Australasian Parliamentary Review

JOURNAL OF THE AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Editor: Dr Sarah Moulds, Senior Lecturer in Law, University of South Australia

Inter-parliamentary cooperation on advanced information sharing

Royal Commissions and the Pandemic

Referendums, Elections and more!

Australasian Study of Parliament Group

AUTUMN/WINTER 2023 • VOL 38 NO 1 • RRP $A35

AUSTRALASIAN STUDY OF PARLIAMENT GROUP (ASPG) AND THE AUSTRALASIAN PARLIAMENTARY REVIEW (APR)

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

Editor: Dr Sarah Moulds, University of South Australia. Email: Sarah.Moulds@unisa.edu.au

EDITORIAL BOARD

Dr Peter Aimer, University of Auckland
Jennifer Aldred, Public and Regulatory Policy Consultant
Dr David Clune, University of Sydney
Dr Ken Coghill, Monash University
Professor Brian Costar, Swinburne University of Technology
Dr Jennifer Curtin, University of Auckland
Dr Gareth Griffith, NSW Parliamentary Library
Professor John Halligan, University of Canberra
Associate Professor Graham Hassall, Victoria University of Wellington
Dr Richard Herr, University of Tasmania
Professor Bryan Horrigan, Monash University
Professor Helen Irving, University of Sydney
Dr Rosemary Laing, Australian Senate
Adjunct Professor Colleen Lewis, Monash University
Dr Clement MacIntyre, University of Adelaide
Dr Isla Macphail, Parliament of Western Australia
Professor Raymond Miller, University of Auckland
Professor Graeme Orr, University of Queensland
Dr Sonia Palmieri, Australian National University
Dr Harry Phillips, Parliament of Western Australia
Dr Stephen Redenbach, Parliament of Victoria
Dr Paul Reynolds, Parliament of Queensland
Kirsten Robinson, Parliament of Western Australia
Kevin Rozzoli, University of Sydney
Professor Cheryl Saunders, University of Melbourne
Emeritus Professor Marian Sawer, Australian National University
Dr Robyn Smith, Parliament of the Northern Territory
Dr David Solomon, former Queensland Integrity Commissioner
Dr Katrin Steinack, University of Melbourne
Dr Elaine Thompson, University of New South Wales
Wayne Tunnecliffe, Parliament of Victoria
Professor Anne Twomey, University of Sydney
Dr June Verrier, former Head, Australian Parliament Information and Research Services
Professor George Williams, University of New South Wales

Australasian Parliamentary Review

AUTUMN/WINTER 2023 • VOL 38 NO 11

Table of Contents

From the Editor 5

COMMENT **6**

Can language rules improve everyday respect in the parliamentary chambers? *7*

Sonia Palmieri *7*

ARTICLES **17**

The First Nations Voice and the Parliament: A New Constitutional Relationship *18*

Gabrielle Appleby *18*

The Voice Referendum Needs to Enter the Deliberative Zone 34

Andrew Cole *34*

The Shake-Up: New rules in play for the NSW Legislative Council 52

Allison Stowe *52*

Re-shaping Interparliamentary Cooperation through Advanced Information Sharing* *78*

Fotios Fitsilis *78*

Jörn von Lucke *78*

A royal commission into Australia’s response to the pandemic?* 89

Scott Prasser *89*

Former senior reseacher and policy adviser, federal and state governments. *89*

Revisiting Six Queenslands: Disaggregating the Regional Vote at the 2020 Queensland State Election* *108*

Paul D Williams *108*

BOOK REVIEWS **128**

The Whitlam Era, edited by Scott Prasser and David Clune. Connor Court Publishing, 2022, pp 480. RRP $54.95, ISBN: 9781925826944. *129*

Bryan Moulds *129*

Power, Politics and Parliament: Essays in Honour of John R Nethercote, edited by Henry Ergas and Jonathan Pincus. Connor Court Publishing, 2022, pp 412. RRP $36.99, ISBN: 9781922815163. *133*

Sarah Moulds *133*

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

From the Editor

It is with great pleasure that I introduce this Edition of the *Australasian Parliamentary Review*. This Edition includes contributions that are varied and diverse, reflecting the dynamic parliamentary and political environment of 2023.

Two articles in this Edition focus squarely on the significance of the upcoming constitutional referendum in Australia, and what it means for Australians to be called upon to exercise a form of direct democracy that will characterise a nation. The first is by Professor Gabrielle Appleby, a constitutional law scholar with in-depth knowledge of the *Uluru Statement from Heart* process. The second is by Andrew Cole, an experienced parliamentary officer from South Australia, and focuses on how and when constitutional referenda can enter the deliberative zone.

This Edition also includes a future-looking contribution from senior parliamentary official Fotis Fitsilis, from Greece, and Professor Jörn von Lucke, from Germany, on the topic of reshaping interparliamentary cooperation through advanced information sharing. There are also contributions in this Edition that speak to the significance of procedural changes in our parliaments, and the implications of these changes for the cultural environments in which parliamentary work takes place. This includes a comment piece from Policy Fellow Sonia Palmieri, asking whether language rules improve everyday respect in the parliamentary chamber, and a reflection on the new rules governing the work of the Legislative Council in New South Wales by senior parliamentary officer Allison Stowe.

Scott Prasser has prepared an insightful piece exploring whether we need a royal commission into Australia's response to the pandemic. Dr Paul Williams offers an analysis of the 2020 Queensland state election and the 'six Queenslands' he suggests may require revisiting.

The Edition concludes with reviews of Scott Prasser and David Clune's edited collection *The Whitlam Era*, and *Power Politics and Parliament: Essays in Honour of John R Nethercote,* edited by Henry Ergas and Jonathan Pincus. I express deep gratitude to all authors and reviewers involved in this publication and commend the contents to you.

Sarah Moulds

Senior Lecturer in Law, University of South Australia, May 2023

Comment

Can language rules improve everyday respect in the parliamentary chambers?

Sonia Palmieri

Policy Fellow (Gender), Coral Bell School of Asia Pacific Affairs, Australian National University

INTRODUCTION

In November 2021, the Australian Sex Discrimination Commissioner, Kate Jenkins, tabled a report outlining 28 recommendations to 'ensure that Commonwealth parliamentary workplaces are safe and respectful and that the nation's Parliament reflects best practice in the prevention and handling of bullying, sexual harassment and sexual assault'.[1] The *Set the Standard* report reflects the evidence gathered from over 1700 individuals and 33 organisations and collectives, through surveys, interviews, written submissions and focus group discussions. Among its key findings, the report points to the role of 'power imbalances, gender inequality and exclusion'[2] in normalising and perpetuating misconduct. Contributors to the report pointed to what they called a 'toxic workplace culture'.[3] To rectify this, the Commission made a series of recommendations relating specifically to diversity, equality and inclusion. The Commission recommended that: efforts be made to diversify the cadre of politicians, as well as political and parliamentary staff in Australia; there be stronger mechanisms

[1] Australian Human Rights Commission (AHRC), *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* Sydney: AHRC, 2021, p. 1.

[2] AHRC, *Set the Standard*, p. 160.

[3] AHRC, *Set the Standard*, pp. 84, 95, 124.

by which to measure and report on that diversity; and 'everyday respect' be improved in the parliamentary chambers (Recommendations 5 to 10).[4]

While the parliament has been in the process of implementing the *Set the Standard* recommendations, women from the Coalition parties have publicly invoked calls for 'everyday respect' in both the House of Representatives and the Senate. In October 2022, a female Coalition MP accused the Prime Minister of 'aggressive' 'bullying' during Question Time.[5] In March 2023, a female Coalition Senator called on a male Senator to withdraw comments made in the course of a debate on the appearance of neo-Nazis at anti-transgender rights protests, and the attendance of Liberal Party members at those protests.[6] On both occasions, political tensions were high.

These instances beg the question of whether it is actually possible to improve everyday respect in the Australian parliamentary chambers, particularly in moments of heightened political sensitivity or adversarialism. I would argue that respect is possible, but that it requires a more sophisticated conversation, both in parliament and with the Australian public. In this brief commentary piece, I reflect on the use of 'unparliamentary language' rules and their potential to address the power imbalances, gender inequality and exclusion that in the Commissioner's view drive misconduct. I argue that improving everyday respect in the parliamentary chambers requires both formal rule change and norm change, and that there is hope for constructive change.

ARE PARLIAMENTARY RULES GENDER DISCRIMINATORY?

Rule changes occur infrequently, and usually modestly, in the Australian parliamentary chambers.[7] There are, however, exceptions to this general approach. In 2004, the House of Representatives Standing Orders were 'totally revised and renumbered'. In this review, gender-neutral language conventions were adopted; where the rules had

---

[4] AHRC, *Set the Standard*, pp. 172-73.

[5] Josh Butler, 'Coalition MP Michelle Landry accuses Anthony Albanese of 'bullying' her in parliament'. *The Guardian*, 27 October 2022.

[6] Lauren Evans, 'Senator Sarah Henderson addresses 'abhorrent and offensive' comments she claims Murray Watt made during Nazi debate'. *SkyNews Australia*, 24 March 2023.

[7] Keith Dowding, Patrick Leslie and Marija Taflaga, 'Australia: Speaker time in an adversarial system' in Hanna Bäck, Marc Debus and Jorge Fernandes (eds) *Politics of Legislative Debates*, Oxford: Oxford University Press, 2021, pp. 130-151.

previously referred to Members with a masculine pronoun (e.g. 'he', or 'Chairman'), from the beginning of the 41st Parliament, these were replaced with more gender-neutral language (e.g. 'he or she', and 'Chair'). The emphasis on gender-neutrality reflected conventions adopted by the Office of Parliamentary Counsel, as well as wider conversations about sex discrimination, that had begun in the early- to mid-1980s.

The gender neutrality of legislation (and, by extension, rules of procedure) has recently come into question. Despite ostensibly gender-neutral rules, parliamentarians experience the chamber in different ways – not only based on gender, but on race, disability, and age, among other indices of intersectionality.[8] Legal academic Ramona Vijeyarasa has noted that apparently gender-neutral legislation has facilitated and aggravated the 'perpetuation of gender stereotypes and traditional practices', and thereby gender discrimination.[9] Similarly, Canadian academics Cheryl Collier and Tracey Raney specifically point to the 'myth of neutrality' as that which privileges male norms of behaviour, particularly in Westminster parliaments.[10] Indeed, the myth of gender neutrality, combined with adversarial politics and parliamentary privilege conventions, constructs a pervasive political and cultural denial of gender-based discrimination.

WHEN GENDER NEUTRAL RULES CAUSE HARM

In October 2018, Greens Senator Sarah Hanson-Young called out repeated incidents of bullying, intimidation and sexual harassment in the Senate in an essay entitled *En Garde*.[11] The essay spotlights an episode with Senator David Leyonhjelm during a debate concerning violence against women in which he jeered that she should 'stop

---

[8] Nirmal Puwar, *Space Invaders: Race, Gender and Bodies Out of Place*. Oxford and New York: Berg, 2004; Mona Lena Krook, 'Westminster Too: On Sexual Harassment in British Politics', *Political Quarterly* 89(1) 2018, pp. 65-72; Kerryn Baker, 'Melodrama, fisticuffs and generally aberrant behaviour': Gender, norms of behaviour and workplace culture in the New Zealand Parliament'. *Australasian Parliamentary Review*, 36(2) 2021, pp. 130-147.

[9] Ramona Vijeyarasa, 'In pursuit of gender-responsive legislation: Transforming women's lives through the law' in Ramona Vijearasa (ed) *International Women's Rights Law and Gender Equality: Making the Law Work for Women,* London: Routledge, 2021, p. 3.

[10] Cheryl N Collier, Tracey Raney, 'Understanding Sexism and Sexual Harassment in Politics: A Comparison of Westminster Parliaments in Australia, the United Kingdom, and Canada', *Social Politics: International Studies in Gender, State & Society*, 25(3), 2018, pp 432–455.

[11] Sarah Hanson-Young, *En garde*. Sydney: Melbourne University Press, 2020.

shagging men'. Senator Leyonhjelm refused to apologise for his taunt in the Senate, and in subsequent public media engagements explained that his remarks were not sexist, but rather 'normal Australian behaviour'.[12]

The episode was not an exception. As a Matter of Public Importance (MPI) in November 2018, the Senate debated 'The increasing attacks on Australia's traditional freedoms'.[13] Among the 'traditional freedoms' considered under threat, the conservative senators proposing this item for debate were most concerned with freedom of speech. Earlier in the day, Greens party leader Senator Richard Di Natale had been expelled from the chamber for refusing to withdraw remarks made to conservative Senator O'Sullivan after he suggested that 'there's a bit of Nick Xenophon in [Senator Hanson Young]'. While Senator O'Sullivan withdrew his comments, adding that he 'did not mean that to be a double reference',[14] Senator Di Natale did not withdraw his remarks expressing disgust at Senator O'Sullivan's turn of phrase. Later supporting her expelled party leader, Senator Hanson-Young observed:

> *I want to make it very clear that I am thankful to Senator Di Natale for standing up and calling them out. That is what real men do. Real men don't insult and threaten women, they don't slut-shame them and they don't attack them and make them feel bullied in their workplace. I have sat in this chamber for weeks and weeks—months—and heard the disgusting slurs and attacks coming from a particular group in this place, and I for one am sick of it, and I know many of my female colleagues on all sides of politics are sick of it, too.*[15]

The MPI debate that followed became a thinly veiled attack on Senator Hanson-Young; the proposer of the motion, Senator Cori Bernardi, declared:

[12] Hanson-Young, *En garde*, pp. 29-31.

[13] President of the Senate, Senator Hon. Scott Ryan, Commonwealth, *Parliamentary Debates*, Senate, 27 November 2018, pp. 8719-8732.

[14] Senator O'Sullivan, Commonwealth, *Parliamentary Debates*, Senate, 27 November 2018, p. 8691.

[15] Senator Hanson-Young, Commonwealth, *Parliamentary Debates*, Senate, 27 November 2018, p. 8694.

> *When I look at Senator Hanson-Young, I don't see a woman; I see a senator. Gender should be blind in this chamber, yet Senator Hanson-Young wants to make it a perpetual grievance—that somehow she's being maligned … But we should not be silencing these [traditional freedoms] through victimhood, through shaming, however you want to call it—through this perpetual indulgence of identity politics. It is counterproductive, and it is doing us harm.*[16]

There is clearly a political debate about the role of 'identity politics' in Australia, but globally, links have been made between sexist language and violence against women in politics. A 2016 global survey from the Inter-Parliamentary Union found that almost 82 per cent of the responding women parliamentarians had suffered some form of psychological violence, including 44 per cent who said they had received threats of death, rape, beatings or abduction during their parliamentary term. The same report found that over 60 per cent of those (predominantly women) who had been subjected to sexist behaviour and/or violence in parliament believed those acts had been intended primarily to dissuade them and their female colleagues from continuing in politics.[17]

EXPLICITLY GENDER SENSITISING RULES OF DEBATE

In the Senate, Standing Order 193 requires that:

> *A senator shall not use offensive words against either House of Parliament or of a House of a state or territory parliament, or any member of such House, or against a judicial officer, and all imputations of improper motives and all personal reflections on those Houses, members or officers shall be considered highly disorderly.*

In the House of Representatives, standing orders 89 (Offensive words) and 90 (Reflections on Members) cover the same points. In her chapter on 'unparliamentary

[16] Senator Cori Bernardi, Commonwealth, *Parliamentary Debates*, Senate, 27 November 2018, p. 8720.

[17] Inter-Parliamentary Union (IPU), *Sexism, harassment and violence against women parliamentarians*. Geneva: IPU, October 2016.

language', Cornelia Ilie contextualises its use by noting that members of parliament are required to abide by codes of conduct; that despite the resort to 'gladiatorial combat' 'MPs are expected to observe the general principles of selflessness, integrity, objectivity, accountability, openness, and leadership'.[18] Discourse, in parliamentary chambers, is intentionally in the third person – that is, directed to the presiding officer – so as to avoid personalising insults. Ilie argues that this indirectness has both seen greater acceptance of 'unparliamentary language', and its intensification as a form of offensive attack.[19]

To date, in the absence of a code of conduct in Australia, the rules regarding offensive, unparliamentary language have not kept up to date with new norms of workplace behaviour. In fact, traditionally the rules have been more concerned with who the words might be about (MPs and Senators, judges), than the words themselves. There has never been a tight definition of the words that might be considered offensive, although there has been some monitoring of the words used in the chamber.[20] This means that while Members and Senators may have a general sense of what might be offensive, there is no clear direction by which presiding officers' might determine orderly conduct. There is no clear set of standards that presiding officers can point to in encouraging 'good' behaviour, or in eliminating misconduct. In their current form, the rules are neither explicitly gender nor diversity sensitive.

To do so, I argue, requires changes to the standing orders to more explicitly link sexist, racist, homophobic and otherwise exclusionary words with offensive and therefore unacceptable language. Such a change would align the parliament's rules of procedure with anti-discrimination law – specifically the Sex Discrimination Act 1984 and the Racial Discrimination Act 1975 – which outline acts of discrimination that are considered unlawful in the broader community.[21] In a parliamentary context, unparliamentary language would include derogatory or discriminatory references to Members' and Senators' gender, sexuality, race, disability or age. With these explicit

---

[18] Cornelia Ilie, 'Unparliamentary Language: Insults as Cognitive Forms of Ideological Confrontation' in Rene Riven, Roslyn Frank and Cornelia Ilie (eds) *Language and Ideology Volume Ii: Descriptive Cognitive Approaches*, Philadelphia: John Benjamins Publishing Company, 2001, p. 239.

[19] Ilie, 'Unparliamentary Language', p. 240.

[20] Words that have been withdrawn in the course of parliamentary debate are often collated and compiled by staff of the chamber departments.

[21] I thank Sarah Moulds for this important point.

references in the standing orders, Senator Leyonhjelm's jeers would have been publicly identified as sexist, as would have Senator O'Sullivan's (alleged) faux pas. The difference between the two examples is that Senator Leyonhjelm's refusal to withdraw would have been in direct breach of the standing orders, and the Senate would have had to vote on his suspension from the chamber. Senator O'Sullivan of course withdrew but not because the chair connected his remarks with sexism. Indeed, it might have been the case that had the chair been able to make that connection, and publicly acknowledge the sexism inherent in Senator O'Sullivan's comment, Senator Di Natale might not have been so vehement in his reaction, leading to his suspension from the chamber.

When the chair is unable to articulate a direct link between exclusionary language and offensive words, that language is normalised and accepted. Indeed, the current gender neutrality of the standing orders means that the parliament normalises derogatory comments not just in the chamber, but more broadly in society, and accepts them as part of a wider narrative of 'robust debate in the chamber'. Yet, it is possible for parliamentarians to engage in robust debate without using sexist, racist, homophobic, exclusionary language. Clarifying that this language is unacceptable means that the chair has a clear sense of what should be called to *immediate* attention.

In fact, the very banter that might occur following the utterance of exclusionary language would define its acceptability. For example, a Member might say something that the chair considers contravenes that standing order. The chair may ask the member to withdraw the comment. That member may either accept the directive to withdraw, or may disagree that the comment was exclusionary. The public 'back and forth' becomes an opportunity for the parliament to reflect on its language and tone, and for the Australian community to judge that tone of debate.

Specifying that exclusionary language will not be tolerated in the parliament literally sets the standard. In some senses, it might be argued that the wider Australian discourse has moved beyond that which continues to be accepted in the chamber. Many phrases in common parlance 20 years ago are no longer in use. It is therefore important that the parliament at least keeps pace with these trends, if not actually represent a more inclusive model.

PARLIAMENTARY LEADERSHIP IN UPHOLDING THE STANDARD

Enshrining the standard in the standing orders however is not sufficient. There needs to be consequences for failing to abide by the standard. In both the Senate and the House of Representatives, standing orders allow for suspension. The two chambers differ in terms of the time in which a Member/Senator can be suspended from the chamber. The House of Representatives introduced in 1994 a procedure by which Members could be directed to leave the chamber for an hour for disorderly conduct,[22] while the Senate continues to use the practice of suspending for the rest of the day.[23] The suspension of Members and Senators who refuse to withdraw exclusionary language would have the effect of signalling the parliamentary leadership's 'zero tolerance' for such language and such behaviour.

On this, there is a critical role for the Speaker of the House of Representatives and the President of the Senate, and the panel of individuals who take the chair in their absence. The parliamentary leadership will have to make the determination – be it political or procedural – that a parliamentarian found to have used exclusionary language be suspended. Suspension would not be automatic. It is possible that making these determinations will require some discussion among members of the Speaker's and President's panels: what constitutes exclusionary language, and how should the parliamentary leadership – composed of Members and Senators from different political persuasions – implement the standing orders in a consistent manner. I would suggest that such a discussion be facilitated by an expert in unconscious bias or the role of language in inciting violence. During my appearance before the House of Representatives Procedure Committee in February 2023, the Deputy Chair noted:

> *The Speaker's panel probably needs to be updated far more regularly than it has been. Since I've been back, I don't think there has been one Speaker's panel meeting to talk about the new determinations. It will probably need the Speaker to provide regular updates to the Speaker's panel, in order to execute these types of new standards that*

[22] David Elder, *House of Representatives Practice*, 7th Edition, Canberra, p. 536.

[23] Senate Standing Order 204.

> *we have, because nothing has been done so far. I know that last year was difficult, but maybe that will set the practice for the new year.*[24]

In that discussion, there was also some consideration of the issue that speakers and presidents frequently find it difficult to hear language considered to be unparliamentary, particularly in the very noisy periods of question time and MPIs. While this is understandable, it may also appear as an excuse for inaction. Yet exclusionary language can have devastating impact – both in the moment, and later on – for those to whom it is directed. Therefore, it is important for the chair to take seriously any potential offence. I have suggested to the House of Representatives Procedure Committee that when exclusionary language is brought to the attention of the chair, even in question time or an MPI, they acknowledge that members have heard something that is potentially exclusionary, and that they will investigate further with the members believed to be involved. Something to the effect of, 'I would like to see this member and that member in my office after question time.'[25] In that way, the chair signals that they are taking the matter seriously, and will have a conversation to resolve it in due course. In this way, the chair publicly recognises that offence may have been caused.

Should the Standing Orders be amended in this way, I would encourage a review of its operation in line with a review of the Code of Conduct currently being considered by the Joint Select Committee on Parliamentary Standards. Such a review process would be well supported by parliamentary staff who already monitor 'unparliamentary language'. There could also be a yearly reflection on the language was used in chamber debates and the consequences of that language, and these reflections could be used in the induction training of new presiding officers and members of speakers'/presidents' panels.[26]

---

[24] Ross Vasta, Commonwealth, *Parliamentary Debates*, House of Representatives Procedure Committee, 13 February 2023, p. 3.

[25] Sonia Palmieri, Commonwealth, *Parliamentary Debates*, House of Representatives Procedure Committee, 13 February 2023, p. 8.

[26] This point was further supported by Professor Michelle Tuckey and Dr Sarah Moulds during their appearance before the House of Representatives Procedure Committee on 2 December 2022.

CONCLUSION

Given the longstanding acceptance and normalisation of exclusionary language in Australian parliamentary chambers, it will take rule changes and concerted leadership to address the widespread incidence of inequality and misconduct uncovered by Commissioner Kate Jenkins.[27] At a minimum, the standing orders should be more explicit about a zero tolerance of sexism, racism, homophobia and other forms of exclusion. Making that zero tolerance explicit is important not only for the safety and wellbeing of all parliamentarians, but also because it defines 'good' standards to the Australian community.[28] As I have noted in this commentary, I believe the presiding officers have a critical role to play in upholding the new standard.

Cultural change is also required. There is a need to reflect on the unwritten rules, norms and practices in the chambers that (inadvertently) seep out into other areas of the parliamentary workplace. While this commentary has considered changes to written rules, there is also a need to reflect on the ideas and practices that allow and tolerate a degree of theatricality in the chambers in the name of robust political debate. This theatricality may include various expressions of anger, (mock) hatred, or other confronting behaviour that is generally believed unacceptable in most other workplaces. This norm of adversarialism is accepted in the chamber as a legitimate form of 'political combat'. This acceptance is, in part, sustained because of an assumption that (all) Members and Senators can – and will – switch off their theatricality as soon as they leave the chamber. The evidence presented in *Set the Standard* suggests that this assumption may be fair in most cases, but not all. This is why more intentional mechanisms are required to improve everyday respect in the chambers. Norm changes take more honest conversations that recognise fundamental inequalities in the multiple workplaces of parliament, and in taken for granted practices. It is likely that the Australian parliament needs specific – and public – fora in which those honest conversations can take place.

[27] AHRC, *Set the Standard*, pp. 148-159.

[28] On the term 'good', see Sarah Childs, *The Good Parliament*, Bristol: Bristol University, 2016.

Articles

The First Nations Voice and the Parliament: A New Constitutional Relationship

Gabrielle Appleby[1]

Professor in Law, University of New South Wales

Abstract: A key part of the proposed constitutional amendment to establish a First Nations Voice is creating a new relationship between the Voice and the Parliament. This article explores a number of dimensions of that relationship. The amendment proposes that the Voice will have a constitutionally guaranteed role to make representations – that is, to speak – to the Parliament, to improve its work, most particularly in relation to the passage of legislation and the oversight of delegated legislation. The mechanics of this relationship will be worked out in legislation, policies and practice. The Parliament is also given a constitutional power to make laws on matters relating to the Voice. This gives the Parliament a significant constitutional responsibility in two areas. First, in determining the design of the Voice itself, and importantly the legitimacy and authority of its composition. Second, in determining the dynamics of the relationship between the Voice and the Executive, the other key constitutional relationship that the amendment creates. In both of these areas, the Parliament's legislative power should be informed by the overarching objectives of the Voice, and the principle of Indigenous self-determination of political status and representation that sits behind the Voice.

[1] A version of this paper was delivered as a seminar to the Department of the House of Representatives as part of my role as Constitutional Consultant to the Clerk of the House of Representatives. In 2016-2017 I was a pro bono constitutional adviser to the Regional Dialogues and First Nations Constitutional Convention that delivered the Uluru Statement from the Heart, and continue to work in that capacity for the Uluru Dialogues.

INTRODUCTION

If successful later this year, a referendum to establish a First Nations Voice (referred to in the constitutional amendment as an boriginal and Torres Strait Islander Voice'[2]) will herald a new constitutional relationship between this institution and the Parliament. The Voice is designed to inform and improve parliamentary decision-making, particularly in relation to law-making (as well as Executive decision-making, and policy and law development, but the focus of this article is the relationship with the Parliament). The Voice also raises questions about the responsibility of Parliament to design the detail of the Voice following a referendum, both initially, and in terms of its adaptation and evolution over time, and the relationship between this process and the Voice itself.

The establishment of the Voice enshrined in the Constitution will create a new institution within our constitutional system of government that I have described previously as modest and congruent, as well as radically transformative.[3] It is modest and congruent, in that it has been carefully designed to work within – that is, be coherent with – the existing structures and principles of the Australian constitutional system.[4] This starts with the assertions of sovereignty in the Uluru Statement from the Heart from which the proposal is drawn. They are expressed as a spiritual notion, connected to country, that are consistent with, in that they sit alongside the legal claim of British sovereignty that the High Court has persistently indicated is not subject to judicial questioning.[5]

---

[2] The Uluru Statement from the Heart (May 2017) called for a constitutionally enshrined 'First Nations Voice'. The Constitution Amendment (Aboriginal and Torres Strait Islander Voice) 2023 introduced into the Parliament in March 2023 refers to that body as an "Aboriginal and Torres Strait Islander Voice". I will use the terms interchangeably in this article.

[3] Gabrielle Appleby, 'The First Nations Voice: A modest and congruent, yet radically transformative constitutional proposal'. *AUSPUBLAW*, 11 June 2021.

[4] See e.g. Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile project', *Uphold & Recognise*, 2019. Accessed at: https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5d30695b337e720001822490/1563453788941/Recognition_folio+A5_Jul18.pdf. Robert French, 'Voice of reason not beyond us'. *The Australian,* 31 July 2019.

[5] See the Uluru Statement from the Heart: 'Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago. This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander

But the Voice is also constitutionally transformative, in that, for the first time, we have an attempt at the constitutional level to reconstruct and reset the relationship between the State and First Nations and provide an ongoing mechanism through which their self-determination can be expressed. The modest, congruent, as well as the transformative, dimensions of the Voice proposal provide us with a conceptual way to think of the relationship between the Voice and the Parliament.

What, then, are the key dynamics of this constitutional relationship? In this article, I explore three: the creation of the Voice through an exercise of popular sovereignty; its nature as a representative institution; and finally, the constitutional definition of the parameters of the relationship.

A NEW CONSTITUTIONAL INSTITUTION CREATED THROUGH AN EXERCISE OF POPULAR SOVEREIGNTY

The First Nations Voice is established to act in what has been referred to in shorthand as an 'advisory' capacity, that is, to use the language of the proposed amendment, to 'make representations' to the Parliament. It is not given a formal role in the legislative process. It does not possess a veto power. It is not a 'third chamber of Parliament'. This will mean that the success of the Voice in advocating for the needs and desires of First Nations will turn on its political power: how seriously Parliament engages with its representations.

An important dimension of the relationship between Parliament and the Voice then will rest on its legitimacy. Institutional legitimacy is a complex idea on which there is much written.[6] Here, it is sufficient to note that there will be many different inputs into the Voice's legitimacy, including the following three: the exercise of popular sovereignty that established it, giving it popular legitimacy; its constitutional status;

peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.' Referendum Council, 'Uluru Statement from the Heart'. First Nations National Constitutional Convention, 26 May 2017.

[6] See e.g. Richard H. Fallon, Jr., 'Legitimacy and the Constitution'. *Harvard Law Review* 118, 2005, pp 1789; Tom R Tyler, *Why People Obey the Law.* Princeton University Press, 2006.

and finally, whether it is seen as genuinely representative and accountable of First Nations people, which I will return to below.

The referendum, if successful, will provide a platform of public awareness of, knowledge of, and endorsement of the proposal.[7] This brings with it a public expectation that the Parliament will engage seriously with this new body, as well as engage seriously in its responsibility for designing the body, an aspect of the relationship discussed below.

The status of the body is also important. Chapters 1, 2 and 3 of the Constitution establish the core institutions of government in our constitutional system as the parliament, the executive and the judiciary. It is intended that the Voice be established also in its own, new, constitutional chapter, giving it the status of a foundational institution of Australian government. This is about establishing its status now and into the future, as well as about ensuring its operational stability and certainty, which will also be key to its success.

THE ESTABLISHMENT OF A REPRESENTATIVE INSTITUTION

The second part of the constitutional relationship between the Voice and the Parliament is the establishment of the body as a *representative* institution. The draft amendment indicates that the Voice is to be an 'Aboriginal and Torres Strait Islander Voice'. The Uluru Statement from the Heart describes it as a 'First Nations Voice'. These labels do not expressly, but rather implicitly, tell us that the institution is to be a representative one, that is, representative of Aboriginal and Torres Strait Islander people. How that representation is achieved, as canvassed below, will be determined under the current draft wording by Parliament, in consultation with First Nations people. But to focus first on two aspects of the importance of the general principle of representation for the Voice.

As Torres Strait Islander political scientist Associate Professor Sana Nakata has written, the Voice is a structural, practically orientated change that is addressed to remedying the systemic injustices that result in the low socio-economic outcomes for Aboriginal

[7] Submission to the *Interim Report to the Australian Government on Indigenous Voice Co-Design Process by 40 public lawyers, October 2020.* Accessed at: https://www.indigconlaw.org/home/submission-the-imperative-of-constitutional-enshrinement.

and Torres Strait Islander people.[8] It is directed at remedying ‘the failure of a representative democracy to represent the very peoples who were dispossessed and disempowered by its establishment’. It does not do this through compulsion or veto, but rather, through ‘representation’. Nakata explains:

> *The power of political representation lies not in a direct line to political decision-making or even in its aggregative effect to elect a Member of Parliament, but in the ability to sustain a set of political claims, both to a compelled audience – in this case the Parliament – but also a broader public.*[9]

Representation is also important, as Professor John Williams and I have written, because it provides a constituency, which it represents and is accountable to, who will also advocate for its ongoing position and authority. This stands in contrast to, for instance, the Inter-State Commission, a constitutional body established in section 101, but that no longer continues in existence. However, it was one that had:

> *no independent constituency base, little public support and no constitutional imperative, was seen as a threat to the position and authority of the Parliament that needed to be removed [as well as] undermining the judicial function exercised by the High Court.*[10]

The Voice does not share these characteristics, undermining attempts to draw analogies between the two institutions, and their likely continued existence and success.

---

[8] Sana Nakata, ‘On Voice and the political power of representation’. *AUSPUBLAW*, 20 February 2023. Accessed at: https://www.auspublaw.org/first-nations-voice/on-voice-and-the-political-power-of-representation/.

[9] Nakata, On Voice.

[10] Gabrielle Appleby and John Williams, ‘The First Nations Voice: An Informed and Aspirational Constitutional Innovation’. *IndigConLaw Blog,* 25 March 2023. Accessed at: https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation.

CONSTITUTIONAL PARAMETERS OF THE RELATIONSHIP BETWEEN PARLIAMENT AND THE VOICE

The constitutional text provides us with an understanding of some of the constitutional parameters of the relationship between Parliament and the Voice, as well as telling us about what will be required into the future: that is, it confers on Parliament responsibility for determining the detail of the Voice including defining the relationship between the Voice and the Executive – the other key constitutional relationship created by the amendment.

The Parliament's responsibility for passing legislation that provides the 'detail' of the Voice

Under the current proposed wording, the amendment provides in (iii) that:

> *The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.*

First, it is important to note the tension that exists here between the proposed amendment and the proposed powers of Parliament, and Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which states:

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*[11]

[11] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007, Article 18 (emphasis added).

The Uluru Statement from the Heart was driven by a desire to implement this right to self-determined political participation.[12] The success of the Voice will draw on its legitimacy and authority that will draw from its ongoing representative nature. So, there is a tension. The tension is most apparent in relation to membership, which I will discuss in more detail here. But it is also apparent in relation to the Parliament determining the processes of the body, and the powers which will determine its effectiveness and success. The Parliament is also given power to determine how the Voice's functions are to be carried out, as well as any future additional functions of the Voice. I return to the Parliament's role in setting out the relationship between Parliament and the Voice and the Executive and the Voice, below.

Here, I focus on the Parliament's power to make laws with respect to composition, that is, membership. Dr Dani Larkin a Bundjalung/Kungarakany public lawyer specialising in First Nations electoral participation, has written that membership and giving effect to the principle of representation is complicated in the First Nations setting:

> *The Voice should reflect our traditional governance structures as much as possible and in doing so, it should place the cultural authority and voices of our Elders and Traditional Owners at the centre of decision-making processes.*
>
> *The Voice should also be as inclusive of all First Nation people and experiences as possible, so that all of our voices are heard, particularly those of us who experience significant powerlessness and political exclusion in mainstream Australian elections - through the over incarceration statistics we comprise, and other issues that limit our access to support services which provide us with the ability to vote and politically engage, but also ensure our votes actually count.*[13]

[12] See Referendum Council *Final Report*. 2017, pp. 30-31. Guiding Principle 3, adopted at the National Convention to guide the outcomes that were adopted, stated: 'Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.'

[13] Dani Larkin, 'Membership models for an Indigenous Voice: What does Representation Mean for First Nations?'. *IndigConLaw Blog,* 11 March 2021. Accessed at: https://www.indigconlaw.org/home/membership-models-for-an-indigenous-voice-what-does-representation-mean-for-first-nations.

Associate Professor Elisa Arcioni, an expert on membership and 'the people' under the Australian Constitution, writes:

> *The identity and cultural traditions of First Nations across Australia are complex and diverse, and their composition and laws are not static. First Nations peoples are heterogeneous, with distinct internal rules for membership and structures of representation.*[14]

Arcioni's comments takes us to the exceptional work of Dr Janine Gertz, a Gugu Badhun and Ngadjon-ji woman from North Queensland. Her work has focused on the cultural identity and membership being recognised and determined by an Indigenous Nation in accordance with their traditional laws and customs, and the importance of authority to determine cultural identity and membership being vested in the decision-making policies and procedures of an autonomous self-determining Indigenous Nations. This has made her:

> *uneasy about the constituted order of the Australian state – in this case, the High Court, but in other instances, the Government itself – externally determining and applying the criteria of Aboriginal people's cultural identities and ongoing connection to our lands.*[15]

There is a tension, then, between the legitimacy of composition as being sourced from the internal rules of membership and structure of First Nations themselves, and the power given to Parliament to make laws for the composition of the Voice. Arcioni resolves this as follows:

> *… the best way to ensure that First Nations determine the membership of the Voice is to have the rules of its membership contained in legislation, the drafting of which is informed by, and*

[14] Elisa Arcioni, 'Membership of the Voice' *Public Law Review,* March, 2023 (forthcoming). Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344248.

[15] Janine Gertz, 'Determining the Self in Self-Determination'. *IndigConLaw Blog,* 31 March 2021. Accessed at: https://www.indigconlaw.org/home/determining-the-self-in-self-determination .

> *amenable to refinement and change in collaboration with, First Nations people.*[16]

That is a significant caveat: 'the drafting of which is informed by, and amenable to refinement and change in collaboration with, First Nations people'. Many First Nations hold genuine concerns that this will be the case, which seriously threatens the viability of the Voice. The Government has yet to release full details of how it intends to collaborate with First Nations to determine the composition of the body, should the Voice be passed. This collaboration will be vital to the legitimacy of Parliament's exercise of its powers in establishing the detail, including membership, of the Voice.

PARLIAMENTARY LAW-MAKING AND THE VOICE

Turning then to the Parliament's relationship with the Voice in relation to law-making, and other parliamentary decision-making, such as scrutiny of delegated legislation and disallowance, which, given what we know of the volume of law-making that is done through this process,[17] will be an important part of the Voice's function of making representations to Parliament.

A minimum dimension of this relationship is constitutionalised in (ii) of the proposed amendment: the Voice must be able to make representations to the Parliament. In practice, the relationship will largely be determined by legislation, standing orders, resolutions, and practice, including, for instance, ad hoc requests to address parliament.

Here, I want to look briefly at two proposals: one from the Indigenous Voice co-design process, undertaken by the Morrison government, led by Professors Marcia Langton and Tom Calma,[18] and the South Australian First Nations Voice model.[19]

[16] Arcioni, 'Membership of the Voice'.

[17] See e.g. Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation.* 6 June 2019, p. 6. There were approximately 1700 instruments tabled annually at that time.

[18] Marcia Langton and Tom Calma, *Indigenous Voice Co-design Process Final Report to the Australian Government*. July 2021.

[19] *First Nations Voice Act 2023* (SA).

The 2021 co-design process report recommended a relationship between the Voice and Parliament that was largely modelled on the Parliamentary Joint Committee on Human Rights, established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and the non-justiciable obligation of the government to consult when making delegated legislative instruments under section 17 of the *Legislation Act 2003* (Cth).[20] Under the model that was recommended by the co-design process, the relationship would operate through what it refers to as 'transparency mechanisms'. In brief, they are:

- *Statement on bills:* An explanatory statement explaining whether consultation and engagement has occurred, and what advice was provided.
- *Tabling of advice:* The Voice would be able to table formal advice in Parliament through three channels:
  - Where formal advice is requested and provided, the advice will be tabled with the Bill
  - If the Voice advised on any other Bill, this would be tabled.
  - A formal statement annually to advise on government programs or raise other policy issues for consideration.
- *Parliamentary committee:* A Committee established to scrutinise the tabled advice, and engagement with the Voice as stated by Government, and hear directly from the Voice, and make recommendations to Parliament and the Government.[21]

The co-design model excluded the making of legislative instruments – subordinate legislation – from its obligatory consultation requirement, leaving it with an 'expectation' to consult, governed by what the report describes as 'common-sense principles that set standards to inform Parliament and Government about when they should consult'.[22] It said:

> *The proposal of the National Co-design Group is that the obligation to consult would apply only to primary legislation, not legislative*

[20] Langton and Calma, Co-design Process Final Report, p. 170.

[21] Langton and Calma, Co-design Process Final Report, p.168.

[22] Langton and Calma, Co-design Process Final Report, p.165.

> *instruments or other policies. The reason for this is to ensure the obligation to consult would apply to a limited number of reforms significant to Aboriginal and Torres Strait Islander peoples. The number of legislative instruments, regulations and notifiable instruments is many more times than the number of bills for primary legislation. Around 1,500 legislative instruments are made every year. The obligation does not capture these items to ensure it does not create an unnecessary administrative burden on all parties.*[23]

The experience of the Parliamentary Joint Committee on Human Rights (PJCHR) has been extensively analysed by others.[24] A number of criticisms of the PJCHR, its practice and experience, raise concerns for the proposed Committee model for the Voice, including timeliness of engagement by the Committee, workload and resourcing of both the Committee and the Voice. Finally, the experience of the Senate Committee on Scrutiny of Delegated Legislation in monitoring the consultation requirements of section 17 of the *Legislation Act 2003* (Cth) raises even further concerns for the proposal. In 2007, the Committee raised concerns about:

- an apparent lack of agency familiarity with the consultation requirements, leading to inconsistency between agencies in relation to levels of compliance;
- the provision of 'cursory, generic and unhelpful' information in explanatory statements [to the Committee]; and
- over-reliance on exceptions to the consultation requirements in the *Legislation Act*.[25]

In its 2019 inquiry into scrutiny of delegated legislation, the Committee also noted concerns that 'it must rely on the views of the executive as to the appropriateness and

[23] Langton and Calma, Co-design Process Final Report, p.165.

[24] See e.g. Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia.* Springer, 2020; Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia'. *UNSW Law Journal* 41 2018 p. 40.

[25] Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*. June 2007 pp. 5-7. This summary is taken from the Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 44.

adequacy of any consultation that has occurred.'[26] The Co-design Final Report rejected a suggestion that the Voice itself should be given responsibility for reviewing Bills and Statements of Consultation provided by the Government, and advising the Houses whether it believes it has been properly consulted in the development of policies and laws.[27]

The second model I want to consider is that set out in the First Nations Voice Act 2023, passed by the South Australian Parliament in early 2023. This model sets out a number of different facets of the relationship between the proposed State-level Voice and the State Parliament. These are:

- Section 38: present to a joint sitting an annual report and address that sets out a summary of its operations, other matters of interest to First Nations People, as well as the operations of the local voices that the legislation establishes.
- Section 39: the Voice is to be notified by the Clerks of each Chamber of the introduction of each Bill in that Chamber. It explicitly states however that failure to notify does not affect validity.
- Section 40: the Voice is entitled to address, through one of its presiding members, either House of Parliament. This is facilitated by giving 7 days written notice to the presiding officer of the House, but that requirement is waived when a Bill is passed urgently through the House. Nothing in the section affects the ability of the Voice to appear before the Houses with the Houses permission. Nothing in the section prevents the House from conducting its business, including to avoid doubt, considering and passing the Bill that the Voice wishes to address the House on, prior to such an address.
- Section 41: The Voice is given the power to provide to the Parliament a report on any matter that is, in the opinion of the State First Nations Voice, a matter of interest to First Nations people. The report is to be provided to the Presiding Officer of the Houses, which must lay it before the House. The Minister is required to respond to the report as soon as is reasonably practicable after receiving the report (but in any

[26] Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 46.

[27] Langton and Calma, Co-design Process Final Report, p.172.

event not later than 6 months after receiving the report). This response must be laid before both Houses of Parliament.

- Section 42: Allows the Houses, through the presiding officers, to request the Voice to provide the House with a report in relation to a specified Bill addressing the matters specified in the notice, but cannot compel the Voice to do so.

The South Australian Act establishes a direct relationship between the Voice and Parliament, with no mediating role for a parliamentary committee. It also provides for an ongoing (not just annual) right to report to Parliament, and a mechanism for a government response to be made in the Parliament to the Voice's concerns. It does not address, at least in its establishing legislation, concerns around timeliness and resourcing. In fact, its provisions explicitly enable the House to pass bills even where the Voice has indicated it wishes to address the House. It also does not provide a mechanism through which the Voice will have a guaranteed role in reviewing the making of delegated instruments.

These two models provide us with an understanding of how the Voice-Parliament relationship might work in practice, while also sounding some notes of caution. They are not the only models.[28] In setting the relationship between the Voice and the Parliament should start from the position that in setting up an inter-institutional relationship, this must be done with an awareness of the work of, strengths, and nature of both of those institutions.[29] This requires acknowledging that Parliament must still be able to perform its work – including in passing laws and scrutinising delegated legislation. In doing so, it represents the broader Australian population. But there must be an accommodation to the new institution, its strength and nature, so that Parliament in undertaking its work is able to benefit from the Voice. This accommodation would require that the Houses set up procedures that allow for:

- The Voice to have a regular, unmediated channel to speak to the chambers of Parliament. This might be supplemented, but should not be replaced, by the work

[28] See, e.g. Geoffrey Lindell, 'The relationship between Parliament and the Voice and the importance of enshrinement'. *AUSPUBLAW,* 2 March 2021. Accessed at: https://auspublaw.org/blog/2021/03/the-relationship-between-parliament-and-the-voice-and-the-importance-of-enshrinement.

[29] Also known as 'institutional settlement' according to Legal Process Theory. See Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*. Foundation Press, 1994, p. 148 (prepared for publication from the 1958 Tentative Edition by William N Eskridge, Jr, and Phillip P Frickey).

of a Committee. In particular, if there is a Committee that analyses consultation, it should seek the views of the Voice on whether and how it has been consulted by the government in the development of proposals, not rely on assessments by government.[30]

- A mechanism for government response to any report made by the Voice to the Parliament that raises concerns relating to government actions or policy.
- According the representations of the Voice priority in considering legislative measures, according it respect as a representative, constitutional institution established by an act of popular sovereignty.
- Encouraging parliamentary engagement and response to the work of the Voice, including providing devoted time to discuss representations of the Voice when they are made, and reporting to the public and the Voice on government responses.
- Limiting when 'urgency' can be triggered to pursue the passage of legislation without consideration of representations made by the Voice.

The Voice must be involved in the different work of Parliament that affects Aboriginal and Torres Strait Islander people – including the significant work of scrutinising delegated instruments, which have an enormous impact on the lives of Aboriginal and Torres Strait Islander people. The Voice should determine the matters on which it engages, and it should report on its work with government prior to the introduction of a Bill. The Voice should be resourced, including with a secretariat, so as to respond to this breadth of matters.

THE DYNAMICS OF THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE VOICE

Turning to the third dimension of the parameters of the relationship between the Parliament and the Voice: the responsibility of the Parliament to determine the functions of the Voice, which would include the power to set out the detail of the relationship between the Voice and the Executive (as well as work out the detail of the

[30] See similar criticisms of the New Zealand Cabinet Circular regarding consultation and reporting in Dominic O'Sullivan, Helen Came, Tim McCreanor and Jacqui Kidd, 'A critical review of the Cabinet Circular on Te Teriti o Waitangi and the Treaty of Waitangi advice to ministers'. *Ethnicities* 21(6) 2021, p. 1093.

relationship between the Voice and the Parliament, which we have already discussed above). This is a relationship has been prominent in the media,[31] and there have been suggestions by some that the clause should be narrowed so as to remove the constitutional guarantee of making representations with the Executive.[32] Such a suggestion is both counter-intuitive, and unnecessary. It is counter-intuitive, because, it is proposed because it would supposedly make it the amendment more likely to pass at a referendum, as a weaker provision, but in fact the change is likely to reduce the practical authority and effectiveness of the Voice, which is likely to make it less attractive at a referendum.

Further, the idea that it needs to be narrowed down because there are constitutional concerns is a tenuous argument,[33] making the change constitutionally unjustifiable. The Court is unlikely to interpret the current amendment as forcing the Government to respond, take into account, or follow the views of the Voice. In fact, in setting up the Voice, it will be the Parliament that will enact the necessary detail about how the Voice will be informed about government decisions, and policy development, and how its views will be received.

Which returns us to the relationship of the Voice to Parliament. In creating the Voice, the Parliament will enact detail about how the Voice will be informed about government decisions, and policy development. It might include, for instance, a system that allows the Voice to be briefed in relation to Cabinet decisions and make representations, to be briefed in relation to Ministerial decisions, and make representations, and how those will be treated by those Executive bodies/officers. It will be the role of the Parliament to determine whether the Voice's representations are mandatory considerations, or how else they are to be treated by those within Government.

---

[31] See e.g. 'Can the Voice be Rescued': Father Frank Brennan enters the debate'. *2GB Radio* Sydney, 21 February 2022. Accessed at: https://www.2gb.com/can-the-voice-be-rescued-father-frank-brennan-enters-the-debate/.

32 See e.g. Andrew Bragg. The Indigenous Voice to Parliament: Five Reasons the Voice is Right. 2023, pp. 14-17.

33 These are arguments that have been dismissed by, for instance, by the Solicitor-General of the Commonwealth: See Solicitor-General's opinion dated 19 April 2023, annexed to the submission of the Commonwealth Attorney-General to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Submissions.

Such schemes would set the vast majority of practice between the Voice and the Executive. Although, and importantly, they could not prevent the Voice from making representations proactively to Executive officers – for instance if decisions made by other public servants arose that were of concern to Aboriginal and Torres Strait Islander people that the Voice had not been officially informed about, it could still make representations. That is the importance of the constitutional baseline. But the vast majority of the relationship between the Executive and the Voice, will be set by the Parliament.

CONCLUSION

Should the referendum to constitutionally enshrine a First Nations Voice be successful, it will alter our constitutional landscape. Part of that alteration will be nation-building, in that a significant dimension of the referendum is an act of recognising the unique place of First Nations people to the lands and waters that are now called Australia, and the history of violence, dispossession and oppression that First Nations people have endured. A significant part of that alteration will be creating new constitutional relationships. In this article, I have focussed on three dimensions of the new constitutional relationship between the Voice and the Parliament. Some of those aspects are set in the constitution itself: the status and core functions of the Voice. But many will be determined by Parliament in the exercise of its constitutionally vested powers to determine the details and practical functioning of the Voice. This vests in Parliament, in large part, the responsibility for exercising those powers in a way that establishes the Voice with the necessary legitimacy to succeed.

The Voice Referendum Needs to Enter the Deliberative Zone

Andrew Cole

Chief Officer of the Parliamentary Reporting Division, Parliament of South Australia, and Adjunct Research Associate with the College of Business, Government and Law, Flinders University, Adelaide, South Australia.

***Abstract*:** This Article considers the Aboriginal and Torres Strait Islander Voice constitutional referendum proposal in the light of two previous referendums, namely the 1967 and 1999 referendums. Introducing the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill (Cth) into parliament sets the scene for an engaged referendum campaign and final ballot expected in late October or early November 2023. The referendums in 1967 and 1999 have essential lessons for the present referendum proposal and highlight serious challenges. To maximise referendum success, I argue that the ensuing referendum campaign must exhibit the highest degree of deliberative democratic expression and provide eligible voters with clear intent and explanation, readily available information, and inclusive engagement. The stakes are high that this referendum campaign does not divide the Australian community but is a vehicle for greater understanding and relationship between Australia's Indigenous and non-Indigenous communities.

INTRODUCTION

Referendums are a critical democratic exchange between the Commonwealth Parliament and the people of Australia. The prescribed method of changing the Commonwealth Constitution is established in section 128. This section requires alteration legislation to be passed by both Houses of the Commonwealth Parliament or passed by one House but rejected by the other House twice within three months. If this is achieved, the Governor-General is required to submit the bill to the eligible voters of Australia in a referendum ballot. As a result of the double-majority hurdle

that referendums must overcome, Quick and Garran have described the people of the Commonwealth of Australia as the 'delegated sovereigns' of the Constitution.[1]

With the official launch of the grassroots ‘Yes’ campaign on 27 February 2023,[2] and now the introduction of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill into the Commonwealth Parliament on 30 March 2023, the race has begun to the expected finish line of a national referendum vote on a ‘Voice to Parliament’ towards the end of 2023. While the Prime Minister has emphasised the importance of bipartisanship in the success of constitutional referendums,[3] this article aims to delve deeper into other significant influences on the progress of referendum campaigns, focussing on the level of deliberation encountered in the national debate. To maximise the success of the upcoming referendum, this article argues that the Voice to Parliament referendum campaign will need to enter the ‘Deliberative Zone’.

REFERENDUMS AND DELIBERATION

Since Federation in 1901, only eight out of forty-four referendums have been successful. In reflecting on the defeat of the 1951 referendum on abolishing the Communist Party of Australia, Menzies commented that getting an affirmative vote in a referendum is likened to one of the Labours of Hercules.[4] When looking at international comparisons, though, Williams and Hume consider that Australia has not done ‘*too* badly’ in implementing constitutional change.[5]

---

[1] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth [1901]*, Sydney: Legal Books, 1976, p. 993. *‘It is an undoubted recognition of the qualified electors as the custodians of the delegated sovereignty of the Commonwealth’*.

[2] Dean Parkin, Australians for Indigenous Constitutional Recognition, ‘In the Media’. Accessed at: https://yes23.com.au/in-the-media.

[3] Maeve Bannister, The New Daily, ‘PM gets party room ready for referendum challenge’. Accessed at: https://thenewdaily.com.au/news/politics/australian-politics/2023/03/21/pm-gets-party-room-ready-referendum-challenge/.

[4] George Williams and David Hume, *People Power: the history and future of the referendum in Australia*, Sydney: University of New South Wales Press, 2010, p. 199.

[5] Williams and Hume, *People Power: the history and future of the referendum in Australia,* p. 200.

The term 'deliberative' can encompass various meanings,[6] and the understanding among political theorists has evolved through several waves or generations of thinking. Dryzek and colleagues have proposed a contemporary conception befitting a modern pluralist democracy and more attuned to the practical implications of how deliberative exercises can be structured in large complex societies to build 'essential democratic capacity'.[7]

For Dryzek and colleagues, 'deliberative' means 'mutual communication that involves weighing and reflecting on preferences and values, and interests regarding matters of common concern'.[8] The role of deliberative exercises is to enable participants to understand issues, their interests, and the interests of others concerning a particular proposition. It seeks agreement where possible and, where not possible, to clarify any conflict in positions and intentions. This definition provides a valid starting point for the following discussion.

Referendums have been an active field of study in both theory and practice in Australia and internationally. Butler and Ranny provide a wide comparative study of the form and functions of referendums.[9] Setälä explores the tension inbuilt within referendums between majoritarian decision-making and the perceived threat to minorities when examining referendums and democratic government.[10]

Galligan analysed Australia's constitutional landscape after the large defeat of the 1988 referendum proposals. Galligan asserted that while the defeat of the 1988 referendum would cause constitutional change to be unlikely for some time, Australia's constitution

[6] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament.* Sydney: Cambridge University Press, 1998, p. 4.

[7] Andre Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren, 'Deliberative Democracy: An Introduction', in Andre Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren (eds), *Oxford Handbook of Deliberative Democracy*, Oxford: Oxford University Press, 2018, p. 31.

[8] Bächtiger, Dryzek, Mansbridge, and Warren, *Deliberative Democracy: An Introduction*, p. 18.

[9] David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory*, David Butler and Austin Ranney (eds), Washington: American Enterprise Institute, 1978. See also David Butler and Austin Ranney, *Referendums around the World*, David Butler and Austin Ranney (eds), Washington: American Enterprise Institute, 1994.

[10] Maija Setälä, *Referendums and Democratic Government: Normative Theory and the Analysis of Institutions,* London: MacMillan Press, 1999.

should not be considered frozen or static.[11] Galligan considered that partisanship, lack of knowledge and apathy, as well as a 'pro-State sentiment' were factors in the referendum defeat.[12]

When reviewing the aftermath of the defeated 1999 referendum, Uhr considered that while apathy and cynicism played a part, the referendum process does little to prevent widespread misrepresentation of issues and little to encourage open and respectful debate where alternative views are respectfully considered.[13]

Williams and Hume reviewed eight referendums in Australia between 1906 and 1999 and described similar factors at play when looking at why referendums fail. They consider that the record of referendum success highlights crucial elements such as popular ownership of the referendum process, deliberation and education, consultation and compromise.[14]

In arguing that referendums must enter the Deliberative Zone, LeDuc provides a valuable intersection between referendums and deliberative democratic theory by proposing several factors that improve the level of deliberation found in a referendum campaign. Le Duc contrasts what he describes as the 'voice' and the 'vote' functions of a referendum.

By 'voice', LeDuc means the general conception of deliberation that allows for a process to incorporate various positions and discuss issues that enable the voting public to make an informed decision. By 'vote', he means the discrete final act of completing a written ballot at the end of the referendum campaign process.[15] The distinction is intended to provide a normative framework to support the proposition that additional deliberative elements are needed for a better direct democratic referendum process.

---

[11] Brian Galligan, *The Constitutional Commission and the 1988 Referendums,* Brian Galligan & JohnNethercote (eds), Canberra: Australian National University, 1989, p. X.

[12] Brian Galligan, *The Constitutional Commission and the 1988 Referendums,* p. 130.

[13] John Uhr, 'Rewriting the Referendum Rules', in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future,* St Lucia: University of Queensland Press, 2002, pp. 188-199.

[14] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia,* pp. 236-237.

[15] Lawrence LeDuc, 'Referendums and deliberative democracy', *Electoral Studies*, Vol 38, 2015, p.139.

LeDuc concedes that deliberative theory and referendums might not, at first sight, seem to have much in common.[16] Referendum ballots require a formal decision based on available information in a highly partisan environment. In contrast, deliberative theory involves a process of rational debate, respected opinions, and freedom from coercion or deception. LeDuc argues, however, that the institutions and processes surrounding referendums do share common elements with deliberative democracy, such as the need to establish an environment conducive to discussing issues publicly and enabling a well-informed decision to be made.[17]

LeDuc identifies twelve influences that can affect or influence the level of deliberation. Here I concentrate on four of the more significant of these elements.[18] The first element is motive, which recognises that referendums are not necessarily initiated by the government of the day for purely deliberative reasons. The second element is the 'role of government' in a referendum, as they are the most prominent political player able to communicate the justification for the referendum. The third of Le Duc's elements is that a referendum question must be clear and concise to support an informed referendum debate. Yet, as DeLuc highlights, clarity is not an easy attribute to define or achieve. The last element to consider is whether a referendum campaign involves a range of complex issues that need to be processed and understood by the voting public. Is it sufficient to accept the 'vibe' for good deliberation?

TWO REFERENDUMS

Two referendums considered here provide a valuable perspective for the present debate over the proposed referendum on an Indigenous 'Voice to Parliament'. The first referendum to look at is the 1967 referendum consisting of two proposals regarding the number of Members of Parliament and matters related to Aboriginal affairs. The second referendum to consider is the 1999 referendum regarding the issue of an Australian republic and a proposed new preamble to the Constitution. These two

---

[16] Lawrence LeDuc, 'Referendums and Deliberative Democracy', 2006. Accessed at: http://paperroom.ipsa.org/papers/paper_5268.pdf.

[17] Lawrence LeDuc, 'Voice vs. Votes: Adapting the Institutions and Processes of Direct Democracy to Improve Citizen Engagement and Participation', 2016. Accessed at: http://labs.carleton.ca/canadaeurope/we-content/uploads/sites/9/LeDuc-CETD-Brief-Final.pdf.

[18] LeDuc, Referendums and Deliberative Democracy, 2006, p. 7.

referendums provide a helpful illustration of the impact of the selected influences above.

1967 REFERENDUM

The 1967 referendum is particularly interesting to review, not only for the social impact of the outcome but also for the nature of the subject matter itself. The context of the 1967 Referendum was that it was a momentous time for civil rights and social change, especially when considering the events taking place in other countries worldwide, especially in America.

The first question on the referendum ballot related to what is called the 'nexus' between the House of Representatives and the Senate, in that the number of Members in the House of Representatives is constrained to be, as near as practicable, twice the number of Senators (amendment to section 24). The second question related to removing impediments to the Commonwealth Parliament in making laws for Aboriginal people (amendment to section 51(xxvi)) and ensuring that Aboriginal people were counted in the formal Commonwealth Census to determine the population of the Commonwealth, which would consequentially impact the determination of the number Members within Parliament (repeal of section 127).

At the time of Federation in 1901, the Commonwealth Parliament did not hold the direct power to make laws over Aboriginal people as it was not considered necessary by the framers of the Commonwealth Constitution.[19] It was felt that the newly established states were best placed or positioned to manage the affairs of the Aboriginal population within their jurisdiction as they had done as separate colonies. Attwood and Markus highlight that:

[19] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007, p. 1. See also *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, Canberra: Commonwealth of Australia, 2012, p.14.

> *Aboriginal people were barely mentioned during the debates of the federal conventions which determined the terms of the nation's foundational document.*[20]

George Williams characterises the framing of the Constitution as being premised upon the notion of 'exclusion and discrimination'.[21] There was also the assumption that the protection of rights was best left to Parliament and not to be defined within the Constitution.[22] This view was further reinforced in the 1929 Royal Commission into the Australian Constitution, which declined to make any recommendations regarding Aboriginal matters, especially any proposals regarding section 51(xxvi) of the Constitution, thereby leaving legislative powers regarding Aboriginal people in the hands of the respective States.[23]

Regarding the proposal regarding the repeal of section 127 of the Constitution, it was clear that the administration of the census from 1901 excluded the counting of all full-blood Aboriginal people in the reported population tables for each State. While Griffiths concedes this to be the product of the political environment of the time[24], the Commonwealth Chief Statistician did encourage the informal counting of all Aboriginal people in an annual census from 1924 onwards.[25]

Motive

When considering the element of *motive*, the focus is whether the reason to submit a referendum proposal to a national vote has contributed to good deliberation. In looking at the 1967 referendum, the motive of the Holt Liberal/Coalition Government had less to do with the cause or aspiration of Aboriginal progress than it did with the

---

[20] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, p. 1.

[21] George Williams, 'The Races Power and the 1967 Referendum', *Australian Indigenous Law Review,* 11 2007, pp. 8-11.

[22] Larissa Behrendt, 'The 1967 Referendum: 40 Years On', *Australian Indigenous Law Review,* 11 2007, pp. 12-16.

[23] John Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901-1967', in *Parliament: The Vision in Hindsight*, Geoffrey Lindell and Robert Bennet (eds), Leichardt: The Federation Press, 2001, pp. 149-209.

[24] Max Griffiths, *Aboriginal Affairs: A Short History,* Sydney: Kangaroo Press, 1995, p. 46.

[25] Statistician's Report, *Census of the Commonwealth of Australia 30 June 1933*, Canberra: Commonwealth Government Printer, p. 117.

political calculation that the popularity of the proposal to repeal section 127 of the Constitution could draw sufficient support of the other question on the ballot paper. That question was the proposal to break the 'nexus' or link between the number of members of the two Houses of Parliament and allow an increase in the number of members of the House of Representatives without increasing the number of Senators. This was the main political game of the Government.[26]

There was also a significant element of support for the ability of the Commonwealth to legislate on Aboriginal matters and to include Aboriginal people within the numerical population census of the Australian Commonwealth. The pressure for changing the Constitution commenced soon after Federation in 1901, with petitioning campaigns from 1910 onwards, moving through to the 1930s with proposals for dedicated parliamentary seats for Aboriginal representatives within the Commonwealth Parliament. These campaigns were organised through the advocacy of the likes of William Cooper and the Australian Aboriginals League,[27] and the Federal Council for Aboriginal Advancement of the 1950s/60s.[28]

The primary motive for initiating the 1967 referendum was establishing a government advantage in the House of Representatives and taking advantage of a civil rights movement's influence to achieve political gains within the Commonwealth Parliament.

Role of Government

The role of the Government during a referendum campaign is the second influence highlighted by LeDuc. This is relevant within an Australian context as constitutional changes can only be initiated in Parliament through the prime agency of the government of the day. Since Federation in 1901, there have been 79 constitution alteration bills out of a total of 115 bills introduced to Parliament that have either lapsed for lack of support or were withdrawn by the Government before the actual

[26] Zachary Gormanand Greg Melleuish, 'The nexus clause: A peculiarly Australian obstacle', *Cogent Arts & Humanities*, 5 (1) 2018, pp. 11-16.

[27] Bain Attwood and Andrew Markus, *Thinking Black*, Canberra: Aboriginal Studies Press, 2014, p. 9. William Cooper petitioned King George V in 1933 to advance the proposal to introduce dedicated parliamentary seats within the Commonwealth Parliament for Aboriginal representatives.

[28] Bain Attwood and Andrew Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, Canberra: Aboriginal Studies Press, 1997, p.21.

issue of referendum writs. The role of government in managing the passage of a referendum bill through Parliament to be submitted to a national vote is crucial.

The decision of the Holt Government to proceed with the 1967 referendum was made early that year, with a referendum scheduled for 27 May. The passage of this alteration bill commenced with the Menzies Government in 1965 and was primarily focused on the issue of breaking the 'nexus' or link between the number of the House of Representatives and the Senate. Cabinet papers at the time indicate that the decision to add the questions regarding Aboriginal matters was made in the hope that it would create a positive influence on the question regarding parliamentary members.[29] The Holt Government prosecuted the case for change primarily in terms of the 'nexus' question and effectively left the referendum campaigning in the hands of various non-government advocacy groups such as the Federal Council for the Advancement of Aboriginals (FCAA), later renamed the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI), involving especially women activists such as Faith Bandler.[30] There was a distinct sense that the Government was only interested in the political advantage of breaking the link between the Senate and the House of Representatives and had exhibited a decided lack of concern for Aboriginal affairs.

While the actual referendum vote on the Aboriginal question was passed with the largest margin of all referendum questions, the Holt Government should have moved straight away to take advantage of the extent of public support for change. The Holt Government only recognised considerations of the condition of Aboriginal communities at least three months after the referendum result. Holt eventually told the Commonwealth Parliament, via a Ministerial Statement on the 7th of September 1967, that he would be simply maintaining the status quo in Aboriginal affairs and expected the States to continue to hold prime responsibility for Aboriginal affairs.[31]

[29] Bain Attwood and Andrew Markus, 'Representation Matters: The 1967 Referendum and Citizenship', in *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities,* Nicolas Peterson & Will Sanders (eds), Cambridge: Cambridge University Press, 1998, pp. 121-124.

[30] Kate Laing and Lucy Davies, 'The Leadership of Women in the 1967 Referendum', *Agora,* 56(1) 2021, pp 13-18.

[31] Harold Holt, *Commonwealth Parliamentary Debates,* House of Representatives, 7 September 1967, pp. 972-975.

Clarity

The third element of our framework is that of clarity, which relates to the extent to which the actual framing of the question itself can contribute to good deliberation. The nature of this element is whether a referendum question is sufficiently clear to support good engagement and debate, especially accepting that good deliberation should enable participants to understand issues, seek agreement where possible and clarify any conflict in positions and intentions.

In looking at the first question regarding the 'nexus' clause of the number of members in both Houses of Parliament, the wording of the referendum question on the ballot paper was concise and clear, being to 'to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of Senators. While the ballot question was straightforward, the explanation of the change in the official Yes/No pamphlet comprised most of the written pages.

In looking at the second referendum question, the wording on the ballot paper was general. It was 'to alter the Constitution to omit certain words relating to the people of the Aboriginal race in any State and so that Aboriginals are to be counted in reckoning the population'. With the question requiring reference to different material, the assumption was that voters would have explored and understood the proposed changes and were aware of its contents and consequences.

This assumption had been off the mark, as opinion polls at the time of the referendum indicated that many Australians believed the effect of the referendum would be to deliver equal rights for Aboriginals or that it would provide the right to vote. A Morgan Gallop Poll on 19 May 1967, one week before the referendum, indicated that 22% of the Australian public believed the referendum would deliver equal rights for Aboriginals.[32] A further 14% thought the referendum would benefit Aboriginals, especially 'better opportunities' and 'improved conditions'.[33] Neither of these beliefs was correct. The right to vote had already been established at the Commonwealth level

[32] Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, power and the Australian Constitution*, p. 49.

[33] Murray Groot and Terrance Beed, 'The referenda: Pollsters and predictions', *Australian Journal of Political Science*, Vol 12 1977, pp. 86-95.

in 1962, with the last State to legislate the right to vote for Aboriginals was Queensland in 1965.[34]

In explaining the second ballot question in the Yes/No pamphlet, there was only a short one-and-a-half-page formal 'Yes' case detailed, with no proper 'No' case included. It was left, therefore, to the various advocacy groups to promote the cause for change with their resources.[35]

As highlighted by LeDuc, clarity is an important influence on the level of deliberation in a referendum campaign. It is an interesting irony that the Government devoted the most resources to justify the first referendum question but failed to obtain a successful result. The second question was more precise but was provided with the least amount of supporting material, but succeeded. The issue of clarity was recognised by Linda Burney in her commentary on the 1967 Referendum and reconciliation efforts. Burney's view is that success in any future proposals will be contingent on a clarity of vision and clarity of purpose.[36] This is a significant factor for the upcoming Voice to Parliament referendum proposal currently before the Commonwealth Parliament.

Complexity

The fourth element of Le Duc's framework is that of complexity. That is, whether there is a multiplicity of institutional structural issues and potential consequences embedded in a referendum question that complicates good deliberation through this level of complexity.

While the first ballot question on breaking the nexus between the House of Representatives and the Senate was clear, it did include complex issues related to the perceived balance of power been the two Houses of Parliament, especially in an environment where Senate numbers could provide obstacles to Government legislation, especially budget or money bills. Meanwhile, while simpler but most

[34] John Gardiner-Garden, 'The 1967 Referendum—history and myths', *Research Brief No 11*, Canberra: Commonwealth of Australia, 2007, pp 15-19.

[35] Attwood and Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, p.37.

[36] Linda Burney, 'Reconciliation and Referendum: 1967 to present', *Australian Journal of Public Administration,* 76 (4) 2017, pp 409.

misunderstood, the second question succeeded by the most significant margin of all referendums held since Federation in 1901.

One of the misunderstandings of the referendum campaign was that a successful 'Yes' vote would somehow resolve the past deficiencies in Aboriginal rights and their status as citizens. This assumption overstated the proposed and implemented changes due to the referendum. The referendum result was expected to improve welfare programs and opportunities for Aboriginals.[37]

> *In my view, the best single explanation for the success of the original referendums between 1898 and 1900, which adopted the Constitution, was the idealism and inspiration which built up around the goal of federation. This, too, may explain the unprecedented success of the 1967 referendum on Commonwealth powers to make special laws for the Aboriginal people. The fact that the actual Constitutional changes involved were widely misunderstood, both at the time and since, only reinforces this interpretation.*[38]

The first question could not achieve a majority 'Yes' vote at a national level, with only 40.25% voting 'Yes' and only one State, New South Wales, gaining a greater than 50% approval. The second question was passed with a national average vote of 90.77% in favour and a positive 'Yes' result in every State.

1999 REFERENDUM

The second selected referendum to consider is the 1999 referendum on the issue of an Australian republic. The Howard Liberal/Coalition Government initiated this referendum in 1998 due to previous electoral commitments leading up to the 1996 Federal election. The broader context of the 1999 referendum was the establishment of the Constitutional Centenary Foundation in 1991 to promote understanding and discussion about the Australian Constitution and Australia's system of government during the lead-up to the Centenary of Federation in 2001. A consequence of establishing this non-partisan body was the subsequent establishment of two opposing

[37] Attwood and Markus, *The 1967 Referendum, or When the Aboriginals Didn't Get the Right to Vote*, p. 39

[38] Helen Irving, 'The Republic Referendum of 6 November 1999', *Australian Journal of Political Science*, 35(1) 2000, p. 115.

parties, the Australian Republican Movement in July 1991 and the Australians for a Constitutional Monarchy in June 1992.

Motive

Looking at motive as an influence on deliberation, we need to consider the political drivers that led to the referendum proposal being put to a national vote and how motive can contribute to the level of deliberation encountered.

The broader context of the 1999 referendum was the establishment of the Constitutional Centenary Foundation in 1991 for the purpose of promoting understanding and discussion about the Australian Constitution and Australia's system of government during the lead-up to the centenary of Federation in 2001. On 28 April 1993, the then Keating Labor Government initiated the Republican Advisory Committee with the primary task of examining the options to advance the minimal changes necessary to establish an Australian Head of State. This Committee, headed by Malcolm Turnbull, reported back to the Commonwealth Parliament in October 1993, resulting in the Keating Labor Government committing to holding a referendum on the issue of an Australian Republic by the centenary of Federation in 2001. The Liberal/National Coalition opposition matched this proposal and that, if elected, they would establish a 'People's Convention' on the issue and, if practical options were developed, a Liberal/National Coalition Government would progress this option to the Australian people in the form of a constitutional referendum.

After the Liberal/National Coalition won the March 1996 Federal election, it would have been easy to allow the previous government's referendum proposal to fade into the background of unfulfilled electoral promises. The calculation by then Prime Minister John Howard, in progressing this proposal, was that he could present the referendum to the people of Australia to decide, but at the same time demonstrate his opposition to the referendum proposal hoping to neutralize the issue.[39]

[39] John Uhr, 'Testing Deliberative Democracy: The 1999 Australian Republic Referendum', *Government & Opposition,* 35(2) 2014, p. 207.

Role of the Government.

How the government of the day conducts itself during a referendum campaign can influence the level of deliberation over a particular referendum proposal. The Howard Government announced, on 10 October 1999, that the Government would not fund any ‘Yes and No’ cases for the first referendum question relating to the Preamble. Therefore, this funding restriction could have impacted the ability to inform the voting public of the details of the first proposal.[40] The higher ‘No’ vote that registered for the Preamble question, compared to the second question on the issue of a republic, potentially reflects the lower profile the proposed new preamble received during the referendum campaign and the lack of engagement with the voting public.

On the issue of the second question on the referendum ballot regarding a proposed Australian Republic, the Howard Government established a separate ‘people’s convention’ to debate the case of a republican head of state. The convention aimed to publicise the debate and significantly influence the referendum’s outcome. While the convention significantly contributed to an increased level of debate and public accessibility of information regarding the referendum, other factors have been proposed for the failure of the referendum.[41]

Clarity

The third element LeDuc considers when analysing contributions or obstacles to the level of deliberation found within referendum campaigns is that of clarity. The more precise the referendum question, the greater the likelihood that voters will understand the purpose of the referendum and will not be subject to different interpretations or deliberate misinterpretations. While the Australian Electoral Commission produced a 38-page ‘Yes-No-Pamphlet’, this document still did not detail the actual alteration bills and required more investigation on the part of the individual voter.

Ian McAllister has highlighted the difficulty in people understanding what they were being asked to vote for, combined with an electoral system of compulsory voting in

---

[40] Mark McKenna, ‘First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991-99’, *Research Paper No. 16*, Canberra: Commonwealth of Australia, 2000, p. 16

[41] George Williams, ‘The 1998 Constitutional Convention-First Impressions, *Current Issues Brief No 11*, Canberra: Commonwealth of Australia, 1998, p.5.

requiring attendance at a polling booth to vote, provided a major cause of the referendum defeat.[42] This is an important lesson to remember for the current referendum campaign.

Complexity

The last of the four elements of analysis is that of complexity. LeDuc highlights that a multiplicity of issues or excessive complexity can contribute to difficulties in deliberation. As the problems or level of impacts embedded within a referendum question increase, the greater likelihood that people will find it challenging to engage in reasoned debate. The more issues built into a referendum question, the greater the potential for failure.

One aspect of the complexity of the 1999 republican referendum was the overlapping referendum questions included on the ballot paper. The first question related to the Preamble, the second referencing a Bill to amend the constitution to abolish the Monarchy and establish a President as replacement Head of State. While both questions related to different components of the Commonwealth Constitution, the two referendum questions were distinct and separate elements and not explicitly connected. Would there have been a more successful outcome if there had been only one proposed element of change? Higley and McAllister have pondered that the 'ability of voters to understand complex political changes has long been a problem with referendums, and with the potential for direct democracy more generally'.[43]

Regarding the first ballot question, the preamble lives outside the standard legal clauses of the Constitution. The preamble is contained within the covering clauses of the British Imperial Act that established the formal Constitution. A significant issue raised with this ballot question was the confidence level in whether a referendum under section 128 of the Constitution could amend the covering clauses of the Imperial Act. The complex issues built within the preamble question certainly detracted from its

[42] Ian McAllister, 'Elections Without Cues: The 1999 Republican Referendum', *Australian Journal of Political Science*, 36(2) 2001, p. 247.

[43] John Higley and Ian McAllister, 'Elite division and voter confusion: Australia's Republic referendum in 1999', *European Journal of Political Research,* 41 2002, p. 859.

potential success. As stated by Les Murray after the referendum, ‘the thing had been crippled by compromise, whereat the people in their mercy took it out and shot it’.[44]

In referencing an amending act to abolish the Monarchy and establish a President, the second referendum question suffered a similar fate regarding the complicated structural and institutional issues involved within the ballot question. The impact of linking the two questions, as difficult as they were, with divided advocates of alternative republican models, with a perceived lack of voter knowledge, combined with compulsory voting, led to a ‘depressed’ vote for change and, therefore, a contribution to its failure.[45] LeDuc considered the 1999 Referendum in his work and calculated that including these complex issues of removing the Monarchy and electing a President may have been significant factors in why the referendum question failed.[46]

In assessing the aftermath of the 1999 referendum, John Uhr gave thought to two essential lessons coming out of the referendum, namely, what future republican options could be considered that may have better success, and secondly, that the referendum procedures ‘failed to give Australia a constitutional change process that measures up to the best standards of a "deliberative democracy", defined as a democracy striving to maximise reasoned public deliberation and to minimise partisan deception’.[47] The complex institutional structures in the referendum question made simple arguments difficult. The extent to which the Voice to Parliament referendum is impacted similarly will be fascinating to see unfold.

The current wording of the referendum, as detailed in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 (Cth), goes beyond what was described in the Final Report of the Referendum Council, where a constitutionally entrenched Voice simply to the Federal Parliament was the most endorsed by Dialogue participants as the most preferred option for constitutional alteration.[48]

---

[44] Les Murray, ‘Mates Lost and Saved: Drafting the Constitutional Preamble‘, in *Constitutional Politics: The Republic Referendum and the Future*, John Warhurst and Malcolm Mackerras (eds), St. Lucia: University of Queensland Press, 2002, p. 86.

[45] Ian McAllister, *Elections Without Cues: The 1999 Republican Referendum*, p. 247.

[46] LeDuc, *Referendums and Deliberative Democracy*, 2006, p. 14.

[47] John Uhr, ‘After the Referendum: The Future of Constitutional Change’, *Public Law Review*, Vol 11 March 2000, p. 7.

[48] Referendum Council, *Final Report.* Canberra: Commonwealth of Australia, 2017, pp. 14-15.

CONCLUSION

In arguing that referendum campaigns must exhibit the highest degree of deliberative democratic expression and enter the Deliberative Zone, national referendum campaigns must provide eligible voters with clear intent and explanation of an alteration proposal, provide readily available information and inclusive public engagement, to overcome the double-majority affirmative vote requirement of Section 128 of the Constitution.

The usefulness of the analytical framework provided by LeDuc is that it gives insight into the influences at play when looking at referendums as an exercise of direct democracy and public engagement. In comparing the 1967 and 1999 referendums, Mark McKenna sees that this coming referendum is not a repeat of 1967 but has more in common with the 1999 referendum. The dynamics will be quite different as the proposed change is broad, there will be a ‘No’ case mounted, and the impact of social media will be large.[49]

Having regard to the work of LeDuc and the influences he has identified regarding deliberation and referendums, what happens from now is that the recently established Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum will examine and receive submissions from the public on the proposed alteration and allow representations to be made to the Committee as part of its public examination of the referendum bill. It will be of critical importance how the Albanese Government responds to the Committee’s Final Report, due to be tabled in May. There should also be a series of deliberative assemblies established in each State and Territory to be a catalyst for a broader discussion and public opinion formation regarding the proposed constitutional change. These deliberative assemblies would work as an auxiliary mechanism to the Parliament, adding a deliberative layer to the ensuing referendum campaign. With an expected referendum ballot to be held in late October or early November 2023, there is time to ramp up the level of deliberative engagement.

Ideally, the public discourse from now until the referendum vote will be considered, respectful and will enable the public to understand the issues related to the proposed Voice to Parliament and its impact on Parliament and the Executive Government. The race to the referendum finish line has begun. The Aboriginal and Torres Strait Islander

[49] Mark McKenna, ‘Australia in Four Referendums’, *Meanjin Quarterly,* 81(4) 2022, pp. 75-78.

Voice to Parliament referendum must enter the Deliberative Zone to maximise its success in this referendum race.

The Shake-Up: New rules in play for the NSW Legislative Council

Allison Stowe

Principal Council Officer, Legislative Council, Parliament of New South Wales[1]

Abstract. In 2019, a post-election non-government majority seized the day and undertook the biggest single shake up of the rules of the NSW Legislative Council since 2004. Forty-one rules were adopted on the first day of business for the 57th Parliament. Seventeen more followed. Some give effect to procedures previously trialled, others were necessitated by the pandemic. Many were new. Primarily the House desired to further enhance its ability to scrutinise the Executive, as well as provide more opportunities for private members' business to conduct business. To achieve these objectives, a wide array of House procedures were revised, including: Questions, private members' business, committees, the conduct of business, the adjournment and parliamentary secretaries. This article outlines the context for change in 2019, details the new rules adopted between May 2019 and December 2021, and reflects on their operation. The impact of the new rules is also explored. In doing so it becomes apparent that the extent of procedural reforms and their use by members is a significant achievement for the Council.

[1] The views in this paper are those of the author and do not necessarily reflect those of the Parliament of NSW or their members. An earlier version of this paper was presented at the 2022 ASPG Conference, Victoria.

… I hope these reforms will reflect well on the House and that we use them to hold the Government to account. This series of changes will have significant and positive outcomes not only for the House but also for the people of New South Wales as we rebalance the power between the Parliament and the Executive. Having worked across the Chamber with parties that are often at loggerheads, I hope it is a good signal for the next four years of parliamentary practice.

Mr David Shoebridge, The Greens [2]

INTRODUCTION

The rules and procedures observed by parliaments serve to ensure our democratic institutions function. Given their role, the rules adopted by jurisdictions, as well as the differing approaches taken to determine them, are of common interest across parliaments. In New South Wales, the Legislative Council operates according to a combination of continuing 'Standing Orders' approved by the Governor, and a series of 'sessional orders' adopted by the House for that parliamentary session only.[3] In the years immediately prior to 2019, the operation of the rules and practices of the House came under increasing scrutiny. A view emerged that much could be gained through procedural reform. Enhancing the capacity of the House to scrutinise the Executive was a key objective for members.[4] As was providing more opportunities for private members to raise matters of interest or concern.[5] Efficiencies in the operation of the House were also sought.[6] While certain procedures were discussed or trialled in the 56th Parliament, the increased and diversified non-government majority resulting from the 2019 State election was the impetus for a wide ranging shake up in the 57th Parliament. This article will explore the wide array of House procedures that were

[2] D. Shoebridge, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 135-136.

[3] The House may also introduce rules which regulate proceedings via 'resolutions' or 'temporary orders'. While in New South Wales these are procedurally distinct to 'sessional orders', in this paper some rules established via these alternative mechanisms are included within the discussion of 'sessional orders'. Explanatory references are contained in footnotes wherever necessary.

[4] A. Searle, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 77-78, p 82, p 106.

[5] D. Shoebridge, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 78.

[6] Revd F. Nile, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, pp 113.

revised between May 2019 and December 2021 by outlining the context for change in 2019, detailing the new rules adopted, and reflecting on their operation. It is hoped these insights prove useful for other jurisdictions who embark on procedural reform.

Forty-one sessional orders were adopted on the first day of business for the 57th Parliament in May 2019. Seventeen more followed. About two-thirds of these 58 sessional orders were new, or a variation on past practice. While a small number of sessional orders have been necessitated by the pandemic, procedural reform has been the overwhelming focus. The new rules have been far-reaching, with few areas of the operation of the House unchanged. New sessional orders have been adopted for questions, committees, private members' business, the conduct of business, the sitting pattern and parliamentary secretaries.

As a result of the wide scope of change, it is not possible for this article to individually assess each new rule in detail. Instead, this paper provides a brief background and context for the 2019-2021 changes, outlines the intent and scope of the new rules, and explores the overall impact and use of the sessional orders within three themes: scrutiny, private members and conducting business. It also touches on how the new rules fit within the traditions of the House, and the ‘great principles of parliamentary law’.[7]

In doing so the extent and nature of the impact of the new rules becomes apparent. In the main, they have achieved members’ objectives. The new rules have enabled the House to further exert its powers to hold the executive to account and have dramatically enhanced the capacity of the House to conduct business, particularly that of private members. Despite the disruption caused by the pandemic, the House has been far more active than any before it. The 57th Parliament has been both extremely busy and immensely complex, with members utilizing any opportunity available, both new and old, to exercise their roles as members in a House of Review. The new sessional orders have also enhanced the existing standing rules and procedures of the House, further developed the way in which the House exercises its powers and traditions and have sought to uphold the principles of parliamentary law and practice.

[7] This paper is guided by ‘the great principles of English parliamentary law’, as quoted and summarised in the form of six questions in D. Blunt, *Parliamentary traditions, innovation and ‘the great principles of English parliamentary law’*, Parliament of NSW, presented at ANZACATT, Canberra, 2012.

Overall, the procedural reforms of the 57th Parliament have been viewed by members as an important achievement.[8] This positive view has resulted in support for exploring their ongoing application.[9] The adoption of new Standing Orders could indeed mark this Parliament as having introduced the single most wide-ranging reform of the rules of the House.[10]

2004-2019: Background and Context

Proceedings in the Legislative Council are conducted according to 'standing orders' adopted by the House, and approved by the Governor, under section 15 of the Constitution Act 1902.[11] In the 57th Parliament there were 234 Standing Orders, adopted in 2004, and replacing the Standing Orders of 1895. In addition, each session, the Standing Orders are supplemented, varied or overridden by 'sessional orders' to ensure that the rules governing the conduct of business reflects the needs of the House in that parliamentary session.[12]

From the reconstitution of the Council in 1978 until 2004, sessional orders were progressively adopted and relied on 'to cover the increasing gaps' in the Standing Orders.[13] During this time, procedural reform could be characterised as ongoing but intermittent, with rules considered at the commencement of a parliament or as an issue arose. Simplifying and codifying this complicated body of sessional orders was the driving impetus for the 2004 revision, with only a limited number of new procedures introduced.[14]

---

[8] See Christmas Felicitations, New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019.

[9] See New South Wales Procedure Committee Review of the Standing and Sessional Orders inquiry, *Review of the Standing and sessional orders*, Legislative Council, 31 March 2022.

[10] Subsequent to the finalisation of this paper in December 2021, the New South Wales Legislative Council adopted new Standing Orders on 17 November 2022, approved by Her Excellency the Governor on 20 February 2023.

[11] *Constitution Act 1902*, (NSW) s 15(1)(a). Under these provisions, standing rules and orders are approved by the Governor and have ongoing effect beyond a parliamentary session or term.

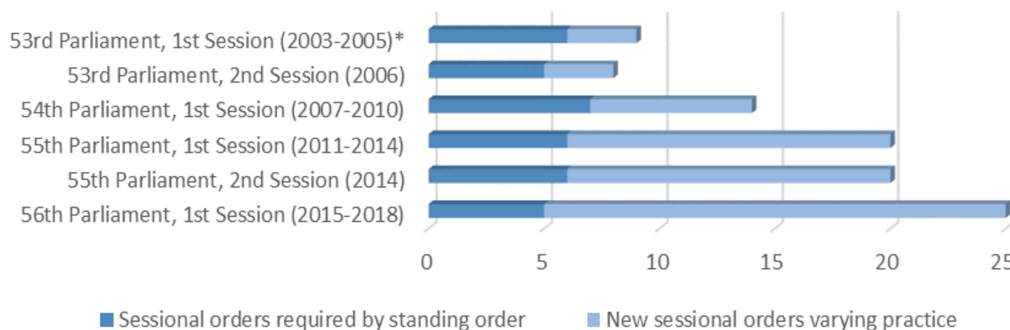
[12] While there is a solid body of precedent relating to the use of sessional orders by the Council, there have been discussions concerning their status and use in the current parliament. These issues are discussed further in V. Mignacca, *Sessional orders as a vehicle for procedural reform in the New South Wales Legislative Council,* Parliament of NSW, 2022.

[13] M. Egan, New South Wales, *Parliamentary Debates*, Legislative Council, 5 May 2004, p 8264.

[14] Stephen Frappell and David Blunt (eds.) *New South Wales Legislative Practice*, 2nd Edition, The Federation Press, 2021, p 316. See also Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales*

A similar, incremental, increase in the use of sessional orders occurred again between 2004 and 2019. In 2004 only nine sessional orders were adopted, the majority of which were required under the revised Standing Orders for the purpose of scheduling business (e.g. times of meeting, precedence of business). By 2018 the number of sessional orders had risen from nine to twenty-five, twenty of which varied practice or introduced new procedures. The chart below shows this increasing use of sessional orders, providing a breakdown of sessional orders required by Standing Order, compared to those which varied or introduce new practices and procedures.

Figure 1. Sessional orders by parliamentary session 2003 – 2018



Between 2004 and 2018, the impetus for new sessional orders varied. Some new sessional orders were an immediate response to events in the House. For example, an extended filibuster in 2011 over industrial relations legislation resulted in the introduction of time limits for speakers.[15] More often, the House established committee inquiries to review an existing practice as need arose or consider a new sessional order when proposed. Thirteen such inquiries were conducted by the

Legislative Council, The Federation Press, 2018, for a comprehensive examination of the purpose, operation and development of the Council's Standing Orders.

*Statistics for this session are reflective of the sessional orders adopted after the 2004 Standing Orders came into effect.

[15] New South Wales, *Minutes*, Legislative Council, 2 June 2011. The bill was mostly considered on the sitting day of Thursday 2 June which did not conclude until Saturday 4 June. During debate three members spoke for approximately six hours each. In order to progress the bill, the conduct of certain proceedings were varied and on three occasions debate as closed via 'guillotine' motions which required the 'question be now put' (Standing Order 9).

Procedure Committee between 2004 and 2019,[16] as well as a 2016 committee inquiry into the Legislative Council Committee System.[17] Particularly in 2011, at the commencement of the 55th Parliament, and in 2017 in the later part of the 56th Parliament, inquiries resulted in the adoption of sessional orders which varied practice.

By the end of the 56th Parliament, fifteen sessional orders were based on inquiry recommendations. These changes were broad in scope, relating to cut-off dates for the receipt or introduction of government bills, the Selection of Bills Committee[18], government responses to petitions, the operation of private members' business, and voting by members with the care of a child. In instances where immediate change was not recommended or a recommended change did not occur, their consideration nevertheless highlighted to members the possibilities for procedural reform via sessional order and provided a basis from which consideration could be given to *future* changes to practice and procedure.

2019: THE SHAKE-UP

'Future' change came surprisingly swiftly. While the 56th Parliament initiated or explored a number of reforms, the real impetus for broad and significant procedural change came at the beginning of the 57th Parliament. Following the 2019 State election, the non-government majority in the House expanded and diversified.[19] Within this increased non-government majority, Mr Searle (ALP - Opposition), Mr Shoebridge (The Greens), and Mr Borsak (Shooters, Fishers and Farmers Party), saw there was

[16] Between 2004 and 2018 the Procedure Committee examined: the sitting pattern, deadlines for government bills, rules for questions, procedures for private members' business, e-Petitions, expert assistance to committees, and young children accompanying members in the chamber. Inquiry information is available via the committee webpage. Accessed at: https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=191#tab-inquiries.

[17] See New South Wales Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, Legislative Council, 28 November 2016, p vi-ix.

[18] While the Selection of Bills Committee was technically established via a resolution and not via a sessional order, as the committee provides a procedural mechanism to facilitate improved scrutiny of legislation and does not conduct inquiries, it warrants review alongside the sessional orders and accordingly an exception has been made for the purpose of this paper.

[19] Representation in the 56th Parliament: 20-Government members (LIB/NAT), 12-Opposition members (ALP) and 10 crossbench members from 5 parties/groups (AJP, CDP, G, IND, SFFP). Representation in the 57th Parliament: 17-Government members (LIB/NAT), 14-Opposition members (ALP) and 11 crossbench members from 6 parties/groups (AJP, CDP, G, IND, PHON, SFFP).

enthusiasm for procedural reforms which further developed the Council's role in executive scrutiny and provided opportunities for members to conduct business.

Between the election in March, and the commencement of sittings in May, members worked across party lines to develop, and garner support for substantial changes to the rules of the House. Knowing the numbers lay with the non-government majority, the Government was pragmatic in their response, with the then Leader of the Government, the Hon Don Harwin MLC, stating: ‘we are taking a collaborative approach to these proposals’.[20] Ultimately, the Government either supported or did not oppose, all but one of the sessional orders proposed. On the first day of business for the 57th Parliament the post-election work of members bore success with 41 sessional orders being adopted. Twenty-five were either required by the Standing Orders or readopted from the 56th Parliament. Seven of these readopted sessional orders had undergone review and varied from past practice.[21] The remaining 16 sessional orders were new. All but one of these forty-one sessional orders passed ‘on the voices’.[22]

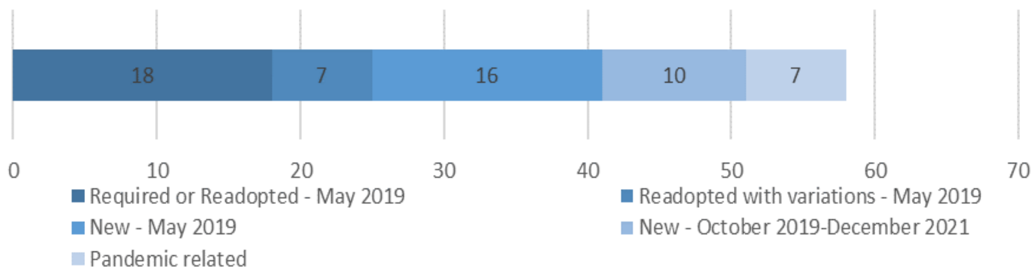
The shake-up continued throughout the 57th Parliament, with members maintaining a sustained focus on the rules and procedures of the House and continuing their efforts in procedural reform. Between May 2019 and December 2021, an additional 17 sessional orders were adopted and six sessional orders were amended. Only one, relating to the conduct of divisions during the height of the pandemic, has been rescinded. As at December 2021, 58 sessional orders had been passed, with fifty-seven still in operation.

[20] D. Harwin, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019 p. 78.

[21] It is further noted that some others contained minor variations but are generally considered to be in the same form.

[22] See New South Wales, *Minutes*, Legislative Council, 8 May 2019.

Figure 2. Breakdown of 57th Parliament sessional orders



The number of sessional orders was a consequence of the scope of the procedural reform sought by members. To achieve their objectives, to improve and strengthen the Council's capacity to scrutinise the Executive; provide more opportunities for private members to conduct business or raise matters of concern; and gain efficiencies in the conduct of business, the House adopted sessional orders which:

- increased opportunities to ask Questions, and provided mechanisms to scrutinise answers
- provided greater alignment between the work and powers of the House and its committees
- reconsidered the role of parliamentary secretaries
- introduced a new framework for consideration of private members' business
- rescheduled the sitting pattern and limited the ability of the House to sit past midnight, and
- provided mechanisms for the progression of business on non-sitting days, including by delegating authority over specific matters to a committee or the President.

This article will explore each of these areas of change within three themes: scrutiny, private members and conducting business.[23]

[23] A detailed list of each sessional order adopted in the 57th Parliament was published as an Appendix to an earlier version of this paper, presented at the 2022 ASPG Conference, Victoria. The current standing and sessional orders are published in full via the Legislative Council *Rules of the House* webpage. Accessed at: https://www.parliament.nsw.gov.au/lc/proceduralpublications/Documents/LC%20Know%20your%20House%20Guide%202023%20WEB.pdf.

THE IMPACT: 2019-2021

Sessional orders relating to Scrutiny

> *With the commencement of the new Parliament, new and not-so-new members have engaged in discussions about how we can lift the standard of parliamentary scrutiny in this State…*
>
> *—The Hon Adam Searle, ALP*[24]

> *…the gradual evolution of the powers of committees towards an equality with the powers of this House … must continue. We need transparency, government honesty, and questions answered properly…*
>
> *—The Hon Robert Borsak, Shooters, Fishers, and Farmers Party*[25]

The Legislative Council is an effective 'House of Review'. Asserting its powers to scrutinise the executive has historically underpinned the actions of the Council and is fundamental to the principles which guide its rules and procedures.

Unsurprisingly, improving the rules relating to the scrutiny of the executive has been a key driver for procedural reform. In May 2019, Opposition and crossbench members expressed concern that the Executive was not as accountable to the Council as it could be, and that the balance of power between the Executive and the Parliament required readjustment.[26] To improve the capacity of the House in this regard, the rules for questions, committees, and parliamentary secretaries were reviewed. Some new sessional orders varied existing practice—others introduced new opportunities for executive scrutiny. The new rules have gone a substantial way to achieving the objectives of members.

[24] A. Searle, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 77.

[25] R. Borsak, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 113.

[26] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 135-136.

Questions

The existing rules for questions have been in place since 2001 and when introduced were modelled on Commonwealth practice.[27] Under Standing Orders 64 to 67, members have opportunities to ask questions and receive timed answers in the House, as well as place written questions on notice. The timeframes and quality of answers received under this system were of concern for members. Six rules were introduced in 2019 to address these concerns, including:

- Written Questions may be asked each business day (previously only sitting days)
- timeframes for providing answers to written questions and question taken on notice during Question Time was reduced to 21 days (from 35 days)
- two supplementary questions may be asked provided they seek elucidation of an aspect of a minister's answer (up from one supplementary question)
- one written supplementary question per party/independent member may be asked after Question Time, the answer being due before 10.00 am on the next working day (new)
- a 30-minute 'take note' debate on answers to questions may occur immediately after Question Time each sitting day (new), and
- answers must be '*directly* relevant' (rather than simply 'relevant').

While minor tweaks were made to the take note debate sessional order, and a substantial ruling guides practice in relation to supplementary questions, the procedural operation of these sessional orders has been relatively unproblematic.

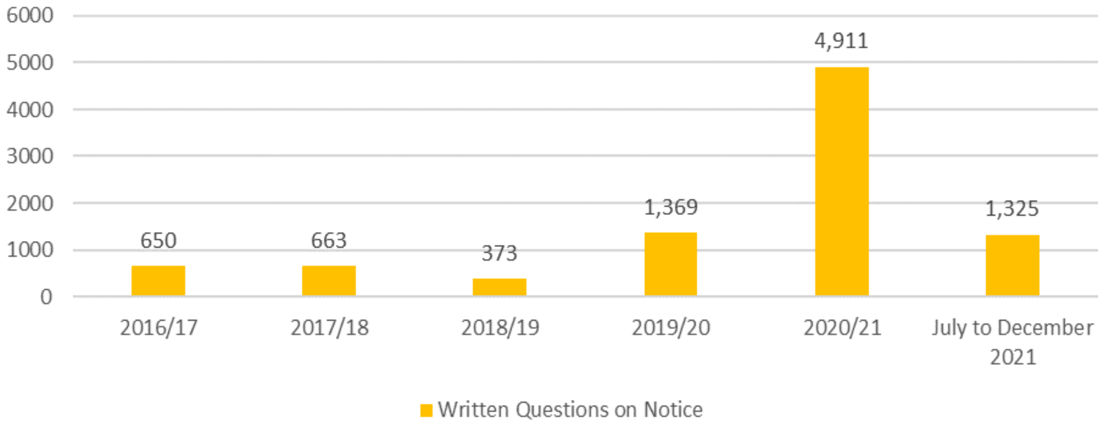
They also appear to have produced many of their intended outcomes. These sessional orders have certainly provided more opportunities for members to ask questions, seek further explanation and debate answers given.

The most identifiable impact of these sessional orders is the exponential increase in the number of written questions asked. Members may now submit written questions each day—no longer needing to wait for the next siting of the House. The graph below shows the extent to which members are utilising this new rule, with a two to seven

[27] Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, The Federation Press, 2018, pp 212-214.

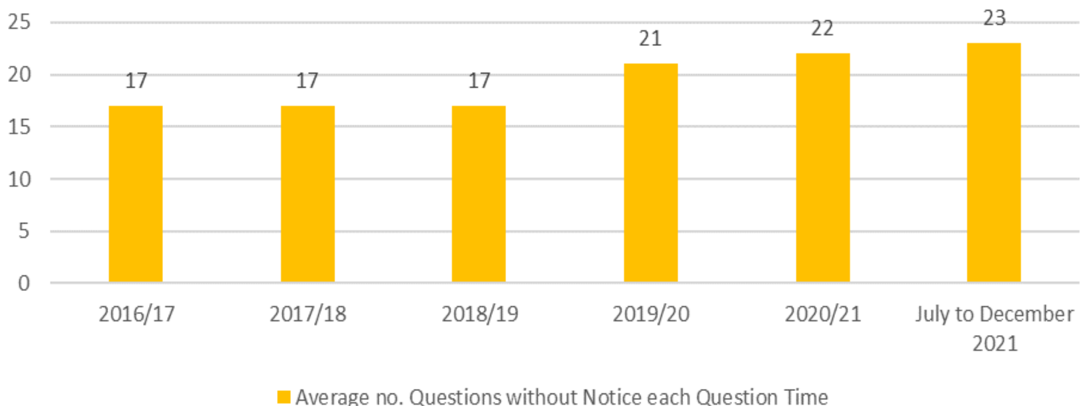
time increase in the number of questions asked annually in the 57th Parliament compared to the 56th Parliament.

Figure 3. Written Questions on notice 2016/17 – July to December 2021



There has also been an increase in the average number of questions asked in the House each Question Time, from 17 to 23. One contributing factor in this regard is the shorter time frames for supplementary answers, from three minutes down to two. Where three primary questions with answers would take twelve minutes, one primary question and two supplementary questions with answers takes ten. The modest increase is therefore unsurprising as the duration of Question Time has remained the same at one hour.

Figure 4. Questions Without Notice 2016/17 – July to December 2021



The new sessional orders also reduced timeframes for the submission of answers from 35 down to 21 days. This has been successful in shortening the time members must wait for an answer, improving the timeliness of the response. The Council has enjoyed strong compliance with answer timeframes by consecutive governments, and the current Government has consistently met the new reduced timeframes. While already historically rare, in this parliament no minister has been called to account for non-compliance for a failure to provide a response within the timeframe.[28]

The impact of the new sessional orders on the quality of answers is more difficult to ascertain. During Question Time, points of order are quickly taken in the House to encourage ministers to stay directly relevant, however the distinction between relevant and directly relevant could well have limitations in practice. In relation to written questions, members have voiced concerns over the quality of the information provided.[29] In some instances members have sought information not forthcoming via questions by seeking to order State papers under Standing Order 52. This approach has had limited success as the government refutes the power of the House to use Standing Order 52 to seek information, arguing the power is to obtain existing documents, not create them.[30]

Committees

The Council committee system is a much-valued mechanism through which members scrutinise the policies and actions of the executive. Informed by the 2016 inquiry on the Legislative Council Committee System,[31] and to meet members' objectives for greater equity between the operation of the House and its committees, twelve

[28] Under Standing Order 66 and 67 ministers are required to explain any non-compliance to the House should they fail to provide a response to a question within the timeframe and without an explanation of the reasons for lateness.

[29] See The Hon. Adam Marshall, New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 2021.

[30] See e.g. correspondence from the Department of Premier and Cabinet relating to an order for papers regarding a list of current TAFE courses, received 5 March 2020.

[31] See New South Wales Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, Legislative Council, 28 November 2016, p vi-ix.

sessional orders were adopted relating to committees—nine of which were new.[32] Key sessional orders relating to committees include:

- a framework for committees to order State papers under Standing Order 208 (new)
- a requirement that, if a government response to a committee report does not address each recommendation, the relevant Minister must address the House and explain their reasons for non-compliance (new)
- provisions to debate government responses to committee reports (new), and
- a 'Selection of Bills Committee', which reports to the House each sitting week with recommendations on whether new bills should be referred for a short inquiry by a standing committee (re-adopted following a 2018 trial).[33]

Other new sessional orders relate to the power of a committee to travel outside the State, electronic participation, substitute members, rules for answers, and a timeframe for the circulation of the Chair's draft report.

In their operation, some of the new rules have resulted in unintended outcomes requiring further attention. For example, an increased number of committee inquiries this parliament has resulted in an increased number of committee reports for debate. Coupled with the new provision for debate on government responses, the list of reports and responses for debate by the House became overloaded and well beyond the capacity of the House to consider. To remedy this issue, the House varied the operation of the sessional order so that reports and responses could be debated simultaneously. Other minor operational issues relating to the bill restoration process contained in the Selection of Bills Committee resolution were also raised.

The sessional order providing committees with a framework to order State papers is yet to operate as intended as it is contested by the Government. This was the only sessional order opposed by the Government in May 2019, who argued committee powers in this regard are uncertain and accordingly, documents should only be

[32] The number and structure of committees along with the provisions contained in committee terms of reference were also reviewed for the 57th Parliament. Procedurally these are 'resolutions' not 'sessional orders' and fall outside the scope of this paper. As does the substantial changes also made to the annual Budget Estimates hearings. See Stephen Frappell and David Blunt (eds.) *New South Wales Legislative Practice*, 2nd Edition, The Federation Press, 2021, Chapter 20: Committees p 726-796.

[33] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 113.

produced to orders made by the House under Standing Order 52.[34] Since its adoption, committees have sought to use the power on two occasions. In the first instance no documents were provided.[35] In the second, documents were provided on a 'voluntary basis'.[36] To ensure committees are not impeded by this impasse, members have relied on Standing Order 52 and utilised the powers of the House on behalf of the committee.[37] This has at times delayed the evidence available to a committee, and also resulted in greater complexity in the work undertaken by members, who have increasingly drawn on the powers and processes of committees and the House concurrently, in order to scrutinise the Executive.

The sessional order requiring ministers to explain reasons for non-compliance where government responses fail to address each recommendation of a committee has been more effective. While past practice was generally very good, it was not without issue,[38] and the non-compliance mechanism was introduced to address concerns that not all responses adequately or directly addressed each recommendation. To December 2021, 58 government responses had been received. On two occasions the Government sought to delay providing an adequate response to a first report of a committee inquiry, until after the final report. In the first instance, the President reported to the House that a response was received but it did not specifically address each recommendation—the House took no further action at the time, pending receipt of the response to the final report.[39] In the second instance, the Government advised prior to

[34] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 106.

[35] See New South Wales, *Minutes*, Legislative Council, 24 March 2020, p 855, item 26 and New South Wales, *Minutes*, Legislative Council, 12 May 2020, p 855, item 22. In response to an order by New South Wales, Portfolio Committee No. 7 – Planning and Environment, the Department of Premier and Cabinet advised that in their view it would only be appropriate for the documents to be provided pursuant to a formal order made under standing order 52.

[36] New South Wales, *Minutes*, Legislative Council, 12 October 2021, p 2443.

[37] In the 57th Parliament to December 2021, 339 orders for papers have been agreed to. This compares with just 15 in the entirety of the 56th Parliament. While the majority of these are not a result of the impasse over the power of committees to order documents, it does demonstrate how focused current members are on executive scrutiny.

[38] In 2011 the House took action to ensure government responses were received to reports of the previous parliament, there have also been instances of late submission after, in some cases well after, the required six month deadline (Standing Order 233(4)). See Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, The Federation Press, 2018, pp 754-759.

[39] New South Wales, *Minutes*, Legislative Council, 23 May 2020, p 948.

the due date that a response would not be forthcoming until after the final report of the committee. According to the new sessional order the Leader of the Government was called on to explain non-compliance. A process to continue each month until a response was received.[40]

The Selection of Bills Committee process has been a successful reform. First trialled in 2018, the committee was established in response to concerns that Council committees undertook relatively low levels of legislative review compared to other jurisdictions.[41] The Committee does not scrutinise legislation, but instead considers all bills introduced into *either* House each week and reports on whether any bill should be referred to a committee—in short it 'selects bills' for inquiry.[42] The Committee also recommends which committee should undertake the inquiry, the stage a bill should be referred from and the timeframe of the inquiry. The recommendations of the Committee are usually adopted by the House without amendment or debate and proved to be a more efficient mechanism than the existing practice of referring a bill at the conclusion of the second reading debate.[43]

The Selection of Bills process has also created greater links between committees and the House relating to legislative review. Inquiries into referred bills allow detailed consideration of the provisions of the bill by members and public stakeholder engagement. While the short length of the inquiry ensures legislation is not unduly delayed, it does not allow for a detailed report, or exhaustive findings or recommendations, as expected from other inquiries. Instead, a recommendation is made to the House on whether the bill should proceed. It is expected that the key issues raised during the inquiry will be acknowledged and addressed during any further consideration of the bill.

[40] New South Wales, *Minutes*, Legislative Council, 12 October 2021, p 2430, 16 November 2021, p 2713.

[41] Select Committee on the Legislative Council Committee System, New South Wales, *Parliamentary Debates*, Legislative Council, 4 April 17.

[42] New South Wales, *Minutes*, Legislative Council, 23 November 2017, p 2221-3, item 3, paragraph (3) (2). The Council model was largely based on that used by the Australian Senate. According to the Council sessional order, the House must agree to the recommendations via motion, which can be amended, agreed to or defeated as the will of the House may be. Procedural provisions for the consideration and implementation of the recommendations of the report of the Selection of Bills Committee, and for restoration of referred bills are also specified in the sessional order.

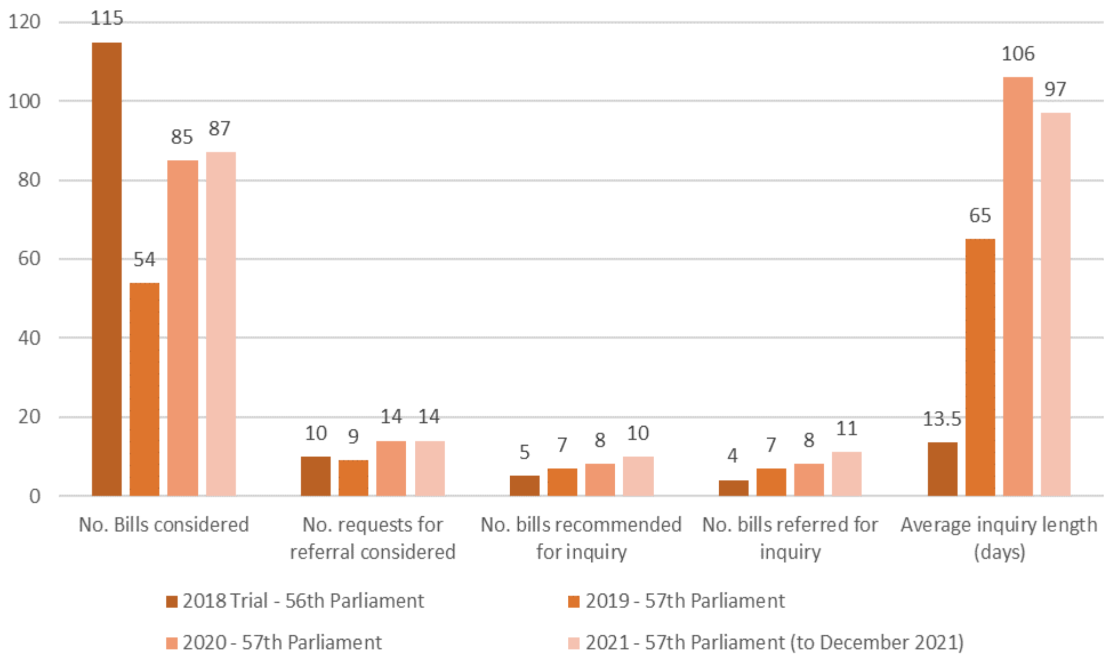
[43] See Standing Rules and Orders of the Legislative Council (NSW) standing order 140(2)(c).

This increased use of committee and House processes was discussed in the 2018 self-evaluation report on the effectiveness of the first Selection of Bills Committee. The then Chair, the Hon Natasha Maclaren-Jones MLC (Government), noted that the Committee 'has allowed members to harness the strength of the committee system to assist them in their role as legislators, thus fostering a respectful culture in the House in which legislative scrutiny is embraced.'[44]

The ongoing success of the Selection of Bills Committee process in the 57th Parliament is evidenced by the volume of legislation referred for inquiry and report via this mechanism. Between May 2019 and December 2021, twenty-six bills were referred via this process. The graph below compares the work of the Committee each year since 2018.

[44] New South Wales, Selection of Bills Committee, *Evaluation of the Selection of Bills Committee trial*, Legislative Council, November 2018, p vi.

Figure 5. Selection of Bills Committee 2018 - 2021[45]



While much of the impact of the new rules regarding committees was as intended, the scale at which members have interlinked House and committee processes was not anticipated. The new rules, in combination with the cohesiveness in voting by the non-government majority, has seen House and committee processes being used in tandem for legislative review, and to scrutinise the executive. This change is evidenced by the work of members in scrutinising water management issues (floodplain harvesting), or the funding and allocation of government grants. On both of these issues the mechanisms available in the House and those available via committee inquiries were utilised by members. While this change has also been a consequence of the challenge to the power of committees to order State papers, these two examples go well beyond the use of Standing Orders 208 and 52, and show how the already assertive Council has approached scrutinising the executive in the 57th Parliament.

[45] These statistics cover bills referred for inquiry through the Selection of Bills Committee process only. It is noted that the House continued to refer a small number of bills each year during the second reading through the existing rules contained in Standing Order 140.

Parliamentary Secretaries

The NSW Constitution provides for the appointment of Parliamentary Secretaries as part of the Executive, to perform functions as determined by the Premier.[46] In the Council, Standing Order 25 provides that parliamentary secretaries are able to 'act as a Minister in all respects, except in relation to answering questions'. In practice this allowed parliamentary secretaries to act both as private members and also in support of a minister, but critically, not be held accountable for the executive. Throughout the 56th Parliament, some members became concerned that parliamentary secretaries were being allocated tasks that went beyond their intended 'secretary' function without being subjected to appropriate accountability.[47] In response, in May 2019 the House adopted sessional orders which allowed for increased scrutiny of parliamentary secretaries and limited their participation as private members. [48] This included:

- restricting parliamentary secretaries from asking questions, making private Members' Statements or being Chairs and Deputy Chairs of certain committees, and
- allowing Questions to parliamentary secretaries.

While the new sessional orders were passed on the voices, the Government disagreed with their rationale. The Government argued that parliamentary secretaries had no legal responsibilities and 'do not take part in the decision-making process in the same way as ministers' who are responsible to Parliament for their portfolio areas. The breadth of restrictions was considered to be 'inappropriate' and the House was cautioned to have 'realistic expectations' about the outcomes of the new rules.[49]

In operation, these sessional orders have not been utilised to the same extent as other new rules and their impact and application has been varied. For example, certain committees are exempt from the restrictions relating to Chairs and the new rules do not exclude all participation as a private member, with parliamentary secretaries continuing to conduct private members' business and contribute to other debates. The new rules have had a particular impact on government backbench members, whose

[46] *Constitution Act 1902* (NSW) Part 4A

[47] Parliamentary Secretary, New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 102.

[48] It is noted that the House also expanded the scope of Budget Estimates to allow parliamentary secretaries to be invited to attend hearings. Attendance and participation in budget estimates hearings has been limited.

[49] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 102.

opportunity to perform duties previously undertaken by parliamentary secretaries, such as asking government questions or acting as committee chairs, has expanded.

The new sessional order allowing Questions to parliamentary secretaries has been rarely used. On 30 May 2019 two questions were asked of the Parliamentary Secretary for Cost of Living. The first related to government action on cost-of-living pressures and the Emergency Services Levy. The Parliamentary Secretary took the question on notice, providing a written deferred answer on 20 June 2019. The second question related to her staff, who is employed by parliament to support her work as a member and not a ministerial employee. This question was ruled out of order as it did not relate to her official public duties or those of her minister.[50]

While overall these restrictions mirror long observed conventions followed by Ministers, this is the first time they have been formalised in the rules of the House or applied to parliamentary secretaries. The key question in relation to the current sessional orders and parliamentary secretaries in the Council is about the balance of these restrictions. Does the role they play warrant direct scrutiny and the curtailment of their rights as private members? If so, to what extent? If not, in what form should accountability occur?

SESSIONAL ORDERS RELATING TO PRIVATE MEMBERS' DAY

> *… the crossbench and the Opposition form well over half of this Chamber and will require time to deal with private members' business. This amendment … will increase the tools available to a diversified Parliament to raise issues in the public interest.*
>
> —*Mr David Shoebridge, The Greens*[51]

Private members' business

The operation of private member's business under the current Standing Orders has been the subject of intermittent review since 2011, with reforms seeking to address

[50] New South Wales, *Parliamentary Debates*, Legislative Council, 30 May 2019, pp 84-85.

[51] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 78.

ongoing concerns that private members’ business was conducted inefficiently and stymied consideration of motions.

In 2011 the provisions of Standing Order 44 were expanded to allow private members’ motions to be considered by the House without debate. Under the ‘formal motion’ provisions, unless a member objects, the President puts a motion to the House for determination without amendment or debate. While this facilitated two-to-three times the number of private members’ motions being agreed to each year, it was not a remedy for the inefficient conduct of private member's day wherein only a relatively small number of motions were debated each year.[52] To address this inefficiency, in June 2015 members began informally negotiating the order of business for private members’ day. At the commencement of the sitting the House would adopt a motion to give effect to the agreement. This practice became known as the ‘Whip's List’ and indeed brought about a rise in the number of private members' motions debated each day.[53]

In May 2019, members sought further improvements to the operation of private members’ day in order to facilitate more opportunities for private members to conduct business. The rules were further reformed throughout 2020 to ensure these objectives were fully realised. To December 2021 the House has:

- readopted provisions relating to formal motions under Standing Order 44
- formally suspended the Standing Orders that determined the precedence of private members' business via a draw (Standing Orders 184 and 185) in preference for the ‘Whip's List’ process
- re-scheduled private members’ day to the middle of the sitting week (Wednesday) to allow for a full private members day which frequently continues until midnight (previously private members' day was scheduled (under Standing Orders 40 and 32) on Thursday until 3.30 pm), and

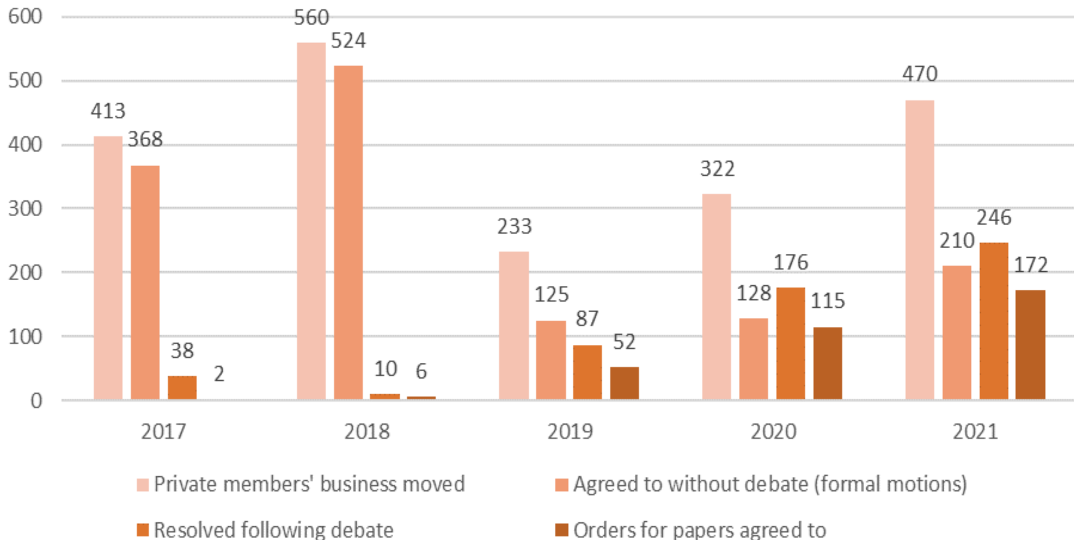
[52] See Steven Reynolds, *Cane Toads, Notices of Motion and the Law of Unintended Consequences*, Parliament of NSW, presented at 60th CPA Conference, 2014 for a detailed discussion on the impetus and impact formal motions under Standing Order 44.

[53] New South Wales, *Minutes*, Legislative Council, 4 June 2015, p 191.

- introduced a 'short form' format for debate, which allows general motions (those not for bills) to be moved with a 30-minute overall debate limit, rather than the full two hour debate limit.

The impact of the new provisions on the volume of private members' business considered has been remarkable. The current Whip's List regularly prioritises thirty items of business, a significant increase from the first list in 2015, which gave precedence to four items. While the Whip's List has greatly improved the organisation of private members' day, increased time for debate and 'short form' debates are of equal importance. On a Wednesday, private members' business now enjoys precedence for approximately 9.5 hours—compared to the 3.5 hours previously provided on a Thursday. Coupled with 'short form' 30-minute debates for motions, at least ten items of business are now debated each private members' day, with as many as twenty-four motions having been debated on a number of occasions. As detailed in the chart below, in 2017 and 2018 less than ten and two per cent of motions respectively were debated, whereas since 2020 this is now over fifty per cent.

Figure 6. Private members' business 2017 - 2021



Alongside the increased opportunities for private members to conduct business—the key driver for change—there are also broader impacts resulting from the new sessional orders. While detailed exploration is not possible in this paper, it is worth noting some trends which have emerged, including:

- a sharp and increasing rise in the number of motions which order State papers under Standing Order 52 (see ‘orders for papers’ in the chart above), many of which pass following statements by the mover and a government representative, or as formal motions without debate
- a rise in private members’ bills being considered, a consequence in part of the Whip's List affording bill introductions priority
- general motions which acknowledge community achievements or current issues, are more likely to be considered as formal motions without debate, and
- shorter debate times and an increased agenda have constrained the contributions of members in some instances.

Assessing these trends would provide valuable insights on the broader impact of the new sessional orders relating to private members’ business and greatly assist in considering key questions about the nature of the current reforms: Is this reform critical to ensuring members fulfil their representative roles, and hold the executive to account? Do the new sessional orders ensure equity of opportunity for all private members? Could business have become too orderly?

Members' statements

The new sessional orders also introduced ‘Members’ Statements’—a 30-minute wide-ranging debate each private members’ day. During this debate, members who are not ministers or parliamentary secretaries, may speak once, for up to three minutes, on any matter of their choosing. There were approximately 380 Members’ Statements in the 57th Parliament to December 2021.

SESSIONAL ORDERS RELATING TO THE CONDUCT OF BUSINESS

The sitting pattern

> *…people have asked, "How can members of Parliament make good and sound decisions when you are so exhausted?"…it is just not proper or sensible to be debating things at those extreme houses of the day…*
>
> *—Mr Adam Searle, ALP*[54]

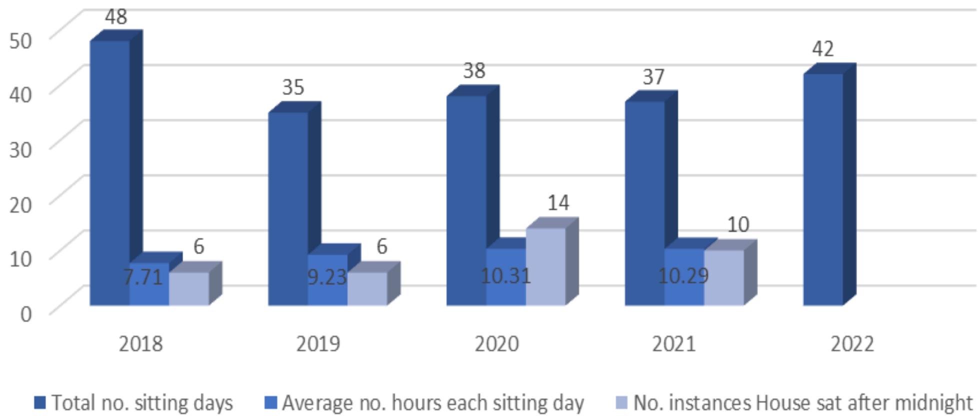
The pattern of business and the hours kept by the House has been an area over time where members have expressed strong views that the House should not frequently sit past midnight nor should it keep hours that disadvantage regional members. To seek to address these concerns private members day was rescheduled from Thursday to Wednesday to ensure all members were able to participate in a full day of private members' business. Additionally, the House introduced a 'hard adjournment' whereby business is interrupted at midnight and the House adjourns.

Ironically, the hard adjournment has become a default, with business frequently conducted until the midnight interruption. The House now sits late on more occasions and consequently a steady and significant lengthening of the average sitting day has occurred. As shown in the chart below, the House sat after midnight on 10 occasions in 2021 and the average number of hours sat each day has risen to 10.3 hours per day.[55]

[54] New South Wales, *Parliamentary Debates*, Legislative Council, 8 May 2019, p 80.

[55] While the pandemic has certainly disrupted the sitting calendar, for the most part the House rescheduled many of the days lost due to lockdowns and the lengthened days cannot in the main be considered a consequence of the pandemic.

Figure 7. Sitting days and hours 2018 - 2021, scheduled days 2022



Conducting business

The third and final objective which drove procedural reform in May 2019, was to gain efficiencies in the consideration of business. Key initiatives in this regard have sought to take better advantage of non-sitting days to aid the conduct of business on sitting days, as well as ensure members do not have to wait for the next sitting day in order to manage or progress certain items business. While such practices were not uncommon in previous parliaments, the 57th Parliament has greatly expanded the scope and acceptability of such procedures. Initiatives in this regard have been underpinned by a degree of respect and collaboration across the chamber regarding the role of members and their right to conduct business in a timely manner. Key sessional orders include:

- the Selection of Bills Committee process which gives consideration to inquiry references prior to the sitting of the House (discussed earlier)
- the Whip's List process which negotiates the order of private member's business prior to the sitting of the House (discussed earlier)
- permitting written questions to be asked each business day rather than each sitting day (discussed earlier)
- delegated authority to members and the President to consider applications from the Government to vary the scope of orders for State papers made under standing order 52 (new), and

- delegated authority to the Privileges Committee to resolve disputes over claims of privilege made on returned State papers (previously only used prior to prorogation).

With the exception of the delegated powers to the Privileges Committee, the new rules were designed to ensure the House retained final authority, with a resolution ultimately required to give effect to any delegated or informal agreements. While there are examples of the House exercising its retained authority, in the main, the collaboration by members outside the House has resulted in resolutions being passed without amendment or debate.[56] The resulting efficiencies on the floor of the House, now see resolutions referring bills for inquiry, determining the conduct of business on private members' day, or varying the scope of orders for State papers, being passed in a matter of minutes. As discussed earlier in relation to committees and private members' business, this efficiency in the conduct of business and diversification in the means by which business is considered has certainly assisted the current Parliament to pursue in extraordinarily busy and complex agenda and ensure business is conducted in as timely a manner as possible.

LOOKING AHEAD

> *This year … we have consider[ed] how we can do our job as a House of review better. Many of the things that we have started doing … have made our Chamber more able to do its job for the people of New South Wales. I hope most members have that view. I will not say that everything we have done has been in that category, but I will have the opportunity to return to that subject on another occasion.*

—*The Hon. Don Harwin, then Leader of the Government in the Legislative Council, Liberal Party*[57]

When presenting to the 49th Presiding Officers and Clerks Conference in New Zealand in July 2018, the Clerk of the NSW Legislative Council, remarked that the work of the

[56] Six amendments have been proposed in the House 2019, 2020 and 2021 to vary resolutions to adopt the recommendations of the Selection of Bills Committee. Only one has been successful. See New South Wales, *Minutes*, Legislative Council, 11 May 2021, p 2148, item 8.

[57] Christmas Felicitations, New South Wales, *Parliamentary Debates*, Legislative Council, 21 November 2019.

56th Legislative Council had taken an already assertive House of Review and ensured it would never be the same again. With hindsight, these sentiments, widely held in 2018, understated what was to follow. The significant changes to the rules of the House introduced following the 2019 election and their impact, while indeed built on the work of the 56th Parliament, were not expected or foreseen. The 57th Parliament has been transformative for parliamentary practice and procedure and has provided a busy, immensely interesting and complex parliamentary session. The members of the 57th Parliament sought to enhance and utilise the Standing Orders, powers and privileges of the House in a way perhaps not seen since the *Egan* cases.[58] The new sessional orders and the procedural reform they introduced have been a true achievement for the 57th Parliament. So committed was this cohort of members to procedural reform, the Standing Orders were referred to the Procedure Committee for a once in a generation review. This review ultimately led to the formal adoption of new rules in February 2023. It will be fascinating to see what impact these changes will have into the future, and what lessons the Legislative Council's approach may hold for other jurisdictions who consider significant procedural reform.

[58] See e.g. Gerard Carney, *Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government*. The Federation Press: 2007, p. 298.

Re-shaping Interparliamentary Cooperation through Advanced Information Sharing*

Fotios Fitsilis

Head of Department for Scientific Documentation and Supervision, Scientific Service, Hellenic Parliament, Athens, Greece

Jörn von Lucke

Professor, The Open Government Institute, Zeppelin University, Friedrichshafen, Germany

* Double-blind reviewed article.

Abstract: A new scientific partnership aims to advance the linear evolution of interparliamentary co-operation. The partnership's concept foresees the implementation of exploratory workshops that investigate the relevance and priority of digital solutions that are based on artificial intelligence (AI) in parliament and workshops have recently been implemented in Greece and Argentina that lay the foundation for further research in Australasia. The results obtained from such workshops suggest that AI could disrupt traditional channels of interparliamentary cooperation in Australasian legislatures and bring entirely novel approaches to the discussion. A joint research and development agenda on AI in parliaments, regionally managed for Australasia, could play its part in making parliaments more sustainable and resilient. Ultimately, the use of AI has the potential to re-shape parliamentary procedures making them more inclusive, sustainable and effective.

INTRODUCTION

Emerging, disruptive technologies can be seen as an opportunity or threat. The underlying everlasting debate, however, should not turn legislatures into modern (institutional) luddites but provoke intense internal debate about the 'parliament of

the future'.[1] This article describes AI research that has been conducted on the Hellenic Parliament and the Honourable Chamber of Deputies of Argentina and proposes its further development to be undertaken in Australasia. The general purpose of this article is to showcase the opportunities that advanced technologies create in the area of interparliamentary cooperation, along with an approach that allows for their careful evaluation and analysis, in order to harness their full potential while avoiding associated risks in the often conservative operational environment of parliaments.

Interparliamentary cooperation enhanced by advances in the area of information sharing can be considered as a discrete parliamentary function. The significance of information sharing between parliaments cannot be neglected. While parliaments have operated for decades as stand-alone institutions, their ability to co-ordinate political and cultural activities with peer institutions, to influence policy-making outside the national borders and to promote national interests has given rise to different cooperation modes and patterns. These are more visible and well studied in the European Union, where interparliamentary cooperation of national member state parliaments has evolved as an instrument for coordinating and influencing the decision-making process at the European level.[2] Other cooperative schemes are becoming important at the regional and global level,[3] and might become relevant for Australasia. Interparliamentary cooperation can also be of technical nature, which refers to the exchange of (technical) experience and skills among parliamentary employees.[4] 'Advanced' in the context of this article means artificial intelligence (AI)-based. This definition is a mere working hypothesis and there are several other technologies that could be encompassed by this generic term.[5] AI on its own part does

[1] An early vision of the 'parliament of the future' is provided by A Williamson & F Fallon, 'Transforming the future parliament through the effective use of digital media'. *Parliamentary Affairs* 64(4) 2011, pp. 781-792.

[2] For a concise presentation of interparliamentary cooperation mechanisms in the European Union see, indicatively, C Hefftler & K Gattermann, 'Interparliamentary Cooperation in the European Union: Patterns, Problems and Potential', in C Hefftler, C Neuhold, O Rozenberg & J Smith (eds), *The Palgrave Handbook of National Parliaments and the European Union*. London: Palgrave Macmillan, 2015.

[3] S A Alshareef, 'Inter-Parliamentary Cooperation: The Next Frontier in Global Politics'. International *Journal of Law and Public Administration*, 4(2) 2021, pp. 38-43.

[4] The French Senate provides an indicative framework of technical interparliamentary cooperation: Accessed at: https://www.senat.fr/international/english/coop.html

[5] A discussion and preliminary evaluation of advanced technologies in the parliamentary workspace is given by D Koryzis, A Dalas, D Spiliotopoulos & F Fitsilis, Parltech: Transformation framework for the digital parliament. *Big*

not constitute a single technology nor does it represent a specific application. To make things fuzzier, when talking about complex organisations like parliaments, there are not even well-defined case studies, for which such applications might be suitable.

Parliaments around the globe have started taking steps – some cautious, some more aggressive – to investigate the potential of disruptive technology in parliamentary environments.[6] The authors have not found any current working examples of AI in Australasian parliamentary institutions. It is not known whether some organisations might not be publishing information from their participation in research projects or their own trials of technology. Nonetheless, AI is on the rise and several parliaments are preparing by building up know-how. For instance, in the Australasian region, the Parliament of Victoria established an All-Party Group (APG) on AI to study the topic.[7] In addition, the parliamentary research service of the Parliament of New South Wales has dealt with issues around the application of AI by the government.[8] Though the aforementioned work is conducted by sub-national parliaments, it clearly shows the awareness and concerns of representative institutions towards the developments around AI. Other regional research efforts attempt to shine light on the role of algorithms, data and AI for effectively facilitating public participation and engagement; a critical parliamentary objective.[9]

The geography of Australasia presents challenges in terms of physical, in-person communication due to practicalities and cost. State-of-the-art AI technology can therefore respond to these hurdles, while automating or accelerating standard

Data and Cognitive Computing 5(1) 2021, p. 15. These technologies go there under the collective term of 'ParlTech'.

[6] A forthcoming study identified 39 use-cases of AI in parliaments worldwide. See F Fitsilis & P de Almeida, (Artificial Intelligence and its Regulation in Representative Institutions, in Y Charalabidis, R Medaglia & C van Noordt (eds), *Research Handbook on Public Management and Artificial Intelligence*. Edward Elgar Publishing, forthcoming.

[7] The APG has issued a relevant primer on AI. See The Parliament of Victoria, *Artificial Intelligence Primer*. 2018. Accessed at: https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13863-artificial-intelligence-primer.

[8] D Montoya & A Rummery, *The use of artificial intelligence by government: parliamentary and legal issues*. NSW Parliamentary Research Service, E-brief 02/2020. Accessed at: https://www.parliament.nsw.gov.au/researchpapers/Documents/The%20use%20of%20AI%20by%20government%20-%20parliamentary%20and%20legal%20issues.pdf.

[9] F Marmolejo-Ramos, T Workman, C Walker, D Lenihan, S Moulds, J C Correa & B Sonna, 'AI-powered narrative building for facilitating public participation and engagement'. *Discover Artificial Intelligence* 2(1) 2022, p. 7.

parliamentary processes. This contribution highlights the opportunities that AI presents for advancing interparliamentary co-operation in Australasia. The next section investigates the significance and boundaries of AI as it stands today. This is followed by a description of the structured approach that was taken in obtaining empirical data on the use, current or potential, of AI in parliaments. This approach takes the form of an 'exploratory workshop'. The proposed concept design requires limited involvement and resources from the target institutions, while offering considerable advantages in return and has been successfully tested in a European and a Latin American parliament (Greece and Argentina). Particular attention will be placed on the potential applications of AI-based communication and how it could re-shape interparliamentary cooperation in the region. Empirical data, however, would be necessary for a detailed evaluation and analysis. Such data could emerge from the organisation of the above-mentioned form of workshop in the Australasian parliaments.

STATE-OF-PLAY AND REGULATION OF ARTIFICIAL INTELLIGENCE

There is no standard approach that can be followed for the application of AI in parliamentary workspaces. Different parliamentary cultures, (legal) traditions, available funding, existing institutional know-how and technical expertise call for different solutions. Moreover, technology is evolving constantly. Keeping that in mind, any digital solution, that is the selection to use a particular AI technology, such as deep learning, machine learning, visual agents and natural language processing, just to name a few, applied on a specific parliamentary task, risks quickly becoming obsolete. Parliaments with no sufficient resources might tend to use a more cautious approach. This is not necessarily a negative approach but needs to be a conscious, educated institutional decision.

In order to determine what AI can do for parliaments, it helps to know the state-of-play in AI. There are a multitude of different AI models and advanced algorithms that can be used (and some already do so) by parliaments in their institutional procedures. ChatGPT by OpenAI reached instant fame in late 2022 by mainstreaming AI technology. Using a simple authentication process, this AI-driven chatbot is accessed via a user prompt and equips the user with virtually limitless options.[10] The underlying

[10] Accessed at: https://chat.openai.com/.

Generative Pre-trained Transformer 3 (GPT-3) model uses deep learning to produce human-like text. As such, the system is not only generating documents, reports and speeches or providing solutions to specialised tasks. It is capable of summarising long texts, brainstorming, providing explanations to complex questions, retrieving information from large textual corpora, translating texts from and to different languages, providing estimates for planning tasks, writing letters and emails and many more.

ChatGPT is not the only system in use. A different one based on GPT-3 was 'questioned' in 2021 by the Committee for the Future of the Finnish Parliament.[11] While potential users might be scared off by its proprietary nature for institutional application, there are also several open source algorithms that can handle similar tasks with similar or perhaps even greater precision. In principle, parliaments should not worry about whether or not such systems will be deployed within the premises – they will – but should be concerned about who sets the rules of engagement.[12] Ultimately, we argue that the question about the necessity of AI-based systems and services in the parliamentary workspace poses a false dilemma. The concern is not about delegating decisions to an AI system. These systems have the potential to substantially advance parliamentary work and influence, provided:

- they are co-developed and operated by competent parliamentary professionals;
- their operation being regulated by an ethical and procedural framework;
- their outputs (and the responsibilities for them) are verified by human beings; and
- accountability is accepted by the institution itself.

Such human verification is technically known as '*human*-in-the-loop' but for the case of governance, the term '*society*-in-the-loop' might be more pertinent.[13]

---

[11] F Fitsilis, 'Artificial Intelligence (AI) in parliaments–preliminary analysis of the Eduskunta experiment'. *The Journal of Legislative Studies* 27(4) 2021, pp. 621-633. In this regard, see also Parliament of Finland, Committee for the Future, 2021. Accessed at: https://www.eduskunta.fi/EN/tiedotteet/Pages/Committee-for-the-Future-heard-AI-probably-as-the-first-parliamentary-committee-in-the-world.aspx.

[12] On the regulation of advanced algorithms (not only) in the parliamentary workspace, see F Fitsilis, *Imposing regulation on advanced algorithms*. Cham: Springer, 2019.

[13] G Siemens, F Marmolejo-Ramos, F Gabriel, K Medeiros, R Marrone, S Joksimovic & M de Laat. 'Human and artificial cognition'. *Computers and Education: Artificial Intelligence* 3 2022, p. 100107.

INVESTIGATING THE RELEVANCE AND PRIORITY OF ARTIFICIAL INTELLIGENCE IN PARLIAMENTS

A partnership has formed among The Hellenic OCR Team and The Open Government Institute to jointly tackle the several research questions related with the use of AI in parliament. The Hellenic OCR Team is an innovative crowdsourcing initiative that was established in 2017 with the aim to process and study parliamentary data.[14] In 2022, the Team took the form of an international expert network now spanning across 14 countries in four continents. The Open Government Institute is part of the Zeppelin University and specialises, among others, in public sector informatics aiming at administrative data openness.[15] Particular issues that will be investigated in the course of this scientific co-operation include the challenges of application of legal and administrative informatics in parliaments, the framework for using emerging digital technology in legislatures and public accessibility of parliamentary data.

In the case of AI in the parliamentary domain, one of the biggest challenges in tackling the above issues is linked with the lack of reliable data. A gradual approach consisting of a *definition* and an *implementation step* was developed to obtain quality empirical data. Due to the COVID-19 pandemic, an on-line moderation tool was opted for data collection and recording, also important when having in mind a potential worldwide application.[16] The definition step was a one-off brainstorming activity of a small group of high-level experts to determine a detailed list of parliamentary tasks that may be influenced by AI. A total of 210 such tasks were defined and clustered into nine sectors (in alphabetical order): Civic Education and Culture; Framework; Legislation; Open Questions; Parliamentarians; Parliamentary Administration and Utilities; Parliamentary Bureau, Directorates and Elections; Parliamentary Control and Parliamentary Diplomacy; and Scientific Services.

[14] The Hellenic OCR Team Headquarters are in Greece. Accessed at: https://hellenicocrteam.gr.

[15] The Open Government Institute resides in Friedrichshafen, Germany. Accessed at: https://www.zeppelin-university.com/institutes/togi/.

[16] XLeap. Accessed at: https://xleap.net.

Table 1. Stakeholder participation per administrative unit and parliament for each exploratory workshop.

Unit/function	Hellenic Parliament (2021)	Chamber of Deputies of Argentina (2022)
Committees	●	
IT systems	●	●
International relations		●
Law-making and control		●
Library	●	
MPs and advisors	●	●
Political & administrative leadership		●
Press and TV	●	●
Project Management Unit	●	
Scientific Service	●	
Strategy Unit	●	

The implementation step included the organisation and holding of exploratory workshops in national legislatures (one at the time) to obtain empirical information from parliamentary stakeholders on the effect of AI on the above 210 tasks. These workshops include up to 15 stakeholders, such as Members of Parliaments (MPs) and/or their aides, parliamentary officials, scholars of parliamentary studies and parliamentary employees from diverse units. Table 1 highlights the administrative units of the stakeholders.[17] Two specific parameters were evaluated for each task, i.e. the relevance and priority of the related AI-based solution.

[17] The full names of the administrative units are not mentioned for comparability purposes. More generic unit descriptions are used instead in alphabetic order.

The reason that a preliminary step was needed in order to determine the target tasks that were subject to evaluation, was twofold. The first one has to do with the necessity for comparability of results from different institutions. The second is concerned with time limitations. For example, it is not conceived as practical and sometimes even as possible, to commit politicians and parliamentary professionals to long hours of deliberation in such workshops. Therefore, an upper limit of three hours was established. Another technical matter dealt with the actual evaluation process. Eventually, it was more pragmatic to allow workshop participants to evaluate tasks and competencies, rather than specific technologies.

The exploratory workshops took place twice, in the Hellenic Parliament in Athens, Greece (April 2021) and the Honourable Chamber of Deputies of Argentina in Buenos Aires (August 2022). On both occasions, their organisation was institutionally applauded and accompanied by positive participant feedback.[18] These workshops produced a wealth of data that offer particularly rich insights on how the individual parliaments approach AI.[19,20] The Australasian parliaments could assess these reports to decide upon implementing this method in their own realms, in order to learn more about their needs and collaboration prospects.

The results contain those proposals that should be considered for implementation in the coming years, when AI technologies in the parliamentary environment become more mature and commercialised. At present, the collection can help determining in which areas to focus research and where AI-based innovations urgently need to be applied towards more efficient and effective parliamentary processes. The study has also helped to make it clearer and easier to understand the upcoming changes and what specifically needs to be talked about when considering such an evolutionary step.

[18] The Honourable Chamber of Deputies of Argentina produced a short video on workshop implementation. Accessed at: https://diplab.hcdn.gob.ar/proyectos.

[19] F Fitsilis, J von Lucke & J Etscheid, 'Prioritisation of artificial intelligence technologies for the parliamentary workspace'. *Working paper at the 14th Workshop of Parliamentary Scholars and Parliamentarian*s, Wroxton UK, 30-31 July 2022. Accessed at: https://wroxtonworkshop.org/wp-content/uploads/2022/07/2022-Fitsilis-.pdf.

[20] J von Lucke, F Fitsilis & J Etscheid . 'Using Artificial Intelligence for Legislation –Thinking About and Selecting Realistic Topics'. *Proceedings of Ongoing Research, Practitioners, Workshops, Posters, and Projects of the International Conference EGOV-CeDEM-ePart 2022*. Linköping, Sweden, 6-8 September 2022. Accessed at: https://dgsociety.org/wp-content/uploads/2022/09/CEUR-proceedings-2022.pdf#page=46.

ADVANCING INFORMATION SHARING FOR AUSTRALASIAN PARLIAMENTS

One of many goals of AI application in parliament could be to make public data more useful for parliamentary stakeholders that originate within or outside the parliamentary workspace. These can be reached through several communication channels. The related processes can be considered a sub-topic of digital communications, which in the case of parliaments has been studied in detail.[21] For the sake of simplicity, the case of AI-based solutions for interparliamentary cooperation will be examined here more closely. This again can be linked directly with advancements in parliamentary diplomacy.[22]

To re-shape information sharing among parliaments requires strategies, methods, skills, as well as the necessary tools and services that do not yet exist in the context of interparliamentary cooperation. In the light of the discussion about AI, this attempt may involve the enhancement of several integral parts of the parliamentary communication process. For instance, parliamentary organisations need to embrace and meticulously utilise a 'data-first' approach. Without open, structured and validated data there can be hardly any trustworthy AI solution. Once there, digital communication strategies and concepts for advanced applications can be designed and implemented. These may include, for instance, messaging campaigns via social media for the propagation of specific parliamentary diplomacy goals. Furthermore, more elaborated communication efforts towards highly specific target groups may be conducted by using stakeholder profiling techniques taking into account any pertinent personal data protection regulations.[23] Other relevant AI-based applications may include semi-, fully automatic or conditional exchange of legal documents of regional context among Australasian parliaments whenever they are issued.

Heaving the above in mind, it quickly becomes apparent that AI and the related research about its application in the parliamentary workspace become significant. Previous studies in Europe (Greece) and Latin America (Argentina) started to produce

---

[21] See, indicatively, J Griffith & C Leston-Bandeira. 'How Are Parliaments Using New Media to Engage with Citizens?' *The Journal of Legislative Studies* 18(3-4) 2012, pp. 496-513.

[22] J d D Cincunegui, 'Parliamentary Diplomacy and the International Relations of Parliaments: Challenges and Opportunities in the Face of Digital Transformation', inF Fitsilis & G Mikros (eds), *Smart Parliaments, Data-Driven Democracy*. Brussels: European Liberal Forum, 2022.

[23] See e.g. the General Data Protection Regulation (EU) 2016/679 that applies in the European Union.

tangible results that can be turned into digital tools, services and policy proposals. Further research in the field is desirable, which could place Australasia in the foreground. This is because the main advantages from strengthening interparliamentary cooperation can be located at the regional scale. In the cases of Europe and Latin America, sampling would still involve a considerable number of legislatures, while in the case of Australasian parliaments the entire region could be covered with just two or three workshop sessions.

As Australasian parliaments might encounter resource limitations and shortage of know-how in the stand-alone development of advanced solutions for the interparliamentary cooperation, a joint large-scale research and development agenda on AI might be necessary. Such an agenda has to be regionally managed and should not only investigate the possibilities modern technology may offer but also all the side parameters and the policy framework to determine, design and implement an advanced interparliamentary cooperation toolbox at a regional scale. The establishment of such a network could include scientific experts, young scientists, AI developers and parliamentary practitioners. This approach additionally requires a lively intra- and transdisciplinary dimension, in which legislators, legal scholars, legal and administrative informaticians are to be integrated.

The design of the investigation can be based on the concept of explorative workshops described above. Potential interest from sub-national parliaments could also be accommodated but at a later stage, as the processing of their data would increase the level of analytic complexity. There are multiple advantages for the participating institutions. Not only do they take part in a study that can potentially advance the implementation of AI-based tools and services at a fraction of the cost, but also they have full access to the obtained data that can be used for the development of individual digital strategies and roadmaps.

Holding such workshops is certainly not a simple task. The Hellenic OCR Team and The Open Government Institute might prepare the backbone and handle the details of the implementation, yet the actual work needs to be done in-house by the interested parliaments. This involves the selection of the local contact point that will take over local organisation issues, including the selection and briefing of suitable workshop participants. Language is an issue when holding an intensive online survey. Should the original list of AI-based proposals in English not suffice, a translation in the native tongues needs to be conducted.

Once a series of workshops are held, comparative analyses will be able to determine and highlight local and regional preferences. Moreover, and perhaps most importantly in the context of regional interparliamentary cooperation, the prioritisation of relevant

solutions will enable their shared development, thus sharing the cost, risks and institutional engagement of individual parliaments. The resulting AI-based solutions will advance the parliaments of the region *en bloc* and can be linked with the creation of a parliamentary community of AI practice. Targeted use of economies of scale (e.g. via increased technical expertise across the aforementioned community of practice) and scope (e.g. by pipelining app development) can further lower implementation cost.

CONCLUSION

Australasian legislatures could be useful case studies for the investigation and development of the emergence of ground-breaking AI-based tools and processes. The research described above indicates that the know-how and tools are available to capture and evaluate AI proposals for parliamentary workspaces. These could lead to the formation of digital strategies and potentially advanced interparliamentary cooperation within the Australasian region and beyond. Most importantly, the institutions involved can narrow down candidate tools and jointly contribute to their development, thus limiting development costs and optimising the channelling of institutional resources. Further benefits and spin-off activities could include skill development; the determination of training needs; and the establishment of a regional community of practice involving intra and extra-parliamentary stakeholders.

A royal commission into Australia's response to the pandemic?*

Scott Prasser

Former senior reseacher and policy adviser, federal and state governments.

* Double-blind reviewed article.

Abstract: This article explores the arguments for and against appointing a national inquiry in reviewing Australia's response to the recent pandemic. Although Australia had one of the lowest death rates in the world, and its economy bounced back faster than most, there were nevertheless concerns about several aspects of Australia's response to the pandemic. Could the number of deaths have been reduced? Were federal-state relations mishandled? Was there adequate parliamentary oversight? Did governments spend too much and were civil liberties curtailed too severely? Consequently, there have been calls for some sort of independent review, mostly in the form of a royal commission, into Australia's response to the pandemic. That countries such as the United Kingdom and New Zealand have appointed such inquiries into their pandemic response makes this an especially pertinent issue. Indeed, the final report of the Senate COVID-19 Committee released on the eve of the 2022 federal election, recommended the establishment of a royal commission. To date, none have been appointed. A range of different options are explored, and attention is given to the particular challenges in appointing a national royal commission in a federal system like Australia's.

INTRODUCTION

There have been many calls from a wide variety of different sources for some sort of independent inquiry, mostly in the form of a national royal commission, to review

Australia's response to the recent pandemic. These calls range from editorials[1], professors of law[2], former prime ministers[3], retired Liberal and Labor premiers,[4] commentors[5], think tanks[6] and some personally affected by the pandemic.[7] Importantly, and significantly, even the Senate parliamentary committee inquiry formed at the beginning of the pandemic[8] recommended in its final report that a 'Royal Commission be established to examine Australia's response to the COVID-19 pandemic to inform preparedness for future COVID-19 and future pandemics'.[9]

Certainly, although Australia had one of the lowest death rates in the world, and its economy bounced back faster than most after the pandemic, which even the aforementioned Senate Committee admitted,[10] there were concerns about Australia's responses to the pandemic including: the rollout of the vaccines; advice by State chief health officers; contradictory policy responses across the States; media misreporting; the constitutionality and impacts of State border closures; effects of lockdowns; the suspension of parliamentary sittings; loss of civil liberties; excessive use of police force; impacts of enforced schools closures; and the role of the National Cabinet.

This article seeks to assess whether a national royal commission type public inquiry would be suitable to conduct such an investigation given the complexities of the COVID-19 issue, and our federal system with responsibilities for managing the

[1] Editorial, 'Inquiry needed into wrongs and rights of COVID response'. S*ydney Morning Herald*, 22 April 2022.

[2] George Williams, 'COVID-19 mistakes? … we made a few so let's take a look'. *The Australian*, 21 March 2022.

[3] See Denis Shanahan, 'Tony Abbott calls for COVID-19 inquiry to prepare us for next pandemic'. *The Australian,* 13 August 2021.

[4] See comments by Jeff Kennett and Peter Beattie in Shane Wright and Katina Curtis, 'People had tried to minimise the errors': Leaders call for royal commission into nation's covid response'. *The Australian*, 20 December 2020.

[5] Peta Credlin, 'Why no inquiry into managing COVID?'. *The Australian*, 16 September 2021.

[6] See Institute of Public Affairs, 'Draft terms of Reference for a Royal Commission into the COVID-19 Response'. 26 September 2022; Monica Wilkie, *Victims of Failure-how the COVID-19 policy response let down Australians*. Sydney: Centre for Independent Studies, December 2020.

[7] Mary Ward and Lucy Carroll, 'Grieving parents call for inquiry into handling of vaccine rollout'. *Sydney Morning Herald,* 19 May 2022.

[8] The Senate Covid-19 inquiry was appointed in April 2020, produced several interim reports and presented its final report in April 2022 on the eve of the May federal election and then disbanded.

[9] Senate COVID-19 Committee, *Final Report*. Canberra: Commonwealth Parliament, 2022, Recommendation 17, p. xii.

[10] Senate COVID-19, *Final Report*, para 1.3, p. 1.

pandemic spread across different levels of government and nine different jurisdictions. Whether it would even be feasible to be formed given those federal and constitutional issues and the challenges in setting its terms of reference, appointing suitable members, and developing effective processes, is a related issue. Why the present Commonwealth Government has desisted to date from appointing such a royal commission is another issue. After all, it is just as instructive to explore why a government does not appoint an inquiry, as to why it does. Governments often seek to keep issues off the agenda, what is called 'non-decision-making' or 'deliberate decisions not to act'.[11]

What makes the failure to appoint an inquiry odd is that the aforementioned Senate Committee that recommended a royal commission so boldly on the eve of the 2022 federal election, was chaired by Labor front-bencher, Katy Gallagher, now Minister for Finance and Albanese in opposition[12] and later in government, supported an inquiry.[13] It certainly cannot be because of the new government's reluctance to evoke the royal commission instrument as it soon appointed a royal commission into one its predecessor's defunct programs.[14] Failure to appoint a royal commission also flies in the face of historic practice when governments after some calamitous event often appoint a royal commission to discover the facts, allocate responsibility and develop lessons for the future.[15] Indeed, as then Justice Holmes, who chaired the 2011 Queensland Flood Commission of Inquiry[16] observed concerning the demand for a review following disasters:

---

[11] Peter Bachrach and Morton S. Baratz, 'Decisions and Non-Decisions: An Analytical Framework'. *American Political Science Review* 57(3) 1963, pp. 632-42.

[12] As stated in address to National Press Club, 25 January 2022 reported in Phillip Coorey, 'Any pandemic probe must also look at the states'. *Australian Financial Review*, 28 January 2022.

[13] See Phillip Coorey, 'Any pandemic probe must also look at the states'. *Australian Financial Review*, 28 January 2022 and Albanese quoted in 'Australian virus response was 'overreach' *The West Australian*, 20 October 2022.

[14] *Royal Commission into Robodebt Scheme* was appointed in August 2022.

[15] See Michael Eburn and Stephen Dovers, 'Learning Lessons from Disasters: Alternatives to Royal Commissions and Other Quasi-Judicial Inquiries'. *Australian Journal of Public Administration* 74(4) 2015, pp. 495-508, which provides a detailed list of the number and type of inquiries into disasters; the most recent example was the Commonwealth-State *Royal Commission into National Natural Disaster Arrangements* appointed by the Morrison Government in 2020.

[16] The Hon Catherine Holmes, now retired from the Queensland Supreme Court, chairs the *Royal Commission into the Robodebt Scheme* appointed by the Albanese Government in 2022.

> *… contemporary society does not countenance a fatalistic approach to such inevitabilities, even if their occurrence is unpredictable. There is an expectation that government will act to protect its citizens from disaster, and that all available science should be applied so that nature and extent of risk is known, and appropriate action taken to ameliorate it.*[17]

Adding to the mystery, has been the uncharacteristic and inexplicable failure of the current federal Opposition to call for an inquiry or royal commission into the pandemic. Is the Opposition concerned that any inquiry might reveal too much about its time in office, or does it not trust the present government to appoint one that would be fair and independent?

WHAT ARE ROYAL COMMISSIONS?

Given the calls for a royal commission, it is important to understand what they are.

Royal commissions are a particular form of public inquiry. These are ad hoc, temporary bodies appointed by executive government with members from outside of government or parliament, with open processes and which report publicly. Australian royal commissions, unlike their United Kingdom (UK) counterparts, have since federation been established under specific legislation, the *Royal Commissions Act 1902* and have extensive coercive powers of investigation concerning witnesses and procurement of documents. Royal commissions only make recommendations, not enforceable decisions like courts, and whether chaired by a sitting or former judge, they are not in our system of government with its separation of powers a ‘judicial inquiry’ – the judiciary does not appoint public inquiries, only executive government does. As royal commissions are ‘bespoke’ instruments appointed only at the discretion of executive government they are individually tailored to meet the issue being reviewed. In Australia, they are not triggered automatically by some constitutional or legislative requirements or are part of any integrated and structured policy process as in Nordic

[17] Catherine Holmes, (Chair), Queensland Flood Commission of Inquiry, *Final Report*. Brisbane: Queensland Government, 2012, p. 38.

countries.[18] Nor are they appointed by parliament or need parliamentary approval.[19] Parliament is only involved in passing the legislation that gives royal commissions their powers of investigation.[20] Federally, they are not even required to table their reports in parliament unlike some permanent advisory bodies such as the Productivity Commission.

Because of their statutory powers of investigation, the controversial and important nature of the issues they review, royal commissions are seen as the apex of public inquiries and thus attract extensive media and public attention.[21] They also attract more resources than other permanent advisory-investigatory bodies like the Ombudsman or anti-corruption bodies and or any parliamentary committee.[22] Governments rarely refuse a royal commission's request for additional terms of reference, more resources, or more time.[23] Although governments decide when to establish a royal commission, and decide its terms of reference, membership and reporting date, they are not without risks. Some royal commissions have interpreted their terms of reference broadly, probed into unexpected areas and produced reports fatal to the appointing government. They can also produce poor quality reports, take too long, cost too much and thus fail in terms of both policy and political objectives.[24]

[18] Kira Pronin, 'Commissions of inquiry in the Nordic countries', in Scott Prasser, (ed), *New directions in royal commissions and public inquiries: Do we need them?.* Redland Bay: Connor Court Publishing, 2023, pp. 367-86.

[19] In 2020 a petition calling for a royal commission into the media, started by former Labor prime minister Kevin Rudd, that garnered 500,000 signatures, was rejected by the Morrison Government on the grounds that 'Royal commissions are initiated by the Governor-General on the advice of the Government of the day' – see Paul Fletcher, Minister for Communications, Letter to Mr Ken O'Dowd MP, 30 January 2021.

[20] Nicholas Aroney, 'The constitutional first principles of royal commissions', in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential*. Ballarat: Connor Court Publishing, 2014, pp. 23-42.

[21] Christian Kerr, 'Royal commissions and the press – seagulls at the lawyers' picnic', in Prasser and Tracey, *Royal Commissions and Public Inquiries*. pp. 281-94.

[22] For the costs of recent Commonwealth royal commissions see, Prasser, *Royal Commissions and Public Inquiries in Australia*. pp. 109-111.

[23] The 1983 Commonwealth *Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam* (Royal Commission into Agent Orange) was denied extra resources by the Hawke Government which its chair, Justice PG Evatt, saw as interference in his inquiry (see *Courier-Mail* 14 July 1984).

[24] Prasser, *Royal Commissions and Public Inquiries*. pp. 129-38.

OVERSEAS DEVELOPMENTS

If the current Commonwealth Government has been reluctant to appoint a royal commission into the pandemic, overseas it has been different.

The United Kingdom (UK) finally initiated its *COVID-19 Inquiry* in June 2022, a year after being promised by the Johnson Conservative Government following political pressure from families adversely affected, the cross-benches, the media, and parliamentary committee assessments. This was despite a range of House of Commons (HC) and House of Lords (HL) committees into different aspects of the pandemic. The HC Public Administration and Constitutional Affairs Committee, although acknowledging that parliamentary committees could possibly be an alternative to a formal public inquiry nevertheless concluded that:

> *… an independent public inquiry is the best means to consider the Government's response to the COVID-19 pandemic … the prospective inquiry into COVID-19 response will be of such a scale that an independent public inquiry should be established.*[25]

That the UK had a far less successful outcome from the pandemic in terms of deaths than Australia and other countries (but below the OECD average) was a further contributing factor. The UK *Covid-19 Inquiry* was appointed under the *Inquiries Act 2005* with considerable powers of investigation and is being chaired by a former senior judge, now a member of the House of Lords.[26] It has a large supporting staff and broad terms of reference that include: identifying the government's mistakes; whether more lives could have been saved; and to compare the UK's response to overseas efforts; and to report on 'lessons to be learned'.

Sweden was more proactive. A commission of inquiry (Swedish *COVID-19 Commission* or Corona Commission) was appointed in June 2020 at the beginning of the pandemic with full bipartisan support, to report on the nation's response as the pandemic progressed. Presided over by a supreme court judge, supported by seven

[25] House of Commons Public Administration and Constitutional Affairs Committee, *A Public Inquiry into the Government's response to the COVID-19 pandemic*. Fifth Report of Session 2019-21, London: House of Commons, September 2020, p. 6.

[26] Baroness Heather Hallett was a judge of the Court of Appeal and in 2019 was appointed to the House of Lords where she sits as a cross-bencher (ie non-party affiliated).

commissioners with expertise across health, public policy, ethics, and representatives from local government and business, it produced several interim reports during the pandemic. Its final report, although largely endorsing Sweden's distinctive response to the pandemic,[27] nevertheless highlighted serious flaws in terms of leadership and the slow initial responses to the pandemic.

In December 2022, the then Ardern Labour Government in New Zealand (NZ) announced a royal commission into the pandemic. Although NZ, like Australia, had performed well during the pandemic, and it had a parliamentary committee overviewing the government's pandemic responses (Epidemic Response Committee), it has succumbed to pressure and appointed a royal commission. The official documentation accompanying the royal commission's announcement explained its appointment was because there 'had been criticisms of NZ's preparedness to deal with COVID-19, of the organisation of its response, and of particular health measures and their impact on people's lives'.[28] That the Ardern Government was suffering declining popularity might also explain the appointment. The full title of the inquiry – the *Royal Commission of Inquiry into Lessons Learned from New Zealand's Response to COVID-19 That Should be Applied in Preparation for a Future Pandemic*, best explains its aims. Established under the new *Inquiries Act 2013*,[29] the royal commission has coercive powers of investigation and as Ardern said, the 'royal commission … is the highest form of public inquiry'[30] in New Zealand, reserved only for matters of great gravity and breadth. Interestingly, New Zealand appointed a royal commission (Influenza Epidemic Commission) following the 1919 Spanish Flu pandemic, but Australia did not.

[27] This involved almost no lockdowns, limited restrictions, few school closures and reliance on promoting 'herd immunity'. See Johan Anderberg, *The Herd: How Sweden chose its own path through the worst pandemic in 100 years*. Melbourne: Scribe, 2022.

[28] Parliamentary Counsel Office, *Royal Commission of Inquiry (COVID-19 Lessons) Order 2022*. Wellington: NZ Government, 2022, p. 3.

[29] This new legislation was the result of the 2008 New Zealand Law Commission's review of the *Commissions of Inquiry Act 1908* – see NZLC, *A New Inquiries Act*. Report 102, Wellington: New Zealand Government, 2008. For a variety of reasons, it took a further five years before new legislation was enacted.

[30] Jacinda Ardern, Media Statement, 5 December 2022.

WHAT ABOUT AUSTRALIA?

All that Australia has had to date to review Australia's national response to the pandemic was the Senate COVID-19 Committee. Its focus was mainly on the Commonwealth's actions. There were several federal and state parliamentary committee inquiries assessing aspects of the pandemic from their specific roles covering issues like the economic package, human rights and delegated legislation, rather than providing any comprehensive national overview of government responses to the pandemic.[31] The Senate COVID-19 Committee dominated by the Opposition, Green and Independent senators, and reporting in the lead up to the 2022 May federal election, hardly constituted an independent or expert review. It was critical of almost all aspects of the Morrison Government's response to the pandemic. It was in short, a political and partisan exercise. It reflected all too well recent assessments that federal parliamentary committees have become increasingly partisan and fractious often failing to reach a consensus.[32] That the Senate Committee itself recommended, as noted, a royal commission for further assessment of the pandemic perhaps indicated its acceptance of the limitations of parliamentary committees to perform such broad-ranging tasks, or was this too, just a politically motivated recommendation?

Of course, some commentators have concluded,[33] that an 'independent review' into Australia's pandemic response has already been held in the form of the self-proclaimed, *Independent review into Australia's response to COVID-19* chaired by Peter Shergold, former head of the Prime Minister's Department and funded by three philanthropic groups.[34] Although its report was critical of different federal and State government responses and produced useful insights, it hardly constituted an 'independent review'. Its processes were not public, submissions were confidential, no evidence was taken on oath, it had no powers to procure information from across the

---

[31] Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees'. *Alternative Law Journal*, 45(3) 2020, pp. 180-7; Peter Wilkins, David Gilchrist. John Phillimore, 'Independent review of emergency economic stimulus measures: Global Financial Crisis and COVID-19'. *Australian Journal of Public Administration*, 80(1) 2021, pp. 12-28.

[32] John Halligan, 'Conflict and Consensus in Committees of the Australian Parliament'. *Parliamentary Affairs*, 69 2016, pp. 230-48; There was a dissenting report from Coalition members of the Senate COVID-19 Committee.

[33] Jennifer Hewett, 'Australia COVID: An independent review reveals how governments got the pandemic so wrong'. *Australian Financial Review*, 20 October 2022.

[34] The Minderoo Foundation; the John and Miriam Wylie Foundation; and the Paul Ramsay Foundation.

jurisdictions, and its membership was not seen as expert especially in relation to the key area of health. Also, as a privately initiated body it lacked any official status.[35] Because of these flaws it was easy for governments to ignore its report. Victorian Premier Daniel Andrews dismissed the report as 'written by a bunch of academics'.[36] Nor has it become part of the usual intergovernmental processes of decision making or necessitated a formal government response(s) to its recommendations.

CRITERIA FOR AN EFFECTIVE REVIEW

The issue then, is what form should a review of Australia's response to the pandemic, who would appoint it and how, given the breadth and complexity of the issues and the challenges of the federal system, would it work.

Criteria for an effective review should include: formal appointment by government giving it official status; wide terms of reference to cover federal and state government actions; non-partisan, independent, and expert membership from across several disciplines;[37] appropriate statutory powers to call witnesses and procure information from all jurisdictions; adequate resourcing and timeframes; open public processes; release of final report and evidence collected; and recommendations that are not only 'doable' – constitutionally, politically, and administratively – but focus on what might be learnt for the future rather than only seeking to allocate blame – a common criticism of post-disaster inquiries.[38]

---

[35] Scott Prasser, 'A 'privatised' review of the COVID pandemic is not the answer'. *Canberra Times*, 8 April 2022; Jack Waterford, 'Fault lines Peter Shergold review: Opinions of the great and good have no special weight'. *Canberra Times*, 21 October 2022.

[36] See Mitch Clarke, 'Why Dan hasn't read the damning COVID report'. *Herald Sun*, 20 October 2022.

[37] Alfred Moore, Michael K. McKenzie, 'Policy-making during crises: how diversity and disagreement can help manage the politics of expert advice'. *British Medical Journal* 321 October 2020. Accessed at: http://www.bmj.com/.

[38] Allan Holmes, 'A reflection on the Bushfire Royal Commission: Blame, Accountability and Responsibility'. *Australian Journal of Public Administration* 69(4) 2010, pp. 387-91.

SELECTING THE RIGHT INSTRUMENT

What then is the right instrument to meet these criteria? Others have also considered this issue in relation to other disasters and crises.[39] Some alternatives include:

Federal government departments

Some have suggested that key Commonwealth departments such as health or central agencies like the Prime Minister's Department could conduct a review. Notwithstanding their considerable expertise and knowledge, their direct involvement in providing advice, and in developing and implementing policies during the pandemic means they could not be seen as independent. Moreover, the public service and its over-compliance to government demands was seen as part of the problem during the pandemic and these days is perceived to be increasingly politicised.[40]

Another federal parliamentary committee

Nor would a further Commonwealth parliamentary committee inquiry work. Although such committees are public and have powers of investigation, their members are after all politicians and partisan who would play the party game. This was all too evident, as discussed, with the Senate COVID Inquiry. There would also be issues in gaining co-operation from State parliaments and governments, and such committees have limited resources.

State parliamentary committees

State parliaments had numerous committees to review their respective governments' responses to the pandemic. Some were specially created to report on their government's response to the pandemic on an ongoing basis. Others examined the pandemic from their roles covering human rights, health, and public accountability issues. Some were affected by partisan politics. The Victorian Parliament's Pandemic Declaration Accountability and Oversight Committee that reviewed the Health

---

[39] Eburn and Dovers, 'Learning from Disasters', pp. 504-5.

[40] Danielle Wood, Kate Griffiths, and Anika Stobert, *New politics: A better process for public appointments*. Melbourne: Grattan Institute, 2022; In 2022 the Victorian Ombudsman initiated an inquiry into politicisation of the public service.

Minister's pandemic orders, was seen by the Oppositionas too easily acquiescing to executive government decisions and not being evidence-based.[41]

State(s) royal commissions or inquiries

Of course, each State could appoint its own royal commission or public inquiry. This is not without merit but any such inquiry would be confined to the State's own jurisdiction and unable to review national issues. Of course, the States could come together and form their own national royal commission without Canberra. This would be unprecedented, but more pertinently, it would be unable to review the Commonwealth's economic, social welfare, immigration policy issues and international agreements and actions. To date, no State has announced any overarching royal commission or inquiry, though there were several commissions of inquiry during the pandemic into certain aspects of government administration.[42] A recent development was Western Australia's appointment in January 2023 of a three person 'independent' inquiry into to 'review the State's COVID-19 pandemic management and response',[43] This inquiry lacked any powers of investigation, and its expertise and independence may be questioned.[44]

Commonwealth Auditor-General

The Commonwealth Auditor-General is another suggestion some have proposed should be utilised more fully instead of royal commissions.[45] After all, the Auditor-General is an independent, statutory based officer, highly regarded, and experienced body in reviewing projects and reports to Parliament. It was also monitoring

[41] See Minority Report, Pandemic Declaration Accountability and Oversight Committee, Review of the Pandemic (Quarantine, Isolation and Testing) Orders, Melbourne: Victorian Parliament, July 2022, pp. 82ff.

[42] In Victoria there was the *COVID-19 Hotel Quarantine Inquiry* (2020), and NSW appointed the *Special Commission of Inquiry into the Ruby Princess* (2020) each of which reviewed quarantine issues.

[43] Mark McGown and Amber-Jade Sanderson, Media Statement, 'Independent experts appointed to review Western Australia's COVID-10 management and response', 23 January 2023.

[44] Its members included a former Liberal health minister, a professor who was head of the State's Arts Department and another who was a member of the Australian Competition and Consumer Commission – none had health qualifications.

[45] John Phillimore and Peter Wilkins, 'Can – and should – royal commissions provide policy advice?' in Prasser, *New directions in royal commissions*, pp. 277-92.

Commonwealth funding arrangements and approval processes during the pandemic.[46] However, its jurisdiction and resources are limited, and it lacks the prestige of a royal commission.

Commonwealth Ombudsman

There is also the Commonwealth Ombudsman. The office is established by statute and the ombudsman is appointed for a fixed term and can only be removed by Parliament. It has the powers of a royal commission and some governments have referred issues of probity and integrity to be reviewed by the ombudsman. Nevertheless, its focus is primarily on administrative conduct and procedures and its limited resources and experience makes it unsuitable to review a complex issue like the pandemic. Similarly, anti-corruption commissions now found in all Australian jurisdictions, would also be inappropriate given their narrow focus on integrity and corruption issues, the many controversies concerning their operations, their limited resources and parliamentary oversight of their operations.[47]

Productivity Commission

Another alternative is the current Commonwealth Productivity Commission (PC). The PC and its antecedents[48] has a long history of producing quality reports on an increasingly wide variety of public policy issues. It is legislatively backed, can enforce attendance at hearings, take evidence under oath, and procure information. It has public hearings, produces draft reports, and releases its findings which must be tabled in parliament. It is legislatively required to act in the public interest and ‘to provide a variety of viewpoints and options’.[49] It also has a permanent and competent staff and

[46] For a summary see Australian National Audit Office, *Responding to disaster and pandemic issues,* paper presented to ASOSAI Symposium, Thailand, 8 September 2021, Canberra: Commonwealth Government, 2021.

[47] Helen Reed, ‘The Permanent Commissions of Inquiry – A Comparison with Ad Hoc Commissions – Part I and Part II’. *Australian Journal of Administrative Law* 2 1995, pp. 69-90 and pp. 156-68; In Queensland during 2021-2, a controversy concerning the Crime and Corruption Commission (CCC) and reports by the Parliamentary Crime and Corruption Committee led to the CCC’s Chair standing down and a commission of inquiry appointed to review its operations.

[48] These include the Tariff Board (1921-1973) which under the Whitlam Labor Government became the Industries Assistance Commission, later the Industry Commission and now the Productivity Commission.

[49] *Productivity Commission Act 1998* (Cth) s8(3).

can recruit Associate Commissioners with the relevant expertise for particular reviews.[50] Although it usually takes references from the federal government, the PC can, as its legislation states, 'undertake on its own initiative, research about … industry, … and productivity' and thus it could initiate a research based review of government responses to the pandemic. The drawback is that such research reviews do not have public hearings, lack powers to procure information, and cannot make recommendations. Moreover, the PC would be unwise to launch even a research type review unless supported by the new Albanese Government given recent attacks from Labor Party affiliated trade unions calling for its abolition.[51]

SO, WHAT ABOUT AN AUSTRALIAN ROYAL COMMISSION?

There remains then, the often used, and much demanded, but as yet dormant royal commission instrument. Despite some cynicism about governments' politically expedient motives in appointing royal commissions and doubts about their impact, they are what the public demand when scandal erupts and calamitous events occur. Royal commissions are seen as independent, prestigious and powerful. Because of this the Australian Law Reform Commission in its 2009 review of the Commonwealth's *Royal Commission Act 1902* (Cth) recommended not only continuation of the royal commission nomenclature, but also that these bodies should retain the greatest level of investigation powers to probe major issues.[52] The New Zealand Law Commission's review of similar legislation made the same conclusion in 2008 which is reflected in the NZ *Inquiries Act 2013*.[53]

Certainly, both the Commonwealth and the States have a long history of appointing royal commissions into calamitous events and major areas of public policy. Since federation there have been 139 Commonwealth royal commissions. Many have been joint federal-state royal commissions enabling them to tackle national issues and to call

---

[50] Jenny Stewart and Scott Prasser, 'Expert Advisory Bodies', in Brian Head and Kate Crowley (eds), *Policy Analysis in Australia: The State of the Art.* London: Policy Press, 2015, pp. 151-66.

[51] 'Call to ditch Productivity Commission'. *Australian Financial Review*, 15 December 2022; 'Productivity Commission plagued by policy "group think" says ACTU'. *Australian Financial Review*, 6 January 2023.

[52] Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* Report 111, Sydney: Commonwealth Government, 2009, pp. 105-16.

[53] See New Zealand Law Commission, Report 102.

witnesses and garner evidence from across jurisdictions. During the last decade there has been an upsurge in Commonwealth royal commissions numbers with ten being appointed between 2013-22 – three are currently running.

Issues to be resolved

Regardless of this extensive use of royal commissions, the nature of the pandemic means many issues need to be settled before one could be appointed and its effectiveness assured.

Given that executive government alone appoints a royal commission, a key issue is whether the current new federal government wants to appoint one into the pandemic. After all, since coming to office in 2022, the Albanese Government has had several opportunities to establish such an inquiry. One, was shortly after the release of the Senate Committee COVID-19 report in April just a month before Labor gained office. Another opportunity occurred after the release of the Shergold Report in October 2022 when the Prime Minister made supportive statements for a wide-ranging inquiry, but no announcement followed.[54] Such reluctance could just be partisan concern as any such inquiry must review the States and that Labor held office across five jurisdictions during this period.[55] That one Labor state, Victoria, where there were considerable controversies over its pandemic responses, was facing an election in November 2022, may have been another factor.

Related to this would be the challenges in forming a joint federal-state royal commission – essential for any review of the nation's response to the pandemic given the States' pivotal constitutional, policy and administrative roles.[56] There were also many controversies concerning State lockdowns, border and school closures, suspension of civil liberties, and health injunctions all of which attracted criticisms.[57] By itself, a Commonwealth royal commission would lack the constitutional powers to

---

[54] See Coorey, Australian Financial Review, 28 January 2022 and Albanese quoted in 'Australian virus response was 'overreach' *The West Australian*, 20 October 2022.

[55] The Labor States and Territories were: Queensland, Victorian and Western Australian, Northern Territory and ACT governments. Victoria had an election in November 2022.

[56] Nicholas Aroney and Michael Boyce, 'The Australian Federal Response to the COVID-19 Crisis', in Nico Steytler (ed), *Combating the COVID-19 pandemic; Federal a boon or bane?*. London: Routledge, 2021, pp. 299-316.

[57] Peter Shergold, (Chair), *Independent review into Australia's response to COVID-19*, 20 October 2022; Gigi Foster, *Do lockdowns and border closures serve the "greater good"?.* Redland Bay: Connor Court Publishing, 2022.

investigate these State areas of responsibility. Although the States have joined many Commonwealth initiated royal commissions in the past, this time they may be less enthusiastic given the potential of such a royal commission to put their actions under the spotlight and possibly produce embarrassing findings. Constitutionally the Commonwealth cannot make the States join a royal commission. It is worth noting that several of the countries that appointed public inquiries into the pandemic – UK, NZ and Sweden – are all unitary regimes and do not have to deal with sub-national governments that hold formal constitutional powers, and real political clout.

Even if the States agreed to a joint royal commission that would just be the beginning of a host of issues to be resolved. Terms of reference would have to be agreed with eight other governments. Negotiations would be intense, slow and political. Interest groups too, would have to be consulted. All would seek terms of reference to deflect scrutiny from their roles. Another issue is whether the terms of reference should include an assessment of parliamentary oversight during the pandemic – another area much criticised.[58] Should an executive appointed inquisitorial inquiry investigate the performance of the legislature? The end result could be terms of reference so compromised that it would lead to an inquiry bypassing important issues – a 'whitewash' in the making.

Determining the royal commission's chair, and if thought necessary, other members, is fundamental in ensuring a public inquiry is effective. Although current or former judges chair most Commonwealth royal commissions because of their perceived independence and the legal nature of some issues[59] they can be detrimental to tackling complex policy issues involved in the pandemic. Hogan-Doran KC summed up the issue this way:

> *…the skills required may cross disciplinary boundaries, and include for example to collect, analyse and evaluate scientific data. A lack of public administration and policy experts may be exacerbated by inquiry commissioners, often former judges, and lawyers tending not to have deep knowledge of policy and administration. Whether*

[58] John Warhurst, 'Parliament has been deemed surplus to requirements'. *Canberra Times*, 23 June 2020.

[59] Of the 54 Commonwealth royal commissions appointed between 1950-2022, only 10 were not chaired by a current or former member of the judiciary or were senior legal counsels.

> *judges of any kind are appropriate at all may be debated and practical utility (or political wisdom) of some of their recommendations may be open to question.*[60]

This needs careful consideration. If an inquiry is to have multiple members how should they be selected – representative of different interests and jurisdictions or expert? If 'expert' from what disciplines?[61] Of course, if too many members are appointed, the inquiry may be unable to achieve unanimity for its recommendations resulting in minority reports which adversely affects their impact.[62]

The royal commission's processes would be another issue. Should it rely on the traditional approach of seeking submissions, holding public hearings, and cross-examining witnesses by Counsel Assisting in an inquisitorial manner? Such approaches have been criticised for making royal commissions appear and to operate as courts of law, undermining effective policy development, focussing too much on allocating blame, making inquiries slow, cumbersome, and costly. Or should this royal commission, like some of its predecessors, while using public hearings to inform itself of a range of views and to allow those with grievances to be heard, supplement this by a well-resourced research team to both gain and analyse the masses of complex information collected?[63] After all, the data concerning the pandemic would be varied, complex and extensive and royal commissions do not always handle such matters well.[64]

Then there is the expected reporting timeframe for this royal commission. The average length for recent Australian royal commissions is almost 20 months, but some take four

---

[60] Dominque Hogan-Doran, 'Lessons for Government from recent Royal Commissions and Public inquiries, paper presented to Law Society of New South Wales, Government Solicitors' Conference 2019, 3 September 2019, para 50, p. 17.

[61] See HC, *A Public Inquiry*, pp. 11-14 for discussions about inquiry chairs and members.

[62] See Prasser, *Royal Commissions and Public Inquiries*, pp. 212-14.

[63] Such was the case of the 1981-4 Royal Commission into the Activities of the Ship Painters' and Dockers' Union – see Frank Costigan, 'Organized Crime and a Free Society'. *Australian Journal of Criminology* Vol 17, March 1984, pp. 7-19; Frank Costigan, (Chair), Royal Commission into the Activities of Federated Ship Painters' and Dockers' Union, *Final Report Vol 2.* Canberra: Australian Government Publishing Service, 1984, p. 6, pp. 21-29,

[64] See Margaret Cook, 'Drowning in data: The Queensland Floods Commission of Inquiry', in Prasser*, New directions in royal commissions*. pp. 127-49; Richard Baker, 'Assessing complex technical issues: Public inquiries or commissions'. *Political Quarterly* 59(2) 1988, pp. 178-89.

years. The NZ royal commission into the pandemic is due to report in mid-2024. Such long gestation periods can cause the public and the media to lose interest, and thus affect the implementation of recommendations. Also, the royal commission might find itself reporting to a different government by the time it reports. Releasing several interim reports, maximising modern communications, holding special workshops and conferences is how that problem might be overcome.

Because royal commissions, are often expensive, especially if involving a swathe of legal processes, they attract criticism and thus take attention away from the core focus of the royal commission. Care needs to be taken in ensuring that the resources allocated are not extravagant and are used effectively on those processes and methodologies to meet a royal commission's main aims. In New Zealand the new 2013 legislation requires royal commissions to limit their timeframes, use less adversarial processes, and to take into account their costs.

Penultimately, as mentioned, royal commissions make no binding judgements, just recommendations. Executive government alone decides to accept or reject their proposals but are influenced by factors such as the quality of the report, the rigour of its methodology, and the 'doability' of its recommendations along with public opinion and media attention.[65] Given the complexity of the issues concerning the pandemic, the conflicting 'expert' advice involved, the controversies surrounding government actions, and the powerful interests involved, care would need to be taken as to how a royal commission presented its report, framed its recommendations and explained such complex issues. This requires both a chair and staff of considerable talent with an appreciation of the wider environment in which any royal commission must work and the ephemeral nature of royal commissions, if it wants to see its recommendations implemented. Some royal commissioners have ignored these at their peril.

Finally, as a joint federal-state royal commission, no single government would be fully responsible to respond or oversee the implementation of all its recommendations. This issue was encountered with the federal-state *Royal Commission into Aboriginal Deaths in Custody* (RCADIC) (1987-91). Some 116 of its 339 recommendations (34 per cent) were for the States to implement with only 29 (8.5 per cent) being the

[65] Michael Mintrom, Deidre O'Neill, and Ruby O'Connor, 'Royal Commissions and Policy Influence'. *Australian Journal of Public Administration* 80(1) 2020, pp. 80-96.

Commonwealth's sole responsibility.[66] The remainder (194) required joint action needing considerable intergovernmental negotiation and resulting in long delays. There was confusion about who was responsible for what. State priorities did not always coincide with federal ones. Despite the establishment of extensive post inquiry mechanisms to report on implementation progress, there has been considerable debate as to what has actually been implemented, and whether the RCADIC was even worth it.[67]

CONCLUSIONS

So, in summary, appointing a royal commission into the pandemic is fraught with many political, administrative and policy difficulties. Nevertheless, it is warranted as there were just too many issues which some alleged reflected an overreaction by all governments around Australia which set an unhealthy precedent for managing future policy problems including in the way debates were framed, expert advice used, parliament bypassed and criticism smothered.

This article has sought to highlight that despite the flaws of royal commissions, they remain, in our increasingly politicised government, the 'institution of last resort'. As Kenneth Hayne, who chaired the 2017 Royal Commission into Misconduct in the Banking Industry observed, the resort by governments to royal commissions, and the public's demand for their appointment on 'difficult issues of public policy' suggests that our 'legislative, executive and judicial [structures] – are not working as they should'. [68] He believed that current political and policy practice is characterised by an 'emphasis on party difference … with decision making processes that are …opaque …skewed …captured by the interests of those large and powerful enough to lobby government behind closed doors'.[69]

---

[66] Deloitte Access, *Review of the Implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody*. prepared for Department of Prime Minister and Cabinet, Canberra: Commonwealth Government, 2018.

[67] Elena Marchetti, 'Critical Reflections Upon Australia's Royal Commission into Aboriginal Deaths in Custody'. *Macquarie Law Journal* 5, 2005, pp. 103-25.

[68] Kenneth Hayne, 'On Royal Commissions'. Address, Centre for Comparative Constitutional Studies Conference, Melbourne Law School, 26 July 2019.

[69] Hayne, 'On Royal Commissions'.

A joint federal-state royal commission into the pandemic if properly formed, with the right members and most importantly, appointed with the best of intentions by government(s) and with full bipartisan support, to really learn from the pandemic, to identify faults and to reform processes, could be effective. However, this requires alignment across many different issues in forming such a public inquiry. It is a big ask of any government. It is an even bigger ask across nine governments in a federation like Australia.

The key issue is not whether a royal commission is the most appropriate instrument to conduct such a review of the pandemic, for in the absence of any other viable alternatives, it clearly is. Neither parliamentary committee nor review by any existing government agency would do. Rather, the critical question is whether in our current political system and environment such a royal commission could be formed and be given the imprimatur to ask the right questions so the public gets answers about their concerns and for governments to take stock of how they just might do things better next time before we all forget what happened during the pandemic.

Revisiting Six Queenslands: Disaggregating the Regional Vote at the 2020 Queensland State Election*

Paul D Williams

Associate Professor, School of Humanities, Languages and Social Sciences, Griffith University

* Double-blind reviewed article.

Abstract: The 2020 Queensland state election was the first Australian state (but not territory) poll conducted under the pall of the COVID-19 pandemic. Despite often unpopular border closures and severe business restrictions, the Palaszczuk Labor Government was easily re-elected to a third term with a net seat gain. As always, the results revealed a heterogenous electorate varying widely in vote preference according to geographical location. This article argues that, unlike early analyses of Queensland elections, the state is not dichotomised simply between 'Coast' and 'Inland' or between 'Brisbane' and 'the Bush'. Instead, the article builds on previous research to argue Queensland divides into six regions of voter behaviour, each with its own distinct economic and demographic characteristics.

INTRODUCTION

The 2020 Queensland election of 31 October was notable as the first poll since the 1890s to elect a Queensland parliament of longer than three years' duration. By virtue of the 2016 referendum, Queensland premiers no longer choose the timing of an election; parliaments now run for fixed, four-year terms.[1] The 2020 election was also

[1] Paul D. Williams, 'Political Chronicle: Queensland, July-December, 2017'. *Australian Journal of Politics and History* 64 (2) 2018, pp. 329-38.

the first Australian state (but not territory) election[2] where both government and opposition leaders were women. Given Queensland's was the first state (but not territory) election[3] conducted under the pall of the COVID-19 pandemic, national observers were eager to measure a public response to a government's strict pandemic rules. This election also saw 597 candidates stand in Queensland's 93 electoral districts – including a record 219 women. Yet the result – in which the Labor Government under Premier Annastacia Palaszczuk, seeking a third term, received a swing to it before seizing an additional four seats despite high unemployment, growing debt and localised protests over 'hard' border closures – surprised few.

While the factors driving the result – namely, public acceptance of the Government's tough pandemic rules via a Queensland cultural predilection for 'strong' leadership and state 'parochialism' – have been explored elsewhere,[4] exactly where votes were dispersed across Queensland has not. Indeed, identifying patterns in regional electoral support is particularly critical for a large and deeply decentralized state[5] boasting significant economic and demographic diversity, a populist political culture and no upper house of parliament – characteristics that make comparisons with other Australian states and territories difficult.[6]

Finally, this election was a victory for Palaszczuk herself. Palaszczuk is now Australia's only female leader to have won three consecutive elections and, by the close of the 57th parliament, she will be the third longest-serving Queensland premier and the

[2] The 1995 Australian Capital Territory election saw the Liberal Chief Minister Kate Carnell face Labor Opposition leader Ros Follett.

[3] The Northern Territory held its election on 22 August 2020, and the Australian Capital Territory its poll on 17 October 2020. Kevin Bonham, 'Queensland 2020 elections will be a test of state's Covid response'. *The Guardian*, 20 September 2020; Paul. D. Williams, 'Political Chronicle: Queensland, July-December 2020'. *Australian Journal of Politics and History* 67 (2) 2021, pp. 369-75.

[4] Paul D. Williams, 'The Grateful State: The 2020 Queensland Election'. *Queensland Review* 28 (1) 2021, pp. 57-72; Paul D. Williams, 'Political Chronicle: Queensland, July-December 2020'. *Australian Journal of Politics and History* 67 (2) 2021, pp. 369-75.

[5] Paul D. Williams, 'Queensland', in P. Chen, N. Barry, J. Butcher, D. Clune, I. Cook, A. Garnier, Y. Haigh, S. Motta and M. Taflaga (eds) *Australia's Politics and Public Policy* 2nd ed. Sydney: University of Sydney Press, 2021, pp. 248-68.

[6] Paul D. Williams, 'Queensland's quandary: To reintroduce a Legislative Council?' *Queensland Review* 29 (1) 2022, pp. 36-48; Paul D. Williams, 'Queensland's unpredictable election begins', *The Conversation*, 5 October, 2020. Accessed at: https://theconversation.com/queenslands-unpredictable-election-begins-expect-a-close-campaign-focused-on-3-questions-146927

longest-serving female head at any level of government in Australian history. Ultimately, the 2020 election underscores the value of 'strong' leadership in Queensland political culture, with Palaszczuk playing a key role in extending Queensland Labor's second electoral hegemony.[7]

THE SIX QUEENSLANDS THESIS

The research question driving this article is explicit: how variegated was the 2020 Queensland election result given conventional analysis once characterised differences in Queensland electoral behaviour as a simple dichotomy between 'Coast' and 'Inland' or between 'Brisbane' and 'the Bush'?[8] In answer to this question, I argue that, as in 2017, the 2020 election demonstrated markedly varied patterns of voter behaviour across six distinct regions. As such, this article builds on earlier research[9] that found Queensland behaves electorally not as one but as at least six distinct constituencies.

---

[7] See, for example, Paul D. Williams, 'The Queensland Election of 17 February 2001: Reforging the Electoral Landscape?' *Australian Journal of Political Science* 36 (2) 2001, pp. 363-71; Paul D. Williams, 'The Queensland Election of 7 February 2004: The Coming of the Second Labor Hegemony? *Australian Journal of Political Science* 39 (3) 2004, pp. 635-44; Paul D. Williams, 'The Greening of the Queensland Electorate?' *Australian Journal of Political Science* 41 (3) 2006, pp. 325-37; Paul D. Williams, 'Defying the Odds: Peter Beattie and the 2006 Queensland Election'. *Australasian Parliamentary Review* 22 (2) 2007, pp. 212-20; Paul D. Williams, 'Leaders and Political Culture: The Development of the Queensland Premiership, 1859-2009.' *Queensland Review*, 16 (1) 2009, pp. 15-34; Paul D. Williams, 'The Queensland Election of 21 March 2009: Labor's swim against the tide'. *Australian Journal of Political Scienc*e 45 (2) 2010, pp. 277–83; Paul D. Williams, 'Time of Transition: The Queensland Parliament and Electoral Volatility, 2008-09.' *Australasian Parliamentary Review* 25 (1) 2010, pp. 224-39; Paul D. Williams, 'How did they do it? Explaining Queensland Labor's Second Electoral Hegemony'. *Queensland Review* 18 (2), 2011, pp. 112-33; Paul D. Williams, 'Leadership or Policy: Explaining the Queensland Election of 31 January, 2015'. *Australian Journal of Politics and History* 64 (2) 2018, pp. 1-17; Paul D. Williams, 'Back from the brink: Labor's re-election at the 2017 Queensland state election'. *Queensland Review* 25 (1) 2018, pp. 6-26; Williams, 'The Grateful State'.

[8] John Holmes, 'Coast versus Inland: Two Different Queenslands?' *Australian Geographical Studies* 32(2) 1994, pp. 167-182.

[9] Paul D. Williams, 'One, Two or Many Queenslands? Disaggregating the regional vote at the 2017 Queensland state election'. *Australian Parliamentary Review* 33 (2) 2018, pp. 57-79.

The first region, Brisbane City[10] – corresponding closely to the confines of the Brisbane City Council administrative area – is home to approximately 1.3 million people.[11] Hemmed by a radius of approximately 20 km from the Central Business District, the Brisbane City region enjoys a broad occupational mix dominated by professionals, managers, administrators, and retail. Around 38 per cent of Brisbane City residents hold a bachelor's degree or above: a rate significantly higher than the Queensland mean.

The second region, the Brisbane Fringe,[12] consists of four satellite cities: Logan City to the south, Ipswich to the west, Moreton Shire to the north and Redlands City to the east. The Brisbane Fringe is home to approximately 1.2 million people, with technical and trade workers comprising a significant proportion of the workforce. Weekly median incomes in, for example, Logan, are lower than those in Brisbane City.[13]

The third region, Gold Coast,[14] boasts a population of approximately 625,000 and runs from the Tweed River in the south to the Albert River in the north and abuts the Scenic Rim in the west. The local economy is dominated by small business – especially tourism and hospitality – and the proportion of residents with tertiary qualifications approximates the Queensland mean.[15]

The Sunshine Coast,[16] running from Moreton Shire in the south to Pomona in the north and to Montville in the east, comprises the fourth region. Home to approximately

[10] Brisbane City region includes the seats of Aspley, Mansfield, South Brisbane, Ferny Grove, Mt Ommaney, McConnel, Miller, Stretton, Toohey, Greenslopes, Cooper, Bulimba, Lytton, Stafford, Inala, Clayfield, Chatsworth, Everton, Moggill, Maiwar and Nudgee.

[11] Australian Bureau of Statistics [ABS], '2021 Australian Census Data'. 'Brisbane'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/LGA31000. Accessed 1 April, 2023.

[12] Brisbane Fringe region includes the seats of Capalaba, Redlands, Springwood, Redcliffe, Pine Rivers, Bancroft, Logan, Kurwongbah, Macalister, Morayfield, Murrumba, Jordan, Waterford, Ipswich, Sandgate, Algester, Bundamba, Oodgeroo and Woodridge.

[13] Australian Bureau of Statistics, '2021 Australian Census Data'. 'Logan'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/LGA34590. Accessed 1 April, 2023.

[14] Gold Coast region includes the seats of Gaven, Bonney, Currumbin, Coomera, Theodore, Burleigh, Mermaid Beach, Southport, Mudgeeraba, Broadwater and Surfers Paradise.

[15] Australian Bureau of Statistics, '2021 Australian Census Data'. 'Gold Coast'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/LGA33430. Accessed on 1 April, 2023.

[16] Sunshine Coast includes the seats of Pumicestone, Glass House, Nicklin, Ninderry, Maroochydore, Buderim, Kawana, Noosa and Caloundra.

350,000 people, this region is also dominated by tourism and small business but, as a destination for wealthy retirees, boasts a population significantly older than the Gold Coast.[17]

The fifth region, Eastern Provincial,[18] is comprised of localities running along Queensland's coast, from Noosa in the south to Port Douglas in the north, and largely bordered by the Great Dividing Range in the west. Home to approximately 700,000 people, local economies are largely dependent on primary industries, with Rockhampton long associated with beef, Mackay with sugar, and Gladstone a key port for mining exports. By contrast, Cairns enjoys a strong tourism sector while Townsville is a military base - a city which boasts incomes above the Queensland mean but houses fewer university graduates and more blue-collar workers.[19]

The sixth region, the less populated Western Rural,[20] is found west of the Great Dividing Range from the New South Wales border in the south to the Gulf of Carpentaria in the north. Again, primary industries dominate local economies, with the mining sector a significant employer in central and north-west Queensland, and with pastoralism particularly pronounced in the north-east, and agriculture in the south. Fewer voters in Western Rural will boast university qualifications than the Queensland mean, but voters here will have a higher proportion of Christian identity, and have parents born in Australia, than the state average. The district of Warrego is a typical example.[21]

---

[17] Australian Bureau of Statistics [ABS], '2021 Australian Census Data'. 'Sunshine Coast'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/LGA36720. Accessed 1 April, 2023.

[18] Eastern Provincial includes the seats of Townsville, Mundingburra, Barron River, Maryborough, Keppel, Cairns, Thuringowa, Rockhampton, Cook, Mackay, Mulgrave, Gladstone, Whitsunday, Burdekin, Bundaberg, Gympie, Hervey Bay, Mirani, Hinchinbrook, Hill and Burnett.

[19] Australian Bureau of Statistics, '2021 Australian Census Data'. 'Townsville'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/LGA37010. Accessed on 1 April, 2023.

[20] Western Rural includes the seats of Traeger, Ipswich West, Gregory, Nanango, Scenic Rim, Southern Downs, Toowoomba North, Toowoomba South, Condamine, Warrego, Lockyer and Callide.

[21] Australian Bureau of Statistics, '2021 Australian Census Data'. 'Warrego'. Accessed at: https://www.abs.gov.au/census/find-census-data/quickstats/2021/SED30090. Accessed on 1 April, 2023.

QUEENSLAND POLITICS, 2017-2020

The events leading up to the 2020 Queensland election, and the campaign itself, have been covered in detail elsewhere.[22] This article therefore offers only a summary of the 56th Parliament and of the 2020 election campaign.

Queensland politics between 2017 and 2020 were dominated by five core themes. The first, evident long before the pandemic, was economic challenge. For much of the term, Queensland unemployment hovered around six per cent – higher than the national average – and peaked at 8.8 per cent in July, 2020. Regional and youth unemployment were far higher.[23] State debt, too, plagued the economy, with Queensland's Treasurer then forecasting debt to swell to $130 billion by 2024.[24]

The second, and arguably dominant, theme was the pandemic itself which, from 2020, steered Queensland political discourse for two years. Queensland was the first Australian jurisdiction to declare a COVID-19 emergency in early 2020, with the Health Minister granting special powers to the Chief Health Officer.[25] After Palaszczuk described COVID-19 as '30 cyclones hitting the state at once',[26] the Queensland Government offered economic rescue packages as COVID-19 moved quickly throughout the state. Restaurants, hotels, gymnasia, cinemas and churches soon closed and, in March, Palaszczuk sealed Queensland's borders for the first time in a century; they remained closed until December, 2021. Schools became pupil-free for many weeks, and residents were told to stay home except for essential work, to buy food, for medical reasons or to exercise.

Palaszczuk's strict pandemic rules, especially border closures, met with some opposition within the state and more truculent criticism from outside. New South Wales Premier Gladys Berejiklian, Prime Minister Scott Morrison and conservative commentators were especially virulent in their condemnation. Yet Palaszczuk's tough pandemic rules – her refrain of 'We don't want to put Queenslanders at risk' contrasted

---

[22] Williams, Political Chronicle: Queensland, July-December, 2020; Williams, 'The Grateful State'.

[23] Queensland Government, 'Labour and Employment' *Queensland Government Statistics*. 2020. Accessed at: https://www.qgso.qld.gov.au/statistics/theme/economy/labour-employment/state.

[24] Williams, Political Chronicle: Queensland, July-December, 2020, p. 371.

[25] Paul D. Williams, 'Political Chronicle: Queensland, January to June, 2020'. *Australian Journal of Politics and History* 66 (4) 2020, pp. 681-87.

[26] Janelle Miles, 'A constant state of readiness'. *The Courier Mail*, 18 April 2020, p. 4.

sharply with LNP leader Deb Frecklington's mixed messages on COVID-19 restrictions[27] – appeared to resonate with older voters, even in LNP strongholds.[28] Problematically for the LNP, Frecklington's prevarication on border re-openings came just as Victoria entered a second and more deadly pandemic wave. By contrast, Palaszczuk's populist pitch undoubtedly appealed to regional political culture and its predilection for 'strong' leadership and state 'parochialism'.[29]

Third, the issue of coal mining loomed as the state's southeast, largely opposed to the coal industry, found itself at odds with regional and rural voter support of coal. Indeed, Queensland Labor had performed poorly at the 2019 federal election as regional Queenslanders rejected what appeared to be Labor leader Bill Shorten's opposition to an expanded coal industry.[30] At the heart of this debate was the Indian-owned Adani coal mine in the Galilee Basin, and the plausibility of Stage Three of the Acland coal mine near Toowoomba. Critically, this debate unfolded as several natural disasters plagued the state. In 2018, Cyclone Owen caused flooding in north Queensland despite 67 per cent of the state remaining drought-declared.[31]

Integrity comprised a fourth theme. In 2018, Main Roads Minister Mark Bailey was referred to, and eventually cleared by, the Crime and Corruption Commission (CCC) for his use of a private email account to conduct ministerial business. That same year, former Pauline Hanson's One Nation (PHON) Senator Fraser Anning, later adopted by Katter's Australian Party (KAP), called for a 'Final Solution' to Australia's immigration 'problem'. Palaszczuk joined the near-universal condemnation of Anning and, when the KAP refused to condemn Anning, Palaszczuk withdrew some of the KAP's parliamentary resources. KAP MP Robbie Katter referred Palaszczuk to the CCC which handed the matter to the Legislative Assembly's Ethics Committee. Palaszczuk then became the

[27] Mark Ludlow, 'Neighbours who 'just don't like each other''. *Australian Financial Review*, 28 May 2020, p. 10; Hayden Johnson and Jack Mackay, 'Jobs go but blockade stays'. *Courier Mail*, 20 June 2020, p. 9.

[28] Charlie Peel, 'Palaszczuk pensioners rewarded border action'. *The Australian*, 3 November, 2020, p. 4.

[29] Paul D. Williams, 'Queensland's Role in the 2019 Australian Federal Election: A case study of regional difference'. *Australian Journal of Politics and History* 67 (1) 2021, pp. 150-68.

[30] Williams, 'Queensland's Role in the 2019 Australian Federal Election'.

[31] Paul D. Williams, 'Political Chronicle: Queensland, January to June, 2018'. *Australian Journal of Politics and History* 64 (4) 2018, pp. 673-80.

first Queensland premier found guilty of contempt of Parliament.[32] In 2019, it was revealed that Treasurer and Cross River Rail (CCR) Minister Jacqui Trad had purchased an investment property in Woolloongabba along the proposed CCR route.[33] Trad referred herself to the CCC which found she had not committed a crime but had breached cabinet rules. Trad was again referred to the CCC for allegedly interfering in the selection of a school principal in her South Brisbane electorate.[34]. Trad later resigned from Cabinet and lost her seat after the LNP directed preferences to the Greens.[35]

A fifth theme was conservative disunity, particularly between its organisational wing (which allegedly leaked unflattering LNP polling data to the news media) and the parliamentary wing which had largely supported Frecklington.[36] Disunity was also evidenced in the party's response to Labor's *Termination of Pregnancy Bill* that, in 2018, removed abortion from the state's Criminal Code. Both major parties offered a conscience vote to easily pass the bill despite LNP President Gary Spence warning his MPs not to support the legislation. Three LNP MPs defied the president and crossed the floor, with one, Jann Stuckey, alleging victimisation. Stuckey later resigned her Currumbin seat. The fact Labor attained the first by-election swing to a Queensland government in two decades at the subsequent by-election demonstrated the damage the LNP had sustained.[37]

THE CAMPAIGN

Governor Paul de Jersey issued election writs on 6 October. Long before that, the major parties released a significant number of policies to frame a campaign around pandemic

---

[32] Sarah Vogler, 'Ethics Committee hits out at Katter comments'. *Courier Mail*, 5 November 2019, p. 5; Domani Cameron and Sarah Vogler, 'Sorry Premier guilty of contempt'. *Courier Mail*, 23 October 2019, p. 5.

[33] Steven Wardill, 'Jack's shack could make her a stack.' *Courier Mail*, 18 July 2019, p. 2.

[34] Paul D. Williams, 'Political Chronicle: Queensland, July-December, 2019'. *Australian Journal of Politics and History*, 66 (2) 2020, pp. 339-46.

[35] Paul D. Williams, 'Political Chronicle: Queensland, January to June, 2019'. *Australian Journal of Politics and History* 65 (4) 2010, pp. 669-76.

[36] Paul D. Williams, 'Frecklington may follow the same path as Shorten'. *Courier Mail*, 10 June, 2020, p. 50.

[37] Electoral Commission of Queensland. 'Currumbin State By-election'. 2020. Accessed at: https://results1.elections.qld.gov.au/currumbin2020/currumbin.

management, economic recovery (Palaszczuk pledged she was '[k]eeping Queensland safe and keeping people in work'[38]), major infrastructure and law and order. Labor pledged a $50 billion 'infrastructure guarantee'; the building of a second M1 Gold Coast freeway; new police officers for youth crime hot spots; the construction of new schools and regional hospitals; mining royalty 'freezes' for LNG and coal companies; and $145 million for renewable energy.[39] The LNP, in turn, promised a $33 billion Bruce Highway upgrade between Gympie and Cairns (80 per cent of which relied upon federal funding not secured from Prime Minister Scott Morrison); a revival of the 1930s Bradfield irrigation scheme to divert northern rivers westward; the hiring of new police officers to mitigate youth crime; Galilee Basin mining projects totalling $50 billion; the establishment of an Economic Recovery Agency; and a pledge to 'stabilise' debt.[40]

The campaign's second week saw an *ABC News* website report[41] Frecklington's attendance at fundraising dinners with LNP supporters alleged to have been property developers proscribed from donating under Queensland electoral law. Frecklington conceded she had attended the functions but stood by her integrity. Despite initially appearing terminally injurious to the LNP's campaign, the story soon disappeared. Other key moments included regional Labor candidates – supported by the Queensland Council of Unions – ignoring Labor's instruction to number PHON candidates last,[42] and Clive Palmer's United Australia Party (UAP) echoing a 2019 federal election meme in alleging, without evidence, a secret Labor 'death tax'.[43] The campaign closed with the LNP attracting criticism – even from the usually sympathetic *Courier Mail* newspaper – for failing to reveal policy costings until the campaign's dying hours.[44] The final week underscored the role of regionalism in Queensland politics when both major party leaders visited Townsville for a fourth time.

[38] Annastacia Palaszczuk, 'State can't risk going backwards'. *Courier Mail*, 6 October 2020, p. 70.

[39] Editorial, 'The big pitch: What the parties are promising'. *Courier Mail,* 6 October 2020, p. 70.

[40] Editorial, 'Best choice to ensure state moves forward'. *Courier Mail,* 25 October 2020, p. 70.

[41] Josh Robertson, 'LNP Opposition Leader Deb Frecklington campaign in crisis after being referred by own party to election watchdog'. ABC News, 13 October 2020. Accessed at: https://www.abc.net.au/news/2020-10-13/lnp-crisis-as-deb-frecklington-referred-to-election-watchdog/12748400.

[42] Sarah Elks, 'Unions at war over freeze in wages'. *The Australian*, 9 June 2020, p. 4.

[43] Jessica Marszalek and Domani Cameron, 'Miles' bid to kill off death tax campaign'. *Courier Mail*, 27 October 2020, p. 8.

[44] Editorial, 'Costings blow will hurt Deb if not put to bed'. *Courier Mail*, 29 October 2020, p. 44.

PUBLIC OPINION

Public opinion polls for much of the period suggested an easy victory for Labor: only on two occasions – in June[45] and July[46], 2020 – did Labor fall behind the LNP on the two party-preferred (2PP) vote. Indeed, the campaign's final *Newspoll* pegged Labor at 37 per cent primary support, with the LNP on 36 per cent, the Greens on 11 per cent, PHON on 10 per cent, and 'Others' on six per cent. After preferences, Labor led the LNP, 51.5 to 48.5 per cent.[47] That poll also revealed 56 per cent of voters preferred Palaszczuk as premier, and just 32 per cent Frecklington. Palaszczuk also boasted a 63 per cent approval rating and a 33 per cent disapproval rating for net rating of +30 points. Just 37 per cent approved of Frecklington's leadership while 44 per cent disapproved for a net rating of -7 points.

Critically, most Queenslanders also approved of Labor's management of the pandemic. A July *Newspoll* found, for example, 81 per cent of Queenslanders approving of Palaszczuk's handling of COVID-19, with 69 per cent approving in late September. Only one in five Queenslanders was dissatisfied with Palaszczuk's COVID-19 management. Moreover, a majority of Queenslanders (53 per cent) believed Palaszczuk's border restrictions were 'about right', with 37 per cent saying they were 'too strict' and just seven per cent 'too lenient'.[48] Equally important was an *Ipsos* poll that found 50 per cent of Queensland voters regarded Palaszczuk a better economic manager than Frecklington.[49] A mid-campaign *Newspoll* later found 43 per cent of voters believed Labor would be 'more effective' in job creation, with just 29 per cent of voters expressing similar confidence in the LNP.[50]

[45] Steven Wardill, 'A vote for change.' *Courier Mail*, 7 June 2020, p. 12.

[46] Jamie Walker, 'Popular Premier but poll party postponed'. *The Australian,* 31 July 2020, p. 7.

[47] Jessica Marszalek and Jermey Pierce, 'Divide and Conquer'. *Courier Mail*, 31 October 2020, p.1.

[48] Ellen Ransley, 'Two-thirds of Queenslanders back Annastacia Palaszczuk as state election looms'. *News.com*, 22 September 2020. Accessed at: https://www.news.com.au/national/queensland/politics/twothirds-of-queenslanders-back-annastacia-palaszczuk-as-state-election-looms/news-story/46b9fb24eb42bf41a50719db7f132094.

[49] Mark Ludlow, 'Poll backs Palaszczuk to manage economy'. *Australian Financial Review*, 28 October 2020, p. 9.

[50] Andrew Fraser and Jamie Walker, 'Election polls back Labor's jobs push'. *The Australian*, 19 October 2020, p. 2.

RESULTS

Table 1. 2020 Queensland State Election, by Primary & 2PP Vote and Swing (%)[51]

Party	Primary vote 2020	Primary swing over 2017 (+/-)	2PP vote 2020	2PP swing over 2017 (+/-)	Nom. 2020	Nom. change over 2017 (+/-)	Seats won 2020	Seats change over 2017 (+/-)
Labor	39.57	+4.14	53.2	+1.9	93	0	52	+4
LNP	35.89	+2.20	46.8	-1.9	93	0	34	-5
Greens	9.47	-0.53	-	-	93	0	2	+1
PHON	7.12	-6.60	-	-	90	+29	1	0
KAP	2.52	+0.20	-	-	13	+3	3	0
UAP	0.62	+0.62	-	-	55	+55	0	0
LCQP	0.91	+0.91	-	-	23	+23	0	0
IMOP	0.61	+0.61	-	-	31	+31	0	0
AJ	0.34	+0.34	-	-	13	+13	0	0
NQF	0.20	+0.20	-	-	5	+5	0	0
CLMP	0.18	-0.08	-	-	16	+8	0	0
SFF	0.10	+0.10	-	-	3	+3	0	0
Ind.	2.48	-2.10	-	-	597	+144	1	0

[51] Source: Electoral Commission of Queensland, '2020 State General Election'. Accessed at: https://results.elections.qld.gov.au/state2020. NB: Nom. = Nominations; LNP = Liberal-National Party; PHON = Pauline Hanson's One Nation; KAP = Katter's Australian Party; UAP = Clive Palmer's United Australia Party; LCQP = Legalise Cannabis Queensland; IMOP = Informed Medical Options Party; AJ = Animal Justice Party; NQF = North Queensland First; CLMP = Civil Liberties & Motorists' Party.

Table One reveals Labor enjoyed a 4.14 per cent primary swing, or 1.9 per cent 2PP, and a net increase of four districts for a total of 52 seats. Labor, in winning five seats from the LNP (Bundaberg, Caloundra, Hervey Bay, Nicklin and Pumicestone), made inroads into the LNP-dominated Sunshine Coast (see below). Labor lost one seat (South Brisbane) to the Greens while the LNP recaptured Whitsunday from North Queensland First for a Legislative Assembly share of 34. While the LNP lost representation, it nonetheless increased its primary vote by 2.2 percentage points. The Greens' extra seat arrived despite a slight diminution in its overall vote, while PHON and KAP maintained their previous representation (of one and three seats respectively) despite PHON's vote almost halving, and despite PHON's significantly increased candidate field. Support for some micro-parties increased but the overall Independent vote declined; Noosa Independent MP Noosa Sandy Bolton was easily returned. Despite an estimated advertising expenditure of $8 million,[52] UAP recorded just 0.62 per cent of the primary vote. The informal vote was 3.4 per cent (down 0.94 points from 2017), and participation was 87.92 (up 0.39 points). This election also saw a record number of pre-poll votes cast (1.29 million, or a 74 per cent increase over 2017), and 750,000 postal votes, more than double the 2017 total.[53]

Table 2. Labor Primary Vote and Swing (%), 2020 Queensland State Election, by Region[54]

Region	Primary Vote 2020 %	Primary Vote 2017 %	Primary Swing % (+/-)
Brisbane City	42.98	41.70	+1.28
Brisbane Fringe	50.84	43.10	+7.74
Gold Coast	33.47	30.44	+3.03
Sunshine Coast	31.73	24.94	+6.79

[52] Mackenzie Scott and Sarah Elks, 'Palmer millions count for nothing'. *The Australian*, 2 November 2020, p. 9.

[53] Felicity Caldwell, 'Future elections could go fully postal amid fallout from COVID-19'. *Brisbane Times*, 18 November 2020.

[54] Author's calculation from ECQ data.

Eastern Provincial	38.90	34.74	+4.16
Western Rural	27.89	23.93	+3.96

Table Two reveals Labor continued to enjoy robust support in Brisbane City and on the Brisbane Fringe. Remarkably, it also indicates Labor swings across all six regions, with movements in the Brisbane Fringe and on the Sunshine Coast the most profound. Swings to Labor in such LNP strongholds as the Gold Coast (abutting the New South Wales border) and Western Rural districts (home to voters most likely to embrace a Queensland 'parochialism') also offer evidence of voter 'gratitude' for a government implementing tight pandemic management rules.

Table 3. Labor seats won, 2017 and 2020 Queensland State elections, by Region[55]

Region	Total seats in region	Seats won 2020	% region won 2020	Seats won 2017	% region won 2017	% change 2017-20
Brisbane City	21	15	71.4	16	76.2	-4.8
Brisbane Fringe	19	18	94.7	18	94.7	0
Gold Coast	11	1	9.1	1	9.1	0
Sunshine Coast	9	3	33.3	0	0	∞
Eastern Provincial	21	14	66.7	12	57.1	+9.6
Western Rural	12	1	8.3	1	8.3	0

Table Three indicates how Labor, despite an increase in primary votes in Brisbane, suffered a decline in seat share after losing South Brisbane to the Greens - a loss largely attributable to a conflict-of-interest scandal involving MP Jacqui Trad, and the LNP's decision to preference the Greens above Labor. By contrast, the growth in Labor

55 Author's calculation from ECQ data.

representation on the Sunshine Coast and in Eastern Provincial seats again offers evidence of a 'gratitude' vote among typically 'parochial' voters.

Table 4. LNP Primary Vote and Swing (%), 2020 Queensland State Election, by Region[56]

Region	Primary Vote 2020 %	Primary Vote 2017 %	Primary Swing % (+/-)
Brisbane City	34.24	36.37	-2.13
Brisbane Fringe	26.53	25.37	+1.16
Gold Coast	46.04	47.04	-1.00
Sunshine Coast	40.75	35.57	+5.18
Eastern Provincial	31.27	27.18	+4.09
Western Rural	46.22	37.46	+8.76

Table Four reveals the LNP made gains in the mercurial Eastern Provincial region and in its usually safe Western Rural region. It also indicates healthy LNP growth (but at a rate lower than Labor's) in the traditionally strong LNP Sunshine Coast seats – largely at the expense of PHON and UAP. Despite a slight increase in the Brisbane Fringe, the LNP suffered a slight decline on the Gold Coast – an unexpected result given Gold Coast communities were most affected by border closures – and a larger decline in Brisbane City: a lamentable result for the party given Brisbane City electorates comprise an essential path to government. Probable causes for the LNP's decline in Brisbane City include leader Deb Frecklington's rural identity – Brisbane has not endorsed a rural leader since Joh Bjelke-Petersen in the 1980s – and Frecklington's arguably ambiguous positions on COVID-19 border controls.

[56] Author's calculation from ECQ data.

Table 5. LNP seats won, 2017 and 2020 Queensland State elections, by Region[57]

Region	Total seats in region	Seats won 2020	% region won 2020	Seats won 2017	% region won 2017	% change 2017-20
Brisbane City	21	4	19.1	4	19.1	0
Brisbane Fringe	19	1	5.3	1	5.3	0
Gold Coast	11	10	90.9	10	90.9	0
Sunshine Coast	9	5	55.6	8	88.9	-33.3
Eastern Provincial	21	4	19.1	6	28.6	-9.5
Western Rural	12	10	83.3	10	83.3	0

Table Five offers evidence of how the LNP, despite a growth in primary vote in four regions, suffered reduced parliamentary representation. While the LNP saw no further losses in the Labor-dominated Brisbane and Brisbane Fringe regions – or in the safe LNP regions of the Gold Coast and Western Rural – the party lost seats in the Eastern Provincial region, and in the Sunshine Coast's LNP heartland. Anecdotal evidence suggests the Palaszczuk Government's tough COVID-19 management strategies – buttressed by Palaszczuk's rhetoric appealing to Queensland parochialism[58] – enjoyed the support of retired (especially women) voters, living on the Sunshine Coast and aged over 65 years, who hitherto comprised key constituencies for the LNP, PHON and UAP.[59]

[57] Author's calculation from ECQ data.

[58] Williams, 'Queensland's Role in the 2019 Australian Federal Election'.

[59] Andrew Fraser, 'Pensioners' swayed by Premier's grit'. *The Australian*, 26 October 2020, p. 7.

Table 6. Greens Primary Vote and Swing (%), 2020 Queensland State Election, by Region[60]

Region	Primary Vote 2020	Primary Vote 2017	Primary Swing (+/-)
Brisbane City	17.39	16.85	+0.54
Brisbane Fringe	7.92	8.63	-0.71
Gold Coast	8.14	10.24	-2.10
Sunshine Coast	10.09	11.47	-1.38
Eastern Provincial	5.08	5.96	-0.88
Western Rural	4.72	5.21	-0.49

Table 7. Greens seats won, 2017 and 2020 Queensland State elections, by Region[61]

Region	Total seats in region	Seats won 2020	% region won 2020	Seats won 2017	% region won 2017	% change 2017-20
Brisbane City	21	2	9.5	1	4.8	+4.7
Brisbane Fringe	19	0	0	0	0	0
Gold Coast	11	0	0	0	0	0
Sunshine Coast	9	0	0	0	0	0
Eastern Provincial	21	0	0	0	0	0
Western Rural	12	0	0	0	0	0

Tables Six and Seven offer paradoxical data. Despite the increasing salience of environmental issues in Queensland politics – and Labor's expected defeat in South Brisbane – the Greens' primary vote declined in all regions except Brisbane City. This could be attributable to the marginalization of minor parties during times of political crisis – from pandemics to war – that routinely reduce the news media coverage of non-major parties.[62] Yet the fact the Greens doubled their state parliamentary representation, and captured the seats of Griffith (from Labor) and Brisbane and Ryan

(from the LNP) at the 2022 federal election, offer further evidence of growing Greens support in Brisbane City.

Table 8. PHON Primary Vote and Swing (%), 2020 Queensland State Election, by Region[63]

Region	Primary Vote 2020	Primary Vote 2017	Primary Swing (+/-)
Brisbane City	2.76	3.17	-0.41
Brisbane Fringe	8.31	13.84	-5.53
Gold Coast	6.31	7.15	-1.19
Sunshine Coast	6.16	18.32	-12.16
Eastern Provincial	9.72	21.75	-12.03
Western Rural	10.10	20.83	-10.73

Table 8 reveals a decline in the vote PHON vote across all six regions, with populist support collapsing most spectacularly in three of the party's once-strong regions: the Sunshine Coast, Eastern Provincial and Western Rural. The decline in PHON vote again suggests many electors saw the 2020 poll as a 'crisis' referendum on pandemic management and, therefore, a contest between Labor and the LNP at which minor parties were marginalised. The fact PHON's collapse was especially steep also suggests most Queenslanders rejected Pauline Hanson's skepticism – and occasional hostility – toward pandemic management rules.[64]

---

[60] Author's calculation from ECQ data.

[61] Author's calculation from ECQ data.

[62] David Denemark, Ian Ward and Clive Bean, 'Election Campaigns and Television News Coverage: The Case of the 2001 Australian Election'. *Australian Journal of Political Science* 42 (1) 2007, pp. 89-109.

[63] Author's calculation from ECQ data.

[64] Jane Hansen, 'Are these Aussies our worst Covid threat?' Courier Mail, 30 August 2020, p. 22.

Table 9. PHON seats won, 2017 and 2020 Queensland State elections, by Region[65]

Region	Total seats in region	Seats won 2020	% region won 2020	Seats won 2017	% region won 2017	% change 2017-20
Brisbane City	21	0	0	0	0	0
Brisbane Fringe	19	0	0	0	0	0
Gold Coast	11	0	0	0	0	0
Sunshine Coast	9	0	0	0	0	0
Eastern Provincial	21	1	4.7	1	4.7	0
Western Rural	12	0	0	0	0	0

Table Nine suggests that, in maintaining its sole seat of Mirani in north Queensland, PHON has reached a new low plateau of representation far below its 11-seat presence attained at the 1998 Queensland election. It can be argued that the future of PHON is grim, and one resting directly on the future choices of leader Pauline Hanson who, at the expiry of her current Senate term in 2028, will be 76 years of age.

Table 10. 'Other' Primary Vote and Swing (%), 2020 Queensland State Election, by Region[66]

Region	Primary Vote 2020	Primary Vote 2017	Primary Swing (+/-)
Brisbane City	2.63	1.91	+0.72
Brisbane Fringe	6.40	9.06	-2.66
Gold Coast	6.04	5.13	+0.91
Sunshine Coast	11.27	9.70	+1.57
Eastern Provincial	15.03	10.37	+4.66
Western Rural	11.07	12.57	-1.50

Table Ten reveals a growth in 'Other' minor and micro party and Independent support in four of the six regions. This can be attributed, at least in part, to the record number of candidates standing in this election – a tally boosted by the growth in KAP vote in Eastern Provincial, and by the appearance of such new micro parties as Legalise Cannabis, Informed Medical Options, Animal Justice, North Queensland First and the Civil Liberties & Motorists' Party. The fact the 'Other' vote grew most significantly in Eastern Provincial seats – where PHON support has been historically strong – suggests an appetite remains for populist parties such as IMOP, NQF and CLMP.

Table 11. 'Other' seats won, 2017 and 2020 Queensland State elections, by Region[67]

Region	Total seats in region	Seats won 2020	% region won 2020	Seats won 2017	% region won 2017	% change 2017-20
Brisbane City	21	0	0	0	0	0
Brisbane Fringe	19	0	0	0	0	0
Gold Coast	11	0	0	0	0	0
Sunshine Coast	9	1	4.8	1	4.8	0
Eastern Provincial	21	2	9.5	2	9.5	0
Western Rural	12	1	4.8	1	4.8	0

Table 11 reveals no change in 'Other' parliamentary representation despite an increased vote in four regions. KAP maintained its two seats (Hinchinbrook and Hill) in Eastern Provincial and its sole Western Rural seat (Traeger) in the Western Rural region. Independent Sandy Bolton (Noosa) was easily re-elected.

[65] Author's calculation from ECQ data.

[66] Author's calculation from ECQ data. Other' includes Katter's Australian Party; Clive Palmer's United Australia Party; Legalise Cannabis Queensland; Informed Medical Options Party; Animal Justice; North Queensland First; Civil Liberties & Motorists' Party; and non-aligned Independents.

[67] Author's calculation from ECQ data.

Conclusion

This article has argued that Queensland voters at the 2020 election, like the 2017 election, behaved as at least six distinct constituencies. The evidence presented demonstrates that no party enjoyed identical support across all six regions; all parties saw wide variations in both primary vote and seat share. Moreover, the levels of support each party received in 2020 varied considerably from 2017, suggesting that electoral support in Queensland is neither geographically nor temporally fixed. This was demonstrated most clearly in 2020 in Labor's capture of three seats on the Sunshine Coast. Anecdotally, Labor's increased vote on the Sunshine Coast appeared to come from conservative voters, aged over 65 years, grateful to Labor for safe pandemic management. The article concludes with a recommendation to test this hypothesis in future research.

Book Reviews

The Whitlam Era, edited by Scott Prasser and David Clune. Connor Court Publishing, 2022, pp 480. RRP $54.95, ISBN: 9781925826944.

Bryan Moulds

Former Senior Public Servant and former Director of Urban Policy, Property Council of Australia

As a keen reader of Australian political history and biography, I see two uniquely defining features of the political life and times of Gough Whitlam – the ongoing generation of a plethora of analysis, biography and critique, and the consensus that the times were a pivot in national political history – for good or bad.

First a declaration: as a child of the 1960s I am heavily influenced by the rise and burn of Gough. It coincides with a time of personal maturing, social awareness, rebellion, popular culture, political awakening, and youthful naivety. If only the older, conservative generation were to be moved on, 'm-m-my generation' (to quote the Who) had the answers for the future. I am, though, also a long-term public servant and urban policy advocate which is a key to my reading of any new anthology.

The Whitlam Era, edited by Scott Prasser and David Clune, published to coincide with the 50th anniversary of the 1972 election, appears at first sight to be another compilation to broaden the library shelf. However, on a closer look, this volume takes a refreshingly different approach to the usual dissection. It draws the reader from that era to the present.

Each fulsome chapter is tackled by a wide range of historians, commentators and, in some cases, direct policy participants of the time or with experience of the span from that era to today.

Clune in his *Overview* chapter captures the essence of the Whitlam ascendancy, from firstly the transformation of the old Labor Party and then the political landscape of the nation after the 1972 election. Whilst not the focus of the anthology, Clune has insight into what was happening to the likes of a young 'boomer', like me: becoming politically aware of a new world through media, education, communication and popular culture

and protest. His Wordsworth quote – 'Bliss was it in that dawn to be alive. But to be young was very heaven!' is most apt.[1]

Surely, there has not since, nor possibly before, been such a lasting and memorable campaign launch speech than those of Gough Whitlam in 1972 – the dawning of a new era indeed.

The chapter from Greg Melleuish, *The Whitlam Narrative,* captures the zeitgeist and paradox very well - although the weight of evidence as to whether Mellheuish's suggestion that Whitlam was not a 'strong harbinger of progress' is largely countered by many of the other chapters.

As Clune, Andrew Podger, David Stanton and others throughout the book point out the Whitlam legacy was 'complex and contradictory … left a slow burn … that redefined politics and policy'.[2] The anthology succeeds in providing a deeper perspective on how relevant those legacies are to the challenges of policy today.

The essays follow a familiar logical deconstruction of the big policy agenda from 1972-75. It is prescient that the structure of each chapter provides an echo of that era for considering the issues facing us in 2023 and beyond. This marks *The Whitlam Era* as a valuable resource base to anyone involved in generating and delivering policy today, or anyone with a keen interest to better consider how lessons form a truly disruptive time can throw light on our thinking today.

The approach taken allows each author to structure their contribution around: hindsight of success, failure and struggle of each initiative; insight as to how and why each issue was tackled within the polity and bureaucracy of the time; and foresight as to what may be the legacy signpost to considering contemporary impact of the respective initiatives have had – or could have – on contemporary federal government in Australia.

As a former public servant, albeit in state bureaucracy in SA, and a senior national policy advocate for a peak industry body, I was particularly drawn to the way the authors explored and assessed the bold, headstrong agenda of the Whitlam government, and how – with mixed success - it was received, managed and delivered by an often stolid, long term public service structure. It was disrupted by the introduction of a new

[1] Scott Prasser & David Clune (eds), *The Whitlam Era*, Connor Court Publishing, 2022, p. 7.

[2] Prasser & Clune, *The Whitlam Era*, p. 21.

generation of policy players and outsiders with very different backgrounds to a civil servant class that had, like the governments of the Menzies Liberals and his contemporaries, largely been drawn from a monochrome career pool.

The chapters from Martha Kinsman and Linda Hort on education, Will Sanders on aboriginal affairs and, particularly, that by Paddy Gourley on the public service are especially insightful of the wrestle of political zeal and high policy ambition through the insertion of energy, commitment and naivety from a new generation as they grappled with the structural inertia of a public service from another time. The struggles at both federal and state levels in these and many of the other sectors are a fascinating feature of *The Whitlam Era*.

In addition to my career in the public and private policy and project area, professionally I am a keen advocate of urban policy and its varied landscape history of political commitment, excitement, neglect and atrophy at the federal level. In that regard I was particularly drawn to John Martin's essay *Legacy and Lessons from the DURD Project*.

Martin has set out in concise forensic detail the context, significance, impact and influence of the Whitlam 'episode' of engagement by the federal government in urban affairs. His analysis makes a strong case to suggest this was the most significant emphasis on how the health and efficacy our cities, regions and communities underpin the making of a nation. How the inter-connectiveness of built form, physical and social infrastructure, and private and public investment through co-ordinated urban policy is fundamental for Australia.

Under Whitlam, this was manifest through DURD ((Department of Urban and Regional Development). Like many of the other chapters, Martin has detailed the external influences of the urban agenda on the Whitlam Government with a view as to how the 'sausage was made' within the federal, state and even local government bureaucratic structures – and the political capital that the Whitlam Government was prepared to expend to deliver its ambitious plans and projects. As a young town planner graduate of the time Hugh Stretton's *Ideas for Australian Cities* clearly shaped a generation of urban thinkers like me, as well as influencing Whitlam, Uren and their policy advisors.

Many retrospectives of the Whitlam government contain a list of the 15-20 short term policy changes introduced in the first whirlwind days of 1972-73. Martin has included

an equally impressive list from Pat Troy's speech in 1992[3] and follows up with David Wilmoth's 2021 memoir list[4] to powerfully demonstrate the impact on urban policy achieved by DURD. Whilst the next flowering of federal policy through Brian Howe and Building Better Cities in the 1990's followed this lead, it is hard to identify any current commitment at the DURD level of enthusiasm in any other national government or opposition party since.

Two other observations of Martin's essay come to mind. Firstly, his reference to Gough and Tom Uren's contrasting upbringing in showing how two distinctively different experiences can come together in a common idea is interesting. Tom Uren's auto-biography *Straight Left* is one of the most compelling political and inspiring biographies that I have read.

Secondly Martin touches on the diaspora of young, idealistic and enthusiastic DURD and other public servants after 1975. Nowhere was this more of impact than in South Australia at the time and I had the personal privilege to have been influenced by a number of these people, particularly Ian McPhail, John Mant and Andrew Strickland. They and others meant that a full understanding of the legacies of the Whitlam era needed to be considered through a wide lens.

In a most crowded field, *The Whitlam Era* is a valuable retrospective. Perhaps more uniquely, it's a cleverly compiled thought-bridge on how we might assess the legacy and paradox of Gough Whitlam and his colleagues as we consider the view from the challenging platform we stand on today.

For me, this collection is less a judgement, more an insight that is best summed up by Podger and Stanton: policy foundations were built and youthful enthusiasm and naivety led to mistakes 'but it was an exciting time … and an experience we would not have missed for quids!'.[5]

[3] Prasser & Clune, *The Whitlam Era*, p. 177.

[4] Prasser & Clune, *The Whitlam Era*, p. 178.

[5] Prasser & Clune, *The Whitlam Era*, p. 90.

Power, Politics and Parliament: Essays in Honour of John R Nethercote, edited by Henry Ergas and Jonathan Pincus. Connor Court Publishing, 2022, pp 412. RRP $36.99, ISBN: 9781922815163.

Sarah Moulds

Senior Lecturer in Law, University of South Australia.

Editor, Australasian Parliamentary Review

This edited collection – a *festschrift* in honour of the late John Nethercote[6] - comprises a challenging mix of celebrations of the lives and contributions of significant figures in Australian politics and public administration, as well as a multi-faceted call to preserve the processes, practices and principles of good government and the Westminster tradition championed by Nethercote and his many mentors and mentees within the Australian political landscape.

The volume honours the life and work of Nethercote, an intellectual, experienced public servant, indefatigable editor and compiler, and generous mentor to many engaged in the study of politics and public administration in Australia. His admirers include former Prime Minister John Howard, who wrote the Foreword to the book. Nethercote's personal character and professional contribution are celebrated with gratitude and admiration, [7] made even more poignant by his death in May 2022 just prior to the finalisation of the collection. [8]

[6] Henry Ergas & Jonathan Pincus 'Editor's Preface' in Henry Ergas & Jonathan Pincus (eds), *Power, Politics & Parliament.* Redland Bay: Connor Court Publishing, 2022.

[7] See eg. John Howard, 'Forward', pp. xi; Luke Malpas, 'Nethers – the Person' pp. 4-24; 'Curriculum Vitae of John R Nethercote', pp. 397-403. In Ergas & Pincus, *Power, Politics & Parliament.*

[8] See eg. John Howard, 'Forward', pp. xi; Luke Malpas, 'Nethers – the Person' pp. 4-24; 'Curriculum Vitae of John R Nethercote', pp. 397-403. In Ergas & Pincus, *Power, Politics & Parliament.*

Nethercote’s expertise spanned a range of fields: government and public administration, parliament, public policy, comparative politics, political history, biography, federalism, constitutional, public and administrative law, economics, and industrial relations. Importantly for readers of this publication, Nethercote was also an editor of *Australasian Parliamentary Review* (2001-2003) and founder and long serving editor of the *Canberra Bulletin of Public Administration* which is warmly described in this volume. One of Nethercote’s strengths was that he combined the experience of the practitioner with the discernment of the scholar.

Nethercote’s diverse and prolific achievements over many decades are documented in Part 5 of the volume. His diligent commitment to supporting the careers of the next generation of public servants is thoughtfully acknowledged in contributions from Glyn Davis,[9] Luke Malpas[10] and Angela Adams. [11]

The collection also includes an outstanding contribution from Nethercote himself, ‘Canberra Knights’,[12] that documents the rise and fall of public service mandarins during period 1936 to 1986. In this chapter Nethercote describes a number of key characters in what was then known as the First Division of the public service. These include Sir Roland Wilson, Dr HC ‘Nugget’ Coombs, Sir Kenneth Bailey and Sir Frederick Wheeler. Nethercote describes how these men shaped and responded to the government's policy agenda, bringing both fierce intellect and trusted political intuition to their offices. They created an environment where contested theories on economic management, executive accountability and social policy could be debated among public servants and politicians on equal terms. The expertise of these public servants was respected and admired not only by their juniors but also by their political masters, and often, by politicians ‘across the aisle’ as well. Nethercote describes these characters as formidable presences during the period from Curtin to Fraser - not just able to reach the highest levels of bureaucratic influence, but also to join the knightly ranks of an order of chivalry:

---

[9] Glyn Davis, ‘Aphorisms and Bow Ties’, p. 1. Ergas & Pincus, *Power, Politics & Parliament.*

[10] Luke Malpas, ‘Nethers – the Person’, p. 4. Ergas & Pincus, *Power, Politics & Parliament.*

[11] Jill Adams, ‘The Canberra Bulletin of Public Administration’, p. 24. Ergas & Pincus, *Power, Politics & Parliament.*

[12] John R Nethercote, ‘Canberra Knights’ pp. 281-309 in Ergas & Pincus, *Power, Politics & Parliament.*

Canberra was not a Camelot but the Canberra Knights had some similarities with the Knights of the Round Table. They informally had a code of behaviour for they saw themselves not as clerks but very much as professional doctors and lawyers, and certainly as engineers. The essence of the code was political impartiality; ethical conduct; frank and fearless advice to ministers based on intensive and exacting analysis; due process administration based on law; and what amounted to frugality in deployment of public funds.[13]

In many ways this description matches what the contributing authors to this volume consider to be essential characteristics of the public service that may be under threat in the modern age.

Nethercote – and many other authors contributing to this volume including David Lee[14] and Paul Kelly[15] – are clearly attracted to leaders such as Sir Robert Menzies, who embody the values Nethercote eloquently attributes to the 'Canberra Knights'. At their best, they are able to match political philosophy and conviction with professional implementation, with a sharp eye to ensuring practical outputs and minimal waste.

These values and attributes are particularly well documented and explored in Part 4 of the book which has a focus on political history[16] and explores the life and work of many important figures in Australian public life - including John Curtin,[17] William McMahon,[18]

[13] John R Nethercote, 'Canberra Knights' p. 303.

[14] David Lee 'S. M. Bruce and R. G. Menzies compared' p. 317.

[15] Paul Kelly 'In Search of Robert Menzies' p. 334.

[16] See e.g. Tom Frame, 'Australian Political Biography and Psychohistory', p. 347 in Ergas & Pincus, *Power, Politics & Parliament.*

[17] John Edwards 'Curtin 1942, Morrison 2018 – two declarations on Australia's national interests' p. 326 in Ergas & Pincus, *Power, Politics & Parliament.*

[18] Patrick Mullins, 'The Full Set: Writing the Life of Williams McMahon' p. 359 in Ergas & Pincus, *Power, Politics & Parliament.*

Sir Arthur Tange,[19] Sir James Plimsoll,[20] and Mary Gaudron[21] - through the discerning lens of Nethercote's biographical work. Each of these figures pursued convictions orientated around public service. The portraits are appositely interrogated and evaluated by the contributing authors, with the practical and prudent authority Nethercote himself demonstrated in his published works and editorial positions.

Part 2 of the volume contains a collection of insights on the same themes, but with a more explicit focus on philosophy and ethics, often from the perspective of veterans of the public service, such as Meredith Edwards[22] and Gary Banks,[23] and giants of the commentariat, such as Henry Ergas.[24] Loren Lomasky[25] offers an insightful account on the theme of 'the eclipse of *laissez-faire* utilitariaism' and what this means for contemporary liberalism in social democracies like Australia. Peter Kurti's offering also warrants close consideration and explores the role of religion and 'the ethics of citizenship'[26] in a secular society. When taken together, these contributions remind us of the highly integrated, complex relationship between the institutional identity of the Australian public service and the individual character and attributes of those occupying the position of public officer. These contributors remind us that the integrity, expertise, professionalism and experience of our public servants, coupled with the legal and philosophical frameworks which govern and limit their powers and discretion, both shape and reflect governance and government in Australia.

Part 3 of the book has a focus on parliament, public service and administration. It includes a contribution from David Clune on the NSW Legislative Council, which he insightfully describes as a 'progressive conservative institution' that holds an important

[19] Peter Edwards, 'The Biography of a Mandarin: Writing about Sir Arthur Tange', p. 369 in Ergas & Pincus, *Power, Politics & Parliament.*

[20] Jeremy Hearder, 'Writing the biography of a diplomat: Sir James Plimsoll', p. 378 in Ergas & Pincus, *Power, Politics & Parliament.*

[21] Pam Burton, 'Gaurdon's Law: A tool for change' p. 387 in Ergas & Pincus, *Power, Politics & Parliament.*

[22] Meredith Edwards, 'The Public Policy Process in Australia: reflections from practice' pp. 92-116 in Ergas & Pincus, *Power, Politics & Parliament.*

[23] Gary Banks, 'Ethics and the Statutory Officer' pp. 67-92 in Ergas & Pincus, *Power, Politics & Parliament.*

[24] Henry Ergas, 'Can Columnists be Civilized?' pp. 160-184 in Ergas & Pincus, *Power, Politics & Parliament.*

[25] Loren Lomasky, 'The Eclipse of Laissez Faire Utilitarianism' pp. 116-140 in Ergas & Pincus, *Power, Politics & Parliament.*

[26] Peter Kurti, 'Religion and the ethics of citizenship in a secular society' pp. 140-160 in Ergas & Pincus, *Power, Politics & Parliament.*

place in the broader fabric of parliamentary government in Australia.[27] Richard French writes about 'speaking truth to power' and the strategic limitations of employing such an approach when engaging with Ministers in the policy development process.[28] French instead favours an approach which draws upon the qualities and mannerisms elucidated by Nethercote in his rich body of work in this field, also endorsed by Don Hunn, John R Martin and Elizabeth McLeay in their reflections on the New Zealand public service.[29] William Coleman writes about the independent expert as 'arbiter' within the Australian policy making landscape,[30] also acknowledging and engaging with the attributes identified by Nethercote as essential to ensuring robust, independent public policy advice and practical, incremental policy reform.

Power, Politics and Parliament honours the past. It is a reflective collection of lessons learnt and characters analysed. Its many retrospective and biographical chapters present an image of Australian political life and public administration that exists in sharp contrast to the chaos, distrust and disrepute often associated with modern Australian politics and policy. However, this collection also offers important insights for those currently involved in public administration or parliamentary practice. It documents and celebrates the foundational values that underpin the Australian public service and safeguard those working 'behind the scenes' in Australia's modern democratic institutions.

Many contributions to this collection underscore the importance of incremental reform of public institutions, the value of academic expertise, and the need for patience and reflection when it comes to the development of public policy. Many parts of the book explicitly or implicitly eschew rapid, popularist or reactionary approaches to policy reform and public administration. This makes this collection a sometimes challenging but important read.

---

[27] David Clune, 'The NSW Legislative Council: a progressive conservative institution' pp. 185-206 in Ergas & Pincus, *Power, Politics & Parliament.*

[28] Richard French, 'Speaking Truth to Power is No Way to Speak to a Minister' pp. 206-223 in Ergas & Pincus, *Power, Politics & Parliament.*

[29] Don Hunn, John R Martin & Elizabeth McLeay, 'The New Zealand Public Service: reflections on the past century' pp. 223-255 in Ergas & Pincus, *Power, Politics & Parliament.*

[30] William Coleman, 'The Independent Expert as Arbiter' pp. 255-281 in Ergas & Pincus, *Power, Politics & Parliament.*

This impressive collection of work has been edited by two of Australians most respected scholars and commentators – Henry Ergas and Jonathan Pincus. It gives us a challenging insight into the characters, qualities and values that have shaped public administration and political life in Australia. It is a volume that will be of great interest to readers of this journal and to those working inside or alongside parliaments in the Australasian region as it explicitly interrogates the intersection between power, politics and public service. It also examines whether and how we achieve the high standards Nethercote advocated when it came to serving the public interest in Australia. It is a collection that provides us with examples of the good, bad and ugly. And most compellingly, it inspires us through the example of Nethercote's devotion to probity and frank and fearless advice.