration being given to parliamentary privilege. This highlights the difficulty in quantifying the extent to which potentially privileged material has been accessed and used without Parliament's knowledge.

Covert and Intrusive Powers in Western Australia

To date, Western Australia has no agreement in place with investigating agencies concerning search warrants on Members' premises or the use of covert and intrusive powers where parliamentary privilege may apply. There is also no legislative oversight for reporting occasions where potentially privileged material has been accessed and/or used in Western Australia. The *Surveillance Devices Act 1998* (WA) requires a report be made to Parliament each year, including information about the number of applications for warrants, extensions of warrants and emergency authorisations. While the figures shed some light on the total number of applications and their approval or otherwise each year, they do not provide any information on

[76] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 49.

[77] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, pp. 49-50.

[78] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 50.

[79] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 50.

how many surveillance warrants are currently active or the targets of these applications; e.g., Members, journalists and organised crime identities. There is no requirement under the Act for any such breakdown to be provided.

The most recent known use of covert and intrusive powers in Western Australia was the 2007 CCC investigation into lobbyists (see above), which included contacts between lobbyists and Members of both Houses of Parliament. The investigative techniques employed by the CCC included surveillance of two lobbyists, Brian Burke and Julian Grill, who were both former Members. The material gleaned using these techniques included communications between the lobbyists and Members of both Houses.[80]

The tension between investigative agencies and protecting parliamentary privilege in Western Australia reignited in April 2019. The Corruption and Crime Commission of Western Australia (CCC) issued notices to produce documents or things to the Director General of the Department of the Premier and Cabinet (DPC) relating to parliamentary email accounts of three former Members of the Legislative Council and 14 of their staff over a three year and nine month period. The scope of the notices is estimated to cover thousands of emails sent and received using their @MP email accounts, including material subject to parliamentary privilege and therefore protected from access or use in any place outside of Parliament.[81] Unlike other Australian Parliaments, Western Australian parliamentarians' email accounts are located and managed by the DPC.

Against the express direction of the Legislative Council's Procedure and Privileges Committee (PPC), the DPC instructed the States Solicitor's Office (SSO) to conduct its own review for parliamentary privilege of the emails and other records subject to the notices identified by the CCC as relevant. Emails and other records determined by

[80] Legislative Council of Western Australia, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, *Report*, November 2007. Accessed at: http://www.parliament.wa.gov.au/Parliament/commit.nsf/0/c602551b655196c348257831003e9721?OpenDocument&ExpandSection=1#_Section1

[81] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 6. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2B235E4EE1F5259548258456000DCB60/$file/pp.ntp.190814.rpf.055.pdf

SSO not to be subject to parliamentary privilege were subsequently released to the CCC by DPC.[82]

As at July 2020, the PPC is investigating the actions of the DPC and the CCC by way of privileges inquiries.[83] The PPC summonsed copies of material released to the CCC by DPC to undertake its own audit to identify privileged material.[84] By order of the House, this material, as well as material over which claims of privilege have been made by a former Member, is held securely by the Clerk of the Legislative Council. Subsequently, the Clerk has been served with notices to produce records issued by the CCC.[85]

The matter remains subject to two actions in the Supreme Court of Western Australia. On 27 August 2019, the Attorney-General launched an action challenging the Legislative Council's power to direct its Clerk not to produce House documents to a government agency with statutory powers of compulsion. The action seeks to limit parliamentary privilege to use immunity only, so that privilege cannot be relied upon to refuse to produce documents subject to statutory powers of compulsion.[86] The Attorney-General's position is that the order of the Legislative Council to its Clerk not to produce documents in his custody to the CCC is invalid and beyond the power of the Legislative Council. The second action was taken by the Legislative Council against the CCC and DPC, challenging the validity of the CCC notices and the purported determination of parliamentary privilege by SSO.[87]

Interpretation of s 3(2) of the *Corruption, Crime and Misconduct Act 2003* (WA) will be crucial to the outcome. This section states:

> Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891*

[82] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 2 and 20.

[83] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 56*, p. 1.

[84] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 2.

[85] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 57*, p. 1. Accessed at: https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/FEDEA6C3804602024825847F0016A35C/$file/190924.rpf.57.pdf

[86] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 56*, p. 4.

[87] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 57*, p. 1.

> and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament.

The CCC notices were issued under s 95 of the *Corruption, Crime and Misconduct Act*. The Legislative Council argues that the notices are invalid because, amongst other things:

1. they require the production of records that are subject to parliamentary privilege and immune from production; or
2. they require the Legislative Council to exercise one of its privileges to determine which of the records are proceedings in Parliament and which are not—a matter determinable by a House of Parliament.

In 2018, the Legislative Council Standing Committee on Procedure and Privileges reported on the Corruption, Crime and Misconduct Amendment Bill 2017. That Bill sought to amend s 3(2) to insert the word 'exclusively' after 'determinable'. The objective of that amendment was to reinstate the CCC's power to investigate Members for certain offences under the *Criminal Code Compilation Act 1913* which are also offences punishable by either House of Parliament under s 8 of the *Parliamentary Privileges Act 1891*.[88] The Government reassured the Parliament that the reinsertion of the word 'exclusively' in subsection 3(2) of the *Corruption, Crime and Misconduct Act* would have no impact on parliamentary privilege.[89] After considering advice from Mr Bret Walker QC and the then Solicitor General of Western Australia, the PPC concluded that the amendment Bill would not result in a diminution in the scope or operation of parliamentary privilege.[90] Given the current legal conflict, the Legislative Council has referred the Bill back to the PPC for further consideration.

[88] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017*, May 2018.

[89] Hon Sue Ellery, Western Australia, *Hansard*, Legislative Council, 28 November 2017, p. 6071.

[90] Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 7.

IS PARLIAMENTARY PRIVILEGE A SHIELD?

In the vast majority of cases involving the execution of search warrants where parliamentary privileges have been claimed, the outcome has been that the claim has been upheld and the material seized under warrant returned. A summary of published instances where search warrants have been executed since 2000 is as follows:

1. 2018 Australian Senate: Senator Louise Pratt, Non-Government Member. The AFP seized material as part of its investigation into the au pair saga. Senator Pratt's claim of privilege was upheld and all materials seized were subsequently returned.[91]
2. 2016 Australian Senate: Senator Stephen Conroy, Non-Government Member. The AFP executed search warrants at the office of Senator Conroy, at Parliament House and at the home of a staff member as part of its investigation into NBN leaks. Senator Conroy's claim of privilege was upheld and all materials were returned.[92]
3. 2016 Australian House of Representatives: Mr Jason Clare, Non-Government Member. The AFP executed search warrants on Department of Parliamentary Services servers as part of its investigation into NBN leaks. Mr Clare's claim of privilege was upheld and all material was returned.[93]
4. 2003 New South Wales Legislative Council: Hon Peter Breen, Non-Government Member. The Independent Commission Against Corruption seized material from the Parliament House office of Hon Peter Breen as part of its investigation into suspected breaches of allowances and resources by Mr Breen. Mr Breen's claim of privilege was upheld and all material was returned to him.[94]

[91] The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*.

[92] The Senate, Committee of Privileges, *Search Warrants, 164th Report*.

[93] House of Representatives, Privileges and Members' Interests Committee, *Claim of Parliamentary Privilege*.

[94] Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC*, 3 December 2003. Accessed at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5571/Final%20Committee%20Report%2003%20December%202003%20-%20Inquiry%20.pdf

5. 2001 Australian Senate: Senator Len Harris, Non-Government Member. The Queensland Police seized material from the electoral office of Senator Harris as part of its investigation into election reimbursement claims for the 2001 State Election. Senator Harris' claim of privilege was upheld and all material was returned to him. The Senate Committee of Privileges reiterated the recommendation from their 75th Report that guidelines for executing search warrants on Members' premises should be established to preserve parliamentary privilege.[95]
6. 2000 Australian House of Representatives: the Hon Laurie Brereton, Non-Government Member. The AFP executed search warrants on the home of the Hon Brereton's advisor as part of its investigation into leaked government documents relating to East Timor. While no material was seized, the Hon Brereton requested the matter be referred to the House Privileges Committee on the basis that the executing officers were able to access and review privileged material during their search. The Speaker declined the referral, as an improper interference defined by section 4 of the *Parliamentary Privileges Act 1987* (Cth) had not occurred.[96]

In most instances where material has been seized from Members' premises or where claims of parliamentary privilege have been made, parliamentary privilege has shielded that material from being used outside of parliament. In all of the known cases since 2000, search warrants have been executed on non-government Members whose fundamental role it is to scrutinise the executive and hold the government to account.

The use of search warrants or covert or other intrusive powers by investigating agencies may have a significant chilling effect on the flow of information to Members in the event that material subject to parliamentary privilege is available to those

[95] The Senate, Committee of Privileges, *Execution of Search Warrants in Senators' Offices – Senator Harris, 105th Report*, June 2002. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/~/~/link.aspx?_id=84A4F53EFFAC4890BCC5591990C6B885&_z=z

[96] House of Representatives, *House of Representatives Practice* (6th edition), September 2012, Appendix 25. Accessed at: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=appendix25

agencies. Informants would be in short supply where misconduct or criminal action could be taken against them in the absence of the investigatory and evidential restrictions arising from parliamentary privilege and the capacity of a Parliament to punish for contempt. The absence of these immunities and powers would have serious and concerning consequences for the capacity of the legislature and its Members to undertake their constitutional responsibilities of inquiring, scrutinising and making the government of the day accountable to the Parliament.

Ultimately, the rationale for the immunities and powers granted by parliamentary privilege is to ensure the Parliament and its Members can carry out their functions. Mechanisms that ensure investigating agencies are aware of parliamentary privilege and comply with agreed protocols when exercising their powers will reduce the potential for conflict between Houses of Parliament and those agencies.

IMPROVING OUTCOMES

On 6 December 2018, the Australian Senate passed a resolution regarding parliamentary privilege and the seizure of material by executive agencies.[97] The resolution noted the intention of parliamentary privilege, the source of parliamentary privilege and acknowledged the AFP Guideline. The resolution further noted the right of the House to determine claims of privilege over any material accessed or seized through whatever means, including through covert and intrusive powers. The resolution concluded by calling on the Attorney-General to work with the Parliament to

> … develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the

[97] The Senate, Privilege Resolutions. *38A Seizure of material by executive agencies*. 6 December 2018 J.4483-84. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/~/link.aspx?_id=2E1A8CD342494B6A942AB5DB2674E4A2&_z=z#Procedural-orders_38A

House of Representatives Committee of Privileges and Members Interests.[98]

In Western Australia, the development of a protocol with State investigating agencies for the execution of search warrants similar to the AFP Guideline could incorporate the improvements relating to covert and intrusive powers outlined in the Senate Privilege Committee Reports and any protocol subsequently developed by the Commonwealth Parliament and Attorney-General. A protocol with Western Australia Police and the Corruption and Crime Commission would have the status of statutory recognition, in the event that the Parliament agreed to the amendment to the *Corruption, Crime and Misconduct Amendment Bill 2017* (WA) proposed by a non-government Member. This would address some of the major shortcomings evident when investigative techniques and parliamentary privilege intersect, providing some independent oversight.

The following options may be considered for optimising memoranda of understanding or other agreements between Parliaments and investigating agencies:

1. Establishment of an independent adjudicator, or Parliamentary Inspector, if there is not one already.
2. Ensure the adjudicator or Parliamentary Inspector is notified at the outset of any investigation into a Member or where a Member is involved, that they are informed at each stage of the investigation and that they are satisfied there is no infringement upon parliamentary privilege. This includes use of covert and intrusive investigative techniques.
3. Follow the protocols stipulated in agreements, including notification obligations, to the letter.
4. Ensure agreements include protocols for covert and intrusive surveillance, including metadata access.
5. Conduct thorough pre-search warrant inquiries, including ensuring the specified subject matter of the search warrant does not in its own right impinge upon parliamentary privilege.

[98] The Senate, Privilege Resolutions. 38A Seizure of Material by Executive Agencies. Journal of the Senate, 6 December 2018, pp. 4483-84.

6. Ensure search warrants are approved internally by the most senior person in the agency.
7. Ensure all parties present when the search warrant is executed are aware of any agreements in place and that they act in accordance with the agreement.
8. Consider gathering evidence via requests for information rather than search warrant.

The cost of implementing the above would arguably be negligible compared to the cost associated with the execution of search warrants on Members' premises since 2000 referred to above, where only a fraction of material seized has been able to be used in evidence outside of Parliament.

CONCLUSION

Parliamentary privilege is essential in maintaining the free flow of information and to enable Houses of Parliament and their Members to carry out their functions effectively. The fact that parliamentary privilege may function as a shield to prevent material seized by investigating agencies from being used outside Parliament is a necessary attribute of an independent legislature and insulates it against oppression from the other arms of government. While Members must be subject to the rule of law, exclusive cognisance afforded to the Houses of Parliament is, in effect, an exception to the general principal of the rule of law.

As noted by the UK Parliament's Joint Committee on Parliamentary Privilege:

> The ancient origins of parliamentary privilege, and the archaic language that is sometimes used in describing it, should not disguise its continuing relevance and value. … [T]he work of Parliament is central to our democracy, and its proceedings must be immune from interference by the executive, the courts or anyone else who may wish to impede or influence those proceedings in pursuit of their own ends.[99]

[99] House of Lords House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report of Session 2013-14* 18 June 2013, p. 7

Parliamentary privilege is not a shield against Parliament investigating misconduct by a Member, particularly where Houses have the power to punish for contempt. This power is also necessary to ensure parliamentary independence, the control of its own proceedings and to maintain the dignity and integrity of the institution.

Existing memoranda of understanding between Australian Parliaments and investigating agencies go some way towards protecting the interests of Parliaments and their Members through protocols to determine whether any material seized is subject to parliamentary privilege. However, there is a substantial gap between the intention of the agreements and what occurs in practice. There is also a range of investigative techniques being used that may infringe on parliamentary privilege with little oversight. In light of the most recent search warrant incident with Senator Pratt, it is an opportune time to renegotiate existing memoranda of understanding to include protocols covering more advanced investigative techniques and better safeguards to ensure material subject to parliamentary privilege is treated appropriately.

APPENDIX A: EXISTING MEMORANDA OF UNDERSTANDING

Jurisdiction	House	Agency	Date	HTML Link
Cth	Senate	Australian Federal Police	2005	Senate and AFP MoU and AFP National Guideline
Cth	House of Representatives	Australian Federal Police	2005	House of Representatives and AFP MoU and AFP National Guideline
ACT	Legislative Assembly	Australian Federal Police	2017	LA and AFP MoU and Procedure
NSW	Legislative Council	New South Wales Police	2010	LC and NSW Police Procedure
NSW	Legislative Council	Independent Commission Against Corruption	2008	LC and ICAC Procedure
NSW	Legislative Assembly	New South Wales Police	2010	LA and NSW Police Procedure
NSW	Legislative Assembly	Independent Commission Against Corruption	2008	LA and ICAC Procedure
QLD	Legislative Assembly	Queensland Police Service	2015	LA and QPS Protocol
QLD	Legislative Assembly	Corruption and Crime Commission	2015	LA and CCC Protocol

A Funny Thing Happened on the Way to the National Cabinet—Out Goes Good Policy, One, Two, Three*

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* Double-blind reviewed article.

Abstract This article outlines the impact of the pressures caused by the current pandemic 'crisis' on the nation's governance arrangements with particular reference to intergovernmental relations and their existing institutions and arrangements. Attention is given to the new institutional arrangements that have been developed to replace the Council of Australian Government (COAG) and related advisory bodies by the National Cabinet and other new processes. The issue is whether these new arrangements, announced as the pandemic crisis unfolded, have given further impetus to 'executive federalism' and increased executive dominance within each jurisdiction. It is argued that the nature and extent of these new arrangements have been further amplified by the recently completed review of the COAG superstructure and ministerial councils. These changes may be extensive, but have not altered the fundamental intergovernmental processes and politics that have long dominated Australia's federalism.

INTRODUCTION

Discussion of intergovernmental relations usually focuses on the growing centralisation of power and the Commonwealth's increasing dominance over the states—so called 'coercive federalism'. At the same time, there have been attempts by successive different Commonwealth governments at 'collaborative' or

'cooperative' federalism through their various 'new federalism' initiatives.[1] Also important, though sometimes overlooked, has been the continuing development of 'executive federalism'. This concept highlights how interactions between governments in federations are inevitable and necessary, and are mostly conducted by members of the executive branches—Prime Ministers, Premiers, Ministers, public servants and their departments. They work through various constitutionally prescribed intergovernmental institutions like the Inter-State Commission[2] and other institutions established by agreement between governments like the Loans Council, Premiers' Conference, intergovernmental ministerial councils, forums and officials' meetings, ad hoc advisory bodies and numerous other informal arrangements.[3] Executive dominance of Parliament in Westminster democracies, and especially in Australia, makes this seemingly inevitable and understandable. However, Parliament has not been totally excluded from these interactions as federal-state agreements often require supporting legislation, Opposition controlled upper houses can block progress, and parliamentary committees can probe.[4] Concomitant with executive dominance of federal-state relations and Parliament, has been the increasing centralisation of decision and administrative power in the hands of leaders across jurisdictions—labelled 'leader-centred politics'[5]—as testified by the expansion of their departments and personal staffs in all federal, state and territory governments.[6]

This article outlines the impact of the pressures caused by the current pandemic 'crisis' on the nation's governance, with particular reference to intergovernmental relations and its existing institutions and arrangements. Attention is given to the new institutional arrangements that have been developed to replace the Council of Australian Government (COAG) and related advisory bodies by the National Cabinet

[1] Brian Galligan, 'Federalism and Policymaking', in Andrew Hede and Scott Prasser, (eds.), *Policy-Making in Volatile Times.* Sydney: Hale and Iremonger, 1993, pp. 175-192.

[2] Sections 101-103 of the Australian Constitution.

[3] Campbell Sharman, 'Executive Federalism', in Brian Galligan, Owen Hughes, and Cliff Walsh, (eds.), *Intergovernmental Relations and Public Policy*. Sydney: Allen and Unwin, 1991, pp. 23-38.

[4] Campbell Sharman, 'Parliaments and Commonwealth-State Relations,' in John Nethercote, (ed.), *Parliament and Bureaucracy*, Hale & Iremonger, Sydney, 1982, pp, 280-90.

[5] Paul Strangio, Paul 't hart, and James Walter, *The Pivot of Power: Australian Prime Ministers and Political Leaderships 1949-2016*. Melbourne: The Miegunysh Press, 2017, p.5.

[6] Marija Taflaga, 'Executive Government', in Peter Chen *et al*. (eds.), *Australian Politics and Policy*. Sydney: Sydney University Press, 2nd edition, 2019, pp. 53-69.

and other new institutions and processes. The issue is whether these new arrangements, announced as the pandemic crisis unfolded, have given further impetus to 'executive federalism' and increased executive dominance within each jurisdiction. It is argued that the nature and extent of these new arrangements have been further amplified by the recently completed review of the COAG superstructure and ministerial councils. It is argued that these changes may be extensive, and have gone further than when Australia faced previous crises, but they have not altered the fundamental intergovernmental processes and politics that have long dominated Australia's federalism.

IMPACTS OF CRISES – CATALYSTS FOR ACTION AND 'REFORM'

Australia, like most of the world, is in the grip of a pandemic triggered by the highly contagious coronavirus (COVID-19). We have been told that the pandemic poses the greatest threat to our health since the 1919 Spanish Flu. Although it has caused adverse impacts on the Australian economy, unprecedented since the Great Depression of the 1930s, it has not to date caused loss of life anything like as predicted,[7] or compared to the Spanish Flu, when it was estimated that some 12-15,000 Australians died and 40 per cent of the population were infected.

Nevertheless, the pandemic from the outset has created a sense of 'crisis', which McConnell defines as:

> … extraordinary episodes which disturb and threaten established patterns of working and dominant assumptions about the way aspects of society operate. They can threaten lives, property, markets, infrastructure, public services, policy agendas, political careers and even governing paradigms. Such threats, combined with high uncertainty place enormous pressure and responsibility on crisis managers.[8]

[7] Initial predictions were that 100,000 would die from the virus. As at 20 October 2020, there were 27,371 cases and 904 deaths. Of these 816 were in Victoria. Ninety-three percent of related deaths were of people over the age of 70. Some 682 deaths were those were in aged care facilities of which 652 were in Victoria.

[8] Allan McConnell, 'Success? Failure? Something In-Between? A Framework for Evaluating Crisis Management', *Policy and Society* 30 2011, pp. 63-76.

Crisis situations can produce a number of policy, administrative and political responses from governments that are often unprecedented—constitutionally, ideologically and in terms of costs. They can change, for a time, what governments do, and just as importantly, what they are expected to do, sometimes forcing governments to act contrary to their ideological dispositions and past records. They can also alter how governments operate and especially their choice of policy tools, often meaning more stick and less carrot.[9]

It is not unusual, depending on the length and severity of a crisis, for new institutional arrangements to be created. These can initially be regarded as temporary, but in the aftermath of a crisis, they may become permanent and be grafted onto the existing government architecture or lead to wholesale renovation to serve the new functions of the state that developed during the crisis and are now deemed necessary to continue.

Sometimes crises can accelerate change for a variety of reasons. The need for urgent and authoritative decision making and the importance of maintaining public morale may intensify existing long-term trends in government noted above, such as increasing executive power, leader domination, the erosion of parliamentary scrutiny and less government consultation and openness.

Crises can further stress a nation's policy and administrative capacities that may already had been under question.[10] This is a particular concern in countries where the institutional structures are thinner and constitutional frameworks less secure. The result is often chaos and collapse.

Positive developments can also result from a crisis. Previously resisted 'reforms' may at last be implemented where the crisis has bred cooperation across the partisan and, in federal systems, the intergovernmental divide.[11] An incumbent government or leader can gain status and authority in a crisis through on their performance, thus encouraging shelved reforms to be revived. The opportunity for astute leaders with

[9] Christopher Hood, *The Tools Of Government*. London: Macmillan, 1983.

[10] James Walter *et al.*, 'Policy Capacity in Disruptive Times', *Australian Journal of Political Science*, 55(1) 2019, pp. 72-85.

[11] For a definition of genuine 'reform' see Gary Banks, *Successful Reform: Past Lessons, Future Challenges*. Canberra: Productivity Commission, Commonwealth of Australia, 2011, pp. 1-17 and especially p. 5.

clear policy and political agendas is too good to miss,[12] although it requires considerable political skills to exploit the situation and achieve success.

Of course, crises can also generate the complete opposite—discord, suspicion, blame allocation, and lack of cooperation—whereby the institutional and partisan barriers are raised rather than lowered. Despite the veneer of unity and the temporary suppression of partisanship at the height of a crisis, partisanship may soon reassert itself in various degrees as the pandemic crisis moves through a cycle of alarm to management to its eventual conclusion. Governments and leaders remain acutely aware how their actions during a crisis can redeem their fortunes or destroy their prospects. Previous governments' experiences concerning crisis situations will be considered in this context. For instance, the Rudd Labor Government's response to the GFC in 2008 was particularly important for the Morrison Coalition Government. While the Rudd Government proclaimed its very active Keynesian fiscal stimulus package saved Australia from recession, other assessments are far less sanguine. As Garnett and Lewis concluded:

> The GFC certainly caused a revival of Keynesian sentiment throughout the world, and Australia was no exception. In all probability, the stimulus package did have some short-run effect in preventing unemployment rising … but much of the spending was wasteful and could have damaged long-term economic growth.[13]

Others were even more critical of particular programs that the Rudd Government initiated during this period,[14] like the Building Education Revolution (BER).[15] Leaders will also reflect on their own experiences.[16] Other programs and past personal

[12] For example, see Sarah Jones, 'Industry Chiefs Urge PM Not to Let COVID Reform Chance Pass By'. *The Australian*, 13 August 2020.

[13] Anne Garnett and Phil Lewis, 'The Economy', in Chris Aulich and Mark Evans (eds.), *The Rudd Government: Australian Commonwealth Administration 2007-2010*. Canberra: ANU Press, p. 214.

[14] Tony Makin and John Humphreys, 'Reviewing the Review of the Fiscal "Stimulus" Program', in Scott Prasser and Helen Tracey (eds.*), Royal Commissions and Public Inquiries: Practice and Potential*. Ballarat: Connor Court, 2014, pp. 248-261.

[15] This was a massive school building program that cost $16.2 billion, was slow in being implemented and regarded as having minimal impact on stimulating the economy.

[16] Prime Minster Morrison was criticised for some of his actions during the 2019-20 bushfires. See, for example, Nikki Savva, 'Morrison Snaps Out of His Slumber to Avoid Another Hawaii Moment'. *The Australian*, 18 March 2020.

experiences will both figure in their actions. In addition, imminent elections will intensify the focus by elected officials on election issues at the expense of the policy, the evidence, or notions of cooperation, especially in the public sphere.[17]

WHAT AUSTRALIAN COMMONWEALTH AND STATE GOVERNMENTS DID

As the pandemic crisis was beginning in March this year, the Commonwealth, with state and territory approval, activated a number of stand-by existing crisis health mechanisms like the National Coordination Mechanism[18] (NCC) and the Australian Health Protection Principals' Committee (AHPPC).[19] It needs to be appreciated that an extensive and long standing legislative and institutional framework existed concerning such health emergencies prior to the pandemic erupting.[20] COAG had been party to these and had also adopted in 2011 the *National Strategy for Disaster Resilience* to coordinate intergovernmental policies to crises and all governments had contributed to the *National Disaster Risk Reduction Framework* (2018). The new Commonwealth *Biosecurity Act*, which covered quarantine issues, was seen to greatly expand Commonwealth power to the limits of its constitutionality.[21]

Most importantly, following agreement at the scheduled Council of Australian Governments' (COAG) first ministers' meeting in March,[22] Prime Minister Morrison announced the formation of the National Cabinet. Oddly, this was not mentioned in the COAG Communique.[23] The National Cabinet consists of the same First Ministers

[17] At the time of the pandemic began in March 2020 impending elections were due in the Northern Territory (August 2020), Queensland (October 2020), the Australian Capital Territory (October 2020) and Western Australia (March 2021). To date, the incumbent governments in the Northern Territory, the Australian Capital Territory and Queensland have been returned to office, with the Labor Government in Queensland making its response to the pandemic, especially concerning its border closures, a major part of its winning election strategy.

[18] NCC coordinates the cross jurisdictional response to non-health aspects of the pandemic—an emergency services response.

[19] This consists of the Commonwealth Chief Medical Officer and all State and Territory Chief Health Officers and operates in times of emergencies.

[20] This included the *National Heath Security Act 2007* (Cth), *Biosecurity Act 2015* (Cth) and Australian Health Management Plan for Pandemic Influenza (2014).

[21] H.P. Lee, Michael Adams and Colin Campbell, *Emergency Powers in Australia*. Cambridge: Cambridge University Press, 2018, p. 170.

[22] COAG has operated since 1992, when it replaced the Premiers' Conference and other bodies.

[23] Meeting of the Council of Australian Governments, *Communique*, Sydney, 13 March 2020.

(Prime Minister, Premiers, and First Ministers) who are members of COAG, though without the local government representatives. The inaugural meeting of the National Cabinet was held just two days after COAG. According to the Prime Minister, the National Cabinet's role was 'to get a coordinated response across the country to the many issues that relate to the management of the coronavirus'. It was needed because the virus 'requires responses from all governments … And it is important we act … closely together to ensure there's consistency of response'.[24] As Morrison said:

> … what we are doing here through this National Cabinet is ensuring that we're getting a genuinely national response. That we're getting a consistent response … to reassure everybody is working together to keep you safe and to try to disrupt your daily life as little as necessary.[25]

This seemed an important and bold step, although not without precedents on a smaller scale. During the Great Depression of the 1930s the regular Premiers' Conference developed the Premiers' Plan to provide a national approach to tackle the economic crisis.[26] During World War Two, although Australian attempts to form a national government similar to that in the United Kingdom failed, an Advisory War Council, with senior government and opposition members was established in 1940 and met until 1945.[27]

Morrison initially presented the National Cabinet as a temporary body, supplementing but not supplanting COAG and its numerous ministerial councils. Nor was it meant to bypass Commonwealth or state Parliaments. 'I would consider Parliament essential', said Morrison.[28] The formation of the National Cabinet was widely applauded as an example of 'cooperative federalism' and a breakthrough in the normal fractious nature of federal-state relations.[29] The National Cabinet was not seen to override State governments in the exercise of their constitutional and

[24] Scott Morrison PM, *Press Conference*, 13 March 2020.

[25] Morrison, Press Conference.

[26] Bernie Schedvin, *Australia and the Great Depression: A Study of Economic Development and Policy in the 1920s and 1930s*. Sydney: Sydney University Press, 1970.

[27] Geoffrey Bolton, '1939-51', in Frank Crowley (ed.), *A New History of Australia*. Melbourne: Heinemann, 1974, p. 461.

[28] Bolton, '1939-51', p. 461.

[29] Tom Burton, 'National Cabinet Creates New Federalism Model'. *Australian Financial Review*, 18 March 2020.

localised responses to the pandemic, but merely to help coordinate these within an overarching whole of government framework—though exactly what this was to mean in practice was unclear. Existing parts of the COAG system—the Health Council of federal and state health Ministers, the Australian Health Protection Principal Committee (AHPPC) of federal and state chief health officers and the National Crisis Committee (NCC)—were key parts of the process. A new body was the National Coordination Mechanism (NCM), created to coordinate all non-health government responses—public safety, education, banking, food, and so forth.

However, although some saw it as just COAG under a new banner, from the outset Morrison sought to elevate the National Council's status and authority to something different. It would, stressed Morrison, meet weekly (COAG's First Ministers met twice a year), and have the 'status of a Cabinet meeting' with the same confidentiality and freedom of information protections and protocols as the federal Cabinet.[30] What this meant in practice was unclear. Early on, Professor Anne Twomey raised concerns, arguing that the National Cabinet could not be seen as a 'cabinet' in the Westminster sense of collective or individual ministerial responsibility and accountability, as its members 'are not collectively responsible to one parliament'.[31]

Also created at this time was a National COVID-19 Coordination Commission, involving senior public servants and external members, to coordinate advice to the Australian Government on actions to anticipate and mitigate the economic and social effects of the pandemic. It would undergo further changes in subsequent months.[32]

HOW DID IT GO?

The new National Cabinet and other mechanisms seemed to work. All the leaders had a seat at the table, were part of the ongoing national decision-making process and had their profiles raised. Meetings were frequent (13 over four weeks during March-April), and at first, there were few public disagreements. Morrison, in particular as chair, had his authority enhanced and was seen to be involved, attentive,

[30] Burton, 'National Cabinet Creates New Federalism Model'.

[31] Burton, 'National Cabinet Creates New Federalism Model'.

[32] In July 2020, the Commission was renamed to the National COVID-19 Commission Advisory Board to better reflect its advisory nature.

energetic, engaged and in charge of the nation's response to the pandemic—unlike the way he was criticised during the earlier bushfires.[33] All leaders' poll ratings rose, which was important for those facing forthcoming elections in 2020 (ACT, Northern Territory and Queensland). Morrison sought to maintain maximum public harmony, and to avoid appearing to dominate meetings or to criticise state leaders—even when there were obvious departures from National Council decisions on matters like school openings and border closures. Bipartisanship reigned supreme—it was the 'policy not the politics' that counted, Morrison said.[34] When federal Education Minister Dan Tehan vented public frustration at the Victorian Government's school closure, he was forced by Morrison to apologise to Premier Andrews.[35] Political and policy responsibility seemed unified as never before. National Cabinet seemed like 'unprecedented co-operation between federal, state and territory governments, resulting in 'major COVID-19 reforms, including economic and relief measures, implementation of social and border restrictions, and collaboration on education, health and aged care settings'.[36]

This apparent success soon began rumours that 'Morrison plans to vest National Cabinet with a longer run responsibility'.[37] Morrison himself suggested the National Cabinet 'may prove to be a better way for our federal system to work in the future.'[38] Key commentators like Paul Kelly predicted that 'an attempt will be made to institutionalise the national cabinet and keep it going'.[39]

Others were more sanguine, noting that despite the outward manifestations of cooperation and bipartisanship there were, as noted, federal-state disagreements about school openings and border closures, as well as some disparities between advice from the AHPPC and responses of State medical officers who were members of

[33] Olivia Caisley, 'Scott Morrison Takes a Bushfire Hit'' *The Australian*, 17 February 2020.

[34] Scott Morrison, quoted in *The Australian*, 15 April 2020.

[35] Dan Tehan MP, 'Classrooms Must Reopen Now to Avoid Education Divide'. *Sydney Morning Herald*, 28 April 2020; 'Dan Tehan Admits He "Overstepped the Mark" in Attack on Daniel Andrews over School Closures'. ABC *News*, 3 May 2020.

[36] Geoff Chambers and Paige Taylor, 'COVID-19 Crisis Cabinet to Outlive Pandemic and Replace COAG'. *The Australian*, 15 April 2020.

[37] Paul Kelly, 'National Cabinet Usurps COAG Role'. *The Australian*, 8 April 2020.

[38] Chambers and Taylor, 'COVID-19 Crisis Cabinet'.

[39] Paul Kelly, 'Politics and the Pandemic'. Address to Sydney Institute, 6 May 2020.

that Committee.[40] The usual federal-state buck-passing over accountability reasserted itself concerning responsibility for the inappropriate disembarkation of passengers from the *Ruby Princess* liner in Sydney. This was only resolved by the report of the Special Commission of Inquiry appointed by the New South Wales Government, which found NSW Health at fault.[41] Similar disputes developed over responsibility for aged care in Victoria and the availability of Defence Force staff to the Victorian Government for hotel quarantining. The latter issue also attracted a government appointed public inquiry—the Board of Inquiry into the COVID-19 Quarantine Program.[42]

WHAT HAPPENED NEXT?

On 29 May, Morrison announced that the National Cabinet had decided that it would continue as a permanent body. This meant the 'cessation of the COAG model …COAG is no more' and 'will be replaced by a completely new system' of intergovernmental relations.[43] As before, the National Cabinet would operate 'under Federal Cabinet rules', including the security of documents, process and procedure', or, as the Prime Minister put it, 'like a fair dinkum Cabinet'.[44] National Cabinet was deemed by the First Ministers as a 'more effective body for taking decisions in the national interest than COAG'.[45] Morrison condemned COAG as meeting too irregularly and then too briefly, claimed ministerial councils and forums had mushroomed in numbers and ever expanding agendas, and the whole system was too bureaucratised and formal with its committees of public servants. He was adamant that this new system would 'involve less paperwork, streamline those endless meetings' of COAG, would have a

[40] Jennifer Hewett, 'National Cabinet Shows Multiple Failings'. *Australian Financial Review*, 23 March 2020.

[41] Brett Walker SC, Chair, Special Commission of Inquiry into Ruby Princess, *Report*. Sydney: NSW Government, 2020.

[42] Established under Victoria's new *Inquiries Act 2014*.

[43] Scott Morrison, PM, *Media Release*, 29 May 2020; see also Scott Morrison, PM, in Georgia Hitch 'Scott Morrison Says National Cabinet Here to Stay'. *ABC News*, 29 May 2020

[44] Scott Morrison, PM, *Media Release*.

[45] Scott Morrison, PM, *Media Release*.

narrower agenda, have more practical focus in tackling job creation, and 'ensure Australians get better government … at a state and federal level'.[46]

The National Cabinet agreed to other changes. There would be a new body—the National Federation Reform Council (NFRC)—which Morrison explained 'would change the way the Commonwealth and states and territories … work together to address new areas of reform'.[47] As well, the existing Council on Federal Financial Relations (CFFR) of federal and state treasurers would 'take responsibility for all funding agreements between the states and the Commonwealth' that 'will no longer be the province and domain of individual ministerial portfolios'.[48] This meant the existing range of ministerial councils and forums, covering areas from education to health and involving responsible federal and state Ministers, would 'be consolidated and rationalised' and have their roles 'reset'.[49] The federal and state treasurers, explained Morrison, were 'well placed' to review issues in these agreements.

ISSUES RAISED BY THE NEW ARRANGEMENTS

Consideration of the impact of these new arrangements can be viewed from different perspectives. Do they represent, as Morrison and his fellow First Ministers contended 'a completely new system' and a breakthrough in federal-state relations, resulting in more unified policy making? Alternatively, have these changes further entrenched 'executive federalism' and given more impetus to executive dominance and centralisation of power within each jurisdiction?

The processes and timeframes of how these extensive changes were made are an initial concern. They were rushed through during a crisis situation when attention was elsewhere. There was little prior discussion and consultation. They were presented as a *fait accompli*. Parliamentary approval was neither sought nor needed. Details about many of the new arrangements were missing. For instance, the membership and agenda of the National Federation Reform Council, supposedly pivotal to 'address new areas of reform', were vague and general. They were to be

[46] Scott Morrison, quoted in Hitch, 'Scott Morrison Says National Cabinet Here to Stay'.

[47] Morrison, *Media Release*.

[48] Morrison, *Interview*, 29 May 2020.

[49] Morrison, *Interview*, 29 May 2020.

determined by the National Cabinet and not open to wider debate. Nor was it clear how proposals to 'reset' and 'consolidate' COAG's ministerial councils was to be done and by what criteria. The hastily announced review of these arrangements by an 'eminent person' took time and did not report till October. Further, is the Council on Federal Financial Relations, composed at it is of federal and state treasurers, really as 'well placed' as the Prime Minister contends to subsume the roles of ministerial councils and take over their complex national agreements? It seems a recipe for delay, confusion, and lack of accountability.

All this highlights how little forethought had been given to the changes and their implementation. It stands in stark contrast to the how the COAG arrangements they are replacing were established in 1992 only after considerable deliberation and consultation.[50] They were subsequently further refined, based on experience and practice. Indeed, the Review of COAG admitted that many worthwhile reforms had been achieved through COAG, there had been six different reviews of its processes and the last had resulted in rationalisation of ministerial councils to just twelve.[51] It is not clear what COAG's problems really were. If, as the Prime Minister insinuates, COAG was where 'good ideas went to die', then the only ones to blame were the elected officials like him who attended. Similarly, the Review's lament that there had been 'little progress' from all those earlier reviews raises the question of who exactly was responsible, except the participating governments and Ministers.

Then there remains the issue of how the new permanent National Cabinet, established as a Cabinet Office Policy Committee is going 'under Federal Cabinet rules' of confidentiality to act 'like a fair dinkum Cabinet' and be subject to Cabinet secrecy with the Prime Minister alone deciding what is to be released to the public. Also, how can ministerial accountability be practised? As former Western Australian Premier Colin Barnett said, the National Cabinet, unlike any other in a Westminster democracy, is a 'cabinet without a parliament'.[52] Can First Ministers on their return to their own jurisdictions be held accountable to their Parliaments about the decisions made by National Cabinet? Indeed, can those First Ministers even discuss

[50] Andrew Parkin, 'COAG', in Brian Galligan and Winsome Roberts (eds.), *The Oxford Companion to Australian Politics*. Oxford: Oxford University Press, 2007, pp. 108-110.

[51] *Review of COAG Councils and Ministerial Forums*—Report to National Council October 2020, pp. 11-14.

[52] Colin Barnett, 'A Cabinet Without a Parliament, a Meeting With No Power'. *Australian Financial Review*, 1 June 2020.

those issues? The Prime Minister's response was not reassuring. His view was that the National Cabinet would have the 'same process' of confidentiality as federal and state cabinets: 'it's not a spectator sport. It's a serious policy deliberation between governments and by cabinet members within cabinets'.[53]

In summary, the new arrangements and the role of the National Cabinet involve several departures from the COAG system it has replaced, including:

- exclusion of local government from its membership[54]
- more frequent meetings
- a narrower focus on job creation
- Cabinet secrecy as a new restrictive operating element.

Moreover, some proposals outlined in the Review, like Ministers taking direct control of agendas, banning secretariats and meetings of officials to promote consensus decisions, and relying on informal meetings without minutes, seem decidedly amateurish.

This development has further eclipsed the role of Parliament. Indeed, since the pandemic crisis began, Parliaments have hardly figured in any discussions or debates about the strategies being pursued by their own governments, the powers they have evoked or the National Cabinet's decisions. There has been little oversight of the National Cabinet's actions. The Commonwealth Parliament only sat for 12 days from March to August. Its main role was to approve the Commonwealth's massive spending spree in a one day sitting. The special Senate Committee's oversight of the government's pandemic actions has been seen as 'disappointing',[55] given the lame answers provided by attending public servants. Some state upper houses committees have held useful probing inquiries, but sitting times have been limited and Ministers have evaded answering questions on key pandemic issues.[56] Bipartisanship may have

[53] Morrison, *Interview*, 29 May 2020.

[54] Local government has gained a place on the NFRC.

[55] Margaret White, 'Government's Coronavirus Response Slammed for "Alarming Lack of Oversight" by Retired Judge'. *ABC News*, 3 June 2020.

[56] The Victorian Minister for Health, Ms Jenny Mikakos, in the Legislative Council on 4 August 2020, sought to avoid answering questions concerning the hotel quarantine scandal and the inquiry that had been appointed

occurred for a time at the National Cabinet, but it has been missing across the jurisdictions, where there has been politics as usual.

Former Queensland Supreme Court Judge Margaret White, while acknowledging 'this is an emergency and emergencies … call for quick responses', nevertheless complained that 'we have seen very limited sittings of Parliament and we have next to no oversight except via public press conferences, of what decisions are being made by executive government'.[57] Significantly, executive governments everywhere have avoided recourse to Parliament for approval for their draconian measures by using legislation covering health issues. For instance, the Commonwealth relied on declarations issued by the Governor-General based on powers conferred on the Health Minister under the *Biosecurity Act 2015* (Cth). The New South Wales government issued numerous public health orders under the *Public Health Act 2010* (NSW). In Victoria, the State of Emergency was declared using never-before invoked powers under the *Public Health and Wellbeing Act 2008* (Vic). It is on the basis of advice from the Chief Health Officer that the Minister declares a State of Emergency. The test in Victoria will be when the six month legislative limit on the State of Emergency expires and whether the Andrews Government recalls Parliament for its renewal or tries some other subterfuge to bypass Parliament. Overall, concludes Professor John Warhurst, Parliaments across Australia have been 'deemed surplus to requirements'.[58]

CONCLUSIONS

The new intergovernmental institutional arrangements developed during the recent pandemic crisis to replace COAG have had several different impacts. At one level, they have further enhanced executive federalism, extended executive power and increased the role of First Ministers. Winding up some of the ministerial councils and national agreements has side-lined state Ministers, enhanced central agencies and further increased powers of the respective state and territory leaders. Parliament has

because it was 'part of that formal judicial process. We will not be providing a commentary while the Inquiry is ongoing'.

[57] White, 'Government's Coronavirus Response Slammed'.

[58] John Warhurst, 'Parliament Has Been Deemed Surplus to Requirements'. *Canberra Times*, 23 July 2020.

been diminished by recent developments, but more significantly, it has been exposed to being impotent in holding executive government to account. It has raised real concerns about the value and constitutional standing of Parliament in the Australian Westminster model. That it took two executive appointed public inquiries to expose inept government decision-making and poor administration during the pandemic in New South Wales and Victoria underlines Parliament's inadequacies.

In terms of intergovernmental relations, while these new arrangements may have been motivated for the best of reasons to tackle the pandemic as quickly as possible, there remains a gnawing suspicion that expectations of their potential role and impact has been overplayed. They have not inaugurated a new era of cooperative or collaborative federalism as some hoped. As well, we should not ignore the politically expedient goals of all concerned. For Morrison, it was a means to redeem his Government's standing while possibly pursuing wider reforms, but it was not without risks. Initial federal-state cooperation can easily evaporate by states going their own way in selfish 'provincial parochialism',[59] showing up the limitations of Commonwealth powers and making the Morrison Government look weak and compromised. That increasingly seems to be the situation.

By contrast, the states and territories have had everything to gain and little to lose from participating in the new arrangements. The new arrangements were not binding and digression from decisions brought no penalties. Commonwealth funding flowed regardless of the decisions that the States took, whether or not they were in accord with the increasingly weak enunciations from the fortnightly National Cabinet meetings. This was most vividly seen in relation to border closures, where several states practised what Paul Kelly described as 'pandemic protectionism'[60] taking Australia back to the state sovereignty model of the 1890s when the colonies were unencumbered by the responsibilities or constraints of nationhood. It has made a mockery of yet another Commonwealth inspired 'new federalism', leaving its latest instigator, Prime Minister Morrison, looking increasingly a bystander like many of his predecessors, and his Treasurer the unwitting paymaster of wanton states.

Interestingly, at a time the Review of COAG Councils was advocating the reduction of the number of ministerial councils and forums and lamenting how previous attempts

[59] Simon Benson, 'Premiers Put Selfish Political Goals Above Well Being of Others'. *The Australian*, 21 August 2020.

[60] Paul Kelly, 'Coronavirus: Fortress States Locking Out the National Interests'. *The Australian*, 19 August 2020.

failed as new priorities too often led to the appointment of new bodies, the Royal Commission into National Disaster Arrangement report was released. It proposed a greater role for the Commonwealth in natural disaster management and a 'senior ministerial forum, supporting National Cabinet'.[61]

Australia may well be back to where it was during the 1919 Spanish Flu pandemic, when the Commonwealth brokered an agreement in November 1918 with the States for a national response. Within three months, these arrangements had broken down, provoking the Acting Prime Minister, William Watt to send the following urgent telegram to all state Premiers that effectively ended the agreement:

> In consequence of the violation of control of influenza epidemic agreement of 27 November 1918, by states of New South Wales, Queensland, Western Australia, and Tasmania, Government of Commonwealth is unable to carry out arrangements voluntarily entered into by Commonwealth and states and gives formal and urgent notice that unless states have broken the agreement indicate by noon on Wednesday, fifth instant, their intention to abide by it and assist quarantine authorities of Commonwealth to operate it, Commonwealth Government will renounce agreement and revert to constitutional position it occupied before agreement was drawn.[62]

[61] Royal Commission into National Disaster Arrangements, *Report*, 28 October 2020, p. 25.

[62] Quoted in Royal Commission on Constitution of the Commonwealth, Report of proceedings and minutes of evidence, November 1929, p. 169; see also Gordon Greenwood, *The Future of Australian Federalism*. St Lucia: University of Queensland Press, second edition, 1976, pp. 331-332.

Book Reviews

Neville Wran. Australian Biographical Monographs No. 5, by David Clune. Cleveland (Qld): Connor Court Publishing, 2020. pp. 80, Paperback RRP $19.95 ISBN: 9781922449092

Elaine Thompson

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It's been many years since I've thought about Neville Wran, so I came to this monograph with an open mind, limited by two personal judgements. The first was the belief that Wran was a giant of his time, a real leader and moderniser. The second was the tragedy (farce) of his last years. It was a reminder to us all that there are no guarantees that a great life will be rewarded with a kind death: for Neville Wran that was certainly not the case.

Luckily, now with time we remember his leadership, his modernising policies and his largely successful ability to dominate an extraordinarily powerful political party with its deep factions. David Clune's monograph, through the use of first-hand materials and comments from Wran's colleagues, takes us through Wran's rise to power, his successes as Premier and his fall via the web of corruption and scandal that ended his premiership.

Clune's narrative is clear and remarkably free of value-judgements. It reminds us just how moribund the politics and Parliament of NSW were at the time leading up to Wran's Government and of all the talent Wran brought with him, which transformed NSW politics, policy and Parliament. Of course, there were failures; things left incomplete and the embedded corrupt culture of NSW politics largely ignored. Nonetheless, in this monograph we gain a picture of an extraordinary man leading Australia (via NSW) into the modern era.

I hope this monograph encourages others, as it has done for me, to go back and find earlier biographies of Wran to fill out the picture. Indeed, the very first paragraph drives me to find out more: how did Wran's mother Lilly manage to raise eight children, of whom Wran was the youngest, in Balmain during the depths of the Depression? How did she inspire him towards education?

The second paragraph reminds me of the gigantic contribution that the selective public high schools (in Wran's case, Fort Street) made to Australia, giving children from working-class backgrounds access to the best education and a route to university.

The list of those who so benefitted is quite extraordinary. I looked up Fort St alone. Here is a taste just from politics and law—and the list is incomplete:

- Sir Garfield Barwick, Chief Justice of the High Court of Australia
- Eric Bedford, NSW Government Minister and Member of the NSW Legislative Assembly
- John Bryson, Justice of the Supreme Court of NSW
- Sir Joseph Carruthers, Premier of NSW
- Rodney Cavalier, NSW Government Minister and Member of the NSW Legislative Assembly
- Ian Cohen, Member of the NSW Legislative Council
- Terence Cole, jurist, twice Royal Commissioner (AWB Oil-for-Food and Building Industry)
- John Dowd, NSW Attorney-General, Leader of the Opposition, Justice of the Supreme Court of NSW, Chancellor of Southern Cross University
- Syd Einfeld, Deputy Leader of the NSW Opposition, NSW Government Minister and Member of the NSW Legislative Assembly
- Bob Ellicott, federal Government Minister, Solicitor-General, Attorney-General and Justice of the Federal Court
- Sir Kevin Ellis, Speaker of the NSW Legislative Assembly
- Dr H.V. Evatt, Justice of the High Court, Chief Justice of the Supreme Court of NSW, President of the United Nations General Assembly, federal Opposition Leader
- Clive Evatt, NSW Government Minister and Member of the NSW Legislative Assembly
- Sir David Ferguson, Justice of the Supreme Court of NSW
- Graham Hill, Justice of the Federal Court of Australia
- Michael Kirby, Justice of the High Court of Australia

- David Kirby, Justice of the Supreme Court of NSW
- Sir John Kerr, 18th Governor-General of Australia, Chief Justice of the Supreme Court of NSW
- Trevor Morling, Justice of the Federal Court, Royal Commissioner and chairman of the Australian Electoral Commission
- Lerryn Mutton, Member of the NSW Legislative Assembly
- Max Ruddock, Government Minister and Member of the NSW Legislative Assembly
- Harold Snelling, NSW Solicitor-General
- Sir Percy Spender, diplomat and jurist, President of the International Court of Justice, federal Government Minister
- Sir Bertram Stevens, Premier of NSW
- Stanley Stephens, Government Minister and Member of the NSW Legislative Assembly
- Sir Alan Taylor, Justice of the High Court of Australia
- Allan Viney, Member of the NSW Legislative Assembly
- Sir Robert Wilson, Member of the NSW Legislative Council
- Neville Wran, Premier of NSW.

We lost a great deal as a society when, in the perverse name of egalitarianism, we gave up the notion of giving scholarships to allow children of talent from poor families to attend elite selective high schools and access the very best education and educators available.

To return to Clune's monograph, he draws a lively picture of Wran's intra-party battles and his networks of friends and enemies, reminding us that Wran was true to the great Labor tradition of being a 'great hater'.

Many of the policies introduced under successive Wran governments were good old-fashioned Fabian-style bread and butter reforms to help the working class: cutting public transport fares, limiting local government rates rises, a Lands Commission to deliver blocks of land to first home buyers at affordable prices, and protection of tenants through the establishment of the Rental Bond Board.

Other policies heralded a 'new world': the *Anti-Discrimination Act*, The Ethnic Affairs Commission, a Women's Advisory Council, the Women's Coordination Unit, enlarging

the *Consumer Protection Act*, passing the *Heritage Act*, creating the Land and Environment Court, decriminalising 'victimless crimes', and the introduction of the *Aboriginal Land Rights Act*.

Major constitutional reforms were entrenched in the *Constitution Act*: optional preferential voting, abolishing the weighting of rural electorates, a four year term for the Legislative Assembly, and wholesale changes to the Legislative Council, which had been a back-water of cronyism and incompetence.

As signalled earlier, there were fiascos. These included electricity shortages and a long battle to modernise the state transport system, particularly the railways, where employment was virtually a protection racket. But it was the corruption within the police and justice system, combined with ambitious men from within Labor eyeing the leadership, that finally destroyed Wran.

In Wran's defence, such corruption existed before he came to power. Indeed, one commentator on Robert Askin's Government, which preceded Wran was:

> Development in Sydney reached unprecedented levels under Askin, who ruled until his retirement in 1975. Australian state administrations have long struggled with corruption but NSW was perhaps the worst-affected of all and many believe that Askin's regime deliberately promoted a dramatic strengthening of the links between government, business and organised crime. It is now widely accepted that Askin was one of the most corrupt politicians in recent NSW history. He has been reliably and closely linked with major criminals, oversaw a vast expansion of police corruption, reputedly sold knighthoods for cash, and had intimate connections with the notoriously venal NSW racing industry, including the scandal-ridden Waterhouse bookmaking dynasty.[1]

However, Askin 'got away with it' by and large, while corruption under Wran was seen as completely out of control, especially when his Assistant Police Commissioner and friend, Bill Allen, was forced to retire for serious misconduct and his Corrective Services Minister Rex Jackson was imprisoned over allegations of bribery. Under the

[1] Milesago, 'The Juanita Nielsen Case'. Accessed at: http://www.milesago.com/features/nielsen.htm . See also Ian Hancock, 'Robin (Later Sir Robert) William Askin', in David Clune and Ken Turner (eds), *The Premiers of New South Wales*, Volume 2 1901-2005. Leichhardt: The Federation Press, 2006, pp. 364-368.

strong leadership of Nick Greiner as Leader of the Opposition, and Wran's lack of interest in handling the issue properly (hubris or boredom?), corruption charges destroyed his Government and led to his retirement.

Wran's legacy remains far greater than his failings and NSW in particular benefitted greatly, leaving the State with refreshed vigour and the benefit of young forward-thinking well-educated minds. It is good to be reminded that great leadership is possible and not everything needs to be reduced to tawdry poll-driven small-minded politics.

The Fatal Lure of Politics: The Life and Thought of Vere Gordon Childe, by Terry Irving. Clayton: Monash University Publishing, 2020. pp. 424, Paperback RRP $39.95. ISBN: 978-1-925835-74-8

David Clune

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Terry Irving's biography of Vere Gordon Childe is an unusual one. It is a blend of the traditional 'life and times', a detailed exploration of Childe's ideological development, and a history of radical left politics in Australia and Britain. Irving is unashamedly a proponent of the last and obviously empathises with Childe. While Irving's personal beliefs and sympathy for his subject are undisguised, this does not compromise his meticulous research and superior scholarship. At times, however, Irving's use of left ideological terminology does mar his otherwise readable prose. Another problem is that, as Childe destroyed all his personal papers, he is, at times, a rather shadowy figure in the narrative. Particularly in his early years, Childe is often glimpsed through the lens of the recollections and papers of contemporaries. Because of the absence of Childe's papers, Irving is sometimes forced to fall back on statements that Childe may, might, probably have done this or been present at that.

Irving says that his biography seeks to understand Childe's life 'by placing him within the tradition of dissenting intellectuals of the left'. The book is about the central place 'held by socialist politics in [Childe's] life, and his contributions to the theory of history that it entailed. It is also about the conflict in socialist politics between radical revolutionary democracy and parliamentary social democracy, for Childe decided that "politicalism"—his name for the latter—was fatal to socialism' (pp. x-xi). What Irving calls Childe's 'first life' in politics occupies a much greater proportion of the book than his distinguished archaeological career.

Gordon Childe had one of the most conventional of upbringings. His father was an Anglican Minister from a well-connected British family with an upper-class parish, St Thomas's, North Sydney. His uncle on his mother's side was a Judge of the Supreme Court, Sir Alexander Gordon.

From the beginning, Childe was a brilliant scholar, effortlessly carrying off prize after prize. After attending the elite Sydney Church of England Grammar School (Shore), he studied at the University of Sydney, graduating BA in 1914 with first class honours in Latin, Greek and Philosophy and the University Medal in Classics. Childe also won a prize for an essay on philosophy and a valuable travelling scholarship. While an undergraduate, Childe was exposed to the contemporary ferment of political and industrial upheaval. He became a radical leftist, with links to the Labor Party.

Childe enrolled at Oxford and began his studies just as World War One commenced. He moved further to the left, becoming anti-war, anti-imperialist, socialist and pacifist. Inevitably, his courageous espousal of unpopular beliefs aroused the antagonism of the academic, intelligence and military establishments. Childe's heterodox political views and academic brilliance - he took a First in Greats and began a promising career in archaeology – presented the authorities at Oxford with a problem. The solution was to ship him back to Australia in 1917 with a warning to local authorities that he was a dangerous radical.

Attempts by Childe to secure employment at Sydney University and the University of Queensland were blocked because of his adverse security record and open radicalism. He was active in the Labor Party and trade union movement and was a Marxist revolutionary in his beliefs. However, Childe never joined the Communist Party and had reservations about the Soviet Union.

In 1919, Childe was appointed Private Secretary to NSW ALP Leader John Storey. When Storey became Premier in 1920, Childe was appointed Research Officer in the Premier's Department. According to Irving, Childe enjoyed his role 'as an adviser and trouble-shooter for Storey's Government, the *entrée* it gave him to Labor's inner circles, and his notoriety in the anti-Labor press. In the public service he was a kind of *enfant terrible* … ' (p. 191). Storey was keen to have information on the latest overseas developments in progressive policy and legislation and in 1921 transferred Childe to the NSW Agent-General's Office in London to fulfil this function. When Labor was defeated in 1922, the incoming Nationalist Government dismissed him.

Childe used his inside experience of the ALP in NSW to write *How Labour Governs*, published in 1923. It was a scathing critique from a Marxist perspective of 'politicalism'. Driven by its 'ambition to govern the state, the Labor Party watered down its Labor-socialist objective, drowned the progressive espousal of internationalism in a tide of jingoistic militarism, and alienated unionists by its vacillating policy'. Forced to take direct action against employers 'by the indifference and treachery of the politicians, the unions turned to amalgamation' but what emerged was a giant undemocratic body, the Australian Workers' Union, which was

controlled by corrupt opportunists (p. 234). Having delivered himself of this farewell blast, Childe revived his archaeological career.

In 1925, Childe published *The Dawn of European Civilisation*. It made his reputation and in 1927 he became Abercromby Professor of Prehistoric Archaeology at the University of Edinburgh. Irving says that his 'concepts of the Neolithic and Urban revolutions "rank among the most important theoretical advances" in the study of human cultural evolution'. Childe wrote 21 books, 'including the immensely popular *What Happened in History*, which sold 300,000 copies for Penguin Books in its first 15 years. He also wrote 281 articles or chapters and 236 book reviews in 99 periodicals … His books were translated into 21 languages' (p. ix).

From 1946-57, Childe was Professor of Prehistoric European Archaeology and Director of the Institute of Archaeology at the University of London. When he retired he decided to return to Australia. Irving paints a sad picture of Childe's final years: no close family, few friends, little money. He believed he had nothing more to contribute to archaeology, was disillusioned with contemporary Australian society, and had morbid fears about his declining health.

On 19 October 1957, Childe committed suicide by jumping off a cliff in the Blue Mountains. He arranged for it to look like an accident, an interpretation sustained by the Coroner. Childe wrote a letter to a colleague explaining his intention, asking that it remain unopened for ten years. It was not, in fact, published until 1980.

Typically, Childe's final statement provokes and resonates, particularly in this time of complex debate about the Coronavirus pandemic:

> The progress of medical science has burdened society with a horde of parasites – rentiers, pensioners, and other retired persons whom society has to support and even to nurse … I have always considered that a sane society would disembarrass itself of such parasites by offering euthanasia as a crowning honour or even imposing it in bad cases , but certainly not condemning them to misery and starvation by inflation (p370).