# Australasian Parliamentary Review

## JOURNAL OF THE AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Editor: Dr Sarah Moulds, Associate Professor in Law, University of South Australia

Uncertainty and reserve powers

Order and disorder in committees

Accountability, effectiveness and integrity

Australasian Study of Parliament Group

SPRING/SUMMER 2025 • VOL 40 NO 2

## 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 ASPG 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



## EDITORIAL BOARD

Australasian Parliamentary Review

SPRING/SUMMER 2025 • VOL 40 NO 2

# Table of Contents

* 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.

The edition opens with a commemorative reflection on the Bicentenary of the New South Wales Legislative Council, marking a significant milestone in Australian parliamentary history. This is followed by a series of articles that explore the dynamics of parliamentary committees, public engagement, and executive accountability.

One such article, authored by Catherine Watson, takes us back in time to a period of 'order in a disorderly House', as we explore the work of New South Wales Assembly Committees in an era of independence. Alistair Davidson revisits the exercise of reserve powers through the lens of a Governor-General's Code of Practice, while Jodhi Rutherford investigates committee effectiveness in Queensland's political landscape. Patrick Glynn offers insights into closing the feedback loop in committee engagement, and Simon Scott examines the ethical tensions faced by conscientious public servants navigating codes of conduct.

International perspectives are also featured, with Charlie Feldman and Anushua Nag analysing the trajectory of Senate Public Bills in Canada, and Brittany Turner exploring the implications of artificial intelligence and deepfakes for parliamentary integrity. Alex Hickman revisits the role of explanatory memorandums in legislative clarity, and Kathleen McGarry considers Ministers as private Members, and the implications for constituency representation in the Federation Chamber. Legal jurisdiction in the digital age is addressed in a multi-part exploration of parliamentary oversight of social media platforms, authored by Rachel Tan.

This edition concludes with two book reviews: David Clune reflects on the selected writings of John Hirst, edited by Chris Feik, and Kim Rubenstein reviews *Civic Engagement in Australian Democracy*, edited by Sarah Murray and Lachlan Umbers.

Finally, I would like to use this opportunity to pay tribute to David Blunt AM, former Clerk of the NSW Legislative Council, whose distinguished career and contributions to parliamentary scholarship have left an enduring legacy including in the pages of this Review. His successor, Steven Reynolds, brings a wealth of experience and leadership to the role.

I extend my sincere thanks to all contributors and reviewers for their thoughtful scholarship and commitment.

Dr Sarah Moulds, Associate Professor in Law, UniSA

November 2025

# Comment

# Commemorating the Bicentenary of the New South Wales Legislative Council

**Office of the Black Rod**

Legislative Council, Parliament of New South Wales.

The Bicentenary of the NSW Legislative Council fell in 2024, marking 200 years since the Council sat for the first time in 1824 and the birth of the country's very first legislature. This significant milestone was celebrated with a range of events - including conferences, exhibitions, concerts and regional roadshows – all of which provided a chance to reflect on the past, celebrate process and imagine the future.

## A PIECE OF HISTORY

John Thomas Bigge, an English judge and royal commissioner, delivered three important reports on the state of New South Wales in 1822-23 – one looking at the state of the colony, another on the judicial establishments and the third on agriculture and trade. After these reports, work started on drafting legislation to improve administration of the colony of New South Wales. This ultimately led to the New South Wales Act of 1823 being passed, effectively establishing the Legislative Council and Supreme Court of New South Wales.[1]

In January 1824, the Council's first five members were appointed, with the inaugural meeting occurring at what was then Government House (now the site of the Sydney Museum), presided over by Governor Thomas Brisbane. In 1825, the Legislative Council was restructured to consist of seven members – four from the colony's newly created Executive Council and three non-Executive members.[2] The powers of the Council then continued to grow as membership increased, while the Governor's involvement began to diminish. By 1829 the Council had started to meet in a room of the Surgeon's Wing of the Rum Hospital, today's Parliament House. Once these deep democratic roots had been established, other historic changes

[1] D. Clune, 'The Development of Legislative Institutions in NSW 1823-1843', *Australasian Parliamentary Review*, Vol. 25 No. 2 Spring 2010, pp 80-89.

[2] Clune, *The Development of Legislative Institutions*.

followed – including the erection of a new Council Chamber in 1843, passing of the NSW Constitution Act in 1854 and development of a system of a responsible government in NSW from 1855, with a bicameral Parliament including a Legislative Assembly.[3]

## SIGNIFICANT SEMINARS AND CONFERENCES

To mark the Bicentenary of the Legislative Council, the Parliament of NSW held a number of events, including a range of seminars and conferences that focused on the powerful stories, history and reforms that transpired the Legislative Council from its humble beginnings to its strong presence and role today.

The seminars and conferences delivered in 2023-2024 included:

- The State of the Colony: People, Place and Politics in 1823 – a two day history conference that explored key figures and events in the history of the Legislative council, early colony and Aboriginal community, with sessions delivered by various academics and engaging authors
- The Spark – a two day conference that delved into intriguing stories and fascinating figures surrounding the New South Wales Act of 1823. This event focused on the constitutional significance of the Act, the Chief Justices of the Supreme Court of NSW, the beginnings of Treasury and the development of the Audit Office's role
- Then & Now: People, Power and Representation – a seminar chaired by the President of the NSW Legislative Council, the Hon Ben Franklin MLC, with current and former members sharing incredible stories, achievements and reflections on contributions to the Legislative Council and institution of parliamentary democracy
- Pride & Precedent: Law, Representation, Reform – a seminar focused on exploring the four decades of ground-breaking legal and social reform in the NSW Supreme Court and the Legislative Council which has transformed the experiences of LGBTQIA+ people
- Representation Matters: Culture & Identity - a seminar that explored the fascinating stories that transformed the Legislative Council to reflect the changing cultural diversity of the community in New South Wales
- Gudyarra – an important seminar, delivered in partnership with the History Council of NSW, which brought Elders of the Wiradyuri community and others together to explore

[3] See Department of Legislative Council, Parliament of New South Wales, 'Bicentenary Resources', 2024. Accessed at https://www.parliament.nsw.gov.au/about/Pages/Bicentenary-Resources.aspx.

the bicentenary of the first use of martial law against Aboriginal Peoples in New South Wales

- Through the Hourglass: Parliamentary democracy yesterday, today and tomorrow – a two day conference that retraced the past 200 years of parliamentary history and explored the vision of future democracy.

The Parliament of NSW also opened its doors to the public on the 25 August 2024, the anniversary of the Legislative Council's first ever meeting, enabling thousands of people to join celebrations in the precinct which marked the special occasion. The day commenced with a Welcome to Country and Smoking Ceremony, with a range of activities then offered throughout the day – including music performances, exhibitions, historian-led talks and chamber tours. One highlight was a re-enactment of the first sittings of the Legislative Council.

## CELEBRATING WITH MUSIC AND ARTWORK

To commemorate the Bicentenary, the NSW Legislative Council also commissioned a unique music composition by the Sydney Conservatorium of Music, with the piece honouring two centuries of parliamentary governance in New South Wales, encapsulating the theme of the Bicentenary: *Reflect, Celebrate, Imagine*.

The piece of music composed consisted of three distinct and evocative moments – *The Striving Spirit, In G and Acknowledgment of Country, Gadigal*. The President, the Hon Ben Franklin MLC stated:

> *This composition is a testament to the creativity and talent of our young musicians, and it beautifully reflects the themes of our Bicentenary – Reflect, Celebrate, Imagine. It is a fitting tribute to our past and an inspiring vision for our future.*

In addition to this, a large scale painting by Gumbaynggir/Bundjalung artist Kim Healey was commissioned, officially unveiled in the Parliament of NSW in September 2024. The Aboriginal artwork 'Ngurra Jagun' honours the connection of First Nations people with the land, waters and sky on which we all live and where Parliament meets. 'Ngurra' is a Gumbaynggir word for 'Home' or 'Shelter' and 'Jagun' is a Bundjalung word that means 'Country'. The intricate and impactful artwork has taken up permanent resident in the Parliament's Fountain Court, inspiring deep reflection on our collective past, present and future.

Separate to these important initiatives, there were Bicentenary Concerts held in the NSW Parliament's Fountain Court, attracting large crowds. These concerts enabled musicians to play a selection of pieces ranging from classical through to contemporary movements. Performances were held by the Sydney Conservatorium of Music, Sydney Youth Orchestra and

Musica Viva Australia. While the Bicentenary celebrations officially ended in December 2024, concerts continued during 2025.

## DEMOCRACY IN THE REGIONS

Recognising the need to involve regional communities of New South Wales in Bicentenary celebrations, the President of the Legislative Council and supporting staff also held regional roadshows, visiting Lismore, Port Macquarie, Bathurst, Batemans Bay, Armidale and Wagga Wagga to hold a public speaking competition for high school students, a youth forum and community workshops. These roadshows have continued throughout 2025, inspiring students to be part of the state's democratic future and to use their voice to make a community impact.

## A ROYAL VISIT

His Majesty King Charles III visited the Parliament of NSW on Sunday, 20 October 2024, to celebrate the Bicentenary of the Legislative Council. He addressed officials, members of Parliament and distinguished guests at a celebratory luncheon, showcasing highlights from the program of events and activities commemorating the Council's Bicentenary. Addressing the gathering, His Majesty congratulated the Council on its Bicentenary and its contributions to the state's progress. His Majesty remarked:

> *Having been with you for your 150th anniversary, I am delighted and proud to be able to return to the Parliament of New South Wales to celebrate the occasion of your Bicentenary. This place and the people within it, have continued to uphold strong representative traditions.*

The King presented the President of the Legislative Council, the Hon Ben Franklin MLC, with a gift of an hourglass, engraved with the Royal Coat of Arms and an inscription memorialising his visit.

## CPA CONFERENCE

In November 2024, to finish the celebrations of the Bicentenary year, the NSW Parliament hosted the Commonwealth Parliamentary Association (CPA)'s annual general conference using the excellent facilities of Sydney's International Convention Centre. The conference was attended by over 600 MPs and Clerks throughout the Commonwealth. One of the highlights was the speech by Prime Minister the Hon Anthony Albanese at the conference dinner which

reflected on the Bicentenary and its place in the Westminster system.[4]

## *Coda: Farewell to David Blunt AM, Former Clerk of the NSW Legislative Council*

After an esteemed 35 year career in the Parliament of NSW, including nearly 14 years as Clerk of the Parliaments and Clerk of the Legislative Council, David Blunt retired in March 2025, marking the end of an era in parliamentary service. Aside from his role as Clerk and being a leading authority in parliamentary law and procedure, David was a key figure in planning and delivering the Bicentenary celebrations. He was also a significant contributor to parliamentary scholarship – being the editor of Annotated Standing Orders in New South Wales, the second edition of Legislative Council Practice and recently publishing a collection of essays on the work of the NSW Legislative Council entitled *Democracy at Work*.

In David's last week, during a parliamentary sitting, a motion was moved to acknowledge and thank the Clerk for his professionalism, hard work and commitment. Many members reflected fondly on David's career, recognising his achievements as Clerk and wishing him well in retirement. The contributions were heart felt and emotional, a fitting tribute to the legacy David has left. With David retiring, Steven Reynolds has now taken the reigns as the Clerk of the Parliaments and Clerk of the Legislative Council. Steven was previously the Deputy Clerk in the Legislative Council, bringing to the role a wealth of experience in parliamentary law and practice as well as strong leadership.

[4] Most of the conference papers and other resources referred to in this article can be accessed via the Parliament's website - www.parliament.nsw.gov.au

# Articles

# Uncertainty and the Exercise of Reserve Powers: Revisiting a Governor-General's Code of Practice*

**Alistair Davidson**[1]

Australian National University

* Double-blind reviewed article.

***Abstract:*** This article examines the concept of uncertainty as it accompanies the exercise of the Governor-General's reserve powers according to unwritten constitutional conventions. While such conventions offer flexibility in constitutional umpiring, their vagueness contributes to controversy, speculation and even crisis. During episodes of acute parliamentary dispute, uncertainty has the potential to undermine the Governor-General's reputation and authority. In response, Canadian scholar Bruce Hicks has advocated for an apolitical decision-making rule for Canada's Governor-General. The rule aims to foster greater predictability by enhancing expectation that Parliament will strive to resolve its own constitutional disputes. Building on Hicks's proposal, this article suggests Australia should go further and introduce a Governor-General's Code of Practice, an idea Australia's Constitutional Commission considered in the 1980s. The proposed code would outline guiding principles for use of reserve powers, including Hicks's rule, to buttress trust in Australia's federal parliamentary democracy.

## INTRODUCTION

Should the Commonwealth alter the form of its constitutional reserve powers? Provoking this question is the uncertainty inherent in vague unwritten conventions that attach to the Governor-General's discretionary use of the reserve powers. Further uncertainty arises for want of precedents in the use of those powers. By definition, conventions guide actions by dint of being usually followed or at least considered acceptable. In contrast, occasions marked by the use of reserve powers, ostensibly guided by convention, are rare and distinguishable by their distinctive circumstances. Nevertheless, Australia's federal parliamentary democracy has enjoyed notable stability in the presence of unwritten reserve powers.

[1] Former Australian Public Servant, MEc (ANU) and Master of Laws student at the ANU. I am grateful to Professor Ron Levy, Liz Drysdale and two anonymous reviewers for their helpful comments and suggestions on an earlier draft. All errors and mistakes remain mine.

However, reconsidering the form of the reserve powers is important for three reasons. One, whether to leave the reserve powers in an unwritten form is a controversy that has persisted since Federation.[2] Two, controversy inevitably marks the use of reserve powers because the conventions are unenforceable,[3] 'disputed and uncertain'.[4] Three, uncertainty in their use invites speculation by constitutional commentators, which can heighten the accompanying sense of crisis.[5]

In this article I argue that the Commonwealth of Australia should adopt a Code of Practice that contains principles federal Parliament expects the Governor-General to follow when using reserve powers. In reaching this conclusion, I rely on the argument propounded by Bruce Hicks, a Canadian political scientist, that making the Governor-General's decisions more predictable during constitutional episodes lessens the sense of crisis, thereby supporting public trust in the constitutional fabric of a democratic society.[6]

I have chosen this approach for two reasons. First, as countries of the British Commonwealth, Australia and Canada share the unwritten constitutional norms called reserve powers. Second, there is much to learn from analysing Australia's Constitution through the analytical lens of uncertainty. Uncertainty is an important and ubiquitous dimension of human decision making.[7] As this article discusses, decision making under uncertainty shaped the formation of Australia's reserve powers, clouds their use by Governors-General and affects a range of stakeholders when they are used.

The remainder of this article is structured as follows. First, I provide a 'biography' of the Commonwealth's reserve powers in which I discuss their nature, their history and why uncertainty about their use persists. Next, I introduce Hicks's predictability benefit argument as a way of mitigating some uncertainty that accompanies their use. This section discusses how uncertainty in constitutional umpiring causes harm, how speculation fuels that uncertainty and how predictability dampens that speculation. Finally, I present the case for a modest constitutional reform. I examine the validity of Hicks's argument in Australia's federal context,

[2] *Official Report of the National Australasian Convention Debates*, Adelaide. 1897, p. 910.

[3] B. J. Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution'. *Journal of Commonwealth and Comparative Politics* 18(3) 1980, p. 266.

[4] Galligan, 'The Kerr-Whitlam Debate and the Principles of the Australian Constitution', p. 249.

[5] Bruce Hicks, 'Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule'. *Constitutional Forum Constitutionnel* 18(2) 2009, p. 65.

[6] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[7] Amy R Bland and Alexandre Schaefer, 'Different Varieties of Uncertainty in Human Decision-Making'. *Frontiers in Neuroscience* 6(Article 85) 2012, p. 1.

consider the merits of more predictable decision making through adoption of Hicks's apolitical decision rule, and revive the idea of a Governor-General's Code of Practice as a way of implementing Hicks's rule.

## THE COMMONWEALTH'S RESERVE POWERS

Some might say that uncertainty about the Commonwealth's reserve powers traces back to disagreements in the lead up to Federation. Others, looking back many hundreds of years, might say reserve powers inherently express uncertainty. After all, they are discretionary and subject to unwritten conventions that have been shaped by disparate events that rarely occur. Yet, despite this, complementing their greatest weakness of uncertainty is their greatest strength of flexibility.

This section provides a 'biography' of the reserve powers to support their analysis through the lens of uncertainty. First it discusses their definition, purpose and types. Next it considers their historical roots. Finally, it examines the reasons why reserve powers persist as unwritten constitutional norms.

### *Definition, purpose, types*

A reserve monarchical power is a residual power,[8] an artefact of the Westminster-style system of responsible government.[9] Heads of state may exercise the power at their discretion,[10] without or against ministerial advice,[11] but subject to convention.[12] A 'head of state' includes the Sovereign, a vice-regal representative, and heads of state in countries that have inherited features from Westminster.[13]

The purpose of reserve powers is to enable the head of state 'to uphold and maintain the fundamental constitutional principles of the system of government that the head of state

[8] Advisory Committee on Executive Government, Parliament of Australia, *Report of the Advisory Committee to the Constitutional Commission*, Parliamentary Paper (no. 303) 1987, p. 3.

[9] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (digital). Cambridge University Press, 2018, p. 1.

[10] Twomey, *The Veiled Sceptre*, p. 6.

[11] Twomey, *The Veiled Sceptre*, p. 6.

[12] Twomey, *The Veiled Sceptre*, p. 7.

[13] Twomey, *The Veiled Sceptre*, pp. 1–2.

represents'.[14] In fulfilling this purpose, reserve powers enable change of government,[15] and serve as 'the last line of defence against governmental actions in breach of fundamental constitutional principles'.[16]

In Australia, reserve powers are rarely exercised.[17] At the Commonwealth level, the last occasion was in 1975 when the Governor-General Sir John Kerr dismissed the Prime Minister Gough Whitlam in the circumstances of a supply deadlock (commonly known as 'the Dismissal'). Prior to that occasion, in 1909, Lord Dudley (William Humble Ward) refused the application from Prime Minister Alfred Deakin requesting a dissolution.[18]

Despite being rarely exercised, it does not necessarily follow that reserve powers play no ongoing role in maintaining fundamental constitutional principles. To an unknown extent, reserve powers may achieve that purpose without being exercised. For example, their mere existence may suffice to cause a chief minister to moderate behaviour,[19] rather than to 'push the boundaries of appropriate behaviour'.[20]

There are several types of reserve powers. Anne Twomey categorises them into three groups. One group comprises the 'classic'[21] powers: to dismiss a chief minister, to appoint a chief minister, and to refuse a dissolution.[22] Another group comprises the disputed reserve powers: to refuse royal assent, to force a dissolution, and to summon and prorogue Parliament.[23] A further group contains several discrete powers, including to refuse to act in breach of caretaker conventions, the *Australian Constitution* (the Constitution) or the law, and to pursue the doctrine of necessity to restore constitutional governance.[24]

---

[14] Twomey, *The Veiled Sceptre*, p. 1.

[15] Twomey, *The Veiled Sceptre*, p. 1.

[16] Twomey, *The Veiled Sceptre*, p. 1.

[17] Australia. Constitutional Commission, *Final Report of the Constitutional Commission*, Parliamentary Paper (no. 229) 1988, p. 76 [2.135].

[18] Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd ed). London: Routledge, 2013, p. 53.

[19] Twomey, *The Veiled Sceptre*, p. 43.

[20] Twomey, *The Veiled Sceptre*, p. 42.

[21] Anne Twomey, *Unrecognised Reserve Powers*, Speech, High Court of Australia, 14 November 2012, p. 1. Accessed at: https://www.hcourt.gov.au/publications/speeches/high-court-lecture-series.

[22] See also George Winterton, 'Reserve Powers in an Australian Republic'. *University of Tasmania Law Review* 12(2) 1993, p. 253.

[23] Twomey, *The Veiled Sceptre*, p. 10.

[24] Twomey, *The Veiled Sceptre*, p. 10.

## *Historical Roots*

Reserve powers are the remnants of the British Crown's discretionary powers.[25] The Commonwealth of Australia inherited these by inheriting the British system of responsible government.[26] Their origin traces to the transfer of the Crown's power to the state that occurred during the age of enlightenment of the 17th and 18th centuries.[27] Although decision makers at the time found agreement on who should control most of the Crown's discretionary powers, they could not agree on a suitable alternative for a few powers.[28] Over time, the Crown came to retain these remnants, which are now referred to as reserve powers.[29]

Philosophical developments during the enlightenment explain why conventions 'temper'[30] the exercise of these 'sweeping'[31] reserve powers. During this age, legal philosophers reconceived the rationale for the Crown as the source of all public authority as 'the people's choice' rather than God's choice.[32] Hicks describes this new way of thinking as a 'clever sleight of hand' to align the justification for power allocations with evolving societal mores.[33] In effect, it changed the rationale that supported the constitutional authority of institutions without markedly altering the institutions themselves.[34] The resulting equilibrium between the forces for change (democracy) and for permanence (convention) became part of British common law.[35]

Australia inherited this common law to the extent it was applicable.[36] Further, the framers of Australia's Constitution were familiar with British constitutional traditions as a reason for not codifying conventions.

---

[25] Bruce M. Hicks, 'The Crown's "Democratic" Reserve Powers'. *Journal of Canadian Studies* 44(2) 2010, p. 8.

[26] Winterton, 'Reserve Powers in an Australian Republic', p. 252.

[27] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 9.

[28] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 8.

[29] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 8.

[30] Richard A Edwards, 'Republican Britain: The Constitutional Implications'. *Cambrian Law Review* 31 2000, p. 7.

[31] Edwards, 'Republican Britain: The Constitutional Implications', p. 7.

[32] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 9.

[33] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[34] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[35] Hicks, 'The Crown's "Democratic" Reserve Powers', p. 10.

[36] William Blackstone, *Commentaries on the Laws of England in Four Books* (16th ed) ed. John Taylor Coleridge. London: J Butterworth and Son, 1825, p. 107 [108].

## *Power Persisting in Unwritten Words*

Reserve powers exist in the form of unwritten constitutional norms. This, of itself, may introduce uncertainty into political and constitutional decision making where there is doubt about a power's precise definition. Additional uncertainty attaches to reserve powers through unwritten conventions intended to govern their use. Most of the Commonwealth of Australia's constitutional conventions are the product of 'about 250 years of evolution of British parliamentary government'.[37] Despite this historical development, significant uncertainty attaches to the conventions,[38] or their application in novel circumstances, including where they might clash.[39] Further uncertainty may confront decision making by political actors where a Governor-General errs in applying the relevant power to the prevailing circumstances.[40] More uncertainty emerges to the extent that conventions need to change. While constitutional conventions are 'customs, or understandings',[41] they reside in the sphere of 'constitutional or political ethics'.[42] As such, conventions coexist with the written law as 'an unwritten or conventional Constitution'.[43] For example, a large proportion of changes in the British Constitution since Edward I (1239–1307) have been 'silent changes' to conventions.[44] Conventions have also changed during the 20th century.[45] And, on occasions, conventions may need to be adapted or created.[46] It is always open to Parliament to change a convention.[47]

During the 1897 National Australasian Convention debate on the draft Constitution Bill, the applicability of unwritten conventions under an unwritten British constitution for an Australian

[37] Australia. Constitutional Commission, *Final Report*, p. 88 [2.193].

[38] Twomey, *The Veiled Sceptre*, p. 38.

[39] Anne Twomey, 'The Reserve Powers in Times of Political Crisis: The Dutton/Turnbull Leadership Challenge and Royal Assent to the Medevac Bill and Brexit Bills'. *Federal Law Review* 49(1) 2021, p. 101.

[40] LJ Mark Cooray, 'Australian Constitutional Convulsions of 1975 - The Reserve Powers of the Governor-General and Implications for the Future'. *Malaya Law Review* 22(1) 1980, p. 114.

[41] A V Dicey, *Introduction to the Study of the Law of the Constitution* (3rd ed). London: MacMillan and Co, 1889, p. 352.

[42] Dicey, *Introduction to the Study of the Law of the Constitution*, p. 341.

[43] Edward A Freeman, *The Growth of the English Constitution from the Earliest Times* (2nd ed). London: MacMillan and Co, 1873, p. 278.

[44] Freeman, *The Growth of the English Constitution from the Earliest Times*, p. 90.

[45] Australia. Constitutional Commission, *Final Report*, p. 82 [2.168].

[46] Twomey, 'The Reserve Powers in Times of Political Crisis', p. 101.

[47] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (online). Oxford University Press, 1987, p. 217.

constitution in written form was contested.[48] Several reasons explain why the founders of federation decided to retain the reserve powers in an unwritten form. First, Sir Edmund Barton insisted on treating the reserve powers for the Commonwealth's written Constitution in the same way that England's Constitution treated them — as unwritten.[49] Further, as lead drafter, Barton 'feared ridicule in London' if the Bill embraced constitutional conventions rather than 'confin[ing] itself to the "law"'.[50] Moreover, within Barton's understanding of English constitutional practice, '[c]onventions offered the enticing prospect of flexibility'.[51] A key advantage of flexibility is the adaptability of reserve powers to address novel crises.[52]

Faced with a trade-off between uncertainty and flexibility, commentators appear polarised as to what form of reserve powers best serves the Commonwealth's long-term interests. Some commentators argue against codification on the grounds that conventions need to 'develop organically'.[53] In this vein, Robert Hawkins points to the 'impossibility of anticipating all eventualities', the risk of embroiling the Governor-General and the spectre of judicial review.[54] Others, notably Herbert Evatt, posited two reasons to codify reserve powers. First, it avoids 'an over-careful Governor-General' failing to act for want of a clear definition of their scope.[55] Second, it avoids 'an imprudent or over-zealous Governor-General' acting without reasonable grounds.[56]

Since federation, two notable efforts have sought to put aside conventions and instead codify reserve powers. In 1936, Evatt published his book The King and His Dominion Governors 'to demonstrate how uncertain and vague the reserve powers were and to advocate for their

[48] *Official Report of the National Australasian Convention Debates*, Adelaide. 1897, p. 910 (Edmund Barton, George Reid, John Cockburn).

[49] *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, p. 910 (Edmund Barton).

[50] Winterton, 'Reserve Powers in an Australian Republic', p. 253.

[51] Michael Crommelin, 'Powers of the Head of State'. *Melbourne University Law Review* 38(3) 2015, pp. 1122–3.

[52] Winterton, 'Reserve Powers in an Australian Republic', p. 252.

[53] James W J Bowden and Nicholas A MacDonald, 'Cabinet Manuals and the Crown', in D Michael Jackson and Philippe Lagassé (eds), *Canada and the Crown: Essays in Constitutional Monarchy*. Queen's University: McGill-Queen's University Press, 2013, p. 182.

[54] Robert E Hawkins, '"Inefficient Efficiency": The Use of Vice-Regal Reserve Powers', in D Michael Jackson and Philippe Lagassé (eds), *Canada and the Crown: Essays in Constitutional Monarchy*. Queen's University: McGill-Queen's University Press, 2013, p. 103.

[55] Evatt, *The King and His Dominion Governors*, p. 306.

[56] Evatt, *The King and His Dominion Governors*, p. 306.

codification'.[57] Then in 1985, the Brisbane session of the Australian Constitutional Convention resolved '[t]hat this Convention recognises and declares that the following principles and practices should be observed as Conventions in Australia'.[58] Although this effort resulted in the compiling of 18 constitutional conventions in written form, the outcome was not authoritative or binding in any formal sense.

Further support for the codification of reserve powers is often linked to republican reform. In this regard, the Australian Republican Movement has proposed amendments to the Constitution, which it has detailed in its Australian Choice Model.[59] The proposal's intention is to extinguish reserve powers currently exercisable by the Governor-General unless codified within the Constitution.[60]

In conclusion, the persistence of the Commonwealth's reserve powers in their vague unwritten form is no historical accident. The evidence presented does not suggest their persistence stems from a chance happening or a cause that was other than deliberate. Rather, it appears to be the reasoned outcome of conscientious political actors concerned about power sharing for the good of a nation. Notwithstanding, the vague form of unwritten reserve powers is a legal tension. While the next section finds that uncertainty clouds their application and scope,[61] the law generally favours certainty in these areas.[62] Yet efforts to codify reserve powers have not succeeded. Viewed through the analytical lens of uncertainty, the existing form of the reserve powers becomes questionable. Should the Commonwealth leave its reserve powers in their current form, or should it alter their form to alleviate the uncertainty that clouds their application and scope during a constitutional episode? Thus far, identification of a middle approach that balances flexibility and predictability has proved elusive.

[57] Twomey, *The Veiled Sceptre*, p. 38.

[58] *Minutes of Proceedings, Official Record of Debates and Biographical Notes on Delegates and Representatives Attending the Australian Constitutional Convention,* Brisbane. 1985, p. 415.

[59] Australian Republican Movement, *The Australian Choice Model: A Genuine Choice for Australians*. Accessed at: https://republic.org.au/letsdiscuss.

[60] Dane Luo, 'The Devil Is in the Detail: The Reserve Powers under the Australian Choice Model', Blog Post, *AUSPUBLAW*, 18 February 2022. Accessed at: https://www.auspublaw.org/blog/2022/02/the-devil-is-in-the-detail-the-reserve-powers-under-the-australian-choice-model.

[61] Twomey, *The Veiled Sceptre*, p. 42.

[62] See eg *Pyrmont Point v Westacott*, 91 NSWLR 170 (2016), at 178 [47] (Ward JA).

## HICKS'S PREDICTABILITY BENEFIT ARGUMENT

To address the legal tension inhering in the Commonwealth's reserve powers — law generally favouring certainty and reserve powers favouring uncertainty — I rely on an argument by Bruce Hicks, a Canadian political scientist. Hicks expounded his argument during the Canadian 2008–2009 parliamentary dispute. In this dispute, the Governor-General granted the Prime Minister's request to prorogue Parliament just 'six weeks after a federal election, three weeks into the new session, and two sitting days before an opposition motion of non-confidence was likely to defeat the government'.[63] The uncertainty that enveloped the Governor-General's decision making engendered a sense of crisis.[64] Hicks argues that enabling more predictable decision making during a prorogation episode will reduce the sense of crisis, among other benefits.[65]

In this section, I discuss Hicks's predictability benefit argument through the analytical lens of uncertainty. I step through how uncertainty in constitutional umpiring causes harm, how speculation fuels that uncertainty and how predictability dampens speculation which, in turn, mitigates the sense of crisis.

### *Uncertain Umpiring Causes Harm*

Resolving a constitutional episode such as Canada's 2008 prorogation episode requires constitutional umpiring. I use the term 'constitutional episode' to mean a dispute between constitutional actors that invites intervention by the independent umpire. This is to distinguish most uses of the term 'constitutional crisis', which are hyperbole,[66] from a real constitutional crisis, which is 'a very serious thing'.[67]

A constitutional crisis occurs when the Constitution risks 'failing at its central task'.[68] According to Jack Balkin, that task is ensuring disputes remain 'within the boundaries of ordinary politics rather than breaking down into anarchy, violence, or civil war'.[69] Such occasions could arise from politicians announcing they will defy the Constitution, many people refusing to obey the

[63] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[64] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[65] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[66] Jack M Balkin, 'Constitutional Crisis and Constitutional Rot'. *Maryland Law Review* 77(1) 2017, p. 148.

[67] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 150.

[68] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 147.

[69] Balkin, 'Constitutional Crisis and Constitutional Rot', pp. 147–8.

Constitution or the Constitution keeping political actors from preventing a disaster.[70] Notwithstanding, the scope of this article does not consider the use of reserve powers under the extreme uncertainty of a real constitutional crisis.

Within the context of a constitutional episode, constitutional umpiring means 'resolv[ing] disputes among contending parties'.[71] Within the realm of the British Commonwealth, the Governor-General fills this role. Insofar as the Constitution delimits and allocates governmental powers,[72] constitutional umpiring involves decision making to maintain the predetermined power allocations.

Constitutional umpiring characterised by uncertain decision making can harm public trust in the constitutional fabric of a democracy. For example, during the 2008 Canadian parliamentary dispute, uncertain decision making '[shook] public faith in Canada's constitutional conventions and its system of responsible parliamentary government'.[73] Further, it highlighted a potential risk to the office of the Governor-General as part of that system.[74] Moreover, Hicks identified a 'very real danger' if the public were to expect the Governor-General to use reserve powers contrary to constitutional conventions which constraint their use. Such an expectation could emerge if, for example, many citizens came to accept the inaccurate notion that the Governor-General's umpiring role is to 'thwart the will of a ruthless prime minister'.[75]

At the root of uncertain umpiring are ambiguous conventions attached to reserve powers. Use of reserve powers must follow convention, but control over their use 'suffers from inevitable ambiguity' attached to conventions.[76] Without clearly expressed conventions to guide the use of reserve powers, decision making becomes uncertain. Amplifying this uncertainty are the circumstances that characterise a constitutional episode — controversy and disagreement among constitutional actors.[77]

## *Speculation Fuels Uncertainty*

During the Canadian 2008 parliamentary dispute, the influence of the media and expert

[70] Balkin, 'Constitutional Crisis and Constitutional Rot', p. 148.

[71] David Chang, 'Conflict, Coherence, and Constitutional Intent'. *Iowa Law Review* 72(4) 1987, p. 774 n 64.

[72] Australia. Constitutional Commission, *Final Report*, p. 466 [9.94].

[73] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[74] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[75] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[76] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[77] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

commentators fuelled the sense of uncertainty.[78] The media took an intense interest as the dispute offered 'daily drama' and raised constitutional questions.[79] For answers to emerging constitutional questions, the media approached various academics to help the public 'understand the relevant constitutional rules and possible decision outcomes'.[80] However, for their part, the academic experts 'did nothing to alleviate the sense of uncertainty'.[81] We can infer from Hicks that because of the uncertainty attached to the prorogation conventions, experts offered different interpretations of those conventions and their application in the circumstances. Supporting this inference is Johannes Wheeldon's ex-post analysis of the views of 25 constitutional scholars about the 2008 prorogation.[82] Although most scholars agreed the Governor-General had discretion to refuse the request, Wheeldon's results confirm no consensus. In fact, and underscoring the pervading uncertainty, Wheeldon proposes 'four unique schools of thought' about that constitutional episode.[83]

Ample anecdotal evidence buttresses the proposition that ambiguity invites speculation. As a media invitee himself during the 2008 prorogation,[84] Hicks witnessed the speculation among academics firsthand.[85] Further, Hicks observed that 'even the reasons underlying convention are largely speculative'.[86] With the Governor-General's decision hanging on convention subject to multiple interpretations, it is natural for academics to theorise or conjecture about the possible outcomes of the dispute. After all, Canada needed answers.

However, in that constitutional episode, speculation by the media and constitutional experts fuelled the 'sense of "crisis"'.[87] Further, Hicks views the variety of political events that ensued in the weeks following prorogation as unnecessary. They were avoidable but for 'continued

[78] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[79] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[80] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[81] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[82] Johannes Wheeldon, 'Constitutional Peace, Political Order, or Good Government? Organizing Scholarly Views on the 2008 Prorogation'. *Canadian Political Science Review* 8(8) 2014, p. 102.

[83] Wheeldon, 'Constitutional Peace, Political Order, or Good Government?', p. 102.

[84] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[85] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[86] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[87] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

lack of clarity'.[88] Moreover, avoiding them would have 'eliminated the sense of crisis',[89] and its attendant uncertainty surrounding the Governor-General's decision making.

## *Hicks's Predictability Benefit Argument*

However, Hicks argues that simply making conventions less ambiguous is not sufficient to alleviate uncertainty during a constitutional episode,[90] were this feasible. Instead, he argues for predictable decision making by the Governor-General. In his view, this approach will deliver greater benefits than relying only on making conventions less ambiguous.[91] Hicks reasons that predictability reduces uncertainty during a constitutional episode particularly to the extent that it reduces academic and media speculation.[92]

Empirical scholarship adds weight to Hicks's argument that constitutional reforms aimed at making umpiring decisions more predictable are preferable to reforms simply aimed at making conventions less ambiguous. Catrin Rode and others have found that when choosing between options in situations lacking probability information (ie under uncertainty),[93] people take account of three determinants: their need; an option's expected outcome; and the outcome's variance.[94] Crucially, they do not generally avoid ambiguous options as such,[95] that is, options with unknown outcome probabilities.[96] Rather, empirical evidence suggests that people generally seek to avoid high variance outcomes, which may or may not be associated with ambiguous options.[97]

Likewise, presumably political actors would prefer reforms that best serve to reduce uncertainty surrounding decision making by the Governor-General during a political dispute, all other things equal. To that end, reforms that make umpiring decisions more predictable are likely to lower the variance of political choice outcomes predicated on those decisions more than reforms that make conventions less ambiguous. Two reasons stand out. One, reforms

[88] Hicks, 'Guiding the Governor General's Prerogatives', p. 56.

[89] Hicks, 'Guiding the Governor General's Prerogatives', pp. 56–7.

[90] Hicks, 'Guiding the Governor General's Prerogatives', p. 57.

[91] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[92] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[93] Catrin Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty? Testing Some Predictions from Optimal Foraging Theory'. *Cognition* 72(3) 1999, p. 273.

[94] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 269.

[95] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 269.

[96] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 271.

[97] Rode et al., 'When and Why Do People Avoid Unknown Probabilities in Decisions under Uncertainty?', p. 296.

aimed directly at decision outcomes would likely be more effective in reducing uncertainty than reforms aimed at conventions intended to guide those same decision outcomes. Two, the extent to which conventions could be made less ambiguous yet retain sufficient flexibility to guide the umpiring of novel political disputes is far from clear.

As a way to enhance predictability, Hicks proposes '[h]aving the governor general acknowledge and formalize the use of an apolitical decision rule'.[98] The gist of the rule is that a Governor-General should 'try to exercise [their] reserve powers such that as many options as possible will remain available to elected members of Parliament'.[99] In other words, the Governor-General should give Parliament every opportunity to resolve its own political disputes. We can infer the fundamental premise of the rule from Hicks's article, which is that although the Governor-General does have 'an autonomous decision-making role',[100] a minimalist approach is nevertheless appropriate.[101] Hicks gives other reasons to support adopting the apolitical decision rule to operationalise his predictability benefit argument. These include an analogous precedent in the Canadian Speaker's conventions,[102] and the imperative to safeguard the Governor-General's impartiality.[103]

Elsewhere Hicks argues that a Governor-General may avoid adding to uncertainty during a constitutional episode by issuing a written decision that explains their reasoning.[104] In his view, having the Governor-General adopt this approach would have removed much of the uncertainty surrounding the Canadian 2008 prorogation episode.[105] While the merits of this idea are largely self-evident, this article focuses on the Governor-General's use of reserve powers rather than their communication as such.

While Hicks leaves the precise text and instrumental form of his apolitical decision rule open for further discussion, he recommends three broad guidelines to ensure its effectiveness. One,

[98] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[99] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[100] Hicks, 'Guiding the Governor General's Prerogatives', p. 59.

[101] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

[102] Hicks, 'Guiding the Governor General's Prerogatives', p. 62.

[103] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[104] Bruce Hicks, 'Lies My Fathers of Confederation Told Me: Are the Governor General's Reserve Powers a Safeguard of Democracy?'. *Inroads: The Canadian Journal of Opinion* (25) 2009.

[105] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

unlike ambiguous conventions, the rule should be 'formally enunciat[ed]',[106] — a 'formal rule'[107] expressed in 'clearly defined' terms.[108] Two, Hicks impliedly invites constitutional scholars to contribute to the rule's development by examining the acceptability of his idea from several scholarly standpoints.[109] In addition, he appears to leave open its precise wording insofar as he simply states the gist of the rule,[110] and always refers to the rule using the indefinite article. Three, Hicks recommends that the Governor-General should acknowledge the merits of the rule,[111] and formalise its use.[112]

In conclusion, we see that uncertain decision umpiring during Canada's 2008 prorogation episode harmed public trust in Canada's constitutional fabric. This harm stemmed from the vague nature of conventions intended to guide use of reserve powers. However, it was exacerbated by commentators who, understandably, speculated on the possible alternative outcomes in the uncertain circumstances. Hicks argues that enabling political actors to better predict outcomes in a prorogation episode offers the benefit of reducing speculation and, in turn, reducing the sense of crisis. Further, as a way to enhance predictability, Hicks recommends the Governor-General acknowledge and formalise the use of an apolitical decision rule. In effect, such a rule would serve to enhance predictability by explicitly placing the burden of resolving political disputes on Parliament, unless a higher threshold is reached that warrants the Governor-General's intervention.

## THE CASE FOR CONSTITUTIONAL REFORM

As discussed previously, various sources of uncertainty cloud the reserve powers, and their use during a constitutional episode would likely add to that uncertainty. On the basis of Hicks's predictability argument, I will argue that the Australian Parliament should develop a code of practice specifying principles for the Governor-General to adhere to when using reserve powers. The inference I draw from Hicks's argument is that reforms to support more predictable decision making during a prorogation episode in Canada would, likewise, be beneficial in managing constitutional episodes in Australia. Further, while Hicks does not address in detail the rule's formalisation, it is nevertheless important to consider how federal

[106] Hicks, 'Guiding the Governor General's Prerogatives', p. 57.

[107] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[108] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

[109] See eg Hicks, 'Guiding the Governor General's Prerogatives', pp. 58, 60–1.

[110] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[111] Hicks, 'Guiding the Governor General's Prerogatives', p. 65.

[112] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

Parliament should formalise the rule to clarify how it relates to other elements of the constitutional system.

I develop this argument for constitutional reform in three steps. First, I explain the validity of applying Hicks's argument to Australia's Commonwealth. Next, I argue that adopting Hicks's apolitical decision rule would benefit Australia's federal parliamentary democracy by improving the predictability of decision making by the Governor-General during constitutional episodes. Finally, I revive the idea of a Governor-General's code of practice as an instrument for introducing Hicks's apolitical decision rule.

## *The Validity of Applying Hicks's Predictability Benefit Argument to the Commonwealth of Australia*

Three grounds validate applying Hicks's predictability benefit argument to the Commonwealth of Australia. One, the constitutional heritage of reserve powers in Australia and Canada is identical. Both countries share 'a sufficiently close connection to the Westminster system of government'.[113] And although their constitutional conventions attract 'legitimate and healthy differences of interpretation',[114] they are nevertheless broadly comparable.[115]

Two, the essence of Hicks's apolitical decision rule, which gives practical expression to his predictability benefit argument, does not purport to alter power balances within a constitutional system. It does not codify nor materially change existing conventions. The rule is essentially a meta-convention — a convention about the use of conventions themselves.

Three, Hicks's reasons for enhancing predictability in a prorogation episode apply appropriately to occasions inviting use of other reserve powers. Hicks's chief argument for predictability is to mitigate harmful speculation. The fact that use of the dissolution power can, in certain circumstances, lead to highly predictable outcomes does not weigh against enhancing predictability more generally.

Although the validity of applying Hicks's argument depends on constitutional actors respecting conventions,[116] this condition is not unique to Canada. Precedents already show that Australian

[113] Twomey, *The Veiled Sceptre*, p. 2.

[114] James W J Bowden and Nicholas A MacDonald, 'Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia'. *Journal of Parliamentary and Political Law* 6 2012, p. 366.

[115] Bowden and MacDonald, 'Writing the Unwritten', p. 367.

[116] Hicks, 'Guiding the Governor General's Prerogatives', p. 61.

Prime Ministers have acted contrary to convention.[117] And, as Evatt points out, there is 'no effective remedy against non-observance of conventions'.[118]

## *Adopting Hicks's Apolitical Decision Rule Would Benefit the Commonwealth*

Hicks's predictability benefit argument invites constitutional reform. Reform could imply codifying conventions into black letter law as a way to lessen their ambiguity, were this at all practicable and utile. However, in Hicks's view, this approach would not sufficiently reduce uncertainty fuelled by commentator speculation. Instead, his call is for predictability in Governor-General decision making. This implies a reform involving something additional. To this end, implementation of Hicks's apolitical decision rule could serve as a beneficial constitutional reform initiative.

However, whether the Commonwealth should adopt Hicks's rule turns on a careful weighing of the pros and cons. Weighing in favour is the fact that the Commonwealth does not have a constitutional convention or instrument to promote more predictable decision making by the Governor-General. To argue the converse — that unpredictable decision-making is in the national interest — is not defensible.

In addition, we may expect that Australian media and academic commentators would, like their Canadian counterparts, contribute to the sense of crisis during a constitutional episode. This expectation is not intended to denigrate the media and its reportage of governmental and political matters, which 'must be regarded as indispensable to freedom of communication',[119] nor academics trying to help citizens understand how parliamentary democracy works under constitutional uncertainty. Rather, it is a reason to consider adopting Hicks's rule to address a source of uncertainty that is amenable to mitigation.

Some might argue 'if it ain't broke, don't fix it'. Australia's sparse history of constitutional episodes suggests a stable parliamentary democracy. In contrast, Canada has experienced episodes as recently as 2008,[120] 2020[121] and 2025.[122] However, history cannot guarantee future

---

[117] Cooray, 'Australian Constitutional Convulsions of 1975', p. 108.

[118] Evatt, *The King and His Dominion Governors*, p. 306.

[119] *Levy v Victoria* (1997) 189 CLR 579, at 623 (McHugh J).

[120] Hicks, 'Guiding the Governor General's Prerogatives', p. 55.

[121] Historica Canada, 'Prorogation in Canada', in *The Canadian Encyclopedia*, 15 May 2025. Accessed at: https://thecanadianencyclopedia.ca/en/article/prorogation-in-canada.

[122] Leah Trueblood, 'Judicial Review of Prorogation in Canada: The Applicability of *Miller/Cherry v Prime Minister* to *MacKinnon v Canada*', Blog Post, *UK Constitutional Law Association*, 29 April 2025. Accessed at: https://ukconstitutionallaw.org.

stability. It behoves Australia to avoid presuming that its Federation decision on the form of constitutional conventions necessarily remains fit for purpose.

On balance, the normative arguments in favour of improving decision-making predictability through Hicks's apolitical decision rule appear to outweigh the offsetting considerations of maintaining the status quo.

## *Application to the Dismissal*

Having made the argument for adoption of Hicks's apolitical decision rule, an interesting thought experiment presents itself. How might the rule have applied in the circumstances of the Dismissal? Although Hicks did not address this application, some inferences may be drawn from the rule's definition and an earlier Canadian episode.

In order to consider how the rule might have applied, it is first necessary to assume that the circumstances would still warrant exercise of a reserve power. In this hypothetical scenario, decision making by various actors may deviate from that in 1975 against the backdrop of the apolitical decision rule that the Governor-General and Parliament have accepted. For example, the rule's presence might slow decision making by the Governor-General insofar as it promotes wider consideration of the powers available in the circumstances. Alternatively, to the extent the resolution burden shifts more squarely onto Parliament, the rule might induce greater public pressure on parliamentarians to resolve the dispute in a timelier manner. Assuming vice-regal intervention is warranted, application of the rule means choosing the reserve power which, if exercised, leaves open as many options as possible.

Hicks's consideration of decision making by Governor-General Lord Byng during Canada's so-called King-Byng affair of 1926 illustrates how application of the rule might proceed in practice. In that case, by initially refusing the dissolution request, Lord Byng left the matter before Parliament for as long as possible — until it was 'truly dysfunctional' — before granting the request.[123]

The King-Byng example usefully draws attention to the time dimension of decision making under the rule. Presumably, in the first instance, exercise of the reserve power that leaves open the largest number of options for Parliament also offers Parliament an equal or more generous time constraint for decision making. As such, there may be a time trade-off between giving Parliament every opportunity to resolve its own disputes and the duration of those disputes.

[123] Hicks, 'Guiding the Governor General's Prerogatives', p. 63.

In the case of the Dismissal, time was a more acute decision factor than in the King-Byng dissolution example. Supply deadlocks are inherently urgent.[124] However, where time permits, a Governor-General choosing to make decisions according to the apolitical decision rule might enable Parliament to experience public pressure for longer than otherwise. Noting that the rule is non-binding, the Governor-General makes their decision making more predictable by publicly committing to the rule at the first opportunity during their term.

## *A Code of Practice for the Governor-General*

The question arises as to what form the apolitical decision rule should take. One idea from Australia's Constitutional Commission in the late 1980s is for a 'judicially unenforceable'[125] 'code of practice' to govern reserve powers.[126] A majority of the Advisory Committee on Executive Government made this recommendation. However, the idea did not progress. The Commission itself instead proposed amending the Constitution so that most reserve powers would 'be exercisable only on Ministerial advice'.[127] Notably, the Commission also proposed amending section 64 of the Constitution[128] to preclude dismissal of a Prime Minister without the House first resolving its lack of confidence in the Government.[129] In the end, the ensuing 1988 referendum excluded both proposals.[130]

There are several reasons to revive the code of practice idea as an instrument to introduce Hicks's apolitical decision rule. One, it would ensure the general public, constitutional commentators and all constitutional actors know of the Governor-General's broad approach to making decisions. This approach avoids leaving the Governor-General 'refereeing a game in which the players do not agree on the rules'.[131] Two, developing a code is more likely to succeed than a referendum to change the Constitution. Electors have approved only 8 out of 45 proposals for constitutional change.[132] Three, the code would remain subordinate to the

[124] Brendan Lim, *Australia's Constitution after Whitlam*. Cambridge: Cambridge University Press, 2017, p. 43.

[125] Advisory Committee on Executive Government, *Report to the Constitutional Commission*, p. 38.

[126] Advisory Committee on Executive Government, *Report to the Constitutional Commission*, p. 65.

[127] Australia. Constitutional Commission, *Final Report*, p. 344 [5.164].

[128] *Commonwealth of Australia Constitution Act* (The Constitution), s 64.

[129] Australia. Constitutional Commission, *Final Report*, p. 325 [5.63(b)].

[130] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901–1997*, Miscellaneous Paper (no. 8442) 1997, p. 110.

[131] Peter H Russell, 'Prorogation: Prime Ministers Must Not Become Kings'. *Canada Watch* (Spring) 2011, p. 17.

[132] Australian Electoral Commission, 'Referendum Dates and Results', Web Page, 7 November 2023. Accessed at: https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm.

Constitution. This appropriately recognises the code's role in guiding, not binding. Four, it may assist Governors-General, most of whom are not legally trained. Five, it could serve as a receptacle for related guidance. For example, to reduce uncertainty, Hicks also suggests requiring a Governor-General to issue written decisions explaining their exercise of a reserve power.[133]

One potential disadvantage is that a code is likely to be readily amendable. However, it is non-binding in any case. Moreover, a code containing the apolitical decision rule could potentially increase the Governor-General's power. For example, by subjecting any egregious manoeuvres by a Prime Minister to Parliamentary debate for longer, the Governor-General applies political and public pressure for longer.

A further question is who should take carriage of this reform initiative. As previously mentioned, Hicks recommended that the Governor-General should 'acknowledge and formalize the use of an apolitical decision rule'.[134] However, it is far from clear that the Governor-General would unilaterally take the initiative. Given the likely political and public sensitivities involved, it may be prudent for federal Parliament to take carriage of this constitutional reform initiative. It is critical to ensure clarity about how the Code of Practice containing the apolitical decision rule (and possibly other matters) relates to other elements of the Commonwealth constitutional system and to avoid any unintended consequences during a constitutional episode. It may be prudent, for example, to require a two-thirds majority or similar supermajority to ensure maximal buy-in from parliamentarians.

In sum, applying Hicks's predictability benefit argument to the Commonwealth's reserve powers is a reform opportunity that maintains the flexibility of uncertain conventions but overcomes the significant uncertainty in decision making. Further, Hicks's suggestion of an apolitical decision rule is a practicable means for enhancing predictable decision making by the Governor-General during a constitutional episode. Moreover, the idea of a Code of Practice for the Governor General is a convenient and practicable instrument for introducing Hicks's rule.

## CONCLUSION

The vague form of the Governor-General's reserve powers presents a legal tension. While uncertainty clouds the exercise of the reserve powers according to unwritten conventions, the law and decision makers generally favour certainty. Viewed through the analytical lens of

[133] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

[134] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

uncertainty, the current form of the reserve powers appears suboptimal. There is scope to reduce some uncertainty surrounding their use without fundamentally compromising their flexibility or constitutional power balances.

In this article I have argued that Australia's Federal Parliament should approve a Code of Practice for adoption by the Governor-General. In reaching this conclusion, I have relied on Bruce Hicks's argument that making the Governor-General's decisions more predictable during constitutional episodes would lessen the sense of crisis. The Code would contain principles that Parliament expects the Governor-General to follow when using reserve powers. In this form, the principles should be non-binding and judicially unenforceable. The principles are essentially meta-conventions — conventions about the conventions themselves. Rather than replacing constitutional conventions, these broad principles would serve to guide the Governor-General in using their reserve powers according to the conventions as understood at the time.

One principle for inclusion in the proposed Code should be Hicks's apolitical decision rule. Put simply, the rule states that the 'Governor-General should try to exercise [their] reserve powers such that as many options as possible will remain available to elected members of Parliament'.[135] The rule's purpose is to subdue the sense of crisis during a constitutional episode that media and academic commentators can cause by speculating about uncertain outcomes. Until Parliament is truly dysfunctional, public expectation should weigh on Parliament to persevere in resolving constitutional disputes. The rule offers the advantage of retaining the flexibility inherent in ambiguous conventions.

Australia enjoys a stable parliamentary democracy. To presume this will always be the case is to take it for granted. It is not a question of whether a constitutional episode will occur, but when. Canada's 2008–2009 parliamentary dispute and the Dismissal are salutary reminders that uncertain and unpredictable decision making by the Governor-General can harm public trust in the constitutional fabric of a democracy. The proposed Governor-General's Code of Practice, which includes Hicks's apolitical decision rule, offers a solution.

[135] Hicks, 'Guiding the Governor General's Prerogatives', p. 64.

# Order in a Disorderly House: New South Wales Assembly Committees in an Era of Independence*

**Catherine Watson**

Former Clerk Assistant Committees and Corporate, New South Wales Legislative Assembly and PhD Candidate in History at the University of New England[1]

*Double-blind peer reviewed article

***Abstract:*** The newly elected New South Wales Legislative Assembly of 1856 operated in an environment unrestrained by standards of modern executive dominance. Within this a flourishing select committee system assisted the House to assert its parliamentary watchdog role. This article examines the benefits select committees offered the members of the colonial Assembly to participate in committee work. It also illustrates how in the absence of a party system until 1890, they brought their own style, motivations, and skills to select committees, most notably as Committee Chairs.

## INTRODUCTION

The system of responsible government introduced with the newly constituted New South Wales Legislative Assembly in 1856 in many ways conformed with what A H Birch described as the liberal philosophy of the Westminster model of Parliament, emphasising the watchdog role of Parliament over the Executive.[2] This was combined with a factional system where Members of the Legislative Assembly (MLAs), all elected as Independents, tended to align themselves with dominant leaders before the establishment of a distinct political party system.[3] As a consequence during its first 34 years between 1856-1889, the Assembly operated in an

[1] This article represents part of a thesis on *The Effectiveness of Legislative Assembly Select Committees in the Governance of New South Wales 1856-1889.*

[2] A H Birch, *Representative and Responsible Government,* George Allen and Unwin, 1964, p.165

[3] Peter Loveday and AW Martin, *Parliament, Factions and Parties: the first thirty years of responsible government in NSW, 1856-1889,* Melbourne University Press, Melbourne, 1966.

environment that accentuated independence. A pillar of this liberal model was a flourishing select committee system. In tandem with Standing Orders that emphasised freedom of debate such as large amounts of time for Private Members business, questions and legislative discussion, parliamentary supremacy, rather than executive supremacy, was prioritised. While it cannot be exactly defined as 'a golden age' due to its frequent instability, inefficiency and disorder, individual MLAs were able to utilise Assembly select committees to play a vital role in overseeing government funded agencies and areas of responsibility as well as private commercial entities.[4] Through the parliamentary petitions system committees also directly represented the citizens of New South Wales by investigating grievances with government bodies and seeking redress, where appropriate. Rudimentary government machinery and often only nominally cohesive government Ministries also gave committees unprecedented access to internal documentation which would be declared cabinet confidential today. The powers of these select committees to summon and examine witnesses under oath gave them unrivalled flexibility to collect, assess and present critical information, asserting the Assembly's parliamentary watchdog role.

The Legislative Council had employed an active select committee system prior to 1856 and after its membership became partially elected in 1843, it has been observed that the resultant increased committee activity reflected the 'genuinely interventionist and paternalist aspirations' of its freshly elected membership.[5] However, the new entirely representative Legislative Assembly embraced their committees with spectacular enthusiasm constituting and reconstituting 823 select committees between mid 1856 and the end of 1889.[6] By contrast during the same period the Legislative Council only established approximately 30.[7] These Assembly committees spanned the breadth of the issues of the colony. Wide inquiries were conducted and collaborative reports with substantive findings and recommendations were produced. This article examines the benefits select committees offered the members of the colonial Assembly to participate in committee work. It also demonstrates how in the absence of party restraint, MLAs brought their own style, motivations, and skills to select committees, most notably as Committee Chairs, enjoying what Lord Palmerston described as 'that perfect Freedom of individual action that belongs to the private and Independent Member of

[4] David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003,* Federation Press, Sydney, 2002, pp. 155-156.

[5] Kerry Mills, Lawmakers, Select Committees and the Birth of Democracy in New South Wales, 1843-1855, *Journal of Australian Colonial History,* Vol. 14, September 2012, p.131.

[6] NSW LA V&Ps 1856-1889

[7] D H Bourchardt, *Checklist of Royal Commissions Select Committees of Parliament and Boards of Inquiry,* Stone Copying Company, Sydney 1958.

Parliament'.[8] A variety of committees are compared and contrasted to assess the impacts of different styles of Chairs on committee outcomes.

## COMMITTEE ACTIVITIES AND INFLUENCE

Even in modern parliaments, committees empower Chairs to pursue personal preoccupations, particularly in hung parliaments where the government is required to forge alliances with cross benchers to secure the numbers necessary to pass legislation. However, in contemporary party-dominated parliaments, independent or cross bench Chairs remain rare in lower houses, particularly when a governing party has a firm majority and controls the business of the House. Within the colonial Assembly an MLA who wished to establish and chair a committee only had to seek sufficient support amongst a group of independent colleagues. This was a very strong contributor to the sheer number of committees formed during the period and in an era of frequently changing ministries and rudimentary government machinery, countless issues were ripe for exploration by energetic and ambitious MLAs.

Under the *New South Wales Legislative Assembly Standing Orders* select committees in the 19th Century were proposed by an MLA introducing either a bill, petition or motion in the House.[9] Proposals for committees, which included their terms of reference, were open to debate and could be amended or opposed on the floor of the House then put to a vote or just formally adopted. Committees could consist of between five and ten members with a quorum being three.[10] The MLA putting forward the motion was automatically made a member of the committee and logically, as its proponent, generally elected Chair. The motion to establish the committee was required to include the names of the proposed committee members, though on the motion of any other member these could be drawn by ballot. [11] Chairs prepared and presented draft reports to committees to deliberate on at the end of each inquiry and there was no provision made for dissenting reports. Instead, any amendments or opposition to the original report were minuted.

The select committees of this period were grouped by the Assembly into three types: Public

[8] Philip Guedalla (ed), *Gladstone and Palmerston: being the correspondence of Lord Palmerston with Lord Gladstone 1851-1865,* Victor Gollanz Ltd, London, 1928, p. 288.

[9] *Standing Rules and Orders of the Legislative Assembly of NSW.* NSW Government Printer, 1856.

[10] *Standing Orders* 35 & 41.

[11] *Standing Orders of the NSW Legislative Assembly 1856, Standing Orders* 38 & 39.

Bills, Private Bills, Other Public Matters.[12] Public bills involve matters of public general interest and in the Assembly included 'every bill for the lighting, and or cleansing of any City or Town'.[13] Private bills involve the particular interest or benefit of any person or body.[14] Though MLAs could introduce public bills as private members bills and frequently did. The Assembly received 369 private bills during the period most often from companies seeking incorporation or an increase in powers in the absence of any legal framework for corporations. The churches also required individual legislation to transfer and sell land. Other private bills involved matters such as trusts. Under the Assembly's *Standing Orders* all private bills were automatically referred to a select committee following their first reading in the House.[15] Other Public Matters encompassed all issues to do with the colony, including grievances against the government and other matters contained in petitions.

Various forms of measurement have been proposed to determine committee effectiveness. Quantitative measures such as those proposed by Hindmoor et al and Aldons are based primarily on government responses to committee recommendations.[16] These may fit well within modern standing and legislative parliamentary committee structures, especially where there is a mandatory requirement for government responses to committee recommendations. However, this type of quantitative measurement does not lend itself to a colonial ad hoc select committee structure like the one under discussion where committees were established in response to key issues facing the parliament of the day and dissolved upon reporting. During 1856-1889, New South Wales was governed by 26 different ministries during 42 separate sessions of Parliament. The fragile nature of ministries cobbled together with independently aligned members meant governments struggled to get their legislative agendas through the House and this frequently led to their demise. Within such a tenuous environment government ministries generally had neither time nor ability to analyse, let alone implement, committee recommendations unless forced as a result of a successful motion in Committee as a Whole. The pressing need to unify and coordinate the many administrative agencies inherited by the

[12] NSW LA Sessional Papers 1856 onwards. A summary paper of the business of the Assembly produced each session divided committees into these three categories.

[13] *Erskine May: Parliamentary Practice,* accessed at Bills - Erskine May - UK Parliament and *Standing Orders of the Legislative Assembly 1856*, Standing Order 47.

[14] *Erskine May: Parliamentary Practice,* accessed at Bills - Erskine May - UK Parliament.

[15] *Standing Orders of the Legislative Assembly 1856*, Standing Order 65.

[16] A. Hindmoor, P. Larkin, and A. Kennon, 2009 "Assessing the Influence of Select Committees in the UK: The Education and Skills Committee, 1997-2005, *The Journal of Legislative Studies,* 15(1), pp.71-89 and Malcolm Aldons, "Rating the Effectiveness of Committee Reports: Some Examples", *Australasian Parliamentary Review,* 16 (1), pp. 52-60.

newly responsible government in 1856 added an extra dimension to the task.[17]

It is therefore more relevant to adopt non-quantitative approaches such as Giddings' who examined committees' influence in three areas – the House, the government, and public opinion.[18] Yet this still does not accurately reflect the multifaceted objectives and purpose of these committees. In a fledgling system of responsible government they were one of the primary methods of holding government to account along with the other procedures of the Houses such as debates and questions, government established inquiries and commissions and the press. The ability of committees to require department heads to publicly attend before them and produce documents created not only a governance effect that is impossible to measure but inspired a confidence amongst voters, who by lodging a petition, could hope to have their grievances put to government agencies in a public forum. In relation to areas of government responsibility, select committees not only scrutinised legislation and policy, they devised it, filling in existing gaps. Through their role in the examination of private bills they were entrusted by the Assembly to review, amend and even stop legislation by efficiently and flexibly negotiating with corporations, churches and other bodies and individuals to achieve important outcomes for the colony.

## BENEFITS OF COMMITTEE WORK

One of the most overlooked functions these committees performed was the education of new MLAs on the mechanisms of government and to provide a platform for future leaders to emerge. The new constituency based elected Assembly encouraged a different class of self-made men than the largely appointed Legislative Council. As Terrence Murray, the second Speaker of the Assembly observed:

> *In Sydney, men who have all their lives been engaged in different kinds of business suddenly find themselves legislators, without having any previous experience to fit them for the work.*[19]

Select committees were an important way for an MLA to educate and inform himself about the

[17] Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service, 1786-1859,* Sydney University Press, 1983.

[18] Philip Giddings, 'What has been Achieved?', *The New Select Committees: A Study of the 1979 Reforms,* Oxford: Clarendon Press, pp. 367-381.

[19] *Report of the Select Committee of the Legislative Council,* 1873/74, Minutes of Evidence, p. 15.

work of government departments.[20] In the absence of a party system where candidates tend to learn about government through avenues such as serving as local councillors or working for MPs, the MLAs of the colonial Assembly tended to come from pastoral or commercial backgrounds. They generally also had to keep working to support themselves until the introduction of paid allowances in 1889.

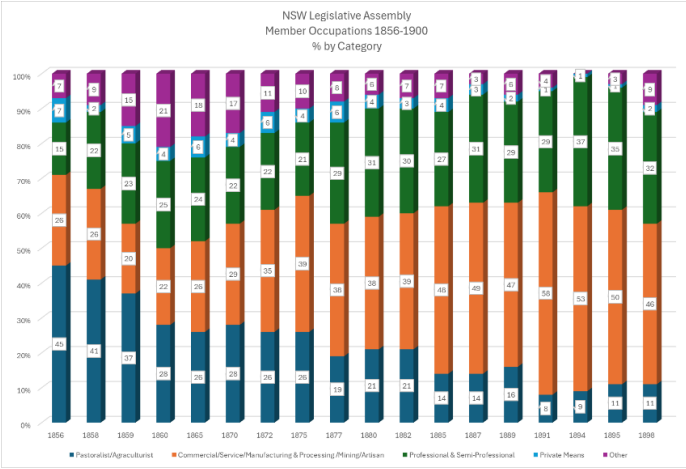



**Figure 1. Member Occupations 1856-1900**

Figure 1, a condensed version based on A W Martin's profile of the backgrounds of MLAs between 1856-1889, shows the strong dominance of MLAs with a pastoral/landholding background in the early years of responsible government and the steady decline of that class as increasing numbers of men with commercial and professional backgrounds entered the Assembly.[21] Unsurprisingly the lack of pay meant that there was very little direct representation of manual workers before the 1890s and MLAs were predominantly middle-class men. Without party rooms and other formal party machinery, select committee membership was one of the few ways for an energetic and ambitious MLA to demonstrate his capacities to colleagues and be noticed. Parliamentary committees, even in modern parliaments, offer one of the very scarce opportunities that bring politicians of opposing parties and viewpoints together to work collectively. The regular presence of sitting and former Premiers and Ministers on committees and the revolving nature of governments allowed new and backbench MLAs the opportunity to work alongside some of the key players of the Assembly.

Direct correlations can be drawn between the amount of committee work members undertook and their political careers. A comparison of the committee work of twenty MLAs chosen at random who served on the backbenches for ten years prior to their ascension to the Ministry

[20] *Report of the Select Committee of the Legislative Council,* 1873/74, Minutes of Evidence, p 15.

[21] A W Martin, 'The Legislative Assembly of New South Wales, 1856-1900', *The Australian Journal of Politics and History,* Vol. 11 No. 1, November 1856.

to the work of twenty other similar MLAs who did not become Ministers demonstrated that the MLAs who went into the Ministry served on 50% more committees than those who did not.[22]

A 1987 study found that members of House of Commons select committees shared similar views on the benefits of select committee membership to their 19th Century counterparts in New South Wales even from within a political party system.[23] When asked what rewards committee membership brought them 85% of members cited expertise, knowledge and the ability to specialise as the primary advantage gained through committee work. [24] Another study of the Commons committee membership in 2019 similarly concluded that committees were important vehicles for parliamentary careers.[25]

There is definite evidence that some MLAs chose committees within personal areas of interest and even used them to develop specialised knowledge. John Robertson, the colony's great land reformer and former Secretary for Lands, served on 41 committees involving the ownership, transfer and maintenance of land while John Fitzgerald Burns as Member for the Hunter showed a decided preference for committees involving coal and gas and transfer of church lands, serving on 58 of these.[26] This view is also given credence by the fact that select committees do not appear to be dominated by factions or friendships. Membership of select committees seems to cover a divergent scope. A Chair would obviously be sensible to ensure a handful of supporters to make up the quorum of three to facilitate the continued functioning of the committee. However, a sample analysis of ten MLAs with a strong history of committee membership over the period between 1860-1870 does not indicate any obvious alignments between them despite including four Premiers of different factions.[27] William Forster, of whom it was said 'seeks no friends in public life, makes no alliances, asks no one to help him, takes no

[22] Hawker, p.87. NB: Hawker gives no source for this sample or names of MLAs chosen.

[23] Jogerst, M, *Reform of the House of Commons: The Select Committee System,* University of Kentucky Press, Lexington 1993, pp188-196.

[24] Michael Jogerst, "MPs on Select Committee Roles and Rewards, *Reform in the House of Commons,* University Press of Kentucky, 1993, p.189.

[25] Stephen McKay, Mark Goodwin, and Stephen Holden Bates, "A Means to an End in Itself: Select Committee Membership, Parliamentary Roles and Parliamentary Careers, 1979-Present, *Parliamentary Affairs,* (2019), 72, pp. 799-820.

[26] Former Members database, Parliament of New South Wales website.

[27] Members chosen were: John Fitzgerald Byrnes, James Byrnes, Reverend John Dunmore Lang, James Squire Farnell, William Forster, John Hay, James Martin, Henry Parkes, William Richman Piddington, John Robertson.

one into his confidence' served on an impressive 74 committees during 25 years as an MLA, giving rise to the assumption he was there merely for the committee work itself.[28] Frequently shifting factional alliances, particularly during the 1850s and 1860s, and the belief in their own innate independence appears to have dictated MLA's decisions regarding areas of committee membership.

## COMMITTEES AND LEADERSHIP

The link between emerging leaders and select committees in the colonial Assembly is indisputable. Leaders of the day served on large numbers of committees, both in and out of government. John Robertson served on 119 committees though only five as Chair. Charles Cowper was appointed to 84 committees and chaired 14 of these, James Farnell was a member of an astonishing 212 committees and chaired 26 of these. Henry Parkes served on 123 committees of which he chaired an impressive 24.

In his first eight years on the Assembly backbench Henry Parkes strategically used his very substantial work on select committees to prepare himself for leadership. Of the 123 select committees he served on 104 directly probed into areas of government. This gave him a solid grounding in the issues and workings of the administration of the time and huge access to departmental officials and their associated documents. It has been observed that through the membership of these committees Parkes

> *established personal contacts within Parliament, the Civil Service and the wider community, reinforced his reputation as a politician to be reckoned with, and removed the rough edges from his earlier image as a radical demagogue.*[29]

The following diagram illustrates the vast range of areas of government covered by committees

[28] Bede Nairn, *Australian Dictionary of Biography,* Vol.4, Australian National University, Canberra, 1972.

[29] Geoffrey Hawker, *The Parliament of New South Wales 1856 – 1965,* p87

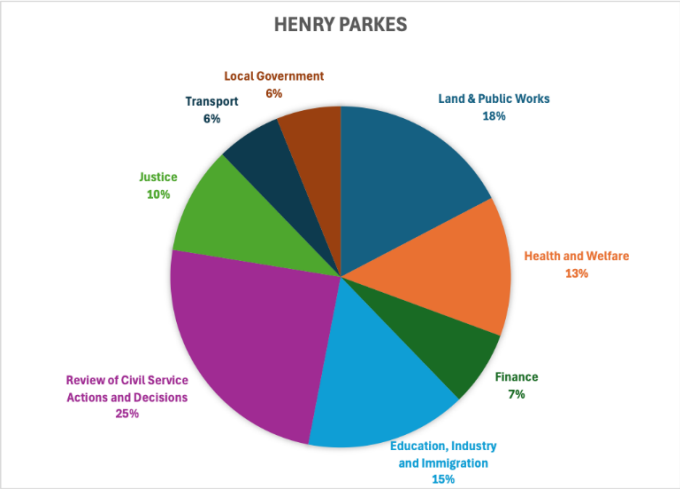



**Figure 2. Henry Parkes - Committees into Areas of Government**

of which Parkes was a member. Several early Committees into the magistracy such as the *Select Committee on the Masters and Servants Acts Continuation Bill* in 1856, the *Select Committee on the State of the Magistracy* in 1858 and the *Select Committee on Secondary Punishment* in 1857 played into Parkes' concerns about the laxity of the magistracy.[30] As a member of committees inquiring into benevolent societies, prisons, asylums, infirmaries and orphanages Parkes was able to display his chartist liberal credentials while committees into the building of ports, railways, schools, universities, lighthouses and parks provided him with a firm grasp on public works.

A study of the committees Parkes chaired show him demonstrating the type of strong managerial authority that later made him the colony's preeminent Premier of the late 19th Century. For example, as Chair of the *Select Committee on the Minmi and Hexham Railway Act Amendment Bill* he provided transparency and a fair hearing for all parties by creating a forum for both the petitioner objecting to the bill and the bill's promoters to cross examine each other and negotiate a variety of amendments. This resulted in fair compensation for the petitioner whose lands were affected and cleared the way forward for the railway. The minutes of the committee and transcripts of evidence show Parkes making rulings throughout the process as to how questioning and negotiation between the parties would be conducted.[31]

[30] NSW LA V&P, 1856-57, Vol 2, p.467, NSW LA V&P, 1858, Vol 2, p73, LA V&P, 1858, Vol.1, p. 1209.

[31] NSW LA V&P, 1861, Vol 2, p.477.

## INFLUENCE OF CHAIRS

In the absence of a political party system, select committees were unquestionably highly influenced by their Chairs' independent motives and views on a level which would be highly unusual within modern parliaments where political parties require adherence to political policies and ideologies. The Assembly practice that Chairs proposed their own committees, lead questioning of witnesses and wrote the draft reports presented to the Committee added to their expansive authority. Committees begun by petition about a grievance against government were generally chaired by the aggrieved person's representative MLA who was familiar with the matter at a local level and had championed it, presumably therefore having an investment in the outcome. Chairs of committees into areas of government and social issues were often forced to direct and focus inquiries when the terms of reference were far too wide to be achieved.

Committees scrutinising private bills tended to have a more limited approach as they just involved going through proposed legislation with the responsible company solicitor and directors or church representatives and other interested parties. Committees into bills that had been drafted by the Chair himself were clearly different and allowed MLAs like Richard Driver to address genuine concerns brought to him by constituent fishermen and introduce legislation to regulate the fishing industry.[32] The Reverend John Dunmore Lang introduced several private bills to establish St Andrews College within the University of Sydney partly to realise his own ambitions. [33] Lang was a member of five bill committees on this topic and chaired three of them. While his advocacy on behalf of the Presbyterian Church was obvious, he also held a profound desire to become its first Principal. His failure to achieve this goal resulted in him challenging the legality of the College in the Supreme Court.[34] When this failed Lang notoriously showed up uninvited with supporters to the College inauguration, created complete disorder, and laid a curse upon it.[35]

On occasion committees into the same subject matter with different Chairs and membership would even make opposing findings and recommendations. The first *Select Committee on the Mineral Selection at Milburn Creek* in 1875 considered a mining lease dispute a matter for the Supreme Court rather than a select committee yet a second committee established in 1878

[32] *Select Committee on the Fisheries Bill 1865,* NSW LA V&P, vol. 2, p. 1053.

[33] C W Salier," The Australian Ideals of John Dunmore Lang", *The Australian Quarterly, Vol. 10 No. 4,* December 1938, pp70-76.

[34] D. W. A Baker, *Australian Dictionary of Biography*, accessed at Biography - John Dunmore Lang - Australian Dictionary of Biography.

[35] Wilson Huang, 'The Curse of St Andrews College', *Honi Soit,* April 4 2019.

had no issue with overruling the subsequent decision of both the Supreme Court and Court of Appeal.[36]

## A PREMIER PERSUADES HIS HOUSE

Premier Charles Cowper, well recognised and feared by conservatives for his 'democratic tendencies', made highly intelligent use of the select committee system in 1862 to convince the NSW Parliament to adopt the South Australian conveyancing system.[37] The *Select Committee on the Land Titles Declaration Bill* 1862 established and Chaired by Cowper examined three bills which had been passed by the Legislative Council and sent to the Assembly for concurrence.[38] These bills were based on legislation introduced into the House of Commons to simplify English land transfers. The colony had inherited the English system of land law and conveyancing in 1788 which was complex, slow and expensive. As John Robertson's land reforms freed up Crown land for sale and leasing in 1861 the colony needed a more streamlined system of transfer of land.[39] As the newspapers of the day regularly reported, conveyancing costs and uncertainty of title were preventing speculators and the poorer classes from investing in land.[40]

Meanwhile a member of the South Australian Parliament Robert Torrens had designed and introduced a private member's bill that became the *Real Property Act 1858* (SA). This Act radically altered the system of recording land under freehold title by issuing government certificates and creating a central land holding registry. By transferring by registration rather than by deeds the system provided an indisputable record and virtually eliminated the need for any subsequent litigation. A former South Australian Collector of Customs, Torrens based his system of transfer of real property on the way ships were registered. The system was already in operation in Tasmania and Queensland and soon to commence in Victoria and had strong public support. Yet its adoption throughout Australia was far from assured due to the system's teething troubles in South Australia, opposition by the legal profession, and several

[36] NSW LA V&P, 1875, Vol 3, p419, NSW LA V&P, 1877-78, Vol 3, p.601.

[37] Arthur McMartin, *Public Servants and Patronage: The Foundation and Rise of the New South Wales Public Service, 1786-1859,* Sydney University Press, 1983. p.259

[38] NSW LA V&P, 1862, V.4, p.1131

[39] *Crown Lands Alienation Act 1861* and *Crown Lands Occupation Act 1861.*

[40] See e.g. *Sydney Morning Herald*, 16 May 1859, p. 5.

competing proposals such as the one before the Assembly.[41]

The fact that a sitting Premier chose to establish and Chair this committee says much about both the independence of MLA voting patterns and the pressing need for land titles reform. Premiers and Ministers were frequently members of select committees during this period when the separation between the Executive and the Parliament was not nearly as wide and the modern machinery of ministerial advisors did not exist. Cowper therefore seized the chance to utilise the select committee process to play a visible leadership role in evaluating the merits of the Torrens scheme against the *Land Titles Declaration Bill 1862* (NSW).

Premier Cowper himself remained unconvinced about the Torrens scheme at the outset. The system had encountered hurdles in South Australia and by this point the legislation had been amended three times. Choosing a select committee to consider the issue provided a transparent public forum for detailed examination of an essential witness under Parliamentary Privilege and produced transcripts of oral evidence and other documentation which were available to other Members of both Houses to consult. Cowper indicated he expected his colleagues to avail themselves of this opportunity when he spoke to the House on the adoption of the report.[42]

The attendance of Robert Torrens to speak about his system was no sales pitch. Over a period of four days the committee asked him 448 questions and examined over 20 pieces of legislation and associated documents. Cowper himself asked 114 questions (approximately a quarter) and he and the committee members presented Torrens with many scenarios and required him to defend how his legislation would deal with them. Torrens was also required to explain how his system compared and contrasted with both the bills before the House and other proposed British legislation.

In their report the committee found that the *Land Titles Declaration Bill 1862* fell short of its object 'to render dealings with real property as safe, expeditious, cheap and simple' as its provisions for dealing with land were too narrow and costly. It recommended that 'Mr Torrens' Act should be adopted in preference to those Bills which have been before the Imperial Parliament, and that the system be brought into operation as early as possible'. The Committee further held the view that a consistent system of property law amongst the colonies would be highly beneficial.

The difficulty in obtaining printed comparative information in that period cannot be overemphasised. The report contained not only the transcripts of Torrens' evidence before the

[41] Greg Taylor, 'The Torrens Systems Migration to Victoria', *Monash University Law Review*, Vol, 33, No. 2, p325

[42] *Sydney Morning Herald,* Thursday August 21, 1862, p. 2.

Committee but also 19 appendices available for parliamentarians to read. These included examples of administrative forms and fees used in conjunction with the *Real Property Act 1858* (SA), detailed administrative instructions regarding the running of the South Australian Land Titles Department, written opinions by Robert Torrens about the *Land Titles Declaration and Land Transfer and Registry Bills*, and copies of the 1862 Bills of the English Lord Chancellor and Lord St Leonards and the Victorian *Real Property Act 1862*. Following the adoption of the select committee's report the *Real Property Act 1862* (NSW) establishing the Torrens Title system in New South Wales came into effect on 1 January 1863 with the *Sydney Morning Herald* proclaiming its virtues.

## DIFFERENT CHAIRS DIFFERENT OUTCOMES

The flexibility of the committee framework can be both its greatest strength and a diminishing factor. This is illustrated by two committees established into intersecting subject areas of lower-class conditions in Sydney for the purposes of at least partially raising the reputation and profile of their Chairs. Both these committees were controversial at the time and have attracted their share of criticism. They both also involved the contentious issue of assisted Chinese immigration. Yet the very different methods by which the inquiries were conducted, as well as the types of findings and recommendations they made, demonstrate how divergent approaches and abilities of Chairs influence both the expansiveness and credibility of the committee process.

On 30 September 1859 Henry Parkes moved for the establishment of a *Select Committee on the Conditions of the Working Classes of the Metropolis.*[43] The terms of reference of the committee were both extensive and prescriptive. They concentrated on gathering figures on unemployment, labourers pay levels and juvenile delinquency.[44] Parkes had been under significant media attack for ongoing proceedings in bankruptcy court. Well recognised for his political opportunism, as goldmining declined and the colony fell into recession, Parkes took the initiative on matters 'ripe for independent action'.[45] A more cynical view was that Parkes rather briefly chose to adopt protectionist views as an effort to please both the working and

[43] NSW LA V&P, 1859/60, Vol 1, p. 129

[44] NSW LA V&P, 1859/60, Vol 1, p. 129

[45] A.W. Martin, *Henry Parkes: a biography,* Melbourne University Press, Melbourne, 1980, p. 172

middle classes and thus increase his voter base and restore his public image.[46]

Parkes cast a wide net in his witness list. The committee met 22 times and examined 41 witnesses and importantly included many working-class men. The final report proposed a comprehensive list of legislative and policy solutions to all the problems it reported on. Land reform, the erection of public baths, more stringent regulation of housing construction, awards for housing design and the appointment of a government health officer were all recommended to improve living conditions. The report's most controversial recommendation urged introducing direct taxation, which constituted the main opposition to the report's adoption by the House.[47]

Despite its defeat, Parkes' report was a masterstroke of public engagement. Over the past two years the Sydney newspapers had been reporting on regular meetings of unemployed men which were taking place in nearby Hyde Park to pressure government. Through his willingness to table their petitions and take up their causes in the House these men had adopted Parkes as their champion.[48] As a result they looked on the report as a charter of reform.[49] Three days later they assembled in front of Parliament House late in the evening while the Assembly was still in debate and:

> *assailed in no measured tones certain members who had voted against the adoption of the report of the working classes and a violent scuffle resulted as police were brought in to disperse the crowd.*[50]

A committee established some 15 years later also sought to elevate its Chair's tarnished image. Angus Cameron was elected to the seat of West Sydney in December 1874 as a candidate for the Trades and Labour Council of Sydney (TLC) which paid him £5 per week. However, he quickly joined John Robertson's faction and was placed in a difficult position with the TLC when

[46] R.H.W. Reece. 'Henry Parkes as 'Parliamentary Martyr for the Working Classes' in 1859', *Labour History*, November 1967, No. 13, p. 16.

[47] *Sydney Morning Herald*, Wednesday 9 May 1860, p. 4 and NSW LA V&P, 1859/60, Vol.1, p. 639.

[48] Eg *The Empire,* Wednesday 9 May 1860, p.8. A torchlight meeting of around 1500 unemployed was held to discuss various matters they faced after which they proceeded down George Street to *The Empire* office and then up Hunter Street to Parliament House to present Henry Parkes with their address and that him for the manner in which he had received their petitions and advanced their causes.

[49] A. W. Martin, *Henry Parkes: a biography*, p. 176.

[50] T Richards, *An Epitome of the Official History of NSW,* Government Printer, 1883, pp. 314-315

Robertson introduced his bill to amend the *Public Schools Act 1866* (NSW). [51] The compromises Premier Robertson was forced to make to get the bill through conservative members of his cabinet meant it did not establish the secular education system that the colony increasingly wanted. In voting for the bill Cameron would be deeply unpopular with his support base.

On 14 March 1876, the day before the vote on the *Public Schools Act Amendment Bill* Cameron successfully moved the establishment of the *Select Committee on the Conditions in Common Lodging Houses.* It has been argued that this was Cameron's attempt to build a new middle-class constituency to replace the trade union supporters he alienated.[52] The report of this committee has been heavily criticised for its disproportionate focus on accusations of Chinese immorality, particularly allegations of opium dens exploiting the addictions of European women. It has been labelled as both 'an incendiary piece of anti-Chinese propaganda' and 'one of the most hysterical attacks on the Chinese people published in colonial Australia'.[53] The findings and recommendations of the Committee report itself were extremely brief, consisting of six short paragraphs taking up less than a page. Despite its brevity, the report did its best to create a sense of absolute crisis. The Committee found 'a state of affairs existing in the heart of the metropolis, which is absolutely disgraceful, and calculated to work most injuriously upon the health and morals of the people'. It recommended legislation requiring lodging houses to pay a license fee, submit to inspections, and meet certain standards regarding space and sanitary amenities. An examination of the minutes of committee meetings shows that the committee itself only met five times and spoke to just nine witnesses, all employees of Sydney Municipal Council except for two fairly newly appointed police officers to the area. Not one landlord or inhabitant of a lodging house gave evidence, least of all a representative from the Chinese community.

When the report was debated in the House on Thursday 17 August 1876 it was largely discredited. It was clear that Henry Parkes, who was a member of the committee, had deliberately distanced himself from it and played the smarter political tactic of attacking the report from the floor of the House. This was despite Parkes' long opposition to Chinese immigration (he would later legislate to restrict it in 1881) and similar recommendations on

[51] The *Public Schools Act Amendment Bill* 1876 (NSW) was laid aside. Accessed at: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=5609 .

[52] Phil Griffiths, 'Containing Discontent: Anti-Chinese Racism in the Reinvention of Angus Cameron', *Labour History,* No. 94, May 2008, p.75.

[53] Frank Bongiorno, *Dreamers and Schemers,* La Trobe University Press, Melbourne, 2023, p 178 and Phil Griffiths 'Containing Discontent: Anti-Chinese Racism in the Reinvention of Angus Cameron', p. 75.

licensing of lodging houses having been made in his own report of the *Select Committee on the Conditions of the Working Classes of the Metropolis* in 1859. While Premier Robertson was clearly obliged to outwardly support Cameron, his tabling of a report from the Inspector-General of Police during the debate which discredited key parts of the committee's evidence called this into question. However, despite these attempts to dismiss the report it garnered a great deal of support both through a debate in the Legislative Council the day before its credibility was attacked in the Legislative Assembly and through the press.[54]

In comparing these two committees it is indisputable that their dubious motives to raise the profiles of their Chairs succeeded. However, there are obviously basic hallmarks to which a robust committee inquiry must aspire. It should allow a broad section of interested voices to be heard and considered in an impartial manner, it should also include elements such as an appropriate number of meetings, sufficient diverse member engagement and participation, gathering of evidence from a genuine cross section of witnesses and other sources, and thorough and practical findings and recommendations which relate directly back to the terms of reference of the inquiry.

On this basis Parkes's *Select Committee on the Conditions of the Working Classes in the Metropolis* is by far the superior democratic exercise. The detailed evidence contained within Parkes's report paints an important overview of social issues within Sydney at the time and relies heavily not just on oral evidence but also significant amounts of appended background material, ensuring it was not only an important information source for the House but remains a salient historical document. Further, an examination of the attendance at committee meetings gives an indication of the ability of Parkes to engage members and lead the committee, while deliberations on his draft report speak to an inclusiveness of other committee members' input.

The following table compares key elements of the two inquiries, demonstrating the robustness of one against the other:

[54] *Sydney Morning Herald*, 10 December 1874, p. 9 and 17 August 1876, p.2

**Table 1. Comparison between Working Classes and Common Lodging Houses Committees**

| | Conditions of Working Classes of the Metropolis | Common Lodging Houses |
|---|---|---|
| **Meetings** | 22 | 5 |
| **Witnesses** | 41 | 9 |
| **Percentage of meetings with 5 or more members** | 95% | 20% |
| **Member Attendance at Draft Report Consideration** | 8 | 4 |
| **Number of Amendments to Draft Report Adopted** | 5/6 | N/A |
| **Report Recommendations** | 14 | 2 |
| **Supporting Material Appended** | 52 | Nil |

## NON-ALIGNED INDEPENDENTS AS CHAIRS

It could optimistically be argued that devoid of leadership ambitions and owed allegiances, non-factionally aligned independent MLAs of the era may provide different styles of chairmanship when afforded an opportunity to lead committees. Perhaps their intentions were purer and nobler than some of their colleagues? However, results are once again varied as closer study demonstrates that Chair's temperaments, abilities and ideologies still played a large part in committee processes and outcomes.

David Buchanan has been described amongst other things as 'a particularly coarse and irresponsible demagogue' or more kindly as 'a rather idiosyncratic and eccentric example of a

private independent Member of Parliament' representative of the period.[55] In 1875 he was given the rare opportunity to establish and lead two committees, presumably to court his vote in the tenuous 1875-1877 Robertson Ministry. An analysis of the transcripts and minutes of these two committees demonstrate how Buchanan brought his dominant adversarial style in the House to the proceedings, putting facts before witnesses to respond either in the negative or affirmative rather than drawing information from them. Minutes of both report consideration deliberative meetings show Buchanan strenuously opposing any proposed amendments to his draft report forcing multiple divisions and requiring him to use his casting vote on numerous occasions. The result in both cases were narrow rather accusatory reports devoid of any real recommendations for policy or legislative change.[56]

In 1872 Captain Arthur Onslow forced the Parkes Ministry to appoint a Select Committee on the Civil Service which he chaired. In contrast to David Buchanan Captain Onslow demonstrated his ability to collaboratively lead a committee which brought forward a report which rose above accusations and put forward important recommendations which made important and lasting changes to civil servant recruitment procedures. The committee took evidence from four former Ministers and one former Premier as well as the Auditor General and representatives of various large government departments. The main focus of questioning concerned the competency of the current civil service workforce and the extent of political interference with regard to both recruitment and discipline. Unlike most committee reports of the time, the final report presented to the House differed significantly from the Chairman's draft report presented initially to the committee by Captain Onslow. It is indicative of Onslow's pragmatism and willingness to collaborate that nine of the 12 amendments put forward in the report deliberative were agreed to by all but one of the committee members. The result has been described as "a forceful report packed with evidence critical of the service (which) suggested recruitment procedures that had important long term effects'.[57]

[55] R B Walker "David Buchanan: Chartist, Radical, Republican", *Journal of the Royal Australian Historical Society,* Vol 53 Pt 1, p.122

[56] Select Committee on the Letter Addressed to MM. Rochefort and Groussett, NSW LA V&P, 1875, Vol 3, p.271 and Select Committee on the Case of Amelia Gould, NSW LA V&P, 1875/76, Vol 2, p95

[57] Brian Dickey, *Politics in New South Wales 1856-1900*, Cassell, Melbourne, 1968, p.80

## CONCLUSION

The Legislative Assembly's select committees system during the factional period produced mixed outcomes regarding its overall effectiveness. However, membership of committees provided important opportunities for MLAs to educate themselves about government, represent their electorates, form alliances, and demonstrate their skills. It also provided an important pathway for aspiring leaders. The absence of a definite political party system within the colonial Assembly allowed select committees to thrive while members took advantage of their flexible framework for a variety of purposes, including sometimes partially their own self-interest. The rudimentary and less Executive controlled Standing Orders and practices of the Assembly also facilitated an environment where Chairs influenced committee processes and outcomes to a degree that is highly unusual by modern standards.

An analysis of select committees of the time very much indicates that whether committees succeeded in achieving the aspired ideals of the Westminster democratic process depended very much on a variety of factors, not least of which were the Chairs themselves. Still, regardless of the motivations behind the establishment of some committees they still had the capacity to achieve wide evidentiary scope, significant member and public engagement, and extensive but practical findings and recommendations that genuinely informed both the House and the government.

# 'We Asked, You Said, We Did': Closing the Feedback Loop in Committees' Public Engagement Processes

**Patrick Glynn**

Committee Manager, Legislative Assembly, Parliament of New South Wales.

***Abstract:*** Parliamentary departments are adopting more professionalised and embedded approaches to public engagement to address declining trust in democracy. A critical element of such engagement is 'closing the feedback loop'. This involves returning to participants at the end of a process to explain how their contributions influenced outcomes (such as recommendations made by a committee), or to evaluate the impact of the engagement activity. Closing the feedback loop can help foster trust and legitimacy by assuring people they have been genuinely heard. However, many parliaments do not have clear strategies or consistent processes for feeding back to participants following an engagement initiative. This article argues that feedback loops are an indispensable component of effective parliamentary engagement. It considers the advantages (and associated risks) of implementing and closing feedback loops in public engagement with committee inquiries, presents three case studies, and concludes with practical strategies and considerations for embedding feedback into committee inquiries and other types of parliamentary business.

## INTRODUCTION

Political trust in Australia has seen some decline over the past two decades, reaching a record low in 2019.[1] However, recent research from the Australian National University indicates that, unlike in countries that have elevated populist leaders and parties, the Australian population

[1] Liang Jiang, 'Political Performance and Political Trust in Australia'. *Australian Journal of Politics and History* 68(1) 2022, p 109.

remains broadly satisfied with democracy itself, albeit with 'significant pockets of discontent'.[2] These so-called pockets of discontent, shaped by factors such as economic pressures and education, are a source of some concern: if people lose trust that democratic systems and institutions are working for them and in their best interests, there is a risk they will turn to actors with much weaker commitments to those institutions and democratic norms.[3] This represents a challenge for modern legislatures, whose authority and legitimacy depends on the trust citizens place in them. For this reason, public engagement has become a key strategic focus for modern parliaments. Engaging with diverse publics can help to restore trust by improving the representativeness of decision making and strengthening public policy outcomes and governance. Parliaments must provide *authentic* and *meaningful* opportunities for citizens to learn about, participate in, and influence their democracy, if they are to combat civic disengagement and mistrust.

In this article, I explore the importance of public engagement with parliamentary committees, with a particular focus on how committees can feed back to participants at the end of an inquiry (referred to as 'closing the feedback loop'). Informing stakeholders about how their input has shaped a committee's deliberations and findings is critical to ensuring they feel genuinely heard. However, embedding feedback loops in committee processes is challenging; in many parliaments, such mechanisms are ad hoc, underdeveloped, or absent altogether. Leston-Bandeira et al contend that lack of feedback is 'one of the main problems with parliamentary public participation initiatives'.[4] I consider the advantages of implementing and closing feedback loops in public engagement with committee inquiries and discuss the implications of failure to do so. The article offers three case studies as examples of closing the feedback loop in practice and outlines some strategies practitioners can consider using in committee inquiries and other areas of parliamentary public engagement.

[2] Nicholas Biddle and Matthew Gray, *Perceptions of democracy and other political attitudes in Australia* (Report, October 2024), p 3.

[3] Biddle and Gray, *Perceptions of democracy and other political attitudes in Australia*, pp 49-50.

[4] Cristina Leston-Bandeira, Didier Caluwaerta and Daan Vermassen, 'Reimagining Engagement between Citizens and Parliament', in David Judge and Cristina Leston-Bandeira (eds), *Reimagining Parliament*. Bristol: Bristol University Press, 2024, pp 65, 76.

## PARLIAMENTS AND PUBLIC ENGAGEMENT

The Global Parliamentary Report, jointly produced by the Inter-Parliamentary Union (IPU) and United Nations Development Programme (UNDP), offers insight into, and analysis of, some of the most pressing challenges for contemporary parliaments. Public engagement with the work of parliament was the focus of the third IPU Global Parliamentary Report ('IPU Report'), published in 2022. Significantly, the report's core message was that 'engagement with the community is a necessity, not an option; an enabler, not a distraction.'[5]

Indeed, in recent years, there has been a clear trend towards more professionalised and embedded approaches to engagement by parliamentary departments, as they work to counter disenchantment with democracy. Parliaments cannot hope to perform their functions in a way that fulfils community expectations unless they listen and are responsive to the people they represent. As Armstrong argues:

> *We also need to make sure that the engagement we seek is relevant and matches a need; that it is integrated into parliamentary business and that there is an outcome. We want people to feel that something happens as a result of their feedback. The public's trust in both the institution and our processes are at risk if they feel that we are not listening.*[6]

As representative institutions, parliaments' legitimacy and authority hinges on the extent to which citizens trust them to act in their best interests. The IPU Report observes that a responsive parliament, one that actively seeks to understand and resolve community concerns, is better placed to build public trust and, therefore, secure legitimacy.[7]

Several factors can shape an individual's attitudes toward democracy, including their civic knowledge, sources of information about politics and government, level of social engagement, and experience of adverse life events.[8] At the same time, broader social and digital transformations are reshaping patterns of democratic participation. Leston-Bandeira argues

[5] Inter-Parliamentary Union and United Nations Development Programme, *Public engagement in the work of parliament*, (Global Parliamentary Report, 2022), p 11 ('IPU Report').

[6] Emma Armstrong, 'Digital Innovation and Public Engagement at the Scottish Parliament'. *Australasian Parliamentary Review* 37(2) 2022, p 58.

[7] IPU Report, p 34.

[8] Commonwealth of Australia, Australian Public Service Commission, *Trust and Satisfaction in Australian Democracy* (2023 National Survey), pp 24-36.

that the growth of the internet, increasing expectations of standards of governance, and decline in trust underscore the need for sustained public engagement by parliaments.[9] She further highlights the rise of the 'critical citizen'. This concept describes the phenomenon whereby higher levels of education and unprecedented availability of information have created a citizenry that is more critically engaged in matters of governance and better equipped to form judgements. As a result, Leston-Bandeira argues, citizens of today are more likely to question, criticise, or seek to influence the decisions of their elected representatives, when compared to past generations.[10] There is also greater demand for transparency, openness and accessibility, given how easily information can be disseminated in today's digital society, as well as a growing focus globally on promoting these ideals.[11] For the modern parliament, addressing the critical citizen's ever-increasing demand to participate is not simply a matter of appeasement, but a necessary condition for realising the promise of representative democracy in contemporary society.

Public engagement in parliamentary contexts can be classified according to five broad categories of activity: information, education, communication, consultation and participation.[12] Engaging the public effectively requires that parliaments do all five well. Hendriks and Kay note that while many legislatures are communicating more effectively with the public through websites, blogs, YouTube and other social media platforms, comparative research shows an over-reliance on initiatives designed to inform or educate the public about existing functions. Innovative participatory approaches that '[strengthen] ties between citizens and elected representatives' are not evident to the same extent.[13] In other words, there is a tendency by parliaments to 'broadcast' to the public, rather than engage them in a dynamic and dialogical way. Where participatory mechanisms do exist, it is important they be 'outcome-led rather than activity focused'.[14] Simply creating opportunities for participation will not

[9] Cristina Leston-Bandeira, 'How public engagement has become a must for parliaments in today's democracies'. *Australasian Parliamentary Review* 37(2), 2022, p 9.

[10] Leston-Bandeira, 'How public engagement has become a must for parliaments in today's democracies', p 9.

[11] Leston-Bandeira, 'How public engagement has become a must for parliaments in today's democracies', p 9.

[12] Leston-Bandeira et al, 'Reimagining Engagement between Citizens and Parliament', p 67.

[13] Carolyn Hendriks and Adrian Kay, 'From 'Opening Up' to Democratic Renewal: Deepening Public Engagement in Legislative Committees'. *Government and Opposition* 54(1), 2019, pp 25, 26.

[14] Leston-Bandeira et al, 'Reimagining Engagement between Citizens and Parliament', p 67.

assuage disillusionment.[15] Unless public engagement supports participants to feel more confident, empowered or valued as a result of their contribution, it could potentially have the reverse effect of exacerbating the democratic deficit.

Parliamentary committees, particularly those with broad powers of inquiry, 'have long been the site of engagement between citizens and members of parliament'.[16] By virtue of their position at the 'nexus' between the formal political system and the broader community, committees offer rich opportunities for democratic renewal through public engagement.[17] Effective public engagement by and with committees should be an enriching exercise, both for the committee members and the communities with which they engage. On the one hand, committees themselves stand to benefit 'epistemically and democratically',[18] as the contribution of diverse actors can help shape public policy for the better and ultimately lend legitimacy to their recommendations.[19] On the other, committee inquiries can, and should, provide a forum in which all citizens – not just the politically active, but also the seldom heard[20] [21]– are empowered to have a say over laws and policies that affect them. Geddes observes that the evidence-gathering process gives people a voice, enables them to shape parliamentary

[15] Leston-Bandeira, 'How public engagement has become a must for parliaments in today's democracies', p 12.

[16] Sarah Moulds, 'A toolkit for evaluating the effectiveness of parliamentary public engagement'. *University of South Australia Law Review* Vol 5, 2023, pp 1, 11.

[17] House of Commons Liaison Committee, *Building public engagement: Options for developing select committee outreach* (Special Report, October 2015), p 25.

[18] Hendriks and Kay, 'From 'Opening Up' to Democratic Renewal', p 29.

[19] Iris Young argues that through deliberative democratic models, the voices of 'a plurality of differently opinioned and situated' people may offer representatives new information and insights, or prompt them to recognise the prejudices underpinning their existing views. According to Young, the process enables participants not only to express their opinions, but also for opinions, beliefs, and priorities to be transformed. Such is the potential of parliamentary committees: Iris Marion Young, *Inclusion and Democracy*. Oxford: Oxford University Press, 2002, p 26.

[20] E.g. Hendriks and Kay observe a participatory bias that results in a clear over-representation of 'well-resourced actors' in formal public engagement processes, at the expense of 'everyday citizens, or more dispersed publics': Hendriks and Kay, 'From 'Opening Up' to Democratic Renewal', p 30.

[21] A paper by Professor Diana Stirbu, commissioned through the Senedd Research Academic Fellowship Scheme, considered various measures of committees' effectiveness. It was proposed that committees monitor diversity indicators such as the gender, ethnicity, and geographical spread of witnesses, along with the proportion of 'non-usual suspects' and the year-on-year increase in new individuals or organisations giving evidence. Stirbu noted that 'institutional narratives converge around the value of diversifying the range of evidence… and witnesses committees engage with': Diana Stirbu, 'Power, influence and impact of Senedd committees: Developing a framework for measuring committees' effectiveness' (Project Report, 2021). London: London Metropolitan University.

proceedings beyond the ballot box, and helps sustain the connection between parliaments and the publics they serve.[22] At the end of that process, demonstrable connections need to be made between issues raised by citizens during the inquiry and conclusions arrived at by the committee. Where demands were not met or suggestions not adopted, inquiry participants should be told why. In this way, committees can assure their stakeholders that they have been listened to and their contributions are valued.

This, of course, describes the aspirational ideal of public engagement with committees. The ways committees engage with citizens must be both *effective* and *ethical* if they are to inspire trust in democracy.[23] When done well, public engagement promises an enlivening of democracy; done poorly, it can leave parliaments vulnerable to accusations of tokenism and further erode public trust. Members and secretariats must therefore be alert to risks or pitfalls in how they engage the public.

## *Implementing feedback loops in public engagement: Advantages and challenges*

One of the most promising ways of dispelling perceptions of tokenism is to implement a feedback loop. The IPU Report defined feedback loops as 'two-way stream(s) of communication between parliament and the public involved in the engagement exercise'.[24] The notion of feedback loops contrasts with linear or transmissional models of communication (for example, informational websites, media releases and advertising).[25] Closing the feedback loop involves returning to the public that participated in a parliamentary process after it has concluded. This could be for the purpose of evaluating the impact of an engagement initiative, or informing participants about how their inputs were incorporated.[26] The case studies

[22] Marc Geddes, 'Committee Hearings of the UK Parliament: Who gives Evidence and does this Matter?'. *Parliamentary Affairs* 71(2), 2018, pp 288-289.

[23] Emma Banyer, 'The franking credits controversy: House of Representatives committees, public engagement and the role of the parliamentary service'. *Australasian Parliamentary Review* 35(1), 2020, pp 77, 78.

[24] IPU Report, p 39.

[25] Jim Macnamara, 'The Work and "Architecture of Listening": Addressing Gaps in Organization-Public Communication'. *International Journal of Strategic Communication* 10(2), 2016, pp 133, 134.

[26] The Queensland Parliament, for example, surveys subscribers to committee updates, witnesses who appear at public hearings, and individuals who submitted to committee inquiries to understand their experiences and improve the committee process. This includes finding ways to improve accessibility for seldom-heard groups: Queensland Parliamentary Service, *Annual Report 2023/24* (Report, 2024), p 21; Queensland Parliament, 'Engagement Survey'. Accessed at https://www.parliament.qld.gov.au/Work-of-Committees/Introduction/Survey

presented later in this article provide some examples of what closing the feedback loop can look like in practice. Sheldon argues that a feedback loop has the dual function of encouraging continuous learning and improvement by parliaments, as well as signalling to citizens that their participation has been worthwhile and their contributions given serious consideration.[27] Not only does this create incentive for future participation, it also enhances representative democracy through deliberative decision making, and helps to build trust with, and demonstrate respect for, citizens.

Although there is a view among scholars that closing the feedback loop should be 'a priority of all public engagement initiatives',[28] it does not appear to be a practice that is well-established in many parliaments. This can be attributed to, among other things, inadequate planning and resourcing, training and skill deficits and competing demands of committees' work programs. Also, if there is a lack of institutional strategic focus on closing the feedback loop in public engagement, or if these objectives are not clearly communicated and embedded in practice, it is unlikely to occur.

Properly closing the feedback loop is challenging, because there is no one-size-fits-all model for public engagement. Feedback initiatives need to be calibrated to fulfil the needs and expectations of unique participant groups. This means they may be time-consuming and resource-intensive (in particular if the activity entails travel or organising stakeholder meetings outside of Parliament House), or require new skillsets of committee staff (for example, if the feedback mechanism involves producing specialised resources, such as webpages or alternative versions of a committee report).[29] In addition, closing the feedback loop demands

[27] Christine Sheldon, 'Closing the Gap: Establishing a "feedback loop" for effective parliamentary public engagement'. *Journal of Legislative Studies* 29(3), 2023, pp 425, 439.

[28] Cristina Leston-Bandeira, Nicole Nisbett and Alex Prior (University of Leeds), Submission No 72 to House of Commons Liaison Committee, *Inquiry into the effectiveness and influence of select committees* (September 2019), p 7. See also, e.g. Aileen Walker, Naomi Jurczak, Catherine Bochel and Cristina Leston-Bandeira, 'How public engagement became a core part of the House of Commons select committees'. *Parliamentary Affairs* 72(4), 2019, p 965.

[29] In many parliaments, the sheer volume of committee activity, and the demands this places on resources, makes it especially challenging to deliver meaningful and consistent feedback to inquiry participants. For example, this trend toward heavier committee workloads is evident in the current hung Parliament in New South Wales. In 2023-24, there was a 57 per cent increase in the number of inquiries in the Legislative Assembly and a 150 per cent increase in the number of select committees established compared to the first financial year of the previous Parliament. Understandably, this has entailed more committee meetings, hearings, site visits and a significant increase in the total hours of official proceedings: New South Wales Department of the Legislative Assembly, *Annual Report 2023/24* (Report, 2024), pp 28-29.

investment of time and resources at the *end* of an inquiry, potentially after the public's attention has moved on. In the context of the increasing demands on members' time, some members may take a cynical view that post-inquiry engagement is a big commitment for disproportionately little political advantage. Committee staff may have all the good will in the world, but without support and buy-in from members, they are hamstrung.

Although these challenges are considerable, they are by no means insurmountable. The final sections of this article explore case studies of feedback loops in parliamentary practice, and strategies and opportunities for practitioners to consider.

## CLOSING THE FEEDBACK LOOP: CASE STUDIES

The following three case studies, drawing on initiatives from different jurisdictions, offer considered and meaningful examples of closing the feedback loop in practice. Each example considers a different context for parliamentary public engagement; namely, a committee inquiry, a chamber debate, and a regional parliament exercise. Moreover, the case studies illustrate three unique forms of feedback – the first through a creative approach to framing a committee report, the second through digital storytelling, and the third through in-person engagement.

### *Case study 1: Kids' version of a committee report (Legislative Assembly of New South Wales)*

In September 2009, the NSW Joint Committee on Children and Young People tabled a two-volume, 353-page report on its inquiry into children and young people aged 9-14 years in NSW.[30] Recognising that the report was likely to be inaccessible and unappealing to the group to whom its recommendations were directed, the Committee undertook to repackage its report into a 'kids' version', using plain language and visually compelling design. It was to be the first publication of its kind produced by a committee of the NSW Parliament.

A couple of elements of this initiative make it a particularly fine example of closing the feedback loop. Firstly, the Committee sought to involve children and young people in the preparation and design of the kids' version of the report. It also consulted the Commission for Children and

[30] Committee on Children and Young People, Parliament of New South Wales, *Children and Young People Aged 9-14 Years in NSW: The Missing Middle* (Report 5/54, September 2009).

Young People.[31] The State's peak body for out-of-school-hours services supported this initiative by organising two discussion groups with young people in the target age group. Secondly, the report incorporated young people's voices and established clear connections between the input they provided ('What kids said') and recommendations made by the Committee ('What to do').

While the Committee's research found that most of the children and young people consulted preferred one design, a small group at the younger end of the age range preferred a different design option. Ultimately, both versions – shown in Figure 1 below – were published to maximise reach and appeal. In addition, the Committee distributed the kids' versions to inquiry stakeholders, including several children's organisations, encouraging them to promote the resources through relevant channels.

The Committee Chair at the time, Robert Coombs MP, told the House that feedback from the discussion groups 'substantially improved the quality of the final product'.[32]

[31] New South Wales Department of the Legislative Assembly, *Annual Report 2009/10* (Report, 2010), p 17.

[32] R. Coombs, New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 March 2010, pp 21783-21784.

**Figure 1. Kids' version of a committee report (two different designs) produced by the NSW Committee on Children and Young People (September 2009).**

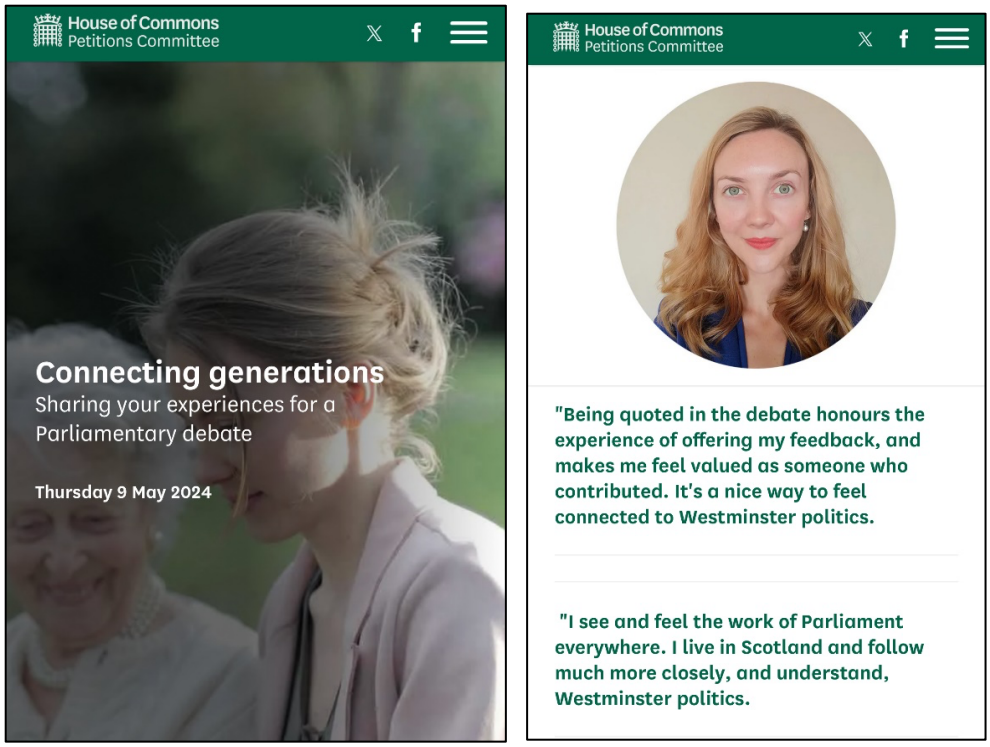

## *Case study 2: Digital storytelling (United Kingdom House of Commons)*

The use of digital storytelling by the UK House of Commons' Chamber Engagement Team is a creative and effective method of closing the feedback loop following an engagement initiative. These digital stories, which are webpages produced using the design platform Shorthand (referred to in this article as 'Shorthand stories'), incorporate video content, dynamic scrolling effects, explanatory boxes and testimonials to illustrate how feedback or contributions from the public informed a particular item of parliamentary business.

For example, in preparation for a debate on Global Intergenerational Week 2024, the MP who led the debate, Fellows, asked the public to contribute their stories and ideas through an online engagement activity. Ms Fellows then shared several of those stories in her contribution to the debate. The Shorthand story pulls together various media, including the video of Ms Fellows'

speech, the Government's response and various informational resources, as well as reflections from participants quoted in the debate.[33] Screenshots of the story are shown in Figure 2.

**Figure 2. UK Petitions Committee's online digital story about a debate in Westminster Hall on Global Intergenerational Week 2024.**




Feedback gathered after the debate suggests that participants, through their direct engagement with Parliament, felt heard, valued, and inspired to participate in future initiatives. People said, for example:

[33] House of Commons Petitions Committee, 'Connecting generations: Sharing your experiences for a Parliamentary debate'. Accessed at: https://ukparliament.shorthandstories.com/cet-global-intergenerational-week-2024/index.html

> *I've always been conscious of the impact of parliamentary process in my life, but I do feel more empowered to have a voice in that process in the future, having been quoted. ('Catherine')*
>
> *I felt empowered. I wouldn't have expected that. It's good to feel heard and that your input matters. It's reassuring as a democratic action. The work of Parliament is essential to my life, even if it's hard to measure how much. The experience of being represented encouraged me to participate more in other ways. ('Marion')*[34]

The Shorthand story 'Connecting generations' clearly demonstrates how a complete feedback loop is mobilised, from the initial soliciting of public input and engagement, right through to collecting and presenting participant feedback. The page also highlights avenues for citizens to get involved with parliamentary debates in future.

## *Case study 3: Taking Parliament to the People 'report back sessions' (Parliament of the Republic of South Africa)*

Each year the National Council of Provinces (NCOP), the upper house of the South African Parliament, holds a week-long event it calls Taking Parliament to the People (TPTTP). During TPTTP, the NCOP sits away from Cape Town and, in collaboration with provincial legislatures, invites members of the public to attend meetings and forums and raise issues regarding government service delivery. Through this program, the NCOP aims to drive public participation in parliamentary processes, particularly among citizens in remote and rural areas for whom it is impractical to visit Parliament.[35]

In 2018, to address criticisms that public engagement processes 'lacked a feedback mechanism and that previously identified challenges were rarely revisited',[36] the Parliament modified its TPTTP program to include an in-person 'report back' session. These sessions aimed to ensure

[34] House of Commons Petitions Committee, 'Connecting generations: Sharing your experiences for a Parliamentary debate'. Accessed at: https://ukparliament.shorthandstories.com/cet-global-intergenerational-week-2024/index.html

[35] Parliament of the Republic of South Africa, 'Public participation and oversight programmes'. Accessed at: https://www.parliament.gov.za/national-council-provinces

[36] Parliament of the Republic of South Africa, *Annual Report 2017/18* (Report, 27 August 2018), p 32.

greater executive accountability, by providing feedback to communities on issues raised during the main TPTTP program. They usually take place 12 months or more after the initial engagement. The report back programs – which can span several days – may consist of verification visits to service delivery sites, as well as unmediated public meetings where citizens can interact with legislators on service delivery issues raised during TPTTP.[37]

## A WAY FORWARD FOR PRACTITIONERS

The case studies discussed above illustrate a range of techniques parliaments and individual committees can employ to close the feedback loop in public engagement. This section briefly explores other methodologies, as well as considerations for parliaments looking to improve their post-inquiry engagement.

Firstly, it is essential that all parliamentary public engagement is underpinned by a robust and well-understood engagement strategy. Hendriks and Kay emphasise that while committees will necessarily use different mechanisms to support participation by diverse publics, an overarching strategy helps to ensure that fundamental principles of good public engagement are observed across all committees and areas of parliamentary business.[38] As this article has argued, closing the feedback loop should form a key tenet of that strategy. Moreover, many parliamentary departments (including the NSW Legislative Assembly[39]) are now employing digital communications and/or community outreach staff with specialised knowledge and skillsets 'beyond the traditional clerkly profile that supports parliamentary business' to oversee public engagement.[40] Having dedicated engagement staff supports parliaments to reach out to seldom heard groups and sustain relationships, actively monitor best practice in other jurisdictions and drive innovation.

Walker et al observe that until recently, very little would follow the tabling of a committee report. Nowadays, committees are increasingly experimenting with ways to promote their reports and recommendations and reach more diverse audiences.[41] Earlier planning and

[37] Parliament of the Republic of South Africa, 'NCOP embarks on a report-back programme focusing on the impact of migration on service delivery in Gauteng'. Accessed at: https://www.parliament.gov.za/project-event-details/290

[38] Hendriks and Kay, 'From 'Opening Up' to Democratic Renewal', p 42.

[39] New South Wales Department of the Legislative Assembly, *Annual Report 2020/21* (Report, 2021), p 22.

[40] Sofia Serra-Silva and Cristina Leston-Bandeira, 'The Invisible Architects of Public Engagement: Understanding the Different Types of Roles Played by Parliamentary Staff'. *Politics and Governance* Volume 14, 2025, pp 2, 4.

[41] Walker et al, 'How public engagement became a core part of the House of Commons select committees', p 977.

identification of engagement objectives – ideally at the start of an inquiry – will help ensure committees' activities are focussed, productive and provide meaningful experiences for participants. It would also assist departments with resource allocation. Opportunities to close the feedback loop should always be considered in these early stages of planning, so that it becomes an entrenched part of committee practice – not an afterthought.

As mentioned previously, one-size-fits-all models do not support genuine public engagement. The needs and expectations of the target cohort, as well as the initial means of participation, should naturally inform the approach to feedback. Take, for example, a committee that has elicited insights from First Nations stakeholders through an informal process of yarning. Yarning prioritises 'Indigenous ways of communicating' and 'shows respect to Elders and connections to Lands, laws, culture, community and family'.[42] It stands to reason that feedback should be offered in the same way, both to foster cultural security for participants and to honour their contribution authentically. In saying that, the most effective way to optimise the feedback process is to ask stakeholders how they would like to receive feedback about inquiry outcomes.

Depending on the stakeholder group and its needs, approaches committees could consider include:

- reporting outcomes of public engagement in the committee's report, along with 'more systematic integration of the information obtained… showing how it influenced the committee's deliberations';[43]
- generic emails and social media content to announce the publication of a report, possibly acknowledging or highlighting a particular group's contribution;[44]
- creating reports or summaries in formats accessible to people with visual, auditory or cognitive disabilities;
- translating reports or summaries into languages other than English;

[42] Amy Cleland and Carole Zufferey, 'Yarning about yarning: A potential strategy to deconstruct whiteness', in Jioji Ravulo, Katarzyna Olcon, Tinashe Dune, Alex Workman and Pranee Liamputtong (eds), *Handbook of Critical Whiteness*, Singapore: Springer Verlag, 2023, p 1257.

[43] House of Commons Liaison Committee, *The effectiveness and influence of the select committee system* (Report, September 2019), p 57.

[44] Leston-Bandeira et al, Submission No 72 to House of Commons Liaison Committee, p 7.

- in-person meetings, roundtables or yarns to consult on proposed recommendations (or in-person report back sessions);
- use of e-consultation platforms such as the one used by the Scottish Government (*We asked, you said, we did*),[45] both to harvest citizens' suggestions on an issue and keep them informed of actions taken in response;
- narrating citizens' stories in committee outputs, which 'shows a capacity for committees to relate (and demonstrate relation) to citizen input';[46]
- Shorthand stories, or other forms of multimedia storytelling;
- surveys to help evaluate the impact of an engagement activity, which signal to participants that the parliament takes public engagement seriously.[47]

Clearly, there is a myriad of ways in which committees can close the feedback loop with citizens who have engaged with their processes. The list above is by no means exhaustive. While this represents the final step in the inquiry engagement process, it is arguably the most critical and will leave an impression on participants, one way or another. That said – and as alluded to earlier in this article – the strategies outlined above carry potential risks that practitioners should carefully consider. For instance, they could artificially raise expectations for future engagement. In addition, because these activities may require apolitical parliamentary staff to innovate and exercise a degree of strategic influence, their actions may risk being perceived as transgressing their politically neutral remit. And, of course, without adequate research, planning, or resources, such initiatives may simply fail to achieve their intended purpose and be perceived by the intended audience as tokenistic or insincere. However, as this article has

[45] The e-participation initiative *We asked, you said, we did* (implying a complete feedback loop, and therefore an apt title for this paper) is a feature of the Citizen Space platform designed by a private company called Delib. It is used by local authorities and government agencies throughout Scotland. The process is perhaps self-evident: citizens provide input on issues through the platform and policy makers respond with actions taken as a result. Consultations are then summarised succinctly on a webpage according to the issue in question ('we asked'), the feedback provided by the public ('you said') and the outcome ('we did'): E.g. Scottish Government, 'Consultation on the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024: Statutory Guidance on Part 2 and 3, section 18'. Accessed at: https://consult.gov.scot/children-and-families/part-2-and-3-uncrc-incorporation-scotland-act-2024/

[46] Alex Prior and Cristina Leston-Bandeira, 'Parliamentary storytelling: A new concept in public engagement with parliaments'. *Journal of Legislative Studies* 28(1), 2022, pp 67, 77.

[47] Moulds, 'A toolkit for evaluating the effectiveness of parliamentary public engagement', p 16.

established, careful and thorough preparation will go a long way toward mitigating these challenges.

## CONCLUSION

Purposeful and inclusive public engagement in the work of parliamentary committees can enhance their epistemic and representative capacity, by allowing access to a wide spectrum of views and expertise. This, in turn, lends legitimacy to committee outputs. Closing the feedback loop should be seen as an integral part of any public participation initiative. It is about giving people a sense that they were genuinely heard as part of a process and not 'speaking into the void'. This article has highlighted different ways to close the feedback loop in committees' engagement processes. Exactly what form a feedback activity should take depends on a range of factors, including the nature and objectives of the original engagement, and the needs, expectations and preferences of participant groups. Effective feedback is difficult for parliaments to deliver well; it is perhaps the most commonly overlooked aspect of public engagement practice. A greater focus on closing feedback loops as part of a formal parliamentary engagement strategy would promise more consistent implementation and earlier planning of feedback activities. This, ultimately, will help to ensure parliaments are realising their broader strategic goal of inspiring trust and confidence in parliament, its people and its processes.

# Committee effectiveness in the pursuit of executive accountability: does the winner really take all in Queensland?

**Dr Jodhi Rutherford**

Committee Secretary, Queensland Parliament

***Abstract:*** Committee effectiveness literature is replete with criteria for how to best measure the performance of parliamentary committees. Traditional focus of these studies on committee outcomes (such as outputs produced or influence wielded) has observed the restraining effect of executive dominance on committee work. Emerging work in this field is shifting gaze away from outcomes and towards process considerations of committee effectiveness. This paper applies systems theory to highlight factors present at various levels of parliamentary systems which support or constrain parliamentary committees' objective of pursuing executive accountability and finds encouraging evidence of many of these factors operating at the committee, assembly and parliamentary levels of the Queensland Parliament.

## INTRODUCTION

> *The main task of committees in Queensland is to ensure government administration is accountable to the parliament and to the people of Queensland… [to] consider and report on bills introduced into the parliament and subordinate legislation, consider the annual state budget Appropriation Bills, investigate issues of public importance, consider*

> *whether policies or past decisions could be improved and make sure that public money is used appropriately.*[1]

Parliamentary committees are limbs of their parent parliaments. The effectiveness of a committee is therefore determined by how well it expedites the parliament's core function. As to what that core function is, the Hansard Society concludes that parliament should be defined by what it does.[2] What parliament does has much to do with the executive; of the three primary functions of modern parliaments – lawmaking, representation and oversight - holding the executive to account predominates.[3] However, parliaments generally exercise their oversight function within a dynamic relationship which is traditionally characterised by executive dominance.[4]

Executive dominance, or the inability of parliaments to restrain or resist the executive, is central to much of the extant body of empirical studies into committee effectiveness.[5] These

---

[1] Queensland Parliament, 'Parliamentary Committees Factsheet 3.9'. Accessed at https://www.parliament.qld.gov.au/Visit-and-learn/Education/Resources/3-Parliament.

[2] Hansard Society, 'The Challenge for Parliament: Making Government Accountable'. Accessed at https://www.hansardsociety.org.uk/publications/reports/the-challenge-for-parliament-making-government-accountable-the-report-of The Report of the Hansard Society Commission on Parliamentary Scrutiny

[3] Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies.* New York: Palgrave Macmillan, 2003.

[4] John Uhr, 'Redesigning accountability: From muddles to maps' *Australian Quarterly*65 (2) 1993, pp. 1-16; David Hamer, 'Can responsible government survive in Australia?' (PhD thesis) University of Canberra, 1994. Accessed at https://cir.nii.ac.jp/crid/1130000794190500864; Jim Chalmers and Glyn Davis, *Power: Relations between the Parliament and the Executive Australia*. Canberra: Department of the Parliamentary Library, Commonealth of Australia 2000; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies;* Scott Prasser, 'Executive growth and the takeover of Australian parliaments' *Australasian Parliamentary Review* 27(1) 2012, p. 48; Kate Jones and Scott Prasser, 'Resisting executive control in Queensland's unicameral legislature-recent developments and the changing role of the speaker in Queensland' *Australasian Parliamentary Review* 27(1) 2012, p. 67; Ian Holland, *Senate committees and the legislative process* (Parliamentary Studies Paper 7) Canberra: Crawford School of Economics and Government, Australian National University; Paul Lobban, 'Who cares wins: Parliamentary committees and the executive' *Australasian Parliamentary Review* 27(1) 2012, p. 178.

[5] Kenneth Wheare, *Government by Committee: An Essay on the British Constitution.* Oxford: Clarendon Press, 1955; Malcolm Aldons, 'Rating the effectiveness of committee reports: some examples' (2001) 16(1) *Australasian Parliamentary Review* 52; Gareth Griffith, 'Parliament and accountability: The role of parliamentary oversight committees' *Australasian Parliamentary Review* 21(1) 2005, p. 7; Elizabeth McLeay, 'Scrutiny and Capacity: An evaluation of the parliamentary committees in the New Zealand Parliament' *Australasian Parliamentary Review* 21(1) 2006, pp. 158-82; John Alvey, 'Parliament's accountability to the people, the role of committees: A Queensland view'' *Australasian Parliamentary Review* 23(1) 2008, pp. 62-72; Clare James, 'Government responses

studies have employed a variety of empirical methods to evaluate committee effectiveness, including the traditional approach of measuring the impact and outputs of committees - through assessing the number of report recommendations accepted by the government, or amendments to legislation in response to committee reports.[6] However outcome-focused assessment frameworks can obscure the importance of committee processes, and the relationships between different committees within the parliamentary system. Repeated findings in these studies, of executive dominance resulting from entrenched party discipline, do little to progress the committee effectiveness literature. [7]

The objective of this paper is to situate committee processes – those tasks undertaken towards its function - within the parliamentary context, by examining the systemic factors that bear on committees' core function of pursuing executive accountability to parliament. This paper takes as its starting point that the objective of the parliamentary system is pursuing executive accountability. Within the parliamentary system contemplated by this paper, the whole of government activity constitutes the 'what' of accountability; the executive – ministers and senior public service leaders– are *from* 'whom' accountability is sought, and Parliament and the public are *to* 'whom' accountability is provided. This paper conceptualises the 'how' of accountability by analysing the systemic guardrails and resources available to support committees' accountability function. The 'why' of executive accountability is beyond the scope

to parliamentary committee enquiries'*Australasian Parliamentary Review* 24(2) 2009 p. 182; David Monk, 'A framework for evaluating the performance of committees in Westminster parliaments' *The Journal of Legislative Studies* 16(1) 2010, p. 1; P Lobban, *Who cares wins: Parliamentary committees and the executive*; David Monk, 'Committee inquiries in the Australian Parliament and their influence on government: Government acceptance of recommendations as a measure of parliamentary performance' *The Journal of Legislative Studies* 18(2) 2012, pp. 137-160; Ian Marsh and Darren Halpin, 'Parliamentary committees and inquiries', in Brian Head and Kate Crowley (eds) *Policy analysis in Australia*. Bristol: Policy Press, 2015, p. 137; Mark Goodwin, Stephen Bates and Steve McKay, 'Elected chairs do not seem to have brought a new kind of parliamentarian to Select Committees' *Democratic Audit UK.* Accessed at https://www.democraticaudit.com/2016/07/06/elected-chairs-do-not-seem-to-have-brought-a-new-kind-of-parliamentarian-to-select-committees/*;* John Halligan and Richard Reid, 'Conflict and consensus in committees of the Australian parliament' *Parliamentary Affairs* 69(2) 2016 p. 230.

[6] M Aldons, *Rating the effectiveness of committee reports: some examples.*

[7] D Hamer, *Can responsible government survive in Australia;* J Chalmers and G Davis, *Power: Relations between the Parliament and the Executive Australia*; Christopher Kam, *Party discipline and parliamentary politics*. Cambridge: University Press, 2009; Ulrich Sieberer, 'Party unity in parliamentary democracies: a comparative analysis', in Phillip Norton (ed) *The Impact of Legislatures*. London: Routledge, 2020, 141; Kate Jones and Scott Prasser, 'Resisting executive control in Queensland's unicameral legislature-recent developments and the changing role of the speaker in Queensland' *Australasian Parliamentary Review* 27(1) 2012, pp. 67-84.

of this paper, but has been extensively considered in the literature.[8] This paper case-studies the presence of factors bearing on committees' accountability function in the Queensland Parliament, and argues that a focus on process over outcomes neutralises the executive dominance narrative in committee effectiveness literature, by acknowledging that committee work is a nuanced task specific affair, and conditioned by processes operating holistically within the system in which committees are located.

## ACCOUNTABLE GOVERNMENT

> *'Accountability' means answerability. To be accountable is to promptly and accurately inform the relevant authority or the public directly of the reasons for all significant or potentially controversial decisions and actions. It means being answerable in respect of those decisions [emphasis added].*[9]

Uhr defines accountability in government as obligations owed by the powerful to the powerless through various accountability institutions including parliament.[10] Parliament pursues accountability through identified procedures - including debates, question time and inquiry by committee - for scrutiny of legislation and regulatory policy, finance and public administration.[11] Parliament legitimates the political system by linking politics with the people, functioning as a 'safety valve' check on government action, and ensuring articulation of the public interest through consultation and engagement processes which supplement

[8] Andrew McGowan, 'Accountability or inability: to what extent does House of Representatives question time deliver executive accountability comparative to other parliamentary chambers? Is there need for reform?' *Australasian Parliamentary Review* 23(2) 2008 pp. 66-85; Richard Mulgan, ''Accountability': an ever-expanding concept?' *Public administration* 78(3) 2000, pp. 555-573; Eric Posner and Adrian Vermeule, 'The credible executive' *University of Chicago Law Review* 74 2007, pp. 865; Sean Gailmard and John Patty, *Learning while governing: Expertise and accountability in the executive branch.* Chicago: University Press, 2012.

[9] Peter Coaldrake, *'Let the sunshine in'- Review of culture and accountability in the Queensland public sector.* Final Report, Accessed at https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf, 6; see also Accountability Roundtable, *The Fitzgerald Principles*, Press Release, 2015 accessed at https://alhr.org.au/wp/wp-content/uploads/2015/01/150128-Open-Letter-Fitzgerald-Principles-.pdf.

[10] J Uhr, *Redesigning accountability: From muddles to maps.*

[11] Malcolm Aldons, 'Problems with parliamentary committee evaluation: Light at the end of the tunnel?' *Australasian Parliamentary Review* 18(1) 2003 pp. 79, 82-87; Malcolm Aldons, 'Responsible, representative and accountable government' *Australian Journal of Public Administration* 60(1) 2001 pp. 34, 36; R Mulgan, *Holding Power to Account: Accountability in Modern Democracies,* 52.

parliament's traditional public-facing educative, petition and grievance functions.[12] People or groups excluded from the government process or those who were unsuccessful get an opportunity or another chance.[13] Committees work to connect the public to the parliament in recognition of the rightful place that publics have alongside houses and chambers of assembly as to 'whom' executive accountability is required.

Notions of executive accountability for parliaments without a strict separation of powers between the parliamentary and executive branches traditionally rest on the ideal of responsible government, which has been argued in Australia to have collapsed in the wake of some of the strictest party discipline of any Westminster system.[14] Prasser observes the general consensus that the executive are seen to dominate decision making processes across government, set the policy agenda and manage policy issues, and minimise scrutiny of its activities.[15] The apparent demise of responsible government as a litmus test for executive accountability has prompted proposals for a functional (rather than outcomes-based) approach to evaluating committee effectiveness.[16] Aldons has argued this type of approach promotes an alternative ideal of accountable government to supplant responsible government.

## COMMITTEE EVALUATION FRAMEWORKS

It is difficult to arrive at a shared understanding of what committee effectiveness means, given the number of ways in which it can be measured.[17] As outlined above, impact or outcomes have traditionally been the focus here, measuring committee power, influence, and/ or

[12] Malcolm Aldons, *Responsible, representative and accountable government*; John Halligan, 'Parliamentary committee roles in facilitating public policy at the Commonwealth level' *Australasian Parliamentary Review* 23(2) 2008 p. 135; Philip Norton, *Parliament in British Politics*. Basingstoke : Palgrave Macmillan, 2013.

[13] John Uhr, *Deliberative democracy in Australia: the changing place of parliament*. Cambridge: University Press, 1998, 140.

[14] D Hamer, *Can responsible government survive in Australia*; J Chalmers and G Davis, *Power: Relations between the Parliament and the Executive Australia;* C Kam, *Party discipline and parliamentary politics*; U Sieberer, *Party unity in parliamentary democracies: a comparative analysis*.

[15] S Prasser, *Executive growth and the takeover of Australian parliaments*, 49; John Halligan and Robin Miller, *Parliament in the Twenty-First Century: Institutional reform and emerging roles*. Melbourne: University Press, 2007; John Uhr, 'The future roles of parliament'' in Patrick Weller and Michael Keating (eds), *Institutions on the Edge? Capacity for Governance.* London: Routledge, 2020, p. 10; Gordon Reid, 'Parliamentary politics' *Politics* 2(1) 1967, pp. 76, 92.

[16] M Aldons, *Responsible, representative and accountable government*.

[17] T Mickler. *Parliamentary committee in a party-centred context: Looking behind the scenes*. London: Routledge, 2022.

outputs such as recommendations. [18] Other committee measures that have been canvassed include: extent of parliamentary scrutiny achieved; presence of democratic indicators including transparency, inclusivity, and diversity and level of participation of witnesses; or structural issues such as level of activity, or scope of legislative powers.[19] The question of exactly which criteria to use in effectiveness assessments remains contested.[20]

Critiques of the impact or outcomes model of evaluation point to the difficulty of assessing long term effect of committee recommendations on policy matters, and the complexity of integrating qualitative and quantitative data to measure the phenomenon of influence.[21] In her 2021 review of parliamentary committee effectiveness in the Senedd (Welsh Parliament), Stirbu observed that

> *One of the biggest hurdles in developing a coherent framework for evaluation of committees' work is that not everything can be easily quantifiable and measurable.*[22]

[18] M Aldons, *Problems with parliamentary committee evaluation*; Ian Marsh and Robin Miller, *Democratic decline and democratic renewal: Political change in Britain, Australia and New Zealand*. Cambridge: University Press, 2012; Suman Ojha, 'The effectiveness of parliamentary committees in Queensland: 1996-2001' *Australasian Parliamentary Review* 27(2) 2012, pp. 71, 72.

[19] Standards, Procedures and Public Appointments Committee, Scottish Parliament, Committee effectiveness – background resource overview, 2. Accessed at https://www.parliament.scot/-/media/files/committees/standards-procedures-and-public-appointments-committee/spice_briefing.pdf.

[20] Wheare, *Government by Committee: An Essay on the British Constitution*; Ian Marsh, 'Interest groups and policy making: A new role for select committees?' *Parliamentary Affairs* 41(4) 1988 p. 469; Gavin Drewry, 'Perspectives on law and politics' *Parliamentary Affairs* 42(1) 1989, p. 127; M Aldons, *Responsible, representative and accountable government*; M Aldons, *Rating the effectiveness of committee reports: some examples*; Diana Stirbu, 'Power, influence and impact of Senedd committees-developing a framework for measuring committees' effectiveness'. Accessed at https://senedd.wales/media/xtqk0ojr/gen-ld14672-e.pdf; T Mickler. *Parliamentary committee in a party-centred context: Looking behind the scenes*.

[21] Meghan Benton and Meg Russell, 'Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons' *Parliamentary Affairs* 66(4) 2013, pp. 772, 775; Derek Hawes, 'Parliamentary select committees: Some case studies in contingent influence' *Policy & Politics* 20(3) 1992, p.227; Meg Russell and Philip Cowley, 'The policy power of the Westminster parliament: The "parliamentary state" and the empirical evidence' *Governance* 29(1) 2016 p.121; M Aldons, *Rating the effectiveness of committee reports: some examples*, 55.

[22] D Stirbu, *Power, influence and impact of Senedd committees-developing a framework for measuring committees' effectiveness.*

Regarding impact evaluations, Aldons notes that contemporary assessments give less weight to process than outcomes, such that a focus on committee power or influence may ignore committees that have neither, but which nonetheless contribute to open government and accountability.[23]

## *A process approach*

An alternate evaluation approach to an impact or outcomes focus is one that focuses on *process*. A focus on the *way* committees work (including the different discrete steps they undertake to complete their functions) supplies a more holistic evaluative lens to the scrutiny, oversight and public engagement tasks committees do to support parliament's core function of executive accountability. A process focus also allows other criteria which have been applied to committee effectiveness, such as attendant democratic indicators such as transparency, inclusivity, and diversity and level of participation of witnesses, and structural issues such as level of activity or scope of legislative powers, to be integrated into assessments of committee effectiveness alongside impact or outcome considerations. Critically, this more process-focused analysis of the parliamentary system engages the equally important yet oft-overlooked work that committees do in pursuing accountability of the executive to the voting public.

A process approach does not reject consideration of committee impacts - indeed, the process of producing committee reports containing recommendations subsequently accepted (or not) by government, shows the scope of the lens. Halligan, Miller and Power propose a hybrid outcome and process evaluation, by distinguishing between different committee processes which support policy-influencing, legislation-influencing and scrutiny functions.[24] Committees progress through each function incrementally, and the effectiveness of how committees step through each function provides insight into the expected outcome. In this way, the Halligan, Miller and Power model can accommodate inherent tension between process and outcome in committee effectiveness evaluations.

> *When a committee scrutinises a bill, the question of whether it has made a valuable contribution to the legislative process is a very subtle exercise. Is the most important contribution flushing out the people with an interest in*

[23] M Aldons, Rating the effectiveness of committee reports: some examples, 57; M Aldons, *Problems with parliamentary committee evaluation,* 83; M Aldons, *Responsible, representative and accountable government*.

[24] J Halligan and R Miller, *Parliament in the Twenty-First Century: Institutional reform and emerging roles*; J Halligan, *Parliamentary committee roles in facilitating public policy at the Commonwealth level*.

> *legislation and hearing their voices, or, at the other end of the scale, having a bill rejected or amended?*[25]

A body of work is developing around process-driven considerations of committee effectiveness, such as committee regard for rights protection during scrutiny, and agenda-setting processes used by committees overseeing non-legislative executive action.[26] Moulds argues for a systems-based analysis of committee effectiveness in rights scrutiny, moving through various layers of evaluation based on context, function, committee factors and outcome.[27] James argues important committee functions such as public participation, exposure of issues, interactions with the executive, exercising jurisdictional mandate and bipartisanship are better observed by functional rather than impact analysis.[28]

A process approach to committee effectiveness can also neutralise the executive dominance narrative emanating from impact studies that focus on committees' scrutiny role in Australian parliaments with strong party discipline. These studies point to the sheer volume of Bills resulting from government majorities, whose large, well-resourced executives produce more work, use Ministerial powers to shorten reporting timeframes, and ensure supportive recommendations in committee reports despite overwhelming stakeholder opposition (usually aided by a government Chair's casting vote).[29] Other studies of committees' scrutiny function

---

[25] Harry Evans, 'Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles, by John Halligan, Robin Miller and John Power.' *Australian Journal of Public Administration* 67(1) 2008, p. 112.

[26] Sarah Moulds, 'Democratic and Judicial Review of Enacted Laws in Australia: A Case Study of the Rights Scrutiny Work of Australian Parliamentary Committees' *Revue générale de droit* 51 2021 p. 47; Benton and Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons*; James, *Government responses to parliamentary committee enquiries.*

[27] Sarah Moulds, 'Committees of influence: Evaluating the role and impact of parliamentary committees' (2024)(071) *Papers on Parliament*. Canberra: Parliament of Australia, 66; Sarah Moulds, 'Committees in Dialogue: Parliamentary Scrutiny of the High Risk Terrorist Offenders Bill' *Australian Public Law*. Accessed at https://www.auspublaw.org/blog/2017/01/committees-in-dialogue; C James, *Government responses to parliamentary committee enquiries.*

[28] C James, *Government responses to parliamentary committee enquiries.*

[29] S Prasser, *Executive growth and the takeover of Australian parliaments*; Neil Laurie, 'Life after (or winner takes all)' (2022) 25(3) *Queensland History Journal* 260; Cosmo Howard and Pandanus Petter, 'What does democracy require of Queensland's political system?' in M Evans, P Dunleavy, J Phillimore (eds), *Australia's Evolving Democracy: A New Democratic Audit*. London: LSE Press, p. 415. Bryan Horrigan, 'Reforming rights-based scrutiny and interpretation of legislation' *Alternative Law Journal* 37(4) 2012 pp. 228-232; P Lobban, *Who cares wins: Parliamentary committees and the executive*,183.

challenge this view.[30] Marsh and Miller also suggest that parliamentary committees have a unique opportunity to contribute to democratic renewal by reconnecting citizens to the political system, identifying committees' capacity to:

> *recreate the capabilities that were formerly located in the mass party organisations … This involves the ability to renew the link between civil society and the formal political system, in a discursive or deliberative setting... Committees have the capacity to do this around single issues. Their findings might then frame later contention between rival political elites. We conjecture that no other agent in the political system offers these essential capabilities.*[31]

## ACCOUNTABILITY THROUGH COMMITTEES

The Commonwealth (Latimer) House Principles on the Three Branches of Government, endorsed in 2003 by the Commonwealth Heads of Government, provide the foundational doctrine for strong democratic government, and emphasise the importance of maintaining institutional checks and balances, and strengthening the separation of powers. The principles pursue 'the entrenchment of good governance based on the highest standards of honesty, probity and accountability.'[32] Latimer House Principle 6 provides for executive accountability to parliament:

> *Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include … a committee structure appropriate to the size of parliament, adequately resourced and with the power to summon witnesses, including ministers.*

[30] Meg Russell, Daniel Gover and Kristina Wollter, 'Does the Executive dominate the Westminster legislative process?: six reasons for doubt' *Parliamentary Affairs* 69(2) 2016p. 286; Sarah Moulds, 'A deliberative approach to post legislative scrutiny? Lessons from Australia's ad hoc approach', *Parliaments and Post-Legislative Scrutiny* in Franklin de Vrieze and Philip Norton (eds) *Parliaments and Post-Legislative Scrutiny*. London: Routledge, 2020, p. 14; S Moulds, *Democratic and Judicial Review of Enacted Laws in Australia*.

[31] I Marsh and R Miller, *Democratic decline and democratic renewal: Political change in Britain, Australia and New Zealand.*

[32] Commonwealth Parliamentary Association*, Commonwealth Principles (Latimer House) on the Relationship* (Report, 2023)10, Preamble https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf.

> *Governments should be required to announce publicly, within a defined time period, their responses to committee reports.*[33]

Parliamentary studies literature indicates certain factors are required for committees to effectively exercise their accountability function. Systems theory, as developed by political scientists including Easton and Young, provides a useful framework to determine what those factors are.[34] Systems theory anticipates that accountability by one object to another will be achieved through a set of interactions between objects within a system, towards that common objective. A systems analysis therefore focusses on observing patterns in behaviour of different objects in the parliamentary system, and the interactive and conditioning behaviour between objects, to find the factors which help maintain that system. This paper seeks to identify the factors, at different levels of the political system, which bear on executive accountability. All systems have micro- meso- and macro levels, which correspond in this paper to committees (micro), houses and chambers of assembly (meso), and Parliament (macro), see Figure 1 Systemic factors enhancing committees' accountability function.

## *The micro- level: Committee factors*

The nature of parliamentary committees varies dramatically, from oversight and public accounts committees to inquiry-based, portfolio committees. Committees are constituted by elected members of parliament and staffed by secretariats, and factors relevant to a committee's members, staff and style condition how successfully a committee expedites its functions. As well as a Chair's consensual approach, personal capabilities of knowledge and relationship capital held by individual members are significant.[35] Supplementing these capabilities with training in committee specific and parliamentary wide issues can enhance committee members' contribution.[36] A committee secretary with specialist skills in drafting and

[33] Commonwealth Parliamentary Association*, Commonwealth Principles (Latimer House) on the Relationship* (Report, 2023)12, Principle 6 https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf.

[34] Oran Young, 'International regimes: toward a new theory of institutions' *World politics* (1986) 39(1) pp.104-122; David Easton, 'An approach to the analysis of political systems' *World politics* 9(3) 1957 pp. 383-400.

[35] Ken Coghill, 'Queensland's parliamentary committees: dead, on life support, or lively?' *Australasian Parliamentary Review* (2012) 27(2) pp. 99,103.

[36] K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively,* 48; S Moulds, *Committees of influence: Evaluating the role and impact of parliamentary committees*; Colleen Lewis and Ken Coghill, 'Surveying

subject matter is also important.[37] Committee reports with appropriate tone communicate important messages about a committee's style and enhance impact.

A strategic approach involving rigour, initiative and engagement is also critical for committee success. In-depth, consistent examination of policy implementation, administration, estimates and expenditure by executive government, and submission of reports which question aspects of that activity is vital.[38] For inquiry-based committees, drawing attention to niche issues lacking ministerial attention is another effective way to demand accountability.[39] It is also important for the committee to follow up on executive responses to recommendations and monitor implementation, in other words 'closing the feedback loop'.[40] Committees can show initiative by annually reporting on their activities, 'because if committees are to become even stronger advocates of accountability in governance, they will have to lead through example.'[41] Furthermore, committees' strategic engagement with extra-parliamentary components of the scrutiny system, for example Auditors-General or law reform commissions, can enhance overall accountability.[42]

Public representation efforts - calling for submissions, public hearings in decentralised locations, direct inclusion of publics into committee deliberations via round tables - are seen

research on parliament and parliamentary oversight of the public sector' *Australian Journal of Public Administration* (2005) 64(1) p. 62.

[37] S Moulds, *Democratic and Judicial Review of Enacted Laws in Australia: A Case Study of the Rights Scrutiny Work of Australian Parliamentary Committees*, 65; M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Common,* p. 782.

[38] K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively.*

[39] M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Common,* 790.

[40] Cristina Leston-Bandeira and Sven T. Siefken, 'The development of public engagement as a core institutional role for parliaments' *The Journal of Legislative Studies* (2023) 29(3) pp. 361-379, 371; M Aldons, *Rating the effectiveness of committee reports: some examples*; I Halligan, *Parliamentary committee roles in facilitating public policy at the Commonwealth level*,153.

[41] M Aldons, *Responsible, representative and accountable government* (n 9); John Uhr, *Deliberative democracy in Australia: the changing place of parliament*. Cambridge: University Press, 1998; I Halligan, *Parliamentary committee roles in facilitating public policy at the Commonwealth level.*

[42] Sarah Moulds, *Committees of Influence*. Singapore: Springer Nature, 2020; Public Accounts and Expenditure Review Committee, Parliament of Western Australia *Report On Statement Of Understanding Between The Auditor General And The Public Accounts And Expenditure Review Committee.* Accessed at https://parliament.wa.gov.au/parliament/commit.nsf.

to demonstrably improve accountability.[43] Access to public testimony and subject matter experts within committee also provides a 'safe space' for government committee members to resist party discipline through an evidence-based decision-making process.[44]

## *The meso-level: Assembly factors*

Houses and chambers of Assembly interact with parliamentary committees by supplying committee Members. They also condition committees by setting the rules and laws which supply a committee's mandate in terms of jurisdiction, powers, degree of autonomy, and its composition. Assemblies also have the prerogative to override or protect the agenda and reporting timelines of committees, depending on the number of referrals and tabling deadlines. Executive dominance during various committee processes - hearings, report drafting, and private meetings - resulting from government committee Chairs equipped with a casting vote, can be restrained by Assemblies making provisions for non-government Chairs.[45]

Assemblies can codify or mandate requirements for post legislative scrutiny by committee, by including sunset clauses or review provisions in draft Bills, which can lead to a more accountable approach.[46] Pre-legislative scrutiny – where committees scrutinise draft bills, liaise with public servants about guidance and drafting, and make recommendations to ministers –

[43] I Halligan, *Parliamentary committee roles in facilitating public policy at the Commonwealth level*, 136; P Norton, *Parliament in British politics*; S Moulds, *Committees of Influence*; John Uhr and John Wanna, 'The future roles of parliament', *Institutions on the edge?* New York: Routledge, 2020, 10-35; C Leston-Bandeira and S Siefken, *The development of public engagement as a core institutional role for parliaments.*

[44] S Moulds, *Democratic and Judicial Review of Enacted Laws in Australia*, 76,85; Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* Melbourne: University Publishing, 2018.

[45] Commonwealth Parliamentary Association*, Recommended Benchmarks for Democratic Legislatures*. Accessed at https://www.cpahq.org/media/l0jjk2nh/recommended-benchmarks-for-democratic-legislatures-updated-2018-final-online-version-single.pdf; M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Common*, 785; David Skinner, ' Independence and reform – the Legislative Assembly for the Australian Capital Territory ' Unpublished paper, Parliamentary Law, Practice and procedure Course, University of Tasmania 2017*,* 6.

[46] S Moulds, *A deliberative approach to post legislative scrutiny? Lessons from Australia's ad hoc approach,* 4; Catherine Lynch and Shane Martin, 'Can parliaments be strengthened? A case study of pre-legislative scrutiny'*Irish Political Studies* (2020) 35(1) p. 138; S Moulds, *Democratic and Judicial Review of Enacted Laws in Australia*.

can also enhance committee's accountability function, but only if enough time is given to committees to do so.[47]

Assemblies can equip committees with jurisdiction to review all legislative proposals, initiate 'own motion' inquiries and 'cover the field' of executive government action, which underpins committee success, according to the Inter-Parliamentary Union.[48] Their self-assessment toolkit for parliaments additionally requires statutory protection of committee autonomy through control of its own budget, agenda, inquiry timetable, and personnel.[49] A requirement for formal, public government responses to committee reports, and a requirement for the executive to notify when a Bill or subordinate legislation departs from fundamental legal principles or human rights, further legitimates the committee's scrutiny function.[50] Separately, there is benefit from the presence of permanent monitoring committees - with remits over, for example, subordinate legislation, parliamentary ethics or anti-corruption – separate to portfolio committees, and empowered to demand explanations, summon, and to approve executive appointments.[51]

[47] C Lynch and S Martin, *Can parliaments be strengthened? A case study of pre-legislative scrutiny*; S Moulds, *Committees of influence: Evaluating the role and impact of parliamentary committees*, 21; Goodwin, Bates and McKay, *Elected chairs do not seem to have brought a new kind of parliamentarian to Select Committees*; Matt Korris, 'Standing up for scrutiny: How and why parliament should make better law' *Parliamentary Affairs* (2011) 64(3) p. 564.

[48] K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively?*; P Lobban, *Who cares wins: Parliamentary committees and the executive*, 189.

[49] Inter-Parliamentary Union*, Evaluating Parliament - a Self-Assessment Toolkit for Parliaments*. Accessed at https://www.ipu.org/resources/publications/toolkits/2016-07/evaluating-parliament-self-assessment-toolkit-parliaments.

[50] Commonwealth Parliamentary Association, *Commonwealth Principles (Latimer House),*12; Laura Grenfell and Sarah Moulds, 'The role of committees in rights protection in federal and state parliaments in Australia' *University of New South Wales Law Journal,* (2018) 41(1) pp.40,61; J Uhr and Wanna, *The future roles of parliament*; M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons*; Brendan Gogarty and Gabrielle Appleby, 'The role of Tasmania's subordinate legislation committee during the COVID-19 emergency' *Alternative Law Journal* (2020) 45(3) p. 188.

[51] Gogarty and Appleby, *The role of Tasmania's subordinate legislation committee during the COVID-19 emergency*; Hallbera West, 'Parliamentary committees and Ex-post oversight: Institutional options and design' *Parliamentary Affairs* (2024) 77(3) pp.601, 604; M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons*, 793.

## *The macro-level: Parliament factors*

At this macro level of inquiry lies Parliament, an interconnected system of objects – members of parliament, political parties, houses and chambers of assembly, parliamentary rules, procedures and convention, and the parliamentary service – in constant, whirling interaction. Parliamentary culture - created and sustained by the diverse range of participants, traditions and conventions that develop and change over time - is an example of this macro-level landscape for analysis. Coghill suggests the ultimate test of parliamentary culture is whether the committee system operates to make government more responsive to the aggregate wishes of the governed.[52] A United Kingdom study captured this phenomenon in its observation that government 'aims to make policy as committee-proof as possible.'[53]

When the size of the executive is disproportionately large in comparison to the number of Members serving in a parliament, a committee's capacity to expedite accountability tasks associated with its oversight and public engagement function can be hindered, in the face of an agenda drowning in legislation resulting from an over-resourced executive.[54]

Promotion and respect for the committee system is important. Prasser suggests making the position of committee Chair as desirable as a Minister.[55] Another connected issue is how responsive Ministers are committee recommendations? The 'anticipated reaction' of government is linked by scholars to a committee's capacity to generate fear.[56] Readers' familiar with the Queensland context, to which this paper now turns, will implicitly understand this as the 'Courier Mail' effect.

[52] K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively*, 104-105.

[53] M Benton and M Russell. *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons,* 792.

[54] S Prasser, *Executive growth and the takeover of Australian parliaments.*

[55] S Prasser, Executive growth and the takeover of Australian parliaments, 59.

[56] M Benton and M Russell, *Assessing the impact of parliamentary oversight committees: The select committees in the British House of Commons,* 792; Jean Blondel, 'Legislative Behaviour: Some Steps towards a Cross-National Measurement1' *Government and Opposition* (1970) 5(1) p. 67; Michael Ryle, 'Introduction: An investigation into select committees' *Contemporary British History* (1997) 11(3) p. 63; S Ojha, *The effectiveness of parliamentary committees in Queensland: 1996-2001,*305; David Mayhew, *Congress: The electoral connection*. Yale: University Press, 1974, p. 107; M Russell and D Cowley, *The policy power of the Westminster parliament: The "parliamentary state" and the empirical evidence*.

**Figure 1. Systemic factors enhancing committees' accountability function**


## QUEENSLAND PARLIAMENTARY COMMITTEES

*Upper houses elsewhere may have had only a modest track record as chambers of review, yet the potentially moderating influence of a second chamber has not been present in Queensland. This absence, taken together*

> *with something of a frontier mentality, has helped to cultivate a raw, unrestrained 'winner takes all' style of politics in the northern state….*[57]

Criticised since the Fitzgerald Inquiry for its weak parliamentary system and dominant executive, the lack of an upper house in Queensland is sometimes attributed for its late development of parliamentary committees.[58] Post-Fitzgerald, both Labor and Liberal-National Party (LNP) governments experimented with various committee system formulations.[59] Major reforms in 2011 bought permanent portfolio committees, and parliamentary ethics and crime and corruption oversight committees, and the commencement of a Committee of the Legislative Assembly (CLA), comprised of three each of the most senior government and non-government Members, and the Speaker. The CLA has responsibility (formerly sitting solely with the Speaker) for managing House business, and for parliamentary committees funding and resourcing arrangements.[60] In 2016, during a government push for four-year electoral terms, the political trade-off of stronger accountability safeguards saw the entrenchment into the Constitution of Queensland of six 'cover the field' portfolio committees with self-referral and Estimates examination powers, and minimum six week reporting timeframes for referred legislation.[61]

---

[57] P Coaldrake, *Let the sunshine in'- Review of culture and accountability in the Queensland public sector,* 12.

[58] John Wanna, 'Public policy and public administration' in Ian McAllister and Steve Dowrick (eds) *The Cambridge handbook of social sciences in Australia*. Cambridge: University Press, 2003, p. 81; K Jones and S Prasser, *Resisting executive control in Queensland's unicameral legislature-recent developments and the changing role of the speaker in Queensland*, p. 80.

[59] Parliament of Queensland Committee System Review Committee, *Report on the Review of the Queensland Parliamentary Committee System,* 3. Accessed at https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/2010/5310T3777.pdf; Amanda Honeyman, *An evaluation of the Queensland Parliamentary Committee System: from Fitzgerald to recent reforms.* Unpublished paper, Parliamentary Law, Practice and procedure Course, University of Tasmania 2013. Accessed at https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/2014/5414T5920.pdf; S Ojha, *The effectiveness of parliamentary committees in Queensland: 1996-2001*; Judy Spence, 'A new era of parliamentary reform' *Australasian Parliamentary Review,* (2012) 27(1) p. 63.

[60] Committee System Review Committee, *Report on the Review of the Queensland Parliamentary Committee System*, xiv; K Jones and S Prasser, *Executive growth and the takeover of Australian parliaments*; Spence, *A new era of parliamentary reform,* v.

[61] *Constitution of Queensland Act 2001* (Qld) Part 5.

## *Existing evidence*

In a unicameral context, the capacity of parliamentary committees to perform the 'review' aspect of its accountability function is considerably more necessary than for committees in bicameral parliaments. A survey of literature into the effectiveness of Queensland parliamentary committees identified seven studies specifically evaluating their performance using various metrics, at various points in time.[62]

Ojha utilised the traditional impact evaluation framework in his examination of committees in Queensland Parliament between 1996-2000. [63] He found committees were somewhat effective in obtaining the cooperation of the executive, and having a good number of committee recommendations implemented, but less effective on accountability due to rarely probing controversial matters of public importance. Coghill's study assessed the Queensland committee system against the Inter-Parliamentary toolkit in 2011, and noted that while establishing the CLA breached a committee effectiveness requirement for autonomous agenda-setting, there was still effective committee measures present, particularly portfolio committees' complete coverage of the field of executive government responsibility.[64] Prasser and Jones's study also considered the period immediately-post CLA to argue the CLA breached a bulwark against executive intrusion into the legislature.[65] However, they were prepared to consider the CLA as representing cultural change away from extremely traditional public accounts committees with limited executive scope of field accountability, and towards portfolio committees with broader remit. [66]

---

[62] J Alvey, *Parliament's accountability to the people, the role of committees: A Queensland view*; Lyndel Bates, 'Parliamentary committees are important in developing policy: evidence from a Queensland case study' Australasian Parliamentary Review (2010) 25(2) p. 14.; K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively?*; Jacqueline Dewar, *Developing Queensland's Parliamentary Committees: will increased statutory recognition provide better executive and legislative scrutiny in a unicameral parliament?* Accessed at https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2014/5414T5920.pdf; A Honeyman, *An evaluation of the Queensland Parliamentary Committee System: from Fitzgerald to recent reforms*; K Jones and S Prasser, *Executive growth and the takeover of Australian parliaments*; J Spence, *A new era of parliamentary reform;* S Ojha, *The effectiveness of parliamentary committees in Queensland: 1996-2001*; Lynda Pretty, 'Queensland's scrutiny of proposed legislation by parliamentary committees: Do they make for more considered, rights-compatible law?' *Australasian Parliamentary Review,* (2020) 35(1) p. 54. The study by Alvey is not reviewed in the paper as it seeks to explain rather than evaluate committees' role.

[63] S Ojha, *The effectiveness of parliamentary committees in Queensland: 1996-2001*, 84.

[64] K Coghill, *Queensland's parliamentary committees: dead, on life support, or lively.*

[65] K Jones and S Prasser, *Executive growth and the takeover of Australian parliaments.*

[66] P Lobban, *Who cares wins: Parliamentary committees and the executive*, 81.

Honeyman's study applied the Aldons impact evaluation model to the extent of acceptance of committee recommendation during 1996-2010.[67] She noted committees of that era had limited scrutiny of administrative, legal and technical matters, and identified executive dominance of committees via government majority and government Chair, as preventing genuine scrutiny or inquiry into controversial matters; committee recommendations usually supported the government line.[68] Dewar's case study of two portfolio committee inquiries conducted post-2016 constitutional entrenchment found their report recommendations did not reflect majority submitter sentiment. On key policy issues, government-controlled committees for each inquiry reinforced the wishes of the Government such that committee recommendations aligned with party positions.[69] Pretty's study of committees' rights-protection role in the period immediately after the introduction of the Queensland's *Human Rights Act 2019* indicated that even a new layer of human rights scrutiny did not necessarily make for better, more rights-compliant law in the face of the government of the day's priorities.[70]

Bates' impact evaluation, of the effect of a specific standing committee on government policy over two parliamentary terms, made contrasting findings about executive dominance to the other studies surveyed above.[71] By examining the Hansard record for discussion of recommendations and citations of the reports of Queensland's Travel-Safe Committees, her study identified factors which supported that committee's successful impact included: strong ideas about transport policy that were pursued consistently by committee; a consensual approach by the Chair; a focus on reporting evidence-based recommendations; and respect for the work of the committee from other Members of Parliament.[72]

[67] A Honeyman, *An evaluation of the Queensland Parliamentary Committee System: from Fitzgerald to recent reforms.*

[68] S Ojha, *The effectiveness of parliamentary committees in Queensland: 1996-2001*, 82-83.

[69] J Dewar, *Developing Queensland's Parliamentary Committees: will increased statutory recognition provide better executive and legislative scrutiny in a unicameral parliament.*

[70] L Pretty, *Queensland's scrutiny of proposed legislation by parliamentary committees: Do they make for more considered, rights-compatible law,* 54.

[71] L Bates, *Parliamentary committees are important in developing policy: evidence from a Queensland case study.*

[72] L Bates, *Parliamentary committees are important in developing policy: evidence from a Queensland case study.*

## *Systems analysis*

The existing Queensland studies show that committee performance at the micro level of the parliamentary system is difficult to insulate from conditioning by the meso- and macro- levels of that system. When it comes to inquiries where the Government may already have a clear public position that it cannot easily depart from, even in the face of contradictory evidence from committee process, the intent of the incumbent Government prevails. Bates' study reflects this by showing how committee members have space to undertake their work in a more deliberative manner, when the issues under inquiry are outside the immediate political agenda of the government.

Queensland studies generally do not suggest significant progress in the capacity of committees to resist executive dominance over the period 1990-2020 in Queensland. Since Bates' study, no further empirical studies have been published about micro- level factors bearing on Queensland committees' pursuit of executive accountability. Notwithstanding this, a systems analysis of committee effectiveness still helps to reconceptualise whether all has been lost for committees in the 'winner takes all' style of Queensland politics, because it identifies factors present at different levels of the parliamentary system which act as guardrails and resources supporting committees' accountability function. For example, there is great utility in committee members determining to use their personal skillsets – relationship capital, subject matter expertise, knowledge about committee powers and processes – towards a bipartisan, evidence-based approach to inquiries. Additionally, once a committee has made its recommendations, it can maintain the executive's focus on recommendations using the full scope of the committee's powers. Committees in Queensland *do* publish annual reports, engage in extensive public consultation processes, and their committee members receive induction and refresher committees-specific training at the start of each parliament.[73] These factors reflect micro-level factors available to support Queensland committees' accountability function.

Meso-level factor analysis suggests the Queensland's 2011 committee system reforms the Legislative Assembly initiated, were transformational. They gave portfolio committees accountability powers covering the field of government activity (including Budget estimates);

[73] Queensland Parliamentary Service, *Annual Report 2023–24.* Accessed at https://www.parliament.qld.gov.au/Visit-and-learn/Publications-and-Reports/Annual-Reports.

extensive technical and substantive scrutiny remit (including ability to recommend amendments); self-referral powers; and oversight of independent bodies.[74]

The functions of the six portfolio committees entrenched in Queensland's Constitution are contained in Chapter 5, Part 3 of the *Parliament of Queensland Act 2001* (Qld) and the *Standing Rules and Orders of The Legislative Assembly*. Queensland's Parliamentary Crime and Corruption Committee has a non-government Chair which can notably assist to restrain executive accountability.[75] However, some accountability-supporting, meso-level factors are absent, for example, the Legislative Assembly can declare a Bill urgent by ordinary majority, thereby restricting committees' inquiry time. Under Standing Order 137 and section 46 of Queensland's Constitution, a government may introduce a Bill to the House and declare the Bill to be urgent. Government members also chair all portfolio parliamentary committees and have a casting vote, apart from during the 55th Parliament, which was a minority government, when Committees Chairs did not have a casting vote.[76]

At the macro-level of the parliamentary system, while Queensland committee Chairs receive additional remuneration, it is inferior pay (and perceived status) to that of a Queensland government Minister. A parliamentary committee member receives an additional $27,846, a committee Chair an additional $69,616 per annum, while Government Whips, Assistant Ministers and Deputy Speakers receive an additional $97,462 and a Minister an additional $194,925 to their base salary of $183,985.[77] Additionally, Queensland traditionally hosts one of the largest executives proportionally to the number of sitting Members, meaning the executive can stack committee agendas with legislative scrutiny work, at the expense of committee oversight and public engagement functions.[78]

---

[74] K Coghill, Q*ueensland's parliamentary committees: dead, on life support, or lively*; P Lobban, *Who cares wins: Parliamentary committees and the executive.*

[75] *Crime and Misconduct Act 2001* (Qld) s 300(2); Committee System Review Committee, *Report on the Review of the Queensland Parliamentary Committee System*, p. 23.

[76] *Parliament of Queensland Act 2001 (*Qld) s 82, Standing Order 201, Legislative Assembly of Queensland; Neil Laurie, *Moving towards the entrenchment of parliamentary committees* (49th Presiding Officers and Clerks Conference, Wellington, 7-14 July 2018),p. 9. Accessed at https://www.parliament.nz/media/4944/moving-towards-the-entrenchment-of-parliamentary-committees-neil-laurie.pdf.

[77] Office of the Clerk of the Queensland Parliament, *Legislative Assembly Of Queensland Members' Remuneration Handbook* December 2024, p. 8. Accessed at https://www.parliament.qld.gov.au/Members/Members-and-Former-Members-Entitlements.

[78] S Prasser, *Executive growth and the takeover of Australian parliaments*.

## KEY FINDINGS

In Queensland, parliamentary committees undertake a diverse variety of substantive engagement processes that shed important light on their overall effectiveness at performing their prescribed functions. For example, during the period 2023-24, 13 parliamentary committees[79] conducted:

- 72 committee inquiries, made up of 65 Bill, 3 House-referred, 2 self-referred and 2 public works inquiries
- 631 committee meetings, hearing and briefings
- 4745 public submissions considered
- 1428 witnesses called.[80]

By comparison, committee *outcomes* for the same period in Queensland include:

- 137 committee reports (committee annual reports, subordinate legislation and Bill and Inquiry reports)
- 73 recommendations made in Bill inquiry reports (excluding those concerning whether the Bill be passed and including 19 proposed amendments to legislation)
- 27 government responses to Bill inquiry reports (accepting 17 of 19 proposed legislative amendments and 51 of 53 other amendments).

This statistics disparity shows the benefit of a systems approach to evaluating committee effectiveness. The more holistic lens encompasses *all* the processes that committees engage in towards pursuit of executive accountability, moving the focus away from the executive dominance which predominates outcomes measurement, towards attendant factors within the parliamentary system which restrain or enable executive dominance.

A systems approach allows consideration of, for example, how the micro- meso- and macro-levels interacting within the parliamentary system demonstrates the overlapping identities

[79] inclusive of three standing committees: the Committee of the Legislative Assembly, Ethics Committee, and Parliamentary Crime and Corruption Committee, and eight portfolio committees: Clean Economy Jobs, Resources and Transport Committee, Community Support and Services Committee, Cost of Living and Economics Committee, Education, Employment, Training and Skills Committee, Health, Environment and Agriculture Committee, Housing, Big Build and Manufacturing Committee, and Legal Affairs and Safety Committee; and two select committees: Supermarket Pricing Select Committee and the Youth Justice Reform Select Committee.

[80] Queensland Parliamentary Service, *Annual Report 2023–24*, p. 27.

Members of Parliament embody as firstly, a committee member wanted to engage with the public in an issues-based inquiry, then as a member of a house or chamber of Assembly wanting to represent their constituency in debates on proposed laws and finally, as a member of a political party with a particular mandate and capacity to govern. Given all these roles, one of the strongest determinants of committee effectiveness in pursuit of executive accountability may indeed be the personal capabilities of knowledge and relationship capital held by individual committee members. This accords with earlier parliamentary studies literature which observes the different roles that parliamentarians adopt in their work.[81] A systems analysis situates MPs as objects moving within the parliamentary system and draws attention to the full scope of work that committees, as constituted by their individual members, undertake in their furtherance of executive accountability.

Measurement by outcome is inevitably reductive. It obscures the scope, nature and reach of committee activities, particularly engagement with the public as another body 'to whom' the executive is accountable. A systems analysis can measure committee effectiveness within the parliamentary system in which they operate, because this type of approach is alive to the nuanced manner in which committees interact with other parts of the parliamentary system.[82]

## CONCLUSION

This paper has identified guardrails and resources which support parliamentary committees' pursuit of executive accountability, at each level of the system in which they are located. At the Committee level: member capability in subject-matter and committee procedure, a skilled secretariat, consensus, significant public interaction and deliberative engagement with evidence, and strategic relationship management with opposing parties, the executive and other accountability bodies, all reflect and enhance committees' accountability of the executive. At the Assembly level factors include: entrenchment of committees' jurisdiction across the whole field of government activity, ability to self-refer, and pre- and post-legislative scrutiny powers, protecting independence by guaranteeing committees' minimum timelines

[81] K Strom, Rules, reasons and routines: Legislative roles in parliamentary democracies. *Journal of Legislative Studies*, (1997) 3(1), pp. 155-174; D Searing, *Westminster's world: Understanding political roles*. Harvard: University Press, 1994.

[82] S Siefken and H Rommetvedt, *Parliamentary committees in the policy process*. Routledge: 2022; B Gaines and M Goodwin et al, Conclusion: Prospects for analysing committees in comparative perspective. *Journal of Legislative Studies*, (2019) 25(3) pp.434-441.

for reporting, autonomy over budget, agenda, and personnel, permanence of monitoring abilities and powers to obtain information, and support for bipartisanship, support committees' capacity to ensure accountability. At the Parliament level elements including a culture of anticipatory respect for the committee system, financial and reputational incentives for committee members, and an executive reasonably proportionate to the number of sitting members, can ensure an optimal environment for committees to achieve their accountability function.

In delineating these guardrails and resources, this paper contributes to the growing departure in parliamentary studies literature on committee effectiveness away from executive 'winner takes all' dominance of committees, towards a conceptual systems framework that, because it is cognisant of context, is able to assess a committee's effectiveness towards its base obligation to its parent Parliament - enhancing executive accountability to parliament ***and*** to the people.

# Senate Public Bills in Canada: What goes up must bring something down?

**Charlie Feldman and Anushua Nag**[1]

Legislative Counsel, Canada

***Abstract:*** This article examines the evolving role of Senate Public Bills (SPBs) in Canada following reforms to the Senate appointment process. It documents a sharp rise in the introduction and enactment of SPBs, analyses the procedural implications of this trend, and explores its impacts on both the Senate and the House of Commons. Drawing on legislative data and committee activity, the authors assess whether the Senate's growing self-initiated legislative workload enhances its ability to serve Canadians or inadvertently displaces other parliamentary functions. The article concludes by considering whether procedural reforms are needed to maintain institutional balance.

## INTRODUCTION

Canada's Parliament consists of the Crown, represented by the Governor General, and a bicameral legislature composed of an appointed Upper House – the Senate – and an elected House of Commons. The House of Commons is the primary driver of legislation, but the Senate also plays a significant role in this regard by reviewing, amending, and initiating legislation (except for money bills, which must originate in the Commons).

Reforms to the process for appointing Canadian senators was announced nearly a decade ago,[2] whereunder partisan appointments were replaced with appointments made on the recommendation of independent advisory bodies. This has transformed the composition of the

[1] Both authors previously worked at the Senate of Canada; the views in this article are those of the authors alone and not of any employer.

[2] Government of Canada. 'Government Announces Immediate Senate Reform'. *News Release*, 3 December 2015. Accessed at: https://www.canada.ca/en/democratic-institutions/news/2015/12/government-announces-immediate-senate-reform.html.

Senate,[3] which went from having two parties to (at the time of this writing) one party and three groups, the largest of which is the unaligned Independent Senators Group.[4]

The growing body of literature assessing the impacts felt from the 42nd Parliament (when the changes to the appointment process were initiated) until now (the 45th Parliament, which began in May 2025) identifies, among other things, increased amendments to government bills proposed by senators,[5] more Senate willingness to use its formal powers,[6] and some variation in committee practices.[7] In keeping with the theme of this issue, 'Exploring and Assessing Parliamentary Performance,' this article explores the increase in senators initiating public policy through Senate Public Bills (SPBs), a trend on which senators and their advisors have opined.[8]

The most recent completed session - the 44th Parliament, 1st Session (2021-2025) - saw 92 SPBs introduced, setting a sessional record.[9] As an arbitrarily picked but interesting comparative. point: this is more than the total number of SPBs introduced in the 18th through 34th Parliaments combined (90 SPBs), a period of nearly six decades (1936-1993).[10]

[3] Paul G. Thomas, 'Moving Toward a New and Improved Senate,' *Institute for Research on Public Policy*, 6 March 2019. Accessed at: https://irpp.org/wp-content/uploads/2019/03/Moving-Toward-a-New-and-Improved-Senate.pdf.

[4] *Standings in the Senate*. Accessed at: https://sencanada.ca/en/senators/.

[5] Elizabeth McCallion, 'From Private Influence to Public Amendment? The Senate's Amendment Rate in the 41st, 42nd and 43rd Canadian Parliaments'. *Canadian Journal of Political Science* 55(3) 2022, pp. 583-599.

[6] Jason Robert VandenBeukel, Christopher Cochrane & Jean-François Godbout, 'Birds of a Feather? Loyalty and Partisanship in the Reformed Canadian Senate'. *Canadian Journal of Political Science* 54(4) 2021, pp. 830-849.

[7] D. de Paiva & J. Malloy, 'What Do Senate Committees Tell Us About the Post-2016 Senate?' *Canadian Journal of Political Science* 57(4) 2024, pp. 861-876.

[8] Hon. Ratna Omidvar, Jérôme Lussier, Paul Faucette & Hon. Julie Miville-Dechêne, 'Senate Public Bills as 'Excellent Policy Value' for Canadians'. *Canadian Parliamentary Review* 46(4) 2024. Accessed online: https://www.revparlcan.ca/en/senate-public-bills-as-excellent-policy-value-for-canadians/. See also discussion in Catherine Cullen, host, *The House*, podcast, 'Is Trudeau's Reformed Senate Working? Here's What Senators Say', 25 July 2025. Accessed at: https://www.cbc.ca/listen/live-radio/1-64-the-house/clip/16160198-is-trudeaus-reformed-senate-working-heres-senators.

[9] Parliament of Canada. 'LEGISinfo'. Accessed at: https://www.parl.ca/legisinfo/. NB: This includes ceremonial bill S-1, which is indicated as a Senate Public Bill in sources such as LEGISinfo (the parliamentary legislation website) and the Library of Parliament's Table of Legislation for most sessions. However, S-1 is not included in all sources for all sessions as a Senate Public Bill given its pro forma nature. This article will indicate which data source is used for each figure provided, bearing in mind that some data sources may not be internally consistent regarding S-1 (at the time of this writing, LEGISinfo is missing S-1 for some older sessions of Parliament).

[10] Library of Parliament (Canada), 'Table of Legislation'. Accessed at: https://lop.parl.ca/sites/ParlInfo/default/en_CA/legislation/TableOfLegislation.

With this increase comes questions: Has the increase in the number of SPBs introduced made more work for the Senate? If so, is the Senate dedicating more of its sitting time to the study of SPBs or has there been a decline in sitting time devoted to non-legislative matters?

To explore and assess this change, this article is organised in four parts. First, it will explain Senate and House of Commons practice regarding backbench bills, focusing on the consideration of SPBs. Second, it will interrogate the recent increase in SPBs. Third, it will discuss the effects of the increase in SPBs on parliamentary business, including in the House of Commons. Finally, it will offer perspectives on the increase in SPBs and its impacts within the larger context of the Senate reform.

## BACKBENCH BILL PRACTICE

The non-government public bill practices of the Canadian Senate and House of Commons differ in significant ways. In the House of Commons, there is a lottery at the start of a Parliament in which backbench MPs are placed on the List for the Consideration of Private Members' Business.[11] Certain MPs (ministers, the Speaker, parliamentary secretaries, etc.) are ineligible but among the rest, MPs can introduce as many Private Members' Bills (PMBs) and motions as they like regardless of the number they draw. The kicker is that when the MP's number from the lottery comes up, they can only pick one item in their name to advance.

In the Senate, the Rules state that 'A Senator may, as of right, introduce a bill in the Senate.'[12] There is no equivalent lottery to the House of Commons and each bill can be called each sitting once it is on the Order Paper. When the item is called, rather than debate it, senators may let it 'stand' to a future sitting.[13] In other words, senators can have multiple SPBs advancing before the Senate and are not restricted by a lottery, but are limited in that bills are called in their order on the Order Paper. This means there is an incentive to have a bill introduced early -

[11] 'Private Members' Business', in Marc Bosc & André Gagnon (eds), *House of Commons Procedure and Practice*. Ottawa: House of Commons, 2017. Accessed at: https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_21-e.html.

[12] *Rules of the Senate of Canada*, 10-2.

[13] *Senate Procedure in Practice*, Senate of Canada, p. 73.

S-201 is more likely to be called every day but S-250 will have to wait in the queue if the intervening bills are not stood.

In addition to the lottery system, the House has a preliminary review of backbench bills through the Subcommittee on Private Members' Business of the Standing Committee on Procedure and House Affairs (SMEM). When reforms were made to ensure that more PMBs received a vote instead of being talked out (as had previously been the case), criteria to ensure a bill's votability were established.[14] In short, a PMB (or motion) is reviewed with a view to declaring it unable to receive a vote at the end of second reading if it duplicates another matter decided by the House during that Parliament, clearly violates the constitution, exceeds federal jurisdiction, or is on the same matter as something on notice from the government.[15] The effectiveness of the scrutiny process is an open question.[16] A member can also ask for something to be designated non-votable,[17] but this is incredibly rare; non-votable items are debated for only an hour at second reading whereas votable items can have two hours of debate prior to the vote.[18]

When a PMB comes to the Senate, it does not face a similar review to SMEM, nor is there a SMEM-like process within the Senate for SPBs. When SPBs come to the House, they are only reviewed against the criterion of 'whether a similar matter has been voted on by the House in the same Parliament.'[19] SPBs coming to the House need a sponsor (someone eligible for the PMB lottery) and those bills jump the lottery queue discussed above (the sponsor does not lose their place in the lottery nor does it affect their other PMB items).[20] Because of the time it takes for PMBs to advance relative to SPBs, there are cases where the same bill is introduced in both Houses of Parliament with the hope of having the Senate version finish the Senate process and come to the House to be sponsored in the House by the person who introduced the PMB while

[14] For discussion see Charlie Feldman, 'Design of the Past Decade: Private Members' Bills in the Votability Era'. *Journal of Parliamentary and Political Law* 11(1) 2017, pp. 99-127.

[15] House of Commons. 'Private Members' Business: Practical Guide', Appendix A, October 2008. Accessed at: https://publications.gc.ca/collections/Collection/X9-22-2005E.pdf.

[16] See e.g. Alan Freeman, 'Scrutinizing Private Members' Bills'. *CBA National Magazine*, 5 December 2022. Accessed at: https://nationalmagazine.ca/fr-ca/articles/law/rule-of-law/2022/scrutinizing-private-members-bills

[17] Standing Order 87(1)(d)

[18] See Standing Order 95.

[19] See Evidence, Standing Committee on Procedure and House Affairs, 41st Parl., 2nd Sess., No. 4 (27 May 2014).

[20] Standing Order 86.2(2): 'A member shall not lose his or her place on the list for the consideration of Private Members' Business by virtue of sponsoring a Senate public bill or a private bill, but no member may sponsor more than one such bill during a Parliament.'

the PMB languishes waiting for the MP's lottery number to come up.[21] This is possible in part because the House debates PMBs for one hour each day;[22] the Senate can call SPBs every day but does not have time limits for debate on items.[23]

The contrast in debate time allocation for non-government public bills varies in each chamber. In the House, a PMB faces a rigid maximum of two hours of debate at the second reading stage, after which any necessary question for disposal is immediately put without further discussion. Individual members speaking on PMBs are generally limited to 15 minutes for the mover (plus five minutes for questions and comments) and 10 minutes for other members.[24] This means a fixed and finite debate period for PMBs. Similarly, chamber debates at subsequent stages also have time caps.[25] Conversely, SPBs in the Senate are subject to no explicit overall time limits for debate at either the second or third reading stages. Individual speaking times are generous—unlimited for the Government Representative in the Senate, the Leader of the Opposition and the leader of the largest group in the Senate that is neither the Government nor the Opposition, and up to 45 minutes for the sponsor, the critic, leaders of other groups, and other designated senators.[26]

The absence of a hard cap on the total debate time for an SPB means that debate on an SPB can extend across multiple sittings and hours until all interested senators have spoken. As a result, an increase in the number of SPBs introduced could in theory directly contribute to an increase in the Senate's overall sitting time if all were to be debated similarly; an increase in the number of PMBs could not have the same result on the House's sitting time given that chamber's debate time allocation rules and practices.

[21] See discussion in Charlie Feldman, 'Trends in Canadian Non-Government Legislation: A Tale of Two Houses'. *PSA Parliaments*, 5 September 2023. Accessed at: https://psaparliaments.org/2023/09/05/trends-in-canadian-non-government-legislation-a-tale-of-two-houses/.

[22] See Standing Order references to 'private members' hour'.

[23] 'There is no fixed time limit for each category under the Orders of the Day, nor is there a time limit for any particular item, unless it is subject to time allocation. The time spent on the Orders of the Day thus varies from sitting to sitting.' *Senate Procedure in Practice*, Senate of Canada, p. 73.

[24] See House of Commons. 'Time Limits on Debates and Lengths of Speeches'. Accessed at: https://www.ourcommons.ca/procedure/time-limits/index-e.html.

[25] See Standing Order 98(2) and (3).

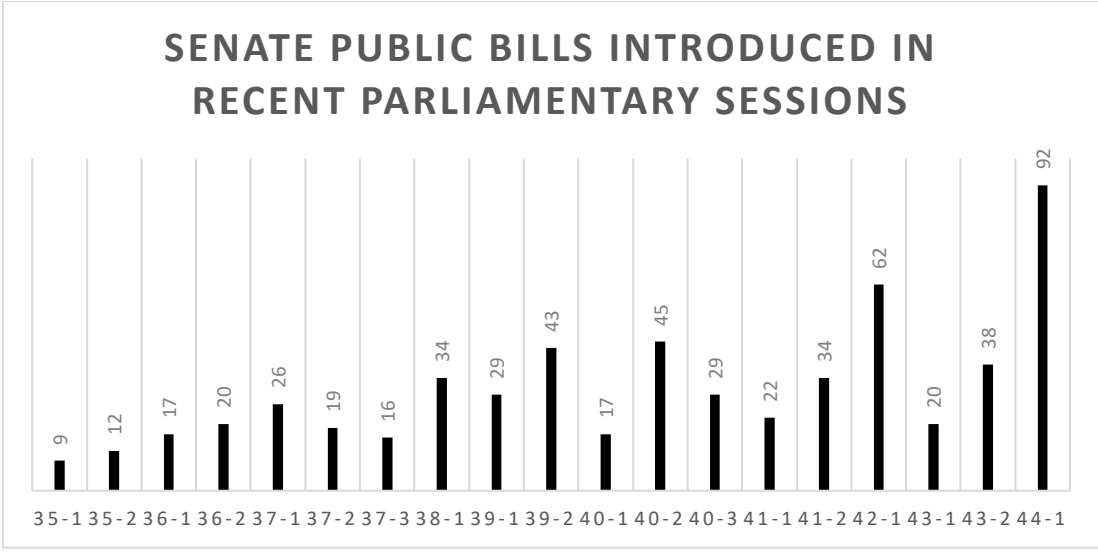
[26] See Senate Rule 6-3.

As a final note of importance for number crunching, PMBs are automatically reinstated in a new session of the same Parliament and retain the same number.[27] In the Senate, there is no automatic reinstatement; items must start afresh. The result is that if prorogation occurs while a PMB is in the Senate at, say, third reading, it will be deemed by the House to pass the House when the House returns in the new session, but will then start the Senate process from scratch. As for SPBs, whether they were in the Senate or in the House at the time of prorogation, their entire parliamentary progress is erased. If the sponsoring senators choose to reintroduce them, they're given new bill numbers following the usual rules.

## *The SPB Increase*

Documenting the SPB increase is rather straightforward in looking at recent sessions; however, sessions do not have equal durations. Consider as well, for example, that the Covid-19 pandemic significantly impacted parliamentary operations in 2020 and 2021 (during the 43rd Parliament, 1st Session).[28]

**Figure 1. Number of SPBs Introduced from the 35th to the 44th Parliament, by session[29]**



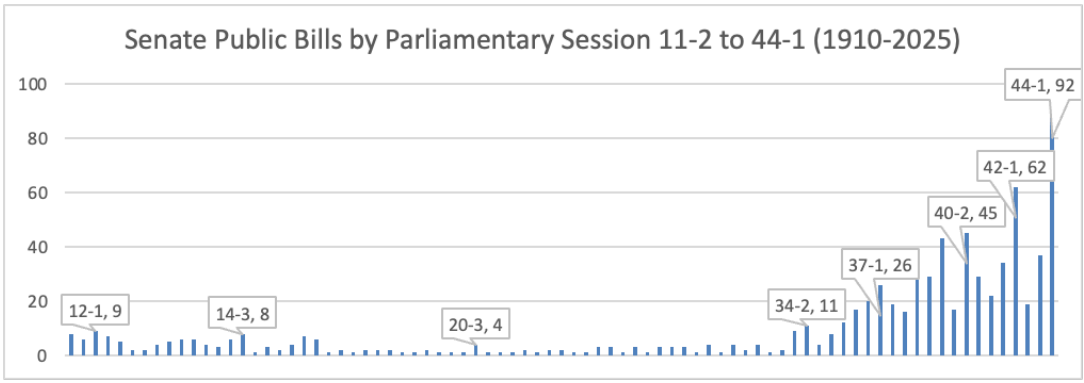

[27] Standing Order 86.1.

[28] For some discussion see Paul E.J. Thomas, *Parliament Under Pressure: Evaluating Parliament's Performance in Response to COVID-19*. Toronto: The Samara Centre for Democracy, 2020.

[29] Data based on LEGISinfo information available in August 2025.

It is recognised that the number of SPBs introduced has fluctuated over time and that this is part of an overall trend in the increase of SPBs that may be linked to matters far beyond the scope of this article.[30] However, even within this context, the dramatic increase in SPBs in the 42nd and 44th Parliament stands out even more when seen against previous SPB peaks, as illustrated in Figure 2.

**Figure 2. SPBs Introduced by Session with peaks indicated (11-2 to 44-1)[31]**




The early activity in the 45th Parliament, which began on May 26, 2025, aligns with the recent trend of increased SPB activity. In the first 15 sitting days, 32 SPBs were introduced.[32] This represents a high initial rate of approximately 2.13 SPBs per sitting day. For direct comparison, in the Senate's first 15 sitting days of the 44th Parliament, a slightly higher number of 34 SPBs were introduced. This equates to an initial rate of approximately 2.27 SPBs per sitting day. While the 44th Parliament saw a marginally higher volume of SPB introductions in its very first 15 sitting days, the 45th Parliament's initial pace remains exceptionally high and suggests that the upward trajectory in SPB volume across recent parliaments will likely be maintained or even surpassed in the current Parliament.

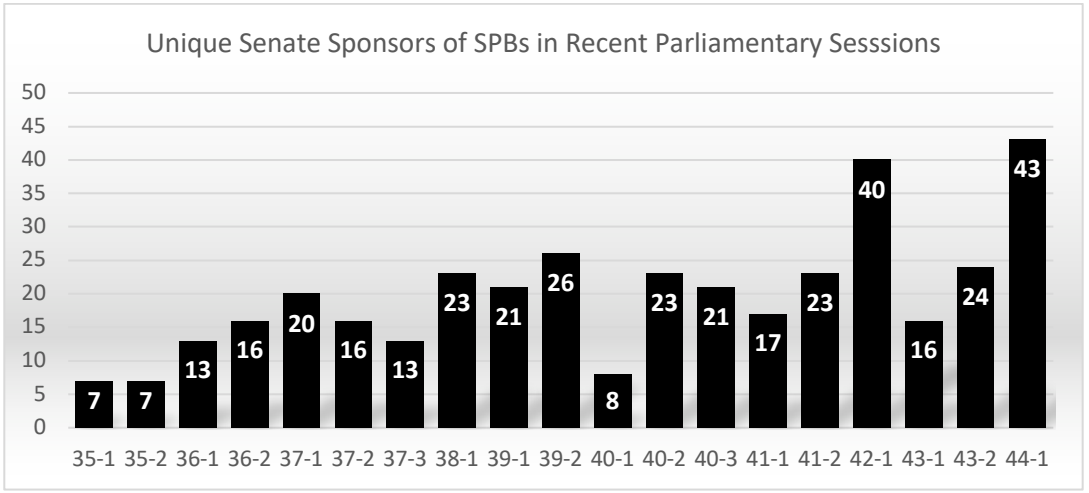
[30] The Senate's work and workload have changed considerably in the last century. Of particular note: The Senate is now sitting more often and no longer has jurisdiction over divorces, which constituted the bulk of the Senate's workload at one time.

[31] Data based on Library of Parliament Table of Legislation information available in August 2025; not all sessions may be visible.

[32] This is excluding S-1. See Parliament of Canada. 'LEGISinfo'. Accessed at: https://www.parl.ca/legisinfo/.

As well as an overall increase in number, there is also an increase in the number of unique SPB sponsors. That is, this is not a case of some veteran senators introducing many bills; rather, more new senators are dipping their toes into legislative waters. Consider that the Senate is composed of 105 Senators.[33] The fact that 43 of them introduced an SPB in the most recently completed parliamentary session means that 40% of Senators had an SPB in their name, a percentage that would be unthinkable in prior decades.

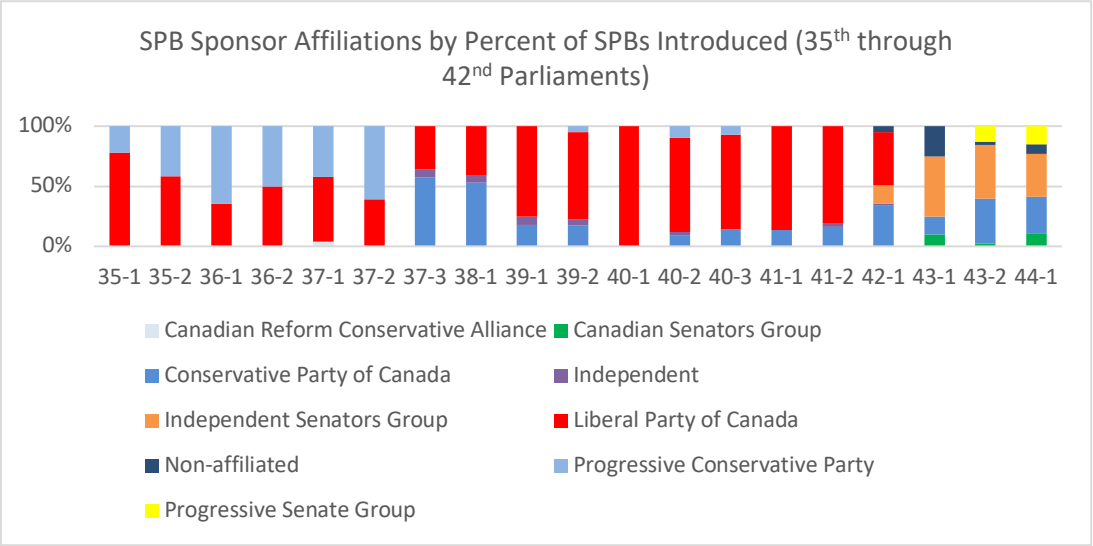
**Figure 3. Unique Senate Sponsors of SPBs in Recent Parliamentary Sessions**




The increase in SPBs is not limited to newly appointed senators - every affiliation in the Senate is involved. With apologies for the somewhat messy visual, here's what the breakdown looks like over time, based on cross-referencing LEGISinfo information with the Library of Parliament's Parlinfo database to determine affiliation on the day of the SPB's introduction.

[33] Assuming all seats are filled and no temporary expansion of the Senate has occurred under section 26 of the *Constitution Act, 1867*.

**Figure 4. SPB Sponsor Affiliations by Percent**




What may not be obvious from the chart is something that may surprise some readers. Though the Independent Senators Group (ISG) had a plurality of Senate seats during the 44th Parliament (37 to 45 seats depending on the day) and the Conservative Party of Canada (the only 'party' within the meaning of the Senate Rules that remains in the Senate) had a dwindling number over the course of the session (from 18 seats to 11), Conservative senators were more prolific in their introduction of SPBs than their ISG counterparts.

Using the median of seats held at any point during the session, the ISG had 38% of the Chamber seats and 35% of the SPBs, whereas the Conservatives had 14% of the seats and 30% of the SPBs introduced. In other words, while the SPB increase followed a change in Senate appointments, it is not necessarily the newly appointed senators who are leading the way on the SPB increase.

In addition to more SPBs being introduced, more are passing the Senate and indeed advancing to royal assent. As an interesting point to ponder, in both the 42nd and 44th Parliaments, more SPBs received royal assent than government bills introduced in the Senate. In the 43rd Parliament, 1st Session no Senate-introduced bills received royal assent (again, recall this was during the Covid-19 pandemic) and in the 2nd Session, one SPB and one Senate government bill each received royal assent.

In short, the numbers show that the Senate is not just seeing a greater number of SPBs introduced but is considering more SPBs, which are in turn being enacted with increasing frequency. This means, along the way, SPBs are taking more chamber and committee space - in both Houses.

## PARLIAMENTARY IMPACTS

If more SPBs are being considered at various stages in the Senate and House of Commons, that means that time has to be made for them. In particular, they are competing for committee consideration time with government bills and PMBs, along with subject-matter studies. Curiously, the increase in SPBs is happening at a time when fewer PMBs are being introduced in the House of Commons.[34] However, PMBs continue to advance (just fewer are being introduced) so there's nothing to suggest that SPBs have displaced PMBs in terms of committee priorities. However, there is reason to think that the rise in SPBs has impacted the work undertaken by Senate standing committees that typically study legislation.

To state the obvious, a committee cannot discuss two things at once. Choices have to be made with the limited time available. The Senate Rules state explicitly that 'Except as otherwise provided, Government Business shall have priority over all other business before the Senate.'[35] However, the application of this principle in committees is not as clear-cut and was the subject of a question of privilege in the Senate in 2019[36] after a committee decided to consider a backbench bill from the Commons before a government bill.[37]

Public bills, including SPBs, undergo a detailed and time-consuming process in committee, which involves witness hearings, clause-by-clause consideration (including consideration of amendment proposals), and reporting to the Senate. If more SPBs are referred to Senate committees for study and more of them are being reported back to the Chamber, there is reason to think that Senate committees may be spending more time studying legislation and less time studying other issues of public concern.

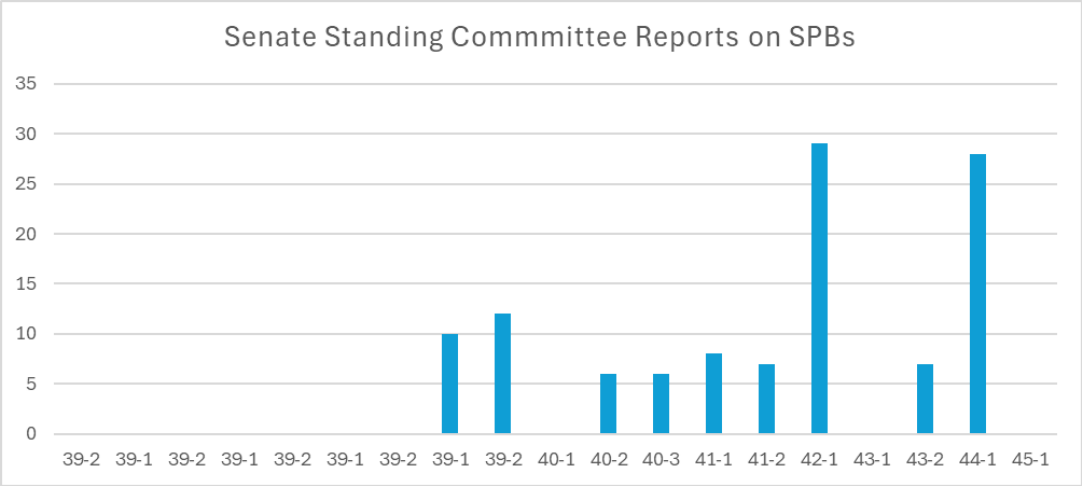
If we take, for example, the number of reports on SPBs produced by Senate standing committees over the last few Parliaments, it is clear that committees are producing more reports on SPBs except during the 43rd Parliament, 1st Session during which Senate committees did not report on any SPBs (recall this was during the Covid-19 pandemic). Notably, in the 2nd Session, which lasted slightly less than a year, committees issued seven reports on SPBs—surpassing the average output of five reports on SPBs per session of the 10 sessions immediately preceding the Senate reform.

[34] See discussion in Feldman, 'Trends in Canadian Non-Government Legislation'.

[35] Rule 4-12 (1).

[36] Canada, *Debates of the Senate (Hansard)*, Senate, 11 June 2019, pp. 8487-8493.

[37] See Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples: Issue 57 – Evidence*, 42nd Parliament, 1st Sess., 11 June 2019.




A review of the legislative reports produced since Senate reform was initiated reveals a consistent pattern in the Senate's studies of bills originating from itself. The proportion of committee reports on SPBs relative to all legislative reports remained remarkably stable across the 42nd Parliament, 1st Session (25%), 43rd Parliament, 2nd Session (22%), and 44th Parliament, 1st Session (26%). This consistent range, approximately one quarter of all legislative reports produced, indicates that a significant and steady portion of Senate committee scrutiny of legislation is dedicated to bills introduced by members of that Chamber.

In that same period, non-legislative substantive committee reports went from making up 69% of all reports produced in the 42nd Parliament, 1st Session (280 such reports over 406 total reports) to representing 57% of the 253 reports produced in the 44th Parliament, 1st Session. Also in that same period, reports on PMBs made up a smaller component of all legislative reports compared to reports on SPBs. Specifically, reports on PMBs constituted 11% of all Senate committee legislative reports in the 42nd Parliament, 1st Session, 19% in the 43rd Parliament, 2nd Session, and 18% in the 44th Parliament, 1st Session.

All these numbers suggest that Senate committees are allocating a significant proportion of their time and resources to SPBs, with less of their attention going to the non-legislative studies through which the Senate traditionally influenced policy-making, as well as public policy originating from backbenchers in the other chamber.

On the House of Commons side, concerns have been mounting that SPBs are displacing PMBs since they jump the queue. This is an issue that the Government signalled as a concern in its

discussion paper on reforming the Standing Orders;[38] however, no reform subsequently occurred.

Notably, the increase in SPBs being passed by the Senate has had an impact on SMEM. While the Subcommittee must meet after a replenishment of PMBs, SPBs coming from the Senate trigger meetings as well. In the 44th Parliament, SMEM met 11 times, of which three were to deal only with SPBs; of the 25 meetings it held during the 42nd Parliament, 11 were to deal with only Senate business. While SMEM meetings are often just a matter of minutes (if that - some of the meetings are less than a minute when the items to be considered are all unobjectionable), all meetings regardless of their duration involve resources. The MPs must book the time and cannot be elsewhere. As well, the procedural clerk of the committee, the analyst from the Library of Parliament, and the interpreters must all be present. Add to that the audiovisual support team, the transcription services provided by the publications team and the physical meeting space that cannot be used by other committees. In short, even if it's effectively a pro forma meeting, it requires resources that could be used otherwise.

As noted above, the SMEM review for SPBs is a limited exercise focused only on whether a similar item has already been voted on in the same Parliament. In the decade since this practice came into being, no SPB has been found by SMEM to run afoul of this criterion. As such, it is worth considering whether SPBs should continue to be a part of SMEM's workload. Other options might include considering whether a bill that was indeed duplicative might simply die on the Order Paper without an MP sponsor or have an MP sponsor but one who never seeks to advance the item. In the alternative, SMEM could apply its full criteria to SPBs - after all, why should the House be allowed to vote on certain matters at second reading if initiated by senators but not if they are initiated by MPs?

Another matter to ponder is whether the Senate itself should adopt a system similar to SMEM to play 'traffic cop' for bills that would otherwise take up chamber or committee time. A proposal before the Senate in 2016 would have placed an obligation on committees considering bills to report back on matters such as constitutionality and 'whether the bill unduly impinges on any minority or economically disadvantaged groups'.[39] In theory such tasks could be given to a subcommittee of senators prior to second reading in the chamber, a process that might determine that certain matters are not appropriate for extended chamber

[38] Government of Canada. 'Reforming the Standing Orders of the House of Commons'. March 2017. Accessed at: https://www.canada.ca/en/leader-government-house-commons/services/reform-standing-orders-house-commons/2017/march.html.

[39] Motion of Senator Bellemare, Canada, *Debates of the Senate (Hansard)*, Senate, 12 May 2016, pp. 676-680.

discussion akin to the criteria used by SMEM. This is distinct from imposing - similar to the House - a hard cap on how long chamber debate can last on an SPB at a particular stage.

These matters are worthy of more consideration if the SPB trends continue. To think through it with a hypothetical: if every senator introduces an SPB, every senator will want to see their SPB debated. Senators will not move to squelch one another's debate as anti-collegial behaviour in this regard may be turned back on them when it is time for their matter to advance. In this world of every-senator-gets-a-debate and that debate being controlled by when something was introduced rather than its importance, surely some initiatives that do not warrant sustained consideration may nonetheless receive it. While 'importance' here is a highly subjective and problematic term, it is intended to cover a number of scenarios. For example, in the current session, as of August 2025, there are bills to establish various symbolic days, weeks and months ranging from Judicial Independence Day to Jury Duty Appreciation Week, to National Immigration Month. Do all these matters require the same amount of debate as, say, proposals before the Senate to lower the voting age or restrict the marketing of alcoholic products? To be clear, this is not to say that 'symbolic' matters should receive no consideration or should not be voted upon; rather, the procedural context for such matters might be tailored to the bill, akin to US Congress procedures attaching different rules to certain bills.[40] Should the Senate approach (procedurally speaking) Bill S-221, *An Act to provide for the recognition of the Canada jay as the national bird of Canada* the same way it will approach Bill S-218, *An Act to amend the Constitution Act, 1982 (notwithstanding clause)*?

## OBJECTIVES OF SENATE REFORM

When changes to the Senate of Canada's appointment process were announced nearly a decade ago, the responsible minister stated, 'The new, merit-based appointment process will reduce partisanship in the Senate, improve its capacity to serve Canadians, and help restore public confidence.' [41] While 'non-partisan' appointments speak to reducing 'partisanship,' and a 'merit-based appointment process' may correspond with efforts to restore 'public confidence' (particularly if the merit of certain appointees was at issue), the matter of 'capacity to serve Canadians' is less obvious. On its face, the Senate had been discharging its functions - and thereby serving Canadians - since its first meeting in 1867.

[40] For discussion see Congressional Research Service, "Special Rules in the House of Representatives: Purpose and Content" R48308 (2024). Online: https://www.congress.gov/crs-product/R48308

[41] Government of Canada, 'Government Announces Immediate Senate Reform'.

The link to capacity goes both ways: One might argue that senators are being more responsive to Canadians and serving them better by introducing more legislation that responds to their needs. However, if more bills are being introduced and debated without a corresponding increase in sitting time, are other matters receiving less scrutiny or being delayed, thereby not serving Canadians as well as before?

The capacity of House MPs to produce quality PMBs has been critiqued, particularly in relation to legislation modifying the *Criminal Code*.[42] If one takes the view that PMBs are not always fit for purpose, is there any reason to suggest that senators have access to additional resources in the preparation of their legislation that makes SPBs preferable to PMBs? This is certainly a capacity question to ponder if SPBs continue to be introduced and advanced in record numbers.

Further, it has been suggested at various points that perhaps Governments have sought to have backbench MPs advance items on the government's behalf as PMBs for various reasons.[43] If SPBs continue to prove a popular and viable means of enacting legislation, might there be great temptation for governments to use this route to advance their business, blurring the line on the Government's role vis-à-vis the 'independent' Senate?

## CONCLUSION

Modifications to the Senate appointment process nearly a decade ago have produced changes to the Senate of Canada, including a dramatic increase in the number of SPBs. The precise nature of the link between the reform and the increase deserves more study. We could consider for example whether the increase is a direct result of the reform, or whether the reform happened to coincide with the upward trajectory SPBs were on given the change in government. For now, what is clear is that more senators are introducing more bills, more of which are receiving royal assent. While these might be touted as - in the words of some senators - 'Excellent Policy Value for Canadians'[44] - there are questions about the trade-offs. Time spent on SPBs is time that cannot be spent on other items of business and there are only so many hours in the (sitting) day.

[42] Robin MacKay, 'Parliamentary Rules Concerning Private Members' Bills'. *Canadian Parliamentary Review* 41(3) 2018, pp. 22-28.

[43] James B. Kelly & Kate Puddister, 'Criminal Justice Policy during the Harper Era: Private Member's Bills, Penal Populism, and the Criminal Code of Canada'. *Canadian Journal of Law and Society / Revue canadienne Droit et Société* 32(3) 2017, pp. 391-415.

[44] Omidvar, Lussier, Faucette & Miville-Dechêne, 'Senate Public Bills as 'Excellent Policy Value' for Canadians'.

It may be opportune for the Senate to consider how exactly its SPB procedures suit its current reality. Certainly, procedures allowing sustained debate over many days and premised on introduction order may have made more sense when few such bills were introduced. Similarly, given the issues presented in this work, it may also be opportune for the House of Commons to revisit the role of SMEM when it comes to SPBs.

Arguably, the increase in SPBs was a predicable consequence of Senate reform -- that is, if you put people who have been passionate advocates for various causes into an institution where they exercise legislative power, it is only natural that they will continue to advocate for those causes and attempt to do so using tools that are now available to them, including legislative ones. As noted earlier, the government signalled the issue of PMB displacement in the House -- perhaps reforms to the Standing Orders are necessary to accommodate the rise in SPBs. Or, it might be that Commoners respond a different way - in theory, if the pendulum swung too far, upset Commoners could band together to defeat or stall SPBs as a matter of course in asserting that their democratic legitimacy should trump the work of their appointed counterparts.

None of the foregoing is to say that SPBs are bad or should not be pursued with as much enthusiasm as they have been in the last few years. Both authors of this work have worked on SPBs that they believe were valuable contributions to the statute book. This work seeks simply to document and analyse trends in SPBs. These deserve close monitoring as finding the right parliamentary balance for the consideration of SPBs in both Houses may prove more difficult than envisaged given the realities of present parliamentary practice.

# The Conscientious Public Servant and the Curse of the Code of Conduct

**Simon Scott**

Secretary, Standing Committee of Public Accounts, Parliament of Tasmania

***Abstract:*** With respect to holding an Executive Government to account, this article examines the tension between parliamentary privilege afforded to a public service witness giving evidence before a committee and the fettering of that individual's capacity to do so through statutory Code of Conduct provisions and directions from the relevant public service authorities. A comparison between the Australian Public Service and Tasmanian State Service highlights some similarities of approach between the systems. This article ends with a suggested improvement to the relevant Code of Conduct provisions to better protect the Tasmanian State Servant, noting the likelihood of adoption of the statutory protection in the current political climate is improbable.

## INTRODUCTION

As the statutorily appointed Secretary for the Tasmanian Parliamentary Standing Committee of Public Accounts (the Committee),[45] I have first-hand experienced the challenges faced by an insider State Servant[46] wanting to bring to light evidence to support the Committee's inquiry into a certain subject matter, only to be hampered by their employment and/or Code of Conduct obligations under the relevant Act. It is this tension between the Committee's theoretical right to bring the Executive Government to account against the actualities of the restraint on free speech of public servants that I aim to briefly expose in this article. I have compared two Australian systems that I am familiar with: the Code of Conduct provisions under the federal *Public Service Act 1999* (Cth) and the Tasmanian equivalent under the *State Service Act 2000* (Tas).

In 1994, Geoffrey Lindell noted:

[45] See *Public Accounts Act 1970* (Tas), s 5.

[46] In Tasmania, public servants are provided under s 6 of the *State Service Act 2000* (Tas): the State Service consists of Heads of Agencies, holders of prescribed offices, senior executives and employees.

> *The extent, if any, to which executive [Crown] privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answers questions or produce documents, remains an open question. Not surprisingly, … the matter has never been the subject of authoritative judicial resolution.*[47]

This being the case, it is contended that in such circumstances the Executive Government cannot truly and completely be held to account. This article examines the current statutory environment within Tasmania and the Commonwealth (of Australia).[48]

In passing, this article recognises that in some circumstances there are alternative avenues to which a public servant might be able to bring evidence to bear against the Executive Government via public interest disclosure or other 'whistle-blowing' legislation. In particular, disclosures of suspected wrong-doing within entities connected to the Australian Government may be brought about under the Commonwealth *Public Interest Disclosure Act 2013*[49] or 'about serious or significant improper conduct in the Tasmanian public sector' under the *Public Interest Disclosures Act 2002* (Tas).[50] It is argued however that a Parliamentary Committee may be seeking evidence on Executive Government policy implementation that is not considered 'improper conduct' per se but rather ill-conceived or have unintended consequences. Such evidence might actually be best brought about by public servants 'at the coal-face', rather than the more distant responsible Minister or the relevant Head of Agency.

This article ends with a suggested improvement to the relevant Code of Conduct provisions could be made to better protect the Tasmanian State Servant, noting the likelihood of adoption of the statutory protection in the current political climate is improbable.

---

[47] Geoffrey Lindell, 'Parliamentary Inquiries and Government Witnesses'. *Melbourne University Law Review* 20 1995, p. 398.

[48] To avoid any confusion, the terms 'public service' and 'public servants' refer to employees under the *Public Service Act 1999* (Cth), 'State Services' and 'State Servants' refer to employees under the *State Service Act 2000* (Tas), and the 'Executive Government' means 'The arm of Government that decides government policy, puts these policies into practice, manages the work of Government departments, and introduces most Bills into Parliament'. Conventionally, in the Commonwealth the Executive consists of the Prime Minister and Cabinet and in Tasmania, the Executive consists of the Premier of Tasmania and Ministers of Cabinet'.

[49] See *Public Interest Disclosure Act 2013* (Cth).

[50] See *Public Disclosure Act 2002* (Tas).

## HOLDING THE EXECUTIVE TO ACCOUNT

Whilst notably absent from both Sir John George Bourinot's KCMG[51] and Hon William Edward Hearn's QC MLC[52] respective collection of the five great principles of English parliamentary law, it is the sixth principle articulated by David Blunt that is of present interest to this article: the notion of holding the Executive Government to account.[53]

The High Court of Australia in *Egan v Wills*[54] noted (as summarised by Kinley):

> *A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'.*[55]

The point was also made by Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts'.[56] It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'.[57] With this principle in mind, it is argued that when applied in the context of a Parliamentary Committee exercising its evidence gathering powers to invite a public servant witness to appear, it is not settled whether those powers have primacy over public service code of conducts.

---

[51] Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada with Historical Introduction and an Appendix*. Toronto: Canada Law Book Company, 1903.

[52] William Edward Hearn, *The Government of England: Its Structure and Its Development*. Melbourne: George Robertson and Co, Melbourne, 1887.

[53] David Blunt, 'Parliamentary traditions, innovation and 'the great principles of English law', in David Blunt and David Clune (eds), *Parliamentary Democracy at Work: Essays on the NSW Legislative Council*. Sydney: The Federation Press, 2025.

[54] *Egan v Willis* (1998) 195 CLR 424, 42.

[55] David Kinley, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices'. *University of New South Wales Law Journal* 18 1995, p. 411.

[56] John Stuart Mill, *Considerations on Representative Government*. Cambridge: Cambridge University Press, 1861.

[57] Queensland Electoral and Administrative Review Commission, 'Report on Review of Parliamentary Committees (October 1992). Accessed at: https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/1992/4792T367.pdf, p.15.

## *Parliamentary Committee Inquiries*

As succinctly noted by the Australian Parliament, Parliamentary Committees 'investigate specific matters of policy or government administration or performance. Committees provide an opportunity for organisations and individuals to participate in policy making and to have their views placed on the public record and considered as part of the decision-making process'.[58]

In general, as part of an inquiry into the impact of a government policy, often the Parliamentary Committee will seek submissions from the agency, statutory authority, public utility, and/or the community to build a narrative in response to the relevant terms of reference. From direct experience in the Tasmanian parliamentary setting, on occasion a public (State) servant has expressed concern that whilst they would like to submit evidence to the Committee, they feel they can only do so anonymously (or not at all) due to the threat of sanction under the prevailing code of conduct.

It is foreseeable that a public servant compelled to answer questions in front of a committee,[59] could in fact be a breach of the Code of Conduct, and be liable to sanctions taken against them.[60] Whilst the public servant witness might have a strong argument, particularly in the face of a summons or order for production from the respective House (and therefore protected by parliamentary privilege),[61] this would be a matter for the subsequent civil court proceedings to determine.

[58] Parliament of Australia, 'Committees'. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees#:~:text=Parliamentary%20committees%20investigate%20specific%20matters,of%20the%20decision%2Dmaking%20process.

[59] By way of example, section 3(b) (Houses empowered to punish summarily for certain contempts) of the *Parliamentary Privilege Act 1858* (Tas) provides 'Refusing to be examined before or to answer any lawful and relevant question put by, the House or any such committee' as an act of contempt punishable by imprisonment.

[60] See *State Service Act 2000* (Tas), s 10.

[61] For a useful synopsis with respect to parliamentary privilege in the context of Australian Parliament committee hearings, see Australian Government Solicitors, 'Interacting with parliamentary committees (Legal Briefing 109)', 23 August 2017. Accessed at: https://www.ags.gov.au/sites/default/files/br109.pdf.

## PUBLIC SERVICE CODE OF CONDUCTS

### *Australian Public Service*

The Australian Public Service (APS) Code of Conduct is a relatively recent invention that came out of the 1994 McLeod Report (Public Service Act Review Group).[62] This Report had recommended:

> *that a new Act should incorporate a statutory Code of Conduct—an approach also endorsed in the framework developed following election of the Coalition Government in March 1996*[63]

In November 1996, Peter Reith issued a discussion paper, 'Towards a best practice Australian Public Service' that, among other things, recommended key elements which might need to be incorporated into a new streamlined and principles-based *Public Service Act*, including a public service code of conduct.[64] Passed in 1999 by the Howard Government, the *Public Service Act 1999* regulates the Federal public service.

Section 13 of the *Public Service Act 1999* included the APS Code of Conduct, and section 14 of the Act requires agency heads to establish and promulgate to their staff procedures for determining whether breaches of the code had occurred and such procedures having to comply with requirements specified in the Public Service Commissioner's Directions. Public servants who breach the Code of Conduct can be demoted, fined, reprimanded or have their employment terminated.

### *Tasmanian State Service*

The *State Service Act 2000* (Tas) was enacted in November 2000 following a review of the Tasmanian *State Service Act 1984*. Like its Federal counterpart, the State Service Principles (subsection 7(1)) and a Code of Conduct have been incorporated into that Act. The Principles provide a statement as to both the way that employment is to be managed in the State Service, and the standards expected of those who work within it. The Code of Conduct reinforces and upholds the Principles by establishing standards of behaviour and conduct that apply to all

---

[62] RN McLeod, *Public Service Act Review Group 1994 Report*. Canberra: AGPS, par 5.9.

[63] Australian Public Service Commission, *Occasional Paper 3 – A History in Three Acts (Evolution of the Public Service Act 1999)*. Canberra: APSC, 2004.

[64] Australian Public Service Commission, 'Occasional Paper 3 – A History in Three Acts (Evolution of the *Public Service Act 1999*)', p. 125.

employees, including Officers and Heads of Agencies.[65] Similar to the Commonwealth provisions, a State Servant who breaches the Tasmanian Code of Conduct may face one or more sanctions against their employment: counselling, a reprimand, deductions from salary by way of fine, reduction in salary, reassignment of duties, reduction in classification and/or termination of employment.[66]

## WHY SHOULD WE CARE?

Regrettably regularly, despite all good intentions, the operationalising of government policy can have unintended and long-lasting damaging consequences to the community impacted. In Australia, the unlawful 2016 Robodebt Scheme[67] and mismanaged 2009 Home Insulation Program[68] detrimentally affected hundreds of thousands of people, and in the latter, led to the death of four persons.

Similarly, the recent 2024 British Post Scandal, with a final cost of compensation expected to exceed £1 billion, was argued by former Prime Minister Sunak as one of the greatest miscarriages of justice in British history.[69] The 2021 Dutch childcare benefits scandal, after a parliamentary inquiry into the affair concluded that the Tax and Customs Administration violated fundamental principles of the rule of law, saw 26,000 parents wrongly accused of making fraudulent benefit claims.[70]

[65] See Tasmanian Government Department of Premier and Cabinet, 'State Service Legislation Overview', Tasmanian Government, Department of Premier and Cabinet. Accessed at: https://www.dpac.tas.gov.au/divisions/ssmo/legislation/state_service_legislation_overview#:~:text=The%20State%20Service%20Act%202000%20(the%20Act),of%20the%20Tasmanian%20State%20Service%20Act%201984.&text=The%20State%20Service%20Code%20of%20Conduct%2C%20which,employees%2C%20including%20officers%20and%20Heads%20of%20Agency.

[66] See *State Service Act 2000* (Tas), s 10.

[67] For a background of Robodebt and an analysis of what happens when accountability is lacking and the rule of law is threatened see Michelle Nemec, 'Robodebt Illegality and How Expediting Automated Decision-Making Failed to take the Bull by the Horns'. *UNSW Law Journal* Student Series 6 2023.

[68] See Michael Kortt and Brian Dollery, 'The Home Insulation Program: An example of Australian Government failure'. *Australian Journal of Public Administration* 71 2012, pp. 65-75.

[69] See Paul Marshall, 'Scandal at the Post Office: The Intersection of law, ethics and politics'. *Digital Evidence and Electronic Signature Law Review* 2022, pp.12-28.

[70] See Menno Fenger and Robin Simonse, 'The implosion of the Dutch surveillance welfare state'. *Social Policy & Administration* 58(2) 2024, pp. 264–276.

All are clear examples of where full and proper parliamentary scrutiny of the Executive Government is essential. Even for nothing else other than bringing to light 'lessons to be learnt' in the hope that such ill-conceived policies are not repeated.[71]

## CAN A PUBLIC SERVANT PROVIDE EVIDENCE AT A COMMITTEE HEARING WITHOUT FEAR OF REPRISAL?

It is argued that there is a tension between free speech and protection of public servant witnesses facilitating effective committee hearings and the political appetite to use compellable powers against public servants.[72] Morris and Sorrial[73] note there is a longstanding institutional tradition that requires public servants to refrain from participating in public debate, in the interests of preserving the impartiality of the APS. At the same time, there is recognition in APS guidelines that public servants are also citizens, who to some extent should be able to participate in public debate (the notion of 'freedom of political communication').[74] These competing tensions have largely remained unresolved in litigation and the recent judgement in the *Comcare v Banerji*[75] case in all probability did not go far enough to clarify the same.

### *Tasmania*

A dichotomy exists between the theoretical and the actual: like most Australian jurisdictions, Tasmania provides under its *Parliamentary Privilege Act 1858* (Tas) the power to order attendance of persons and papers, nominally by summons.[76] Section 2A(1) (Examination of Witness) of that Act provides:

[71] From past personal experience as an Ombudsman investigator, it is not the somewhat bland and at time distant Ministerial response crafted by the senior bureaucracy behind the scenes that count, but rather the 'at the coalface' unfettered and authentic evidence from a lower-level public servant that shines the most light on policy implementation failure.

[72] See Jessica Strout, 'What's at Stake When Parliamentary Committee Inquiries Rely on Voluntary Executive Cooperation'. *Australasian Parliamentary Review* 40(1) 2025.

[73] See Dr Shireen Morris and Professor Sarah Sorial, 'Balancing Public Servants' Responsibilities with the Implied Freedom of Political Communication: What Can We Learn from Banerji?'. *Monash University Law Review* 48(1) 2022.

[74] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[75] See *Comcare v Banerji* (2019) 267 CLR 373.

[76] See *Parliamentary Privilege Act 1858* (Tas), s 1 and 2.

> *A select committee of either House or a joint committee of both Houses with power to send for persons may examine any witness in relation to any matter referred to it.*[77]

Joint committees are also afforded with 'all the powers of a committee of either House duly authorised by the House and persons are required to obey its orders accordingly' and contempt of a joint committee is covered under sections 2 and 3 of the *Parliamentary Privilege Act 1957* (Tas).[78]

At face value it would appear, a summonsed State Servant to make available evidence at a committee hearing has sufficient protections under law, without fear of reprisal. This is not the case for a State Servant who wishes to provide a submission to a committee inquiry and by doing so may be invited to appear before it.

With respect to State Servants called upon to appear before a parliamentary (including a committee) inquiry, 'in their capacity as an employee of the Tasmanian Government', current Tasmanian Government policy mandates that they must advise their Head of Agency before attending the inquiry. The policy also requires (emphasis added):

> *… A State servant must also seek approval from their Head of Agency where they are approached or wish to appear in person at an inquiry. This will enable any agency and whole-of-government implications to be considered.*[79]

In addition, section 9(7) of the *State Service Act 2000* (Tas)[80] stipulates 'an employee must maintain appropriate confidentiality about dealings of, and information acquired by, the employee in the course of that employee's State Service employment'.

With this pairing of requirements, it is conceivable why some State servants are reluctant to provide evidence in the first instance. This is amplified in circumstances where evidence of

[77] Of interest, this includes prisoners as covered under the *Parliamentary Privilege Act 1885* (Tas) s 2.

[78] See *Parliamentary Privilege Act 1957* (Tas) s 2 and 3.

[79] See Tasmanian Government Department of Premier and Cabinet, *Tasmanian Government Submissions to Inquiries and Reviews Policy (Document P2021–01)*. Accessed at: https://www.dpac.tas.gov.au/__data/assets/pdf_file/0032/168476/Submissions_to_Inquiries_and_Reviews_Process_-_December_2021.PDF, p. 2.

[80] See *State Service Act 2000* (Tas), s 9(1).

sub-optimal policy operationalisation paints the relevant Head of Agency and/or the Executive in less than glowing terms.

## *Commonwealth*

Unlike Tasmania, the Commonwealth has a more explicit protection for public servant witnesses-to-be under sections 12(1) and (2) of the *Parliamentary Privileges Act 1987* (Cth). This includes any improper influence on the witness to give (or not to give) evidence (i.e., fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit), before a committee including 'the inflict[ion] of any penalty or injury upon, or depriv[ation] of any benefit'.[81]

The contempt identified above reflects the 'interference of a witness' which is a recognised prohibited act within Westminster systems of government. Notwithstanding, the ability to deal with such a contempt does not lie with the affected committee and arguably is discretionary in nature. The Australian Parliament notes the following:

> *'…one of the most important effects of the power to punish contempts is that the House may protect its committees and their witnesses … committees do not have the power to take action against any person or organisation who is obstructing or hindering them'*.[82]

Rather, if the committee is of a belief that it has been misled or obstructed, or if its witnesses are punished or intimidated, it may bring the matter to the attention of the House which ultimately may punish for contempt. Notwithstanding, the Australian House of Representatives Committee of Privileges noted the importance of witnesses being able to give evidence to parliamentary committees freely:

> *'… if the Parliament fails to provide the protection to which . . . witnesses and prospective witnesses are entitled, the effectiveness of the Committees, and through them, the Parliament and the nation, will suffer'.* [83] [84]

---

[81] See *Parliamentary Privileges Act 1987* (Cth), s 12(1) and (2).

[82] Parliament of Australia, 'House of Representatives, Infosheet 5 - Parliamentary privilege'. Accessed at: https://www.aph.gov.au/about_parliament/house_of_representatives/powers_practice_and_procedure/00_-_infosheets/infosheet_5_-_parliamentary_privilege.

[83] House of Representatives Committee of Privileges, Report concerning the alleged threats or intimidation against a witness before the Defence Sub-committee of the Joint Committee of Foreign Affairs, Defence and Trade, May 2001

[84] See Alex Somlyay, 'The Use and Abuse of Parliamentary Privilege'. *Australasian Parliamentary Review* 17(2) 2002, p. 241-46.

The current practice whereby public servants attending a committee inquiry with a Minister are not there to answer a question on matters of policy, is not in contention. It is fit and proper a Minister should at the first instance answer a question on matters of policy (the 'why'), with public servant giving the committee an explanation of the existing policy (the 'what').[85] What is in contention are the circumstances when an individual public servant wishes to provide evidence at the table (without the Minister) in their 'own' capacity: for example, as part of providing a submission to an inquiry and being invited by the committee to give more details on that submission The combination of the advice given by the Australian Public Service Commission (APSC) and through the Executive Government (via the Department of Prime Minister and Cabinet (DPMC)) appears to fetter the ability of a public servant to provide evidence at the table in their 'own' capacity.

## *APSC Directions to Public Servant Witnesses*

In the 'APS Values and the Code of Conduct in practice',[86] the APSC outlines three important yet somewhat conflicting directions that can be applied to public servant witnesses.

Firstly, the APSC narrowly defines the term 'impartiality' in such that it does not mean 'equal treatment to all sides of politics' and APS public servants should have limited contact with the Opposition and other non-government parties. However, the directions allow for appropriate engagement with the Parliament:

> *At the same time, it is a routine and proper role for employees to provide information to the Parliament about the implementation of the Government's policies, including when appearing before parliamentary committees.*[87]

Secondly, the directions note 'Within the laws established by Parliament, it is ministers who decide what is in the public interest and how it should be brought about'. The role of the APS is to serve the government of the day and to assist in developing and delivering its policy agenda and priorities.[88]

[85] Australian Public Service Commission, *APS Values and Code of Conduct in practice*, 13 September 2021. Accessed at: https://www.apsc.gov.au/sites/default/files/2023-11/APS-Values-and-Code-of-Conduct-In-Practice-2023.docx.

[86] Australian Public Service Commission, *APS Values and Code of Conduct in practice*.

[87] Australian Public Service Commission, *APS Values and Code of Conduct in practice*, p. 8.

[88] Australian Public Service Commission, *APS Values and Code of Conduct in practice*, p. 9.

Finally, with respect to assisting the Parliament with its questions and inquiry function, the APSC notes:

> *'…it is a responsibility of the Parliament to scrutinise the activities of Government and to examine the expenditure of public money. Employees may be required to provide information directly to the Parliament, in particular to its committees'*.[89]

This may include providing Parliament (through the Minister) with full and accurate information about the factual and technical background to policies and their administration and may include reasons for the policy.[90] However, it does not extend to providing personal comment on the policy. This containment is supported by a Senate Resolution.[91]

### *DPMC Guidelines to Public Servants as 'Official Witnesses'*

Concurrently, the Department of Prime Minister and Cabinet (DPMC) has established guidelines for official witnesses before Parliamentary Committees[92] and notes whilst there is no intention to restrict APS employees from appearing before parliamentary committees in their 'personal' capacity:

- the employee must observe the APSC directions relating to public comment
- if appearing before a Parliamentary Committee, an employee must make it clear to that committee that they are not appearing in an official capacity, and
- senior employees and heads of agencies must take particular account as to whether it is realistically possible to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility.

Taking this into account, it is difficult to see how an APS employee could in fact provide useful evidence to a committee in a personal capacity.

And like Tasmania, the APS Code of Conduct provides an APS employee 'must not improperly use inside information or the employee's duties, status, power or authority to cause, or seek

---

[89] Australian Public Service Commission, *APS Values and Code of Conduct in practice*, p.12.

[90] Australian Public Service Commission, *APS Values and Code of Conduct in practice*, p.12.

[91] See Parliament of Australia, 'Parliamentary privilege resolutions agreed to by the Senate on 25 February 1988' in *Odgers' Australian Senate Practice*, Appendix 2.

[92] Australian Government Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters - February 2015*, p.20. Accessed at: https://www.pmc.gov.au/sites/default/files/resource/download/Gov_Guidelines_for_Official_WIitnesses_Feb_2015.pdf

to cause, detriment to the employee's Agency, the Commonwealth or any other person' and 'must at all times behave in a way that upholds the integrity and good reputation of the employee's Agency and the APS'.[93] Sanctions that can be posed under section 15 (Breaches of the Code of Conduct) *Public Service Act 1999* (Cth) are similar to those found under the Tasmanian equivalent.[94]

Whilst in practice it would be open to a committee to be briefed in camera by a public servant,[95] the committee is effectively barred from using that evidence in a report in case it unintentionally identifies the individual concerned. This becomes particularly relevant when such evidence can only come to the attention of the Committee from limited sources within government. This in turn makes it much easier for the Executive Government to sanction the public servant.

## WHERE TO FROM HERE?

As noted by Lindell, there is little authoritative judicial guidance as to whether a public servant would be immune to sanctions under the relevant Code of Conduct if they provided evidence to a parliamentary committee presumably protected by parliamentary privilege.

Notwithstanding, a statutory intervention akin to the protections afforded under the *Parliamentary Privileges Act 1987* (Cth) would have merit in the Tasmanian jurisdiction. Even if for nothing else than to deliver a strong message to the relevant Ministers and Heads of Agency that parliamentary privilege is utmost, and holding the Executive Government to account is both legitimate and necessary under a modern Westminster system.

The harder bridge to cross is the ascendency of the doctrine of public interest immunity (Crown privilege) over public servants. Whilst the majority rule government establishes a clear mechanism for making decisions on policy, it is not (and should not) be unconstrained: repeating *Egan v Wills*, the act of '… secur[ing] accountability of government activity is the very essence of responsible government'.[96]

Whilst not in the scope of this article, academics such as Prasser and Triggs amongst others have noted that the Executive has grown considerably across the Commonwealth, State and

[93] See *Public Service Act 1999* (Cth), s 13(10)(b) and 13(11)(b).

[94] See *State Service Act 2000* (Tas), s 9(1).

[95] See *Public Accounts Act 1970* (Tas), s7.

[96] See *Egan v Willis* (1998) 195 CLR 424, 42.

Territory Governments over the past thirty years.[97] Arguably, the associated increase in the dominance of the Executive over Parliament should not go unchecked. As noted by Lord Hailsham of the UK Parliament in 1976:

> *'Until recently the powers of government within Parliament were largely controlled either by the Opposition or by its own backbenchers. It is now largely in the hands of the government machine, so that the government controls the Parliament, and not Parliament the government. Until recently, debate and argument dominated the parliamentary scene. Now it is the whips and party caucus. More and more, debate is becoming a ritual dance, sometimes interspersed with catcalls ... we live under an elective dictatorship, absolute in theory, if hitherto tolerable in practice'.*[98]

Whilst potentially politically unpalatable, it would be open for the Tasmanian Government to tweak the appropriate State Service Code of Conduct provision to allow for better evidence gathering of a Parliamentary Committee (emphasis added):

> *An employee must maintain appropriate confidentiality about dealings of, and information acquired by, the employee in the course of that employee's State Service employment. <u>This does not prevent a State Service employee with providing evidence to either House or a Parliamentary Committee making inquiries on matters pertaining to that employee's State Service employment</u>.*[99]

With such a provision, a brighter light could be shone behind government policy implementation failures, with the view of better Parliamentary oversight and hopefully through this revelation, lessons learnt without resorting to costly Royal Commissions and the like.

In conclusion, whilst I am of the view that at a local level the Government of the day could and should amend the Tasmanian State Service code of conduct provisions to allow for greater

---

[97] See Scott Prasser, 'The Virtues of Upper Houses', *Upholding the Australian Constitution* 21, Proceedings of the Twenty-first Conference of The Samuel Griffith Society 2009. Accessed at: https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d799db208fc61cd353c1a/1553824179875/vol21.pdf, pp. 44-53; Scott Prasser, 'Executive growth and takeover of Australian parliament'. *Australasian Parliamentary Review* 27(1) Autumn 2012; Gillian Triggs 'Overreach of Executive and Ministerial Discretion: A Threat to Australian Democracy'. *Victoria University Law and Justice Journal* 8, 2017

[98] Lord Hailsham, 'Elective Dictatorship'. *The Listener*, 21 October 1976, p. 496.

[99] See *State Service Act 2000* (Tas) s 9(1).

unfettered participation in Committee inquiries, in reality, current political actualities will continue to hinder this much needed improvement to Executive transparency and accountability. However, with a second minority Tasmanian government having just been reestablished, the crossbenchers and independents could hold the incumbent Government to task.

# Explanatory Memorandums for proposed legislation in Australia: Are they fulfilling their purpose? - a revisitation

**Alex Hickman**[1]

Advisory Officer, Committee Office of the Legislative Council of Western Australia

***Abstract:*** Explanatory Memorandums (EMs) play an important role in ensuring that Parliament and its committees have all the information on proposed legislation they require to fulfill their function of scrutinising the Executive. If EMs are not of sufficient quality, the executive's accountability to parliament can be undermined. There has been significant criticism of the failure of some EMs to comply with various requirements aimed at ensuring they adequately explain proposed legislation. In an article published in the Spring/Summer 2014 edition of this publication, the author explored the proposition that 'Explanatory Memorandums for proposed legislation submitted to parliamentary committees in Australia fail to meet the objective of enhancing committee scrutiny of the Executive'. The article charted some of the criticism levelled at EMs, discussing possible reasons why some EMs have not been of sufficient quality and by making some suggestions for reform. The suggestions for reform were designed to ensure EMs more often meet the expectations of Parliament and its committees, and that agencies routinely fulfill their obligation, as delegates of the Parliament, of full disclosure. As part of this exploration, a survey was undertaken of parliamentary staff of legislative scrutiny committees in Australia (as well as some other Westminster jurisdictions) to ascertain their views on the quality of EMs. This article returns to an exploration of this proposition and includes some developments since 2014. It also includes the results of a further survey of the views of

[1] This article is an edited version of a paper presented at the Australia-New Zealand Scrutiny of Legislation Conference, Melbourne, 3-5 December 2024. The author is very grateful and extends his thanks and appreciation to all parliamentary staff for the time and effort they devoted in providing responses to the survey regarding the quality of EMs in various jurisdictions. These contained very helpful information that this article has drawn on.

parliamentary staff. This is to determine whether there have been any improvements in the quality of EMs.

## INTRODUCTION

Explanatory memorandums (EMs) help ensure that Parliament and its committees have all the information on proposed legislation they require to scrutinise the executive. If EMs lack quality, the accountability of the executive to parliament can be undermined. There are varied audiences for EMs, including stakeholders, academia and, on occasion, the judiciary. However, the primary audience is the Parliament and, more specifically, a parliamentary committee when scrutinising legislation. Considering the well accepted constitutional law principle of parliamentary supremacy and the accountability of the executive to the parliament, one might expect that all EMs sufficiently 'explain' the legislation to the parliament. Full disclosure of all information relevant to parliamentary scrutiny should be assumed.

Unfortunately, this expectation does not always reflect reality. Some EMs merely paraphrase the legislation and highlight its benefits, avoiding addressing issues which are left to the Parliament to raise. This is inefficient, potentially wasting parliamentary time. Further, a lack of executive proactivity in discussing all issues with legislation (of which the relevant agency would be aware) may be self-defeating in missing an opportunity to fully engage in the parliamentary process. This is just one aspect of the power imbalance between the executive and the parliament that has been explored by other commentators.[2] Consequently, there has been a significant amount of criticism levelled at the failure of some EMs to comply with various requirements aimed at ensuring they adequately explain proposed legislation. In an article in the Spring/Summer 2014 edition of this publication, the author explored the proposition that 'Explanatory Memorandums for proposed legislation submitted to parliamentary committees in Australia fail to meet the objective of enhancing committee scrutiny of the Executive' (the Proposition).[3] It did this by charting some of this criticism, discussing possible reasons why some EMs have not been of sufficient quality and suggesting reform. The reforms were designed to assist in ensuring EMs more often meet the expectations of Parliament and its committees and that government agencies routinely give full disclosure to Parliament. To assist, the author conducted a survey of parliamentary staff of legislative scrutiny committees

[2] J. Seal-Pollard, 'Addressing the Balance: The Executive and the Parliament'. Paper presented at the Australasian Study of Parliament Group conference, 5 – 7 October 2016, Adelaide, Australia.

[3] A. Hickman, 'Explanatory Memorandums for proposed legislation in Australia: Are they fulfilling their purpose?', *Australasian Parliamentary Review* Spring/Summer, Vol 29(2), 2014 pp. 116-139

in Australia and some other Westminster jurisdictions to ascertain their views on the quality of EMs.

This article again explores the Proposition and discusses some developments since, including judicial commentary on EMs and guidance on the drafting of EMs. It also includes results of a further survey of parliamentary staff to assist in examining whether there have been any improvements in the quality of EMs.

## WHAT IS AN EXPLANATORY MEMORANDUM?

The terms 'Explanatory Statement', 'Explanatory Memoranda', 'Explanatory Notes' and 'Explanatory Memorandum', in a parliamentary context, are often used interchangeably.

The Senate Standing Committee for the Scrutiny of Bills has referred to EMs as a companion document to a bill containing a statement of the purpose of the legislation, an outline of why it is required, the effect of the principal provisions, an explanation of the policy background and notes on the clauses of the bill. The committee considered the information provided in an EM should be of such quality that the committee, members of Parliament, the courts and the public are able to understand the overall objective and operation of the bill.[4]

As Chair of the Procedure Committee of the United Kingdom House of Commons, Charles Walker MP described EMs as enhancing a committee's ability to scrutinize legislation, unpacking complex or technical amendments and so opening up the legislative process to the wider public. This assists the parliamentary process by providing greater focus for Members' arguments during debates.[5]

These definitions demonstrate what is expected from EMs, especially from parliamentary committees. Arguably, anything that falls short of these expectations is open to criticism. This is because agencies are not adequately informing Parliament about legislation it is being asked to consider and pass.

[4] Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills*, Parliament of Australia, 2004, p 73. This was probably the most comprehensive review of EMs conducted by a parliamentary committee in Australia. The committee undertook an in-depth review of the standard of EMs for proposed primary legislation it has scrutinised. The committee also set out its expectations of what an EM should address. The fact that the committee devoted an entire report focussing on this issue is telling about the concerns held over the quality of EMs.

[5] House of Commons Procedure Committee, *Explanatory Statements on Amendments*, United Kingdom Parliament, 2013. This definition was offered following the release of that committee's Fourth Special Report on explanatory statements on amendments.

While EMs are now more commonplace as part of the legislation making process in Australian and other Westminster parliaments, this was not always the case. Indeed, it was only after 1980 that EMs began to be consistently produced for every Commonwealth Government bill.[6] Before 1980, EMs were only prepared for complex bills.[7] The gradual introduction of EMs since then has enabled parliaments, at least with respect to good quality EMs, to have a better understanding of the purpose and operation of proposed legislation.

Other sources of information available to Parliament and its committees on proposed legislation include the second reading speech, ministerial briefings and committee hearings with Ministers and departmental staff. Nevertheless, with the extensive demands on parliamentarians' time and the ever increasing complexity of legislation, EMs are a vital source of information.

If prepared with a parliamentary audience in mind, a good EM will expedite an understanding of proposed legislation. This also assists others, such as courts, interested organisations, the media and the general public.[8] In the author's opinion, when they comply with best practice form and content requirements, EMs provide the type of information necessary to enable Parliament and its committees to consider the merits of proposed legislation.[9]

[6] P. O'Neill, 'Was there an EM? – Explanatory memoranda in the Commonwealth Parliament 1901-82', *Australian Law Librarian*, Volume 13, No.1, Autumn 2005, p 69.

[7] House of Representatives Standing Committee on Procedure, *Maintenance of the Standing and Sessional Orders*, Parliament of Australia, 2006, p 10.

[8] This applies to EMs made publicly available. In some jurisdictions, such as Western Australia, some EMs are provided only for the information of the parliamentary committee. This is the case with the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament, which has the power to make them public.

[9] Relevantly, the President of the Legislative Council of Western Australia, in a statement on the Mental Health Bill 2013, remarked on the length of the Second Reading Speech (21 pages) and stated "The introduction in standing order 121(3) of the requirement for the member in charge of a bill to table an explanatory memorandum was intentionally designed to provide the clause-by-clause detail that members need to assist them in an understanding of the policy and effect of a bill. I would not like to see the length and detail of the speech given last night to become common practice." See B. House, Western Australia, *Parliamentary Debates*, Legislative Council, 8 May 2014, p 2981.

## THE ROLE OF PARLIAMENT AND EXPLANATORY MEMORANDUMS

One of the primary roles of Parliament and its committees is to scrutinise the operations of the executive and any other bodies to whom it delegates the role of making legislation.[10] The executive is accountable to the parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is fulfilling its duty to parliament of full, pro-active disclosure on legislation, thereby ensuring it is fully briefed.[11] A quality EM will assist the executive in fulfilling this duty.

If a deficient EM does not give a full and accurate account of why the executive is proposing the legislation by not disclosing all material information to parliament and its committees (whether by oversight or other reasons), there is diminished accountability. Depending on the nature of the deficiency, negative consequences, including the following, can occur:

- Parliament not being fully informed of the operation and impact of proposed legislation
- the EM may contain inaccurate information and give the reader a distorted view of the legislation
- the ability of the general public to understand laws passed by Parliament may be impeded
- the quality of the resulting legislation may suffer.

A deficient EM may require a committee to seek additional information from agencies about the proposed legislation. This delays the scrutiny process, which is unwelcome given the tight timeframes under which committees often operate when reporting to Parliament.[12]

[10] Joint Standing Committee on Delegated Legislation, *Explanatory Report in Relation to Legal Profession Conduct Amendment Rules 2013*, Parliament of Western Australia, 2013, p 3.

[11] Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Gene Technology (Western Australia) Bill 2014*, Parliament of Western Australia, 2015, p 18.

[12] Joint Standing Committee on Delegated Legislation, *Explanatory Report in relation to the Legal Profession Conduct Amendment Rules 2013*, Parliament of Western Australia, 2013, p 3. See also House of Lords European Affairs Committee, *Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/ Northern Ireland*, Parliament of the United Kingdom, 2022, pp 24-28.

## JUDICIAL COMMENTARY ON THE ROLE OF EXPLANATORY MEMORANDUMS

The 2014 article did not include any judicial commentary on EMs. The following commentary by Justice Stephen Gageler[13] recognised the quality of EMs can sometimes be wanting:

> *Notoriously, explanatory memoranda sometimes get the law wrong. The potential for error in examples of the contemplated operation of provisions set out in explanatory memoranda is highlighted by the acknowledgement of the Parliament in s 15AD(b) of the Acts Interpretation Act that even an enacted example of the operation of a provision might get the legal operation of the provision wrong: "if the example is inconsistent with the provision, the provision prevails".*[14]

Earlier in the judgement, His Honour observed:

> *The quality and extent of the assistance extrinsic materials provide in fixing the meaning of statutory text is not uniform. The quality and extent of the assistance varies in practice in ways unable to be fully appreciated without regard to the provenance and conditions of creation of the extrinsic materials.*[15]

It is significant His Honour recognised that, despite the purpose of EMs being to assist the reader understand the relevant legislation, there is a well-known lack of consistency in them doing so. The fact that EMs are the subject of such critical judicial commentary underpins concerns regarding the inconsistent quality of EMs.

## SOURCES FOR THE PREPARATION OF EXPLANATORY MEMORANDUMS

Interpretation legislation in most Australian jurisdictions refer to EMs as an interpretation aid. For example, section 19(2) of the *Interpretation Act 1984* (WA) states:

[13] Now Chief Justice of the High Court of Australia.

[14] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*; *Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495, [72] (*Mondelez*)

[15] *Mondelez* (2020) 271 CLR 495 [67].

> *19. Extrinsic material, use of in interpretation*
>
> *(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes —*
>
> *(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted.*

However, the requirements for the preparation of EMs for primary and subsidiary legislation vary across jurisdictions. They are contained in different sources, such as legislation, standing orders, legislation handbooks, committee practice notes and Premier's Circulars.

Some sources contain detailed form and content requirements. They include:

- The Department of Prime Minister and Cabinet *Legislation Handbook* (Legislation Handbook), a leading source of guidance on the preparation of EMs in Australia, contains detailed information on when an EM is required and its form and content.[16]
- The Senate Standing Committee for the Scrutiny of Bills *Guidelines* which sets out the committee's expectations in relation to its technical scrutiny principles and what should be included in EMs.[17]
- Section 15J of the *Legislation Act 2003* (Commonwealth) and section 23 of the *Legislative Standards Act 1992* (Queensland) contain a list of what the EM must contain. While both state that a failure to comply with the requirements does not affect the validity or enforceability of the legislation instrument, the Queensland legislation provides that reasons for the non-inclusion of required information must be explained.
- The Department of Premier and Cabinet in Queensland has also prepared a *Guidelines for the preparation of explanatory notes*. It contains detailed guidance on what is

[16] Department of Prime Minister and Cabinet, *Legislation Handbook*. Australian Government, 2017.

[17] Senate Standing Committee for the Scrutiny of Bills, *Guidelines.* Parliament of Australia, 2nd ed, 2022.

expected to be contained in EMs for bills and subsidiary legislation. It includes a template for EMs as a helpful way of attempting to achieve a consistent level of quality. The guidelines focus the drafter's mind on the type of issues that attract the interest of the relevant portfolio scrutiny committee.[18]

- Premier's Circular 2025/14 (Western Australia) contains form and content requirements for EMs for subsidiary legislation.[19]
- The United Kingdom House of Lords *Top Ten Tips for a Good EM*[20] contains helpful hints on producing a quality EM, including that 'a good EM should be capable of being fully understood without the reader having to refer to other documents'.

Conversely, others require there to be an EM without any further requirements. For example, in the Parliament of Western Australia, Legislative Assembly Standing Order 162(2) and Legislative Council Standing Order 121(3) requires that every bill be accompanied by an EM, but does not contain any form or content requirements.

In South Australia, there is no legislative requirement for an EM to accompany a bill.[21]

## NEGATIVE FEEDBACK ON EXPLANATORY MEMORANDUMS

A common criticism is that the EM merely paraphrases the proposed legislation and does not assist the reader in understanding why it is being made.[22] The *Legislation Handbook* states (emphasis added):

[18] Department of Premier and Cabinet, *Guidelines Preparation of Explanatory Notes,* Queensland Government, 2015.

[19] Premier's Circular 2025/14, Parliament of Western Australia.

[20] House of Lords, *Top Ten Tips for a Good EM*, UK Parliament, 2023.

[21] The second reading speech is regarded as the main source of information on the purpose of a bill. See P. O'Neill, *Was there an EM? – Explanatory memoranda in the Commonwealth Parliament 1901-82*, *Australian Law Librarian*, Volume 13, No.1, Autumn 2005, p 7.

[22] See, for example, M. Sainsbury, *Context or Chaos: Statutory Interpretation and the Australian Copyright Act*, Statute Law Review, Volume 32(1), p 64; Professor D. Pearce, *Legislative Scrutiny: Are the Anzacs still the leaders?*, a paper presented to the Australia-New Zealand Scrutiny of Legislation Conference held in Canberra, July 2009 and Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 2011 *Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report*, 2011, p 5.

> *Notes on clauses or amendments in an explanatory memorandum are intended to be a companion explanation to the clauses of, or amendments to, a bill and are to be drafted in a way that makes them accessible to, and understood by, both expert and non-expert users of the legislation. Notes are also to take into account those matters considered by the Senate Committee for the Scrutiny of Bills set out at paragraphs 7.26 to 7.29. The notes must avoid repeating the words of the bill or amendments or restating them in alternative language.*[23]

The 2014 article referred to a number of criticisms of EMs contained in various parliamentary committee reports. These included the report of the Senate Standing Committee for the Scrutiny of Bills[24] and the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament.

Criticisms continue to be levelled.

The Standing Committee on Uniform Legislation and Statutes Review of the Western Australian Parliament has recently tabled several reports containing commentary on deficient EMs.

In its report on the Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020, the committee stated the EM:

> *falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a significant regulation-making power.*

It recommended the second reading speech or EM for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.[25]

> *Regarding statutory instruments, the House of Lords Secondary Legislation Committee identified the following poor quality EMs:*

[23] Department of the Prime Minister and Cabinet, *Legislation Handbook*, Australian Government, 2017.

[24] Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills*, Parliament of Australia, 2014, p 73.

[25] Legislative Council Standing Committee on Uniform Legislation and Statutes Review, *Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020*, Parliament of Western Australia, 2020, p 33.

> *Infected Blood Compensation Scheme Regulations 2024*
>
> *The compensation scheme is complex, and we found the EM to be of poor quality, using overly technical language and lacking basic information about the policy.*[26]
>
> *Education (Student Fees, Awards and Support) (Amendment) Regulations 2024*
>
> *We were disappointed by the information DfE provided to facilitate parliamentary scrutiny and public understanding of these Regulations. The EM was lacking basic information on why the policy was chosen, and a key piece of supporting material, the Equality Impact Assessment (EIA), which contained some criticisms of the policy, was not laid at the same time as the instrument. Even when published, the EIA was not made easy to access. We reiterate that an EM should include an explanation of the "why" as well as the "what" of the policy and should address any known concerns.*[27]

In its 5th report of session 2021-22, the House of Lords European Affairs Committee drew attention to:

> *the inconsistent and at times poor quality of Government Explanatory Memoranda and ministerial correspondence on EU legislative proposals applying to Northern Ireland under the Protocol.*[28]

The reasons for poor quality EMs are varied. Dr Jacinta Dharmananda has pointed to 'variations in resources, experience, skill and knowledge between federal departments' as one reason for the lack of uniformity in the quality of EMs in the Federal sphere'.[29] This is certainly a factor

[26] House of Lords Secondary Legislation Committee, *2nd report of Session 2024-25*, United Kingdom Parliament, 2024, p 9.

[27] House of Lords Secondary Legislation Committee, *12th Report of Session 2023-24*, United Kingdom Parliament, 2024, p 17.

[28] House of Lords European Affairs Committee, *Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/ Northern Ireland*, United Kingdom Parliament, 2022, pp 24-28.

[29] J. Dharmananda, 'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process'. *New South Wales Law Journal* Vol 2, 2018, p 4.

that must be considered. Presumably, existing guidance on the form and content of EMs in some jurisdictions might assist in overcoming this practical issue? Despite this, the author's research in 2014 suggested this guidance had not provided sufficient incentives to achieve consistent best practice. This led to making a case for various reforms to improve the quality of EMs, including better quality and control by agencies. Some of these reforms are reiterated below, along with an additional suggestion to legislatively mandate tabling revised EMs that correct shortcomings identified by a parliamentary committee.

## SURVEY OF DIFFERENT JURISDICTIONS

### *Views of Parliamentary staff – 2014 article*

As stated above, as part of the research for the 2014 article, the author conducted a survey of parliamentary staff for committees in Australian and some Westminster jurisdictions, including the United Kingdom. The purpose of this survey was to gather empirical evidence to assist in determining the validity of the Proposition the subject of the paper. The survey questions are reproduced in Appendix 1. Sixteen responses were received from 14 jurisdictions, 12 of which gave their view on the Proposition.

### *Analysis of feedback*

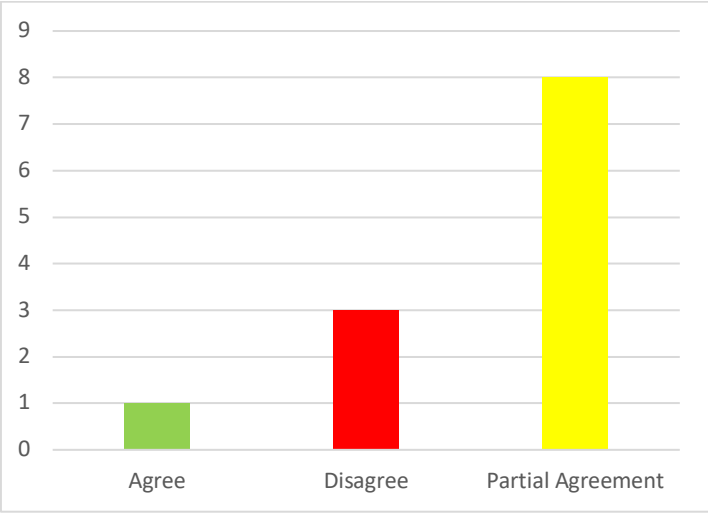
The tool used to analyse the results of the survey and determine whether the Proposition was supported by the feedback was a simple 'traffic light' system. This graded responses, as recorded in the graph below, as follows:

- Left column: Fully agree with the Proposition.
- Right column: Partial agreement – the quality of EMs varies too much to decide one way or the other.
- Middle column: Disagree with the Proposition.

For the Proposition to be valid, in the opinion of the author, at least a majority of participants would need to fully agree with the Proposition.[30]

[30] The number of responses is by committee, not jurisdiction.

**Figure 1. Views of Parliamentary Staff 2014 Article**




Despite the attention that has been drawn to poor quality EMs,[31] the survey results suggested there was not a degree of widespread systemic failure sufficient to support the Proposition. However, the weight of this literature and the instances of partial agreement with the Proposition warranted a serious consideration of reform proposals.

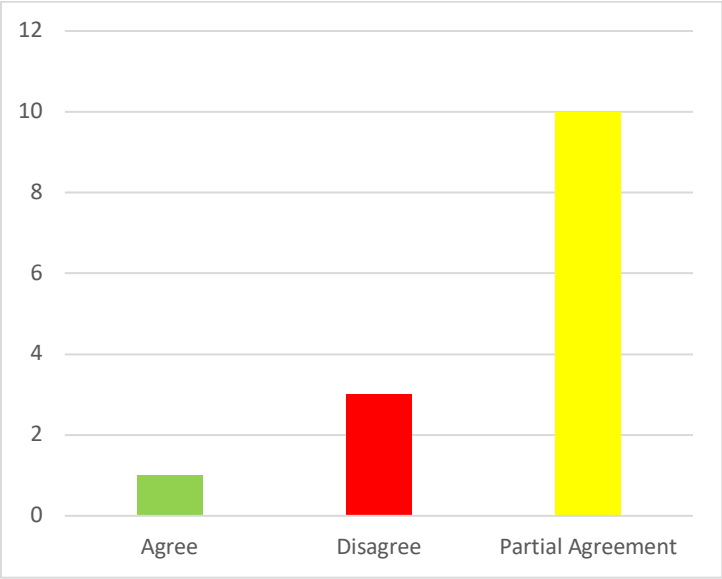
## *Views of Parliamentary staff – 2024*

In August 2024 the author again posed the same questions to parliamentary staff to assess whether there have been any improvements in the quality of EMs. The same tool was used to analyse results. In most cases, unsurprisingly, the staff that responded were different to those in 2014. This must be considered when analysing the results, as views amongst parliamentary staff will inevitably differ.

Fifteen responses were received from 11 jurisdictions, 13 of which gave their view on the Proposition, recorded in the graph below.

[31] Such as in the committee reports referred to.

**Figure 2. Views of Parliamentary Staff 2024**




The graph demonstrates that little has changed in terms of the numbers agreeing, disagreeing or partially agreeing with the Proposition. The author was, again, given many examples of poor quality EMs that committees have drawn attention to in their reports. However, this feedback was not universal, with plenty of good quality EMs referred to that assisted committees in their work. Some responders were also of the view there had been improvement in the quality of EMs over time and there had been a willingness of government to take on board committee feedback and improve EM quality.

## THE CASE FOR REFORM

From the weight of the material considered in this article, some jurisdictions that have the most comprehensive and clear guidance continue, somewhat ironically, to attract the most criticism. Accordingly, the lack of quality of some EMs is not necessarily due to an absence of guidance but the failure of some agencies to follow this guidance.

The matters considered by parliamentary committees in their scrutiny of proposed legislation are clearly set out in their terms of reference and in reports tabled in parliament. By not routinely drawing attention to any possible infringement of terms of reference and providing justification for this, one is left to wonder about some agencies' commitment to and appreciation of the parliamentary scrutiny process. Indeed, some literature has hinted that there may be more underlying reasons why there has been a failure to prepare satisfactory EMs in some instances and why directions in documentation such as the *Cabinet Handbook* are

not always being complied with.[32] It is clearly in the interests of the executive to place legislation it wishes the parliament to pass in a positive light. It is also arguable that there is a dissonance between what some agencies and parliamentary committees believe constitutes problematic legislation.

It is concerning that a failure to comply with form and content requirements for EMs does not affect the validity, operation or enforcement of primary or subsidiary legislation. A similar lack of repercussions pervades the other non-statutory requirements for EMs. The failure of these requirements in having any real, practical teeth reduces the prospect of there being sufficient incentives to achieve best practice in the preparation of EMs.

These observations suggest there is a clear need for reform to ensure EMs meet the expectations of Parliaments and that agencies fulfil their obligation as delegates of the Parliament, to full disclosure.

## SUGGESTIONS FOR REFORM

There have been several suggestions for reform seeking to improve the quality of EMs. These include:

- better quality control by agencies to ensure:
  (a) that the content of draft EMs are checked by staff with appropriate experience and qualifications (as recommended in the Senate Scrutiny of Bills' third report, described above)
  (b) EMs comply with the relevant requirements and fully disclose all potential issues that may be of interest to those scrutinising the proposed legislation,
- appropriate training for those preparing EMs.

Another practice that may assist in improving the quality is for someone, other than the instructing officer for the legislation in the agency, to be responsible for preparing the EM. This person(s) would be more independent of the policy making process. This could assist in ensuring a more dispassionate and objective approach.

[32] Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills*, Parliament of Australia, 2004, p 101.

Reforms which entrench better practices to ensure a more consistent level of adherence to form and content requirements, rather than leaving this up to the discretion and practice of individual agencies, have merit.

Other initiatives could include:

- setting up a specific committee to assess the adequacy of explanatory material
- engaging the Clerk/other parliamentary staff to undertake this assessment and make recommendations to the Presiding Officer. This would feed into the parliamentary process for making legislation and could result in preventing proposed legislation from proceeding until all shortcomings have been addressed.

## *National uniformity?*

Each Australian Parliament has exclusive cognisance over the processes that are followed in the making of legislation applying in its jurisdiction. However, the author questions why there is not some uniformity across Australia in the approach to EMs to ensure better consistency. Parliament and its committees should have a detailed explanation of legislation the executive is asking it to consider and pass. Such a requirement transcends jurisdictional borders. It is arguable that baseline form and content requirements for EMs for primary and delegated legislation should be recorded in a single, authoritative source and not the current plethora of documents. Requirements over and above those contained in such a document could always be catered for in additional documentation specific to the relevant jurisdiction.

Accordingly, one possible reform measure could be the introduction of a uniform legislation model setting out clear and detailed form and content requirements for EMs for proposed primary and subsidiary legislation. Similar requirements are in place for some legislation in the Commonwealth, Victoria and Queensland. However, under the proposed model, the validity and enforceability of the proposed legislation would be conditional upon all such requirements being satisfactorily fulfilled by the relevant agency.

This inevitably raises the question about which body would be responsible for making the decision about whether these requirements have been fulfilled and the impact on the legislative making process (including its timing)? For instance, in most Australian jurisdictions,

subsidiary legislation is subject to the disallowance procedure, not an affirmative resolution procedure.[33]

A helpful example with respect to subsidiary legislation is the process by which the United Kingdom House of Lords Secondary Legislation Committee scrutinises instruments.[34] Those instruments subject to the affirmative resolution procedure cannot proceed to parliamentary debate until this committee has completed its scrutiny process. This will be delayed until the committee is satisfied with the quality of the EM. This provides a strong incentive to ensure that this committee is satisfied with the EM.

### *Tabling a revised EM*

A final suggestion is to legislatively mandate that the relevant Minister table a revised EM that addresses concerns of the relevant scrutiny committee, if that committee deems it necessary. It is noteworthy there have been some recent instances where governments have tabled revised and improved EMs to address scrutiny committee concerns.[35] While this does not prevent a deficient EM from being initially tabled, it may improve their quality over time to reduce the risk of the relevant Minister having to table a revised EM.

For any reform measure to succeed, it is essential that all participants in the parliamentary process recognise the important role played by EMs and the need for complete openness and transparency by the executive towards the parliament regarding information on proposed legislation.

## CONCLUSION

A parliamentary committee has the right to expect assistance with its scrutiny function by a fit for purpose EM. It should not have to consistently draw detailed shortcomings to the attention of the relevant agency which possesses expert knowledge of the proposed legislation. The

[33] See the observations made by Stephen Argument in his paper *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation*, paper for Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p 19.

[34] United Kingdom Parliament, *Statutory instruments procedure in the House of Lords*.

[35] House of Lords Secondary Legislation Scrutiny Committee, *Work of the Committee in Session 2022-23*, United Kingdom Parliament, pp 6-7. On 7 November 2024, the Minister representing the Minister for Early Childhood Education in Western Australia tabled an amended EM. This corrected the misidentification of Henry VIII clauses in the Education and Care Services National Law Application Bill 2024. See Hon J Jarvis MLC, Western Australia, *Debates*, Legislative Council, 7 November 2024, p 5917.

number of criticisms levelled at the quality of EMs in all jurisdictions considered by the author suggests this expectation is still not being routinely met. Consequently, EMs are continuing to not fulfill their purpose as often as they should.

The surveyed evidence in 2014 suggested that EMs produced by agencies do, in many instances, enhance scrutiny of proposed legislation. In 2024, feedback from parliamentary staff suggested this remains the case. Indeed, some jurisdictions reported improvements in the quality of EMs. However, the evidence also suggests there are enough instances of poor quality EMs to support a strong case for reform.

The author continues to argue for the establishment of a legislative provision in every Australian jurisdiction setting out detailed content requirements for all EMs, like in Queensland and the Commonwealth. However, if the failure to comply with the requirements does not affect the validity or enforceability of the legislation, this significantly undermines the effectiveness of this type of provision.

Further, although offering no guarantee of ensuring consistently better quality EMs, clear and comprehensive form and content requirements can assist. The author regards the *Guidelines for the preparation of explanatory notes*[36] and the *Top Ten Tips for a Good EM*[37] as best practice.

If any EM form and content requirements are to have real teeth, there needs to be a compulsory process that checks EMs compliance with those requirements. If they fail to comply, a power to halt the legislative process until improvements are made deserves consideration. A requirement to table a revised EM could assist in achieving this.

The author is of the view there needs to be a shift to a consistent level of quality in EMs across jurisdictions. This can only be undertaken by a commitment by governments to work with parliamentary committees to better ensure those that draft EMs are aware of and proactively address committee terms of reference in the EM. This will go a long way to further improving the law-making process. It is hoped there will be further improvement in the future.

[36] Department of Premier and Cabinet, *Guidelines Preparation of Explanatory Notes,* Queensland Government, 2015.

[37] House of Lords, *Top Ten Tips for a Good EM*, UK Parliament, 2023.

## APPENDIX 1

Questions posed to parliamentary staff

1. What are the requirements in your jurisdiction for the preparation of explanatory memorandums for bills and delegated legislation (i.e. Standing Orders, legislation, departmental and parliamentary counsel handbooks/guidelines)?
2. How would you generally describe the quality of explanatory memorandums in your jurisdiction for:
    - bills
    - delegated legislation.
3. Have there been any incidences where the quality of the explanatory memorandum has been such that the Parliament/its committees have not been able to perform its function of scrutiny of the Executive? Please provide examples and:
    - give reasons, if possible, about why the quality was not acceptable (regarding content of the explanatory memorandum as well as why the drafter failed to provide adequate information)
    - describe how the committee addressed the issue and the outcome.
4. If possible, please identify examples of explanatory memorandum for bills and delegated legislation that you believe are of a sufficient quality to assist Parliament/its committees to properly undertake their scrutiny role and explain why?
5. Do you believe that the requirements in your jurisdiction for the preparation of explanatory memorandums for bills and delegated legislation are sufficient?
6. If so, why?
7. If not, why not and what additional requirements, if any, do you believe would improve the quality of explanatory memorandums?
8. What are your views on the accuracy of the Proposition set out above?
9. Please provide any other information you feel would be of assistance to my research (such as references to committee reports that deal with the subject matter).

# Ministers as private Members: Constituency representation in the Federation Chamber

**Kathleen McGarry**

Committee Secretary, Department of the House of Representatives, Parliament of Australia

***Abstract:*** All parliaments in Australia and New Zealand provide regular opportunities for Members to make statements about general matters of interest or concern affecting their constituencies. However, many jurisdictions restrict Ministers' participation in these items of business, reflecting concerns about the potential misuse of time intended for private Members. This article compares these practices and examines in depth a unique period of statements which has been progressively expanded to include Ministers: Members' three minute constituency statements in the Federation Chamber of the Australian House of Representatives. Drawing on participation data from the 42nd to 47th Parliaments and applying the Representational Connections Framework to statements made during 2024, this article demonstrates that recent increases in Ministers' participation in constituency statements are in proportion with their membership of the House and reflect a genuine intent to represent and connect with constituents. These findings challenge assumptions about executive encroachment into private Members' business and underscore the importance of the representative role played by all Members of Parliament.

*The role of an elected member of parliament is first and foremost to represent their constituents and the values of their electorate. Constituency statements … are an important part of our democracy because they allow elected representatives to highlight their local community in the halls of power, bringing issues of local importance to national attention.*—The Hon Ged Kearney MP[1]

*The purpose of [constituency] statements is to allow members of the House to report on and raise issues of importance to their constituencies. This*

[1] G. Kearney, Commonwealth, *Parliamentary Debates,* House of Representatives, 29 May 2024, pp. 3239-3240.

> *should extend to all members of the House, as all represent areas that require such attention.*—The Hon Anthony Albanese MP[2]

## INTRODUCTION

The 47th Parliament saw a marked increase in Ministers' participation in Members' three minute constituency statements in the Federation Chamber, the secondary debating chamber of the Australian House of Representatives. The standing orders of many parliaments in Australia and New Zealand restrict Ministers from participating, either procedurally or in practice, in certain items of business regarded as the purview of the private Member.[3] The House of Representatives, which still restricts Ministers' participation in a range of opportunities for private Members, removed the last restrictions on constituency statements more than 17 years ago in recognition that all Members of the House, Ministers included, have a role in representing their constituencies. In this article, I seek to understand the recent increase in, and potential implications of, Ministers' participation in constituency statements in the Federation Chamber by exploring the rate of all Members' participation over the previous six parliaments. Then, using a recognised framework of constituency representation styles, I analyse the ways in which constituency statements are used by Members to show connection to their constituents and demonstrate that Ministers are using this opportunity genuinely, and consistent with its intended purpose, to make statements relating to and on behalf of their constituents.

## MINISTERS' PARTICIPATION IN PRIVATE MEMBERS' STATEMENTS AND DEBATE

The ability of Ministers, including Assistant Ministers and Parliamentary Secretaries, to participate in non-government, private Members' or Members' business, in particular the regular periods for statements and debate on general matters affecting their constituencies, varies between jurisdictions in Australia and New Zealand.[4] The procedural rights of Ministers

[2] A. Albanese, Commonwealth, *Parliamentary Debates,* House of Representatives, 24 June 2008, pp. 5790-5791.

[3] That is, not a government Minister or presiding officer. See, David Elder (ed), *House of Representatives Practice*, 7th edn. Canberra: Department of the House of Representatives, 2018, pp. 133, 577; Parliament of New South Wales, 'Private Members', *Parliamentary Education and Engagement*. Accessed at https://education.parliament.nsw.gov.au/glossary-term/private-members/.

[4] In the ACT, another category of 'crossbench executive members' business' has been used to address the complexities of a coalition agreement/minority government and allow business from a crossbench Minister, not supported by the majority governing party. See David Skinner and Tom Duncan (eds), *Companion to the Standing*

to initiate and determine government business do not extend to these periods, which are intended to provide a routine avenue for one of the core functions of parliament: allowing Members to represent the concerns and ventilate the grievances of their constituents.[5] Some parliaments go as far as to restrict the participation of Ministers, either through standing orders or practice, in ways that suggest two implicit concerns: first, that Ministers' participation may unfairly take time from private Members, who have fewer opportunities to address the parliament; and second, that Ministers may abuse these items of business to make statements in their capacity as a representative of the government, rather than in their capacity as representative of their constituents.

Every house of parliament in Australia and New Zealand provides in its order of business at least one regularly scheduled opportunity for Members to make statements on general matters of concern or interest; Table 1 outlines these items of business, including restrictions on Ministers' participation, as set out in standing and sessional orders. Most jurisdictions also allow debate on a broad range of matters during Address In Reply debates, although these are generally limited to the start of a parliamentary term so are not counted as a regular opportunity for the purpose of this article. Many also hold debates on matters of public importance, interest, urgency or similar, but as these debates are constrained to a topic proposed on the day and do not allow for general matters to be raised, they have also been excluded from this article.

Almost all jurisdictions have a regular period for miscellaneous statements by Members, between 90 seconds and ten minutes in length, without a specific question before the House. These are generally referred to as Members' (or Senators') statements or private Members' statements, although some periods are named specifically for their purpose, such as constituency statements, community recognition statements or statements on matters of interest. The first of these was established in the Australian House of Representatives in the late 1980s, based on a model from Canada, following concerns that 'the balance [was] being increasingly tilted away from a reasonable share of the House's time for private Members'.[6]

*Orders of the Legislative Assembly for the Australian Capital Territory*, 2nd edn. Canberra: Legislative Assembly for the Australian Capital Territory, 2022, pp. 202, 275-276.

[5] *House of Representatives Practice*, p. 41; *The Queensland Parliamentary Procedures Handbook*. Brisbane: Queensland Parliament, 2024, p. 3; David Wilson (ed), *Parliamentary Practice in New Zealand*, 5th edn. Wellington, 2023, pp. 48-49.

[6] Members' 90 second statements, standing order 43. Commonwealth, *Votes and Proceedings*, No. 44, 17 March 1988, pp. 411-414; House of Representatives Standing Committee on Procedure, *Alternative opportunities for Members to concisely address the House*. Canberra, 1985, pp. 6-9.

The standing orders of several chambers, including the House of Representatives, explicitly bar Ministers and/or Assistant Ministers from participating in some of these periods for Members' statements.[7] Others place restrictions on Ministers through practice, permitting them to participate only in their capacity as a private Member if their statements do not raise policy issues falling within their portfolio responsibilities.[8] Periods of statements may also be expressly limited to constituency matters or community recognition, having the effect of preventing any Member from using those statements for another purpose.[9]

**Table 1. Opportunities for Members' statements on general matters of concern (as at 1 August 2025)**

| Parliament | Members' statements | Adjournment debate[10] | Grievance debate[11] | Standing orders relating to Ministers' participation |
|---|---|---|---|---|
| **Australian Senate** | Senators' statements – 2 or 10 mins (SO 57) | Yes – 5 or 10 mins (SO 54) | No | None |
| **Australian House of Representatives** | Members' statements – 90 sec (SO 43); Constituency statements – 3 mins (SO 193) | Yes – 5 mins (SOs 1, 31, 191) | Yes – 10 mins (SOs 1, 192B) | SOs 31 and 91 (powers to control adjournment debate, including ability to extend debate to make reply); SO 43 (barring Ministers, including Parliamentary Secretaries, from participating in Members' statements) |

[7] Australian House of Representatives, South Australian House of Assembly and Western Australian Legislative Assembly.

[8] Legislative Assembly, *Guide to Chamber Procedure*, Parliament of New South Wales, Sydney, May 2023, pp. 50-51; *New South Wales Legislative Assembly Practice, Procedure and Privilege*, Online Ed, 2013, Chapter 12, p. 16. Accessed at: www.parliament.nsw.gov.au/la/proceduralpublications/Pages/wppbook.aspx.

[9] Legislative Assembly, *Guide to Chamber Procedure*, pp. 50-51.

[10] Debate on the question 'That the [House] do now adjourn' or similar.

[11] Debate on the question 'That grievances be noted' or similar.

| | | | | |
|---|---|---|---|---|
| **New Zealand House of Representatives** | General debate[12] – 5 minutes (SO 402) | No | No | None |
| **ACT Legislative Assembly** | Member Statements – 90 sec (SO 33A) | Yes – 5 mins (SOs 34, 69) | No | SOs 34 and 35 (powers to control adjournment debate) |
| **Northern Territory Legislative Assembly** | No | Yes – 10 mins (SO 43) | No | None |
| **Queensland Legislative Assembly** | Private Members' Statements – 3 mins (Sessional order 1) | Yes – 3 mins (SO 56, sessional order 1) | No | None |
| **New South Wales Legislative Council** | Members' Statements – 3 mins (SO 43) | Yes – 5 mins (SO 33) | No | SO 33 (adjournment question put at conclusion of the Minister's remarks) |
| **New South Wales Legislative Assembly** | Private Members' Statements – 5 mins (SO 108); Community Recognition Statements – 1 min (SO 108A) | No | No | SO 108 (allowance for 1 min replies by Ministers during the period) |
| **Victorian Legislative Council** | Members' statements – 90 sec (SOs 5.03, 5.13) | Yes – 3 mins (SOs 4.11, 5.03) | No | SOs 4.11, 4.12, 4.13, 4.14 (adjournment debate is for Members to raise matters for consideration by Ministers, provisions for reply by Ministers in debate or in writing) |

[12] Debate on the question 'That the House take note of miscellaneous business'.

| | | | | |
|---|---|---|---|---|
| **Victorian Legislative Assembly** | Statements by Members – 90 sec (SO 40) | Yes – 3 mins (SO 33) | Yes - 15 mins (SO 38) | SO 33 (adjournment debate provisions for reply by Ministers in debate or in writing) |
| **Tasmanian Legislative Council** | Special Interest Matters – 5 mins (SO 39, sessional order 4) | Yes – time not specified in standing orders | No | None |
| **Tasmanian House of Assembly** | No | Yes – 5 mins (SO 18, sessional order reduces time from 7 mins) | No | None |
| **South Australian Legislative Council** | Statements on matters of interest – 5 mins (SO67b) | No | No | None |
| **South Australian House of Assembly** | Private Members' Statements – 90 sec (Sessional order 6) | Yes – 10 mins (SO 49) | Yes – 5 mins (SO 81A) | Sessional order 6 (barring Ministers from making Private Members' Statements but allowing Parliamentary Secretaries to do so) |
| **Western Australian Legislative Council** | Members' Statements – 10 mins (SOs 15, 21) | No | No | None |
| **Western Australian Legislative Assembly** | Members' Statements – 90 sec (SOs 101, 147) | No | Yes – 7 mins (SOs 102, 146) | SO 146 (provisions for Minister to reply to grievances); SO 147 (barring Ministers from making Members' Statements) |

One of the longest-standing opportunities for Members to raise matters of concern in parliament is the grievance debate, derived from the centuries-old financial procedures of the UK House of Commons where grievances were considered before granting supply to the

Crown.[13] In the four jurisdictions which currently hold a grievance debate, Members speak to the question 'that grievances be noted' or similar, making a statement of between five and 15 minutes in length on a matter of concern or interest (not necessarily a 'grievance' in the ordinary sense of the word).[14] Ministers' participation in these grievance debates is rare, but is not explicitly restricted by standing orders; it is possible that this is due to the debate's origins as an avenue for criticism of administrative policy. In the Australian House of Representatives, it has been traditional practice that Ministers do not participate in the grievance debate to allow private Members the opportunity to speak,[15] and this remains the case even as practice has shifted in other periods of statements.

Another common, regular opportunity for statements on general matters is the adjournment debate. In most jurisdictions, Members speak to the question 'that the House do now adjourn' or similar, each making statements of generally three, five or ten minutes in length on any matter of interest, and the House is adjourned at the conclusion of these statements.[16] In some jurisdictions, the Chair may give the call to other Members in preference over Ministers.[17] In others, Ministers are formally restricted to speaking only in reply to other Members18 or limited to speaking last, as their contribution may close the debate unless they are considered to be speaking in their capacity as a private Member.[19] In the House of Representatives in the Parliament of Australia, which has both the long-standing practice of giving the call to other Members ahead of Ministers and standing orders for Ministerial replies and control of debate,

[13] *House of Representatives Practice*, pp. 586. The historical role of the UK Parliament in redressing grievances is also considered in Donald D Searing, 'The Role of the Good Constituency Member and the Practice of Representation in Great Britain'. *Journal of Politics*, 47(2), 1985, p. 50.

[14] Australian House of Representatives, Victorian Legislative Assembly, South Australian House of Assembly and Western Australian Legislative Assembly. See Table 1.

[15] *House of Representatives Practice*, pp. 586-587. For a more comprehensive history of the debate, see J. A. Pettifer (ed), *House of Representatives Practice*, 1st edn. Canberra, 1981, p. 525.

[16] Although there is no debate on the question of adjournment in the New South Wales Legislative Assembly, the Assembly adjourns without motion after its period of Private Members' Statements, which may be considered a quasi-adjournment debate.

[17] *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, p. 252; *House of Representatives Practice*, p. 590.

[18] Victorian Legislative Council and Victorian Legislative Assembly. See Table 1.

[19] Stephen Frappell and David Blunt (eds), *New South Wales Legislative Council Practice*, 2nd edn. Sydney: The Federation Press, 2021, p. 390. See also, *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, p. 252.

it is becoming increasingly common for Ministers to participate in their private capacity and, on occasion, receive the call ahead of private Members.[20]

New Zealand's House of Representatives has a unique item of business for regularly scheduled Members' statements, more alike in form to grievance and adjournment debates. The general debate, which occurs on most sitting Wednesdays, is held on the question 'That the House take note of miscellaneous business' and allows members to make statements of up to 5 minutes in length on any matter of interest or concern. The participation of Ministers in the general debate is expressly provided for through their inclusion in the party proportions when calculating the roster for allocation of the call, unlike other items of business which are also subject to roster.[21]

While some jurisdictions do actively provide for Ministers' participation in these opportunities for Members' statements on general matters, implicit in the restrictions described above is an overall concern about the encroachment of Ministers into the realm of the private Member. This concern may be connected to broader tensions observed about the increasing size of executive governments and their impact on the work of a parliament,[22] a consideration which was articulated when Members' statements were first introduced in the House of Representatives in the Parliament of Australia.[23] Members' three minute constituency statements in the Federation Chamber of the House of Representatives is unique in being the only period of statements which appears to have been specifically expanded over time to encourage the participation of Ministers and Assistant Ministers. However, as I demonstrate below, the uptake of this opportunity, particularly by Ministers, was limited until the 47th Parliament.

[20] For example, J. Elliot, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 August 2024, p. 6196. See also, *House of Representatives Practice*, pp. 588, 590.

[21] *Parliamentary Practice in New Zealand*, p. 265.

[22] For example, Scott Prasser, 'Executive growth and the takeover of Australian parliaments', *Australasian Parliamentary Review*, 27(1), pp. 48-61.

[23] House of Representatives Standing Committee on Procedure, *Alternative opportunities for Members to concisely address the House*. Canberra, 1985, pp. 6-9.

## CONSTITUENCY STATEMENTS IN THE FEDERATION CHAMBER

The Federation Chamber is the second debating chamber of the Australian House of Representatives. First established in 1994 as the Main Committee, its original purpose was to reduce pressure on the House by providing an additional venue for debate on legislation. As outlined by Cooke in her retrospective of the first 30 years of the Federation Chamber, the role of the chamber has expanded over time to provide a venue for a range of both government and non-government business items, increasing the opportunities for members to fulfil their role as representatives of their constituencies.[24] Although there are sometimes differing views between the major parties about the best use of the Federation Chamber, there is an ongoing and widespread support for its role as an avenue for constituency representation.[25]

Constituency statements in the Federation Chamber allow Ministers to take part in a category of business from which they are typically excluded in practice.[26] In the Australian House of Representatives, Ministers may not sponsor items of private Members' business. Their participation is rare during debate of private Members' bills and motions[27] and generally infrequent in the periods of statements, described in the section above, which are deemed 'other opportunities for private Members'.[28] In contrast, constituency statements are expected to be made by Ministers; constituency statements were first introduced in 1998 and later expanded to specifically include participation by Parliamentary Secretaries in 1999 and Ministers in 2008.[29] These expansions were made in recognition that a constituency representative role is one held by all Members of the House, not just private Members.[30]

[24] Natalie Cooke, 'The Federation Chamber at 30: From Main Committee to much more'. *Australasian Parliamentary Review*, 39(2) 2024, pp. 53.

[25] See, for example, K. Hogan, Commonwealth, *Parliamentary Debates*, House of Representatives, 23 July 2025, p. 86; House of Representatives Standing Committee on Procedure, *Maintenance of the standing and sessional orders.* Canberra, November 2024, pp. 21-22.

[26] House of Representatives Standing Committee on Procedure, *Role of the Federation Chamber: Celebrating 20 years of operation*. Canberra, June 2015, pp. vi, 12.

[27] Not including motions to suspend standing orders, or other private Members' motions not moved during Private Members' Business.

[28] *House of Representatives Practice*, p. 573, 577.

[29] Cooke, *The Federation Chamber at 30*, pp. 54-55.

[30] A. Albanese, Commonwealth, *Parliamentary Debates,* House of Representatives, 24 June 2008, pp. 5790-5791; House of Representatives Standing Committee on Procedure, *Role of the Federation Chamber: Celebrating 20 years of operation*. Canberra, June 2015, p. 12.

The period for constituency statements occurs on each day that the Federation Chamber meets, allowing either 30 or 60 minutes of three-minute statements irrespective of interruption for divisions in the House.[31] As is usual practice in the House and Federation Chamber, allocation of the call alternates between government and non-government Members. Unlike the adjournment debate, there is no practice of giving priority to other Members over Ministers during constituency statements, so Ministers may rise to seek the call for the government side in any order. The changing size of the crossbench has also had an influence on practice in allocation of the call during constituency statements over time. For example, crossbench Members were allocated the call with the government side in the minority 43rd Parliament,[32] although the procedure was not formalised in standing or sessional orders.[33] In the 47th Parliament, a new sessional order was adopted to support participation of the large crossbench across a range of items of business[34] and provided for priority of the call in constituency statements for at least one crossbench Member on the non-government side each day.[35]

While these small changes in practice shaped overall participation patterns in constituency statements over the past six parliaments, they do not account for the changing pattern of Ministers' participation over time. Figure 1 sets out the overall participation of all Members in constituency statements from the 42nd Parliament to the 47th Parliament, by the following categories: Government Frontbench (that is, Ministers and Assistant Ministers), Government Backbench, Opposition and Crossbench.

[31] Standing order 193. The period has also been extended at times by agreement; see *House of Representatives Practice*, p. 588.

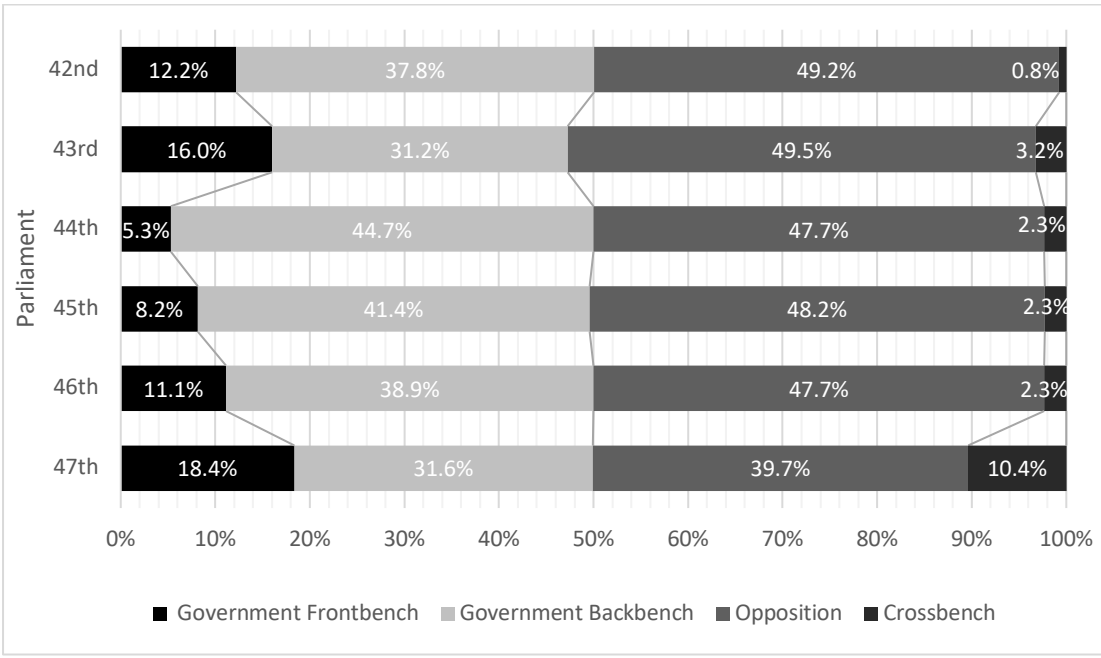
[32] One crossbench member was given the call with the government side on Wednesdays only.

[33] This contrasts with other arrangements during the period, which were proposed in the *Agreement for a Better Parliament: Parliamentary Reform* at the time. See House of Representatives Standing Committee on Procedure, *Interim Report: Monitoring and review of procedural changes implemented in the 43rd Parliament*. Canberra, April 2011, p. 26.

[34] Sessional order 65A. See also, Miriam Berger, 'Beyond the Bench: Crossbench influence on a contemporary House of Representatives'. *Australasian Parliamentary Review*, 39(2) 2024, pp. 27-39.

[35] Sessional order 65A was again adopted at the start of the 48th Parliament in July 2025, allowing priority for one crossbench Member during 30-minute periods and two crossbench Members during new 60-minute periods of constituency statements, maintaining the proportion of participation from the 47th Parliament.

**Figure 1. Percentage of Constituency Statements Made by Member Type, 42nd to 47th Parliaments [36]**



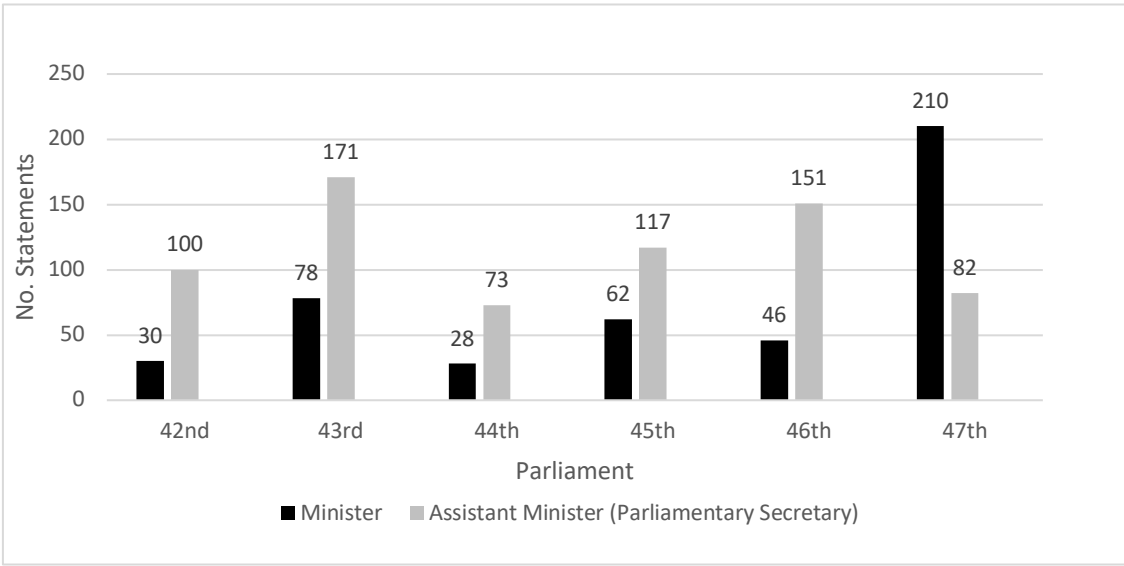

The 47th Parliament had the highest incidence of Ministerial participation in constituency statements to date, with 18.4 per cent of all statements made by the government frontbench, while the lowest level of participation was during the 44th Parliament, with only 5.3 per cent of statements. There appears to be a difference in participation rates based on political party, with the overall average participation level of Ministers during parliaments with Labor Governments (42nd, 43rd and 47th Parliaments) at 15.5 per cent, almost double that of Coalition Governments (44th, 45th and 46th Parliaments) at 8.2 per cent. Ministerial representation in the House of Representatives has remained relatively static over that time,[37] so it is possible that the difference is indicative of differing attitudes between the major parties towards this period of statements and the profile of the Federation Chamber more broadly. This could be a topic for further qualitative study.

[36] *House of Representatives Procedure Office;* Commonwealth, *Parliamentary Debates*, House of Representatives, 2008-2025.

[37] Parliamentary Library, 'Ministries', *Australian Parliamentary Library Handbook Online*. Accessed at: https://handbook.aph.gov.au/Ministries.

While overall participation of Ministers and Assistant Ministers as a proportion of all Members has fluctuated, the pattern of their participation was somewhat consistent between the 42nd and 46th Parliaments. Figure 2 sets out the number of constituency statements made by Ministers during the same period as considered above. Until the most recent parliament, the majority of government frontbench statements were made by Assistant Ministers, with Ministers only accounting for around one quarter to one third of statements from the frontbench. This changed drastically in the 47th Parliament, with Ministers making nearly three quarters of frontbench statements.

**Figure 2. Constituency Statements by Ministers, 42nd Parliament to 47th Parliament[38]**




[38] Commonwealth, *Parliamentary Debates*, House of Representatives, 2008-2025.

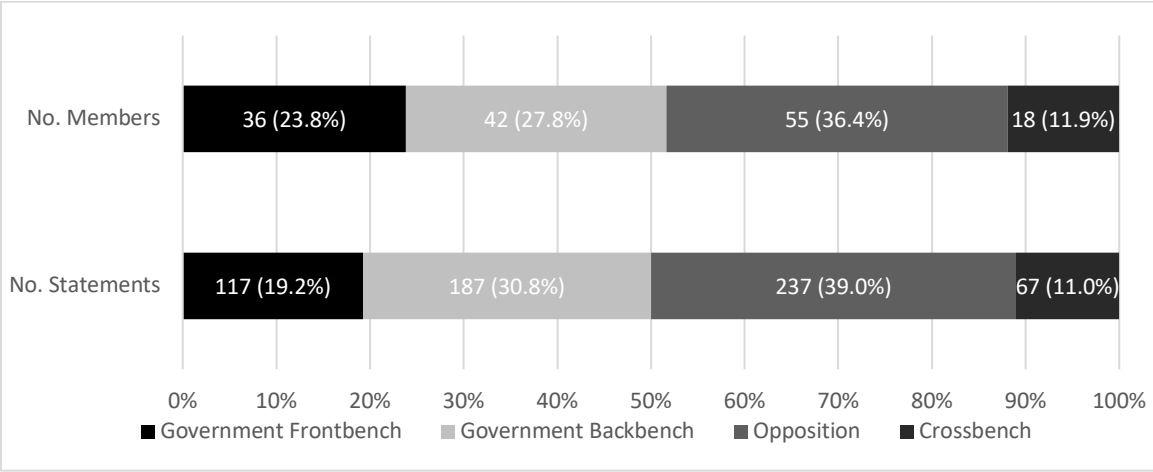
The increase in participation by Ministers, and decrease in participation of Assistant Ministers, has likely been facilitated by an innovation in practice that commenced during the 47th Parliament, whereby the government whips began to set speaking lists for this period in alphabetical order by surname, irrespective of position in the party.[39] For example, on Monday 25 November 2024, government speakers during constituency statements included Assistant Minister Watts, Minister Wells, Mr Wilson, Mr Zappia and Minister Aly.[40] This alphabetical practice also resulted in some days having no Ministers participating in constituency statements, while others had Ministers seeking the call in four of the five government turns. Such days, in isolation, may appear to put government backbenchers at a disadvantage.

With the allocation of the call alternating between government and non-government speakers, the impact of an increase in Ministerial participation across the board has been, necessarily, a reduction in the speaking opportunities for government backbenchers. Figure 3 outlines the number of Members in the House and the number of constituency statements made during the 2024 sitting year, towards the end of the 47th Parliament, grouped by the same Member type categories used in Figure 1. It demonstrates that, even with the increase in Ministerial participation, government backbenchers still accounted for more than their 'fair share' of the call when considering their proportion of membership. Opposition Members were also slightly advantaged by the alternating call arrangements, making up a smaller proportion in the House than in their allocation of the call.

[39] Except for the Prime Minister and the Speaker, and with some flexibility to account for the availability of Members. The practice is also being used to an extent by opposition whips for the non-government speaking list, not including the crossbench.

[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2024, pp. 8474-8479.

**Figure 3. Number of Members and Constituency Statements Made, 2024 Sitting Year[41]**




In summary, the overall increase in Ministerial participation in constituency statements during the 47th Parliament can be accounted for by a shift in government whips' practice in scheduling speaking lists for this opportunity. This approach suggests an interest in ensuring that all government Members, including Ministers and Assistant Ministers, are being scheduled and provided reasonable opportunity to make constituency statements. While government backbenchers had fewer speaking slots available to them than in previous years, they still received an allocation of the call greater than their proportion in the House. Because of existing rules around allocation of the call, the increase in Ministerial participation did not have any impact on the participation of non-government Members in this item of business.

In the early days of the 48th Parliament, government whips appear to be continuing the practice of scheduling all Members alphabetically, but it is not yet clear if Ministers will continue to be regularly included in that schedule. It remains to be seen whether this Parliament will see a sustained higher rate of Ministerial participation in constituency statements, or whether Ministers and Assistant Ministers will at some point give over their time to the larger government backbench and return to the participation patterns of earlier years.

[41] *House of Representatives Procedure Office;* Commonwealth, *Parliamentary Debates*, House of Representatives, 2024.

## CONSTITUENCY CONNECTION STYLES: HOW DO MINISTERS USE CONSTITUENCY STATEMENTS?

While other jurisdictions may restrict the content of Members' statements to require that they relate to specific matters or to prevent Ministers misusing the opportunity for policy statements about their portfolios, the standing orders of the House of Representatives do not define what matters may be raised in a constituency statement.[42] In debate, Members have described the purpose of these statements as intended for Members to speak about, and represent the interests of, constituents.[43] In moving the change to standing orders in 2008 to allow Ministers to participate, the then-Leader of the House, Mr Albanese, described the kinds of matter that 'should not be excluded from representation' by detailing a visit he had made to constituents celebrating a 60th wedding anniversary.[44] While many constituency statements take the form of commemorative or celebratory statements about the community, others are more focused on the impact of government policy, or used as an opportunity for Members to inform the House of advocacy for their constituents or to demonstrate connections with their political party. These broad categories reflect the four styles of constituency representation and relationship-building activities conducted by Members of Parliament as described in Koop, Bastedo and Blidook's Representational Connections Framework.[45] As I am seeking to understand the ways in which Ministers use constituency statements in the Federation Chamber differently to other Members, this model presents a ready classification system for the content of constituency statements made by all Members and the connection styles which they draw upon.

Over the last fifty years, there has been an increasing interest in the constituency role of elected Members in parliamentary democracies[46] and several authors have sought to categorise and analyse the ways in which Members seek to build connections with, and secure the vote of, their constituents. Notably, in the 1970s, Fenno described the behaviour of US

[42] *House of Representatives Practice*, p. 588.

[43] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, pp. 112029-112037.

[44] A. Albanese, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2008, pp. 5790-5791.

[45] Royce Koop, Heather Bastedo and Kelly Blidook, *Representation in Action: Canadian MPs in the Constituencie*s, Vancouver: University of British Columbia Press, 2018, p. 19.

[46] See, for example, Philip Norton, 'The Growth of the Constituency Role of the MP'. *Parliamentary Affairs* 47(4), 1994, p. 705-720; Geoff Gallop, 'The role of a Member of Parliament'. *Australasian Parliamentary Review* 24(2), 2009, pp. 2-8.

Congressmen in their electoral districts as their 'home style',[47] while Eulau and Karps first described four possible components of this representational responsiveness towards constituencies.[48] In the 1980s, Searing described types of 'constituency Members' in the UK House of Commons and observed that all Members, including Ministers, participated in 'at least a little constituency service'.[49] In the late 1990s, Zappala noted that this aspect of representational study remained 'sadly neglected' in Australia.[50] More recently, Koop et al, from observations of Canadian Members of Parliament, built upon this literature and created the Representational Connections Framework, a typology of four representational styles to describe the functions and activities performed by Members to build connections with their constituencies outside of the parliament.[51] Petter then applied and expanded upon the model in his study of both the style and intensity of constituency work by Members of the Queensland Parliament during 2019 and 2021.[52]

In brief, the four connection styles of the framework can be defined as:

- Policy Connections: where Members advocate for, or attempt to change the views of, constituents on legislative or public policy matters;
- Service Connections: where Members lobby for individuals, or the electorate more broadly, to secure assistance through individual 'case' work or program or infrastructure-based 'project' work';
- Symbolic Connections: where Members build cultural and emotional connections to demonstrate their closeness with community; and

[47] Richard Fenno, 'US House Members in Their Constituencies: An Exploration'. *American Political Science Review*, Vol 71(3), 1977, pp. 883-917; Richard Fenno, *Home Style: House Members in Their Districts*. Boston: Little Brown, 1978.

[48] Heinz Eulau and Paul D. Karps, 'The Puzzle of Representation: Specifying Components of Responsiveness'. *Legislative Studies Quarterly*, Vol 2(3), 1977, pp. 233-254.

[49] Donald D Searing, 'The Role of the Good Constituency Member and the Practice of Representation in Great Britain'. *Journal of Politics*, 47(2), 1985, pp. 349-50.

[50] Gianni Zappala, 'Challenges to the Concept and Practice of Political Representation in Australia', Research Paper No. 28, 1998-9. Canberra: Department of the Parliamentary Library, 1999, p. 16.

[51] Koop et al, *Representation in Action,* pp. 16-25.

[52] Pandanus H Petter, 'Against the Void: Constituency Work and Connection Building Evidence from Australia'. *Parliamentary Affairs,* Vol 76, 2023, pp. 382-400.

- Party Connections: where Members build or demonstrate ties with their political party.

## APPLYING THE FRAMEWORK TO CONSTITUENCY STATEMENTS

To understand how Members of the House of Representatives demonstrate their connection to their electorates through constituency statements, I chose to examine the most recent sitting year, 2024, in which there were 60 instances of periods of three minute constituency statements with a total 608 statements made, including 117 statements by Ministers and Assistant Ministers.[53] Analysing the Hansard transcripts of constituency statements made during the year, I drew upon the framework above to classify the content of these statements into five groups (Policy, Symbolic, Service, Party and Mixed) based on the connection themes and actions described within.

### *Policy statements*

Policy statements related to legislative and policy matters, with a broad range of topics including cost of living, foreign policy, budget measures, funding for various government services and programs, and impacts from the policy of another party or level of government.[54] Frequently, these statements included comments about perceived achievements and/or failings of the current or former government.[55] While these policy statements were linked to the interests of the electorate, that link ranged from extensive connection to community matters[56] to what was sometimes a more cursory mention of the electorate by name in a more general policy matter.[57] This variation is consistent with the observations of Koop et al about the different motivations of Members who emphasise policy connections, some of whom may

[53] Statistics held by Procedure Office, Department of the House of Representatives. 10 statements were made at each occurrence of members constituency statements, except for 15 February, 4 July and 21 November (9 statements each); 27 March (11 statements) and 21 November (20 statements, in a double-length period).

[54] For example, statements by M. Ryan and A. Giles, Commonwealth, *Parliamentary Debates*, House of Representatives, 15 May 2024, pp. 2820, 2824.

[55] For example, statements by J. Wilson and D. Coleman, Commonwealth, *Parliamentary Debates*, House of Representatives, 27 February 2024, pp. 1374-1375.

[56] For example, H. Haines, Commonwealth*, Parliamentary Debates*, House of Representatives, 3 July 2024, p. 4944.

[57] For example, A. Byrnes, Commonwealth, *Parliamentary Debates*, House of Representatives, 1 July 2024, p. 4679.

'do so with less reference to local concerns and preferences' and instead act as an advocate to constituents for their own policy preferences.[58]

## *Symbolic statements*

Symbolic statements were most similar to the type of constituency statement referred to by Mr Albanese in his 2008 statement referenced above and encompassed a very wide range of celebratory, commemorative and other community-building statements, for example statements about the significant anniversary of a sporting club, the death of a notable community leader, the achievements of a local hero or, most frequently, a Member's attendance at community events.[59] These statements and the activities described within align closely with Petter's descriptions of Members' efforts towards 'broader symbolic connections to the electorate and its life as a whole' to build electoral support and signal their inclusion in the community,[60] as well as Koop et al's commentary that Members seeking symbolic connection 'are often interested in presenting themselves as one of the people'.[61]

## *Service statements*

Service statements demonstrated the actions of a Member to lobby for outcomes on behalf of the electorate. The small number of Service statements made described acts of advocacy and representation by the Member for community groups or the electorate as a whole, as well as direct acts of service, such as removing graffiti.[62] This is consistent with Petter's observation that Members largely engage in service for community groups or the whole electorate, with fewer undertaking one-on-one assistance for individuals in the electorate.[63]

[58] Koop et al, *Representation in Action*, p. 21.

[59] For example, statements by D. Le, R. Ramsey, K. Pitt, M. Scrymgour, D. Repacholi and D. Smith, Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 2024, pp. 6047-6052.

[60] Petter, *Against the Void,* pp. 395-396.

[61] Koop et al, *Representation in Action*, p. 22.

[62] For example, statements by L. Howarth, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2024, pp. 1704-1705, and J. Burns, Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2024, p. 6575.

[63] Petter, *Against the Void,* pp. 393-394.

### *Party statements*

Party statements demonstrated ties between the Member and their party, and included statements supporting a local candidate running in a state election or detailing a visit to the electorate by the party leader or others in the party executive.[64] Few statements made during 2024 could be classed exclusively as a Party statement, although party themes were more frequent in Mixed statements, as discussed below.[65] Petter noted that, in an era where political parties may be distrusted by the public, 'emphasising one's party affiliation may create tension' for the Member[66] and this hypothesis appears to be borne out in the kinds of connections drawn upon in constituency statements.

### *Mixed statements*

Mixed statements contained more than one of the above categories in the same constituency statement, either as a statement with distinct sub-statements on different connection themes[67] or as a single statement with significant crossover between multiple connection themes.[68] Statements which made only brief mention of another theme were classed with their main connection theme, rather than labelled as Mixed. Mixed statements mostly contained Symbolic and/or Policy connection themes, although some also contained Service and Party themes.

## RESULTS AND ANALYSIS

Using the classifications described above, I categorised each constituency statement made during 2024 by Member Type (Government Frontbench, Government Backbench, Opposition Frontbench, Opposition Backbench, Crossbench) and by Connection Style (Policy, Service,

[64] For example, statements by K. Pitt, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 2024, p. 7141, and C. Caldwell, Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2024, p. 1213.

[65] For example, a Mixed (Symbolic and Party) statement by A. Leigh, Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2024, p. 3376.

[66] Petter, *Against the Void*, p. 388.

[67] For example, a statement with three sub-statements, two Symbolic and one Policy, by S. Rae, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 2024, p. 5769.

[68] For example, a statement with both Symbolic and Policy themes throughout by L. Coker, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 2024, p. 6433.

Symbolic, Party, Mixed) to understand the differences in the statement content across groups of Members. The results of this classification are included below at Table 2.

**Table 2. Number of Constituency Statements by Member Type and Connection Style**

| | Number of Statements (% by Member Type) | | | | |
|---|---|---|---|---|---|
| | **Government Frontbench** | **Government Backbench** | **Opposition Frontbench** | **Opposition Backbench** | **Crossbench** |
| **Policy** | 27 (23%) | 56 (30%) | 51 (50%) | 46 (34%) | 37 (55%) |
| **Symbolic** | 54 (46%) | 93 (50%) | 34 (34%) | 61 (45%) | 16 (24%) |
| **Service** | 7 (6%) | 8 (4%) | 6 (6%) | 11 (8%) | 5 (7%) |
| **Party** | - | - | 1 (1%) | 5 (4%) | 1 (2%) |
| **Mixed** | 29 (25%) | 30 (16%) | 9 (9%) | 13 (10%) | 8 (12%) |

*Note: summed percentages may not total 100% due to rounding*

As Ministers made Mixed statements at a rate higher than other Members and Policy statements at a rate much lower, I examined the Mixed statements made by government frontbenchers to understand the incidence of each of the other four Connection Styles as themes within those statements. Each of those 29 Mixed statements contained two or three connection themes, and none contained all four; the final tally of themes in Mixed Statements occurring is detailed at Table 3 and is consistent with my observation above that Mixed Statements most often contained Symbolic and/or Policy themes and less commonly Service and Party themes.

**Table 3. Occurrence of Connection Style Themes in Mixed Statements made by Ministers**

| **Theme** | **No. of mixed statements containing theme** |
|---|---|
| **Policy** | 24 (83%) |
| **Symbolic** | 26 (90%) |
| **Service** | 9 (31%) |

| | |
|---|---|
| **Party** | 5 (17%) |

My findings demonstrate that the content of Ministers' constituency statements during 2024 was most often Symbolic in connection style. Almost half of all constituency statements made by Ministers were Symbolic (46 per cent of statements), a slightly higher rate than other Members on average (42 per cent). If counting Mixed statements with Symbolic themes, this rises to over two thirds of all statements by Ministers being, at least in part, Symbolic in content. Ministers' rate of Service statements was also the same as other Members on average (six per cent) and, while they did not make any Party statements, the small number of Ministers' Mixed statements involving Party elements was consistent with the low numbers of Party statements made overall by Members.

Ministers made fewer constituency statements with a Policy connection style (23 per cent) when compared to all other Members on average (39 per cent). By contrast, the Shadow Ministers and crossbenchers made policy statements at nearly twice the rate of Ministers (50 and 55 per cent, respectively); even accounting for Policy themes in most Mixed statements, Ministers still made fewer Policy statements in comparison. Additionally, I did not observe any occasions of Ministers using a Policy statement to make commentary on matters specifically relating to their portfolio. Therefore, there is no evidence to suggest that Ministers are using constituency statements to further policy agendas more than is 'normal' for other Members, or in their capacity as Ministers.

As noted above, Ministers made more Mixed statements than other Members, at almost twice the rate (25 per cent compared to 12 per cent). These Mixed statements almost always contained Symbolic and/or Policy themes, with fewer statements including Service or Party themes. The frequency of Ministers making Mixed statements may be an impact of this period being one of the few opportunities for them to speak on matters which impact their constituencies; whereas other Members may be able to split multiple matters between this period and Members' 90 second statements during a sitting, that is not open to Ministers. There is some evidence that sub-statements, whether Mixed or on a single connection theme, are valuable as individual social media clips to share with constituents.[69]

[69] For example, a Symbolic statement that was split into two YouTube videos by the Minister for Regional Development, Local Government and Territories. K. McBain, *Parliamentary Debates*, House of Representatives, 6 February 2024, pp. 85-86; Kristy McBain, 'Opening of the new Narooma Mountain bike Trails', *YouTube*, 15 February 2024. Accessed at: www.youtube.com/watch?v=48YMPApwOgY; Kristy McBain, '90th Anniversary of the Queanbeyan Bowls Club', *YouTube*, 15 February 2024. Accessed at: www.youtube.com/watch?v=gXQMfqwyS4w.

Although this model is valuable for demonstrating the differences in the content of statements made by Members for the purposes of this article, it is possible that the connection styles demonstrated in constituency statements do not reflect the style and intensity of the actual constituency work which they undertake. Future research could consider undertaking statement-based analysis as an adjunct to the type of observational studies and surveys undertaken by Koop et al and Petter. This would provide a chance to explore whether Members' connection activities and self-reported connection styles directly correspond to the connection styles shown in statements made in the House and whether this varies between Ministers and other private Members.

## CONCLUSION

In this article, I have demonstrated that implicit concerns that Ministers will misuse opportunities for private Members are not borne out in Ministers' participation in Members' three minute constituency statements in the Federation Chamber of the Australian House of Representatives. The 47th Parliament saw an increase in Ministers' participation in constituency statements; although this has come at a trade off with fewer speaking opportunities for government backbenchers when compared to previous parliaments, opportunities for all government Members are now more in proportion with their membership in the House due to changes in practice for scheduling speakers. Furthermore, application of the Representational Connections Framework to the content of statements shows that Ministers in the House of Representatives are not using this period to make statements about portfolio matters and most frequently make symbolic statements demonstrating their connection to constituents, consistent with the intent of the item of business.

See also, House of Representatives Standing Committee on Procedure, *Maintenance of the standing and sessional orders.* Parliament of Australia, Canberra, November 2024, p. 22.

# Balancing Openness and Integrity: Parliament's Role in the Age of AI and Deepfakes

**Brittany Turner**

Executive Support Officer, Legislative Council, Parliament of Victoria.

***Abstract:*** This article explores how the Parliament of Victoria balances its commitment to accessibility and transparency with the risks posed by artificial intelligence (AI) and deepfakes. Traditionally viewed as exclusive and opaque, parliaments modelled on the Westminster system, specifically the Parliament of Victoria, have sought to strengthen democracy through reforms such as live broadcasting, closed captioning, and community engagement. While these initiatives enhance public participation, they also increase the risk that parliamentary material may be manipulated and misused. The issue is significant because existing scholarship has considered misinformation and parliamentary engagement separately, but little attention has been given to how accessibility reforms may heighten exposure to deepfake technologies. The research question guiding this paper is: How can parliaments remain accessible and transparent while protecting its integrity from AI-driven threats? This paper analyses parliamentary standing orders, legislative frameworks, and international developments. It argues that while current broadcasting rules ensure accuracy in traditional media, they are inadequate for the unregulated dynamics of social platforms. The key finding is that accessibility and integrity must be jointly pursued through measures such as watermarking, civic education, and digital literacy, reframing accessibility not as a vulnerability but as a foundation for democratic resilience in the face of technological change.

## INTRODUCTION

The Parliament of Victoria, modelled on the Westminster system, carries with it a reputation for tradition and rigidity, reflecting the wider perception of such institutions as archaic and exclusive.[70] Although Australia has 'a relatively robust and resilient democracy, there remains

[70] Fotis Fitsilis, 'A Paradigm Shift for Parliaments', *International Journal of Parliamentary Studies* 3 (2023) 1-4.

significant pockets of discontent',[71] particularly in the face of growing public demand for accessibility, transparency, and engagement. In its 2023-2026 strategic priorities, the Parliament of Victoria has committed to enhancing public awareness and access through education and direct community interaction.[72] Central to this initiative is the use of technology, including live broadcasting and closed captioning, to make parliamentary proceedings more accessible to diverse audiences, including those with hearing impairments.[73]

While these advancements represent a significant step toward demystifying Parliament and fostering public trust, they also present new challenges in the form of emerging technologies like AI and deepfakes.[74] These tools, capable of creating highly realistic but fabricated content, raise concerns about the potential misuse of parliamentary footage. Such threats, although not entirely new, have become pervasive and sophisticated, making it easier to manipulate and spread false information.[75] With politicians increasingly targeted by deepfake content globally, the risk of misinformation influencing public perception, political debates, and even elections, has grown exponentially.[76]

Parliament now faces the challenge of balancing its commitment to accessibility with the need to safeguard its integrity and maintain public confidence in its processes. While traditional broadcasting rules and standing orders aim to ensure fair and accurate use of parliamentary material, the unregulated nature of social media complicates these efforts. This article explores the Parliament of Victoria's efforts to adapt to technological change, examining how accessibility and transparency can coexist with the need to address the risks posed by AI and deepfakes, ensuring the institution remains both relevant and resilient in an evolving digital landscape.

[71] Nicholas Biddle and Matthew Gray, 'Perceptions of democracy and other political attitudes in Australia: October 2024', *POLIS The Centre for Social Political Research*, Australian National University.

[72] Department of the Legislative Council, *Annual Report 2023-24*, Parliament of Victoria, p 4.

[73] Department of Parliamentary Services, *Annual Report 2023-24*, Parliament of Victoria, pp 22-23.

[74] Aileen Walker, 'A People's Parliament?', *Parliamentary Affairs* (2012), 65, 270-280; Olivier Aubert, Joscha Jager, Making Parliamentary Debates More Accessible: Aligning Video Recordings with Text Proceedings in Open Parliament TV, *Open Parliament TV*, May 2024.

[75] Maria Pawelec, 'Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions', *Digital Society*, 2022 pp. 1-19.

[76] Andrew Ray, 'Disinformation, Deepfakes and Democracies: The Need for Legislative Reform', *UNSW Law Journal*, 44(3), pp. 983-1013.

## TENSIONS BETWEEN THE NOTION OF AN ACCESSIBLE PARLIAMENT AND CONTROL OVER THE SOURCE OF TRUTH

The Parliament of Victoria is based on the Westminster Parliament in the United Kingdom—a system that is widely respected for its historical significance and democratic traditions.[77] However, it's important to note that the Westminster Parliament is not universally admired.[78] Many observers, both in the UK and abroad, regard it as an institution that can feel outdated, exclusive, and somewhat closed off from the public.[79] These perceptions stem from its centuries-old customs, formal procedures, and the physical grandeur of its buildings, which together can create an impression of privilege and privacy rather than openness and accessibility.[80]

For readers unfamiliar with the Australian context, this is a crucial entry point: the very model on which Victoria's Parliament is built carries both prestige and criticism.[81] Understanding these mixed perceptions helps frame ongoing debates about how parliaments can balance tradition with the need for transparency and public engagement.[82]

The public does not have much knowledge about Parliament or its day-to-day activities.[83] This lack of knowledge, which can also be seen as a lack of transparency, creates a significant barrier to engagement with the public.[84] Due to the current digital society, there is also growing public expectation for transparency and accessibility.[85] Citizens now expect to be informed about politics and parliamentary activity[86], so it is evident that in order to have a true working representative democracy, it is important that the public is informed and engaged with their

[77] Susanna Kalitowski, 'Parliament for the People? Public Knowledge, Interest and Perceptions of the Westminster Parliament', *Parliamentary Affairs*, 62(2), 2009, 350-363.

[78] Philip Norton, 'Is the Westminster system of government alive and well?', *Journal of International and Comparative Law* (2022) 9(1), pp. 1-24.

[79] Walker, *A People's Parliament?*, pp. 270-280.

[80] Kalitowski, *Parliament for the People?* pp. 350-363.

[81] Walker, *A People's Parliament?*, pp. 270-280.

[82] Kalitowski, *Parliament for the People?* pp. 350-363.

[83] Kalitowski, *Parliament for the People?* pp. 350-363.

[84] Kalitowski, *Parliament for the People?* pp. 350-363.

[85] Cristina Leston-Bandeira, 'How public engagement has become a must for parliaments in today's democracies', *Australasian Parliamentary Review*, 37(2), 2022, p. 9.

[86] Leston-Bandeira, *How public engagement has become a must for parliaments in toda*y*'s democracies*, p. 9

Parliament.[87]

The Parliament of Victoria has signified the importance of democracy and accessibility, with one of its strategic priorities for 2023-26 being creating 'greater awareness of and access to Parliament through direct community engagement and education'.[88] The overarching theme for the Parliament of Victoria's strategic plan is strengthening democracy by making the Parliament more accessible and increasing engagement with the community.[89] This reflects key points made by the Inter-Parliamentary Union about the importance of public engagement with parliaments, especially the need for parliaments to be future focussed by keeping up with technological change.[90]

One of the measures that the Parliament of Victoria has introduced to improve accessibility is the live closed captioning of the chamber proceedings.[91] Although formal written records of proceedings are available through *Hansard*, the Legislative Assembly's *Votes and Proceedings* or the Legislative Council's *Minutes*, live broadcasting has enabled the public to watch proceedings in real time without having to physically attend the building. This technology assists in disseminating information about Parliament and the role of members, effectively opening Parliament up to the public and demystifying it.[92] The introduction of closed captioning has further improved accessibility, allowing the hearing-impaired to engage with the Parliament in real time.[93] Live broadcasting is currently available on the Parliament of Victoria's website, with Question Time and other debates of public importance posted on YouTube.

---

[87] Kalitowski, *Parliament for the People?* pp. 350-363; Jorn von Lucke, Fotios Fitsilis and Stephane Gagnon, 'Comparative Analysis of the Relevance and Priority for Artificial Intelligence Tools, Services and Open Questions in the Hellenic, Argentinian and Canadian Parliaments', *International Journal of Parliamentary Studies*, 2024, pp. 1-30; Fotios Fitsilis, *Beyond standard parliamentary work:side activities of modern representative institutions*, Working paper – 3. Global Conference on Parliamentary Studies, 10 June 2024.

[88] Department of the Legislative Council, *Annual Report 2023-24*, Parliament of Victoria, p 4.

[89] Department of the Legislative Council, *Annual Report 2023-24*, Parliament of Victoria, p 4.

[90] Inter-Parliamentary Union *Public engagement in the work of parliament,* Global Parliamentary Report 2022*,* p. 8.

[91] Department of Parliamentary Services, *Annual Report 2023-24*, Parliament of Victoria, pp 22-23.

[92] Aileen Walker, 'A People's Parliament?', *Parliamentary Affairs*, 65, 2012 pp. 270-280; Aubert, Olivier, Jager, Joscha, *'Making Parliamentary Debates More Accessible: Aligning Video Recordings with Text Proceedings in Open Parliament TV'*; Parliamentary broadcasting – context, engagement and evolution – an Irish perspective, Donnacha McKeon, 10 January 2023, Accessed at: https://www.ipu.org/event/parliamentary-broadcasting-context-engagement-and-evolution-irish-perspective

[93] Department of Parliamentary Services, *Annual Report 2023-24*, Parliament of Victoria, pp 22-23.

Whilst this accessibility has been positive for engaging with Victorians and allowing the public to easily keep up to date with parliamentary proceedings, with the flood of new technology, in particular Artificial Intelligence (AI) and deepfakes, one wonders if the hours of available footage of Members of Parliament will be used maliciously. This threat is not a new phenomenon, media manipulation is an age-old issue, and this is simply a modern manifestation.[94] Prior to the invention of the printing press, books and information were written by hand and closely guarded.[95] Mass printing production was looked upon suspiciously and this saw the beginning of propaganda and misinformation being printed and shared.[96] There are similarities to this with how carefully parliamentary records are produced and kept, with accuracy being a key tenet. Hard copies of parliamentary records are carefully guarded yet with growing technologies, there is a question of whether parliamentary records posted online (and the voices and faces of members) are at threat.[97]

## CURRENT BROADCASTING RULES IN VICTORIA

Broadcast is defined under the Parliament of Victoria's Legislative Council Standing Orders as the 'transmission of proceedings, by any medium, including but not limited to television, radio, internet and still photography, and including any broadcasting'.[98] The Legislative Council authorises the broadcast of proceedings on terms and conditions set out by the President.[99] Filming and photography may only occur when the Chair is presiding over the House or Committee, and it may only include activities related to the Legislative Council or Committee proceedings.[100] Importantly, the Legislative Council Standing Orders set out the rules for use of the broadcast, including that it needs to be a 'fair and accurate' report of the proceedings and a 'reasonable balanced presentation of views'.[101] It also states it must not be used 'in a way

[94] Pawelec, *Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions*, pp. 1-19.

[95] Foley, Dr Catherine, Australia's Chief Scientist, Australian Government, *Official Committee Hansard*, Parliament of Australia, 20 May 2024, pp. 14-21.

[96] Foley, Dr Catherine, Australia's Chief Scientist, Australian Government, *Official Committee Hansard*, Parliament of Australia, 20 May 2024, pp. 14-21.

[97] Von Lucke, Jorn, Frank, Sander, 'A few Thoughts on the Use of ChatGPT, GPT 3.5, GPT-4 and LLMs in Parliaments: Reflecting on the results of experimenting with LLMs in the parliamentarian context', *Digital Government: Research and Practice* 6(2) 2025, pp. 1-21.

[98] Parliament of Victoria, *Standing Orders*, Legislative Council, Chapter 20.01

[99] *Standing Orders*, Chapter 20.02

[100] *Standing Orders*, Chapter 20.03

[101] *Standing Orders*, Chapter 20.04

that is misleading'.[102]

The Legislative Assembly Standing Orders similarly defines broadcast as 'transmission to the public by radio, television, landline, the internet or any other electronic means' and includes rebroadcast. [103] The Legislative Assembly Standing Orders cover off on accredited media and the permission they must seek from the Speaker. [104] There are numerous rules that must be adhered to when broadcasting the proceedings, such as no undue fixation on one member in particular, no misrepresenting the context of the proceedings, the seating position or the office held and ensuring a balance of government and non-government members and their differing views.[105] Additionally, the Legislative Assembly Standing Orders outline what the proceedings must not be used for. Unsurprisingly, the recordings must not be used for 'political party advertising or election campaigns', 'commercial sponsorship or commercial advertising' or 'media advertisements or promotion'. [106] The Standing Orders also explicitly state that recordings must not be used for 'satire or ridicule'.[107] Complaints of breaches can be made to the Speaker or President to decide on an outcome. It is important to note that this is a very complicated space for parliaments to govern as they cannot police social media. Members are public figures who are often provocative in the House, and it is not uncommon for this to be used against them on social media after the fact.

The *Constitution Act 1975* (Vic) also touches on the transmission and broadcasting of Parliamentary proceedings.[108] Section 74AA of the *Constitution Act 1975* (Vic) sets out that no civil or criminal action or proceedings will occur for the transmission, broadcast or rebroadcast of parliamentary or committee proceedings if there is authority of the Legislative Assembly, Legislative Council or its Committees.[109]

[102] *Standing Orders*, Chapter 20.04

[103] *Standing Orders*, Chapter 27, 232 (1)

[104] *Standing Orders*, Chapter 27, 232 (2)

[105] *Standing Orders*, Chapter 27, 232 (3)

[106] *Standing Orders*, Chapter 27, 232 (3)

[107] *Standing Orders*, Chapter 27, 232 (3)

[108] *Constitution Act 1975* (Vic), s74AA

[109] *Constitution Act 1975* (Vic), s74AA

## THE PROLIFERATION OF POLITICAL DEEPFAKES

Deepfakes, AI and related technologies are becoming increasingly prevalent and beginning to affect parliaments around the world.[110] The *Artificial Intelligence Act (Regulation (EU) 2024/1689)* defines deepfakes as 'synthetic or manipulated image, audio, or video content, which would deceptively seem to be truthful or authentic, and that resembles existing individuals, places, objects or other events or entities'.[111] Once perceived as a threat exclusive to celebrities for face swapping and pornographic content,[112] it is reported that politicians are increasingly becoming the target of deepfake materials.[113]

From previous technology that was clunky and easy to spot, recent advancements have meant that the quality of deepfakes are now almost impossible to detect with the naked eye.[114] Previously, hundreds of images were required in order to make a convincing deepfake, whereas now a realistic deepfake can be generated with a small number of images.[115] Along with advancements that create the potential for high quality deepfakes, it is also easier than ever to share and spread the material with thousands of people via social media.[116]

Videos shot with consistent, front-on lighting are easier to replicate, putting footage of politicians at risk.[117] Not only have we seen numerous examples of political deepfakes in the

[110] Jorn von Lucke, Fotios Fitsilis and Stephane Gagnon, 'Comparative Analysis of the Relevance and Priority for Artificial Intelligence Tools, Services and Open Questions in the Hellenic, Argentinian and Canadian Parliaments', *International Journal of Parliamentary Studies* (2024), pp. 1-30

[111] *Artificial Intelligence Act (Regulation (EU) 2024/1689), Article 3(60)*; Felipe Romero Moreno, 'Generative AI and deepfakes: a human rights approach to tackling harmful content', *International Review of Law, Computers and Technology 2024* 38(3), pp. 297-326

[112] Felipe Romero Moreno, 'Generative AI and deepfakes: a human rights approach to tackling harmful content', *International Review of Law, Computers and Technology 2024* 38(3), pp. 297-326

[113] Paula Tabea Berenzen, Deepfakes as a Threat to Democracy – Perceptions, Challenges and Implications of Deepfake Discourses in Democracies, University of Twente, Enschede & Westfälische Wilhelms-Universität, Münster 2024, pp. 20-25; Maria Pawelec, Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions, *Digital Society* (2022), pp. 1-19

[114] Todd C. Helmus, 'Artificial Intelligence, Deepfakes and Disinformation: A Primer', *RAND Corporation* 2022, pp. 3-5; Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform*, pp. 983-1013

[115] Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform*, pp. 983-1013

[116] Pawelec, *Deepfakes and Democracy (Theory): How Synthetic Audio-Visual Media for Disinformation and Hate Speech Threaten Core Democratic Functions*, pp. 1-19

[117] Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform*, pp. 983-1013

Unites States and other countries – such as the deepfake of Donald Trump getting arrested[118] – but we are also seeing an increasing amount in Australia. It has been over four years since the first political deepfake in Australia debuted, of the then Queensland Premier Annastacia Palaszczuk; and although if you looked closely, it was marked as fake, it has had over one million views.[119] Since then, there has been numerous other examples of political deepfakes in Australia, such as satirical deepfakes of Stephen Miles and Peter Dutton dancing.[120]

The Australian Senate recently completed a Select Committee on Adopting AI. Whilst the Committee looked at a breadth of matters concerning AI in Australia, it raised significant issues concerning the upcoming federal election.[121] The Committee noted that deepfakes can be produced at significant volumes and low cost, thus potential malicious actors are able to take advantage of this growing technology.[122] If political deepfakes are allowed to run rampant, it is possible that it will influence the result of political debates or elections, as well as erode public trust and lead to uncertainty.[123]

## MAINTAINING AN ACCESSIBLE AND TRANSPARENT PARLIAMENT AMID TECHNOLOGICAL CHANGE

Parliaments around the world have shown the ability to adapt to fast-changing environments, which was evident during the COVID pandemic.[124] Although lockdowns and regulations forced the hand of many parliaments, this landscape showed that parliaments were able to work in environments previously thought of as impossible.[125] The ever-increasing technological

[118] '*Fake images of Trump arrest show giant step for AI's disruptive power*', 22 March 2023, The Washington Post. Accessed at: https://www.washingtonpost.com/politics/2023/03/22/trump-arrest-deepfakes/

[119] ABC News (Australia) (2024, October 8), *Could digitally altered videos of politicians threaten our democracy?*, *ABC News* [Video], YouTube. Accessed at: https://www.youtube.com/watch?v=1DFz-_9Sdwo

[120] ABC News *Could digitally altered videos of politicians threaten our democracy?*

[121] Senate Select Committee on Adopting Artificial Intelligence, Parliament of Australia, *Final Report*, November 2024, p. 1

[122] Senate Select Committee on Adopting Artificial Intelligence, *Final Report*, p. 10

[123] Senate Select Committee on Adopting Artificial Intelligence, *Final Report*,, p. 11

[124] Francesco Bromo, Paolo Gambacciani, & Marco Improta (2024), 'Governments and parliaments in a state of emergency: what can we learn from the COVID-19 pandemic?', *The Journal of Legislative Studies*, pp. 1-29

[125] The Hon. Jonathan O'Dea MP, Speaker of the NSW Legislative Assembly, 'Socially Distant but Democratically Together: Towards a Virtual Parliament in NSW', *Australasian Parliamentary Review* 34(2) 2020, pp. 29-54;

advancements do not present as urgent or unavoidable like with COVID but whether parliaments are ready or not, this technology is going to start affecting every aspect of working parliaments.[126]

One thing that the pandemic helped fast-track for parliaments was the shift of certain functions online, which were previously considered only possible in person. This has helped put accessibility on the front foot, as parliaments were forced to look at ways that both the public and staff could interact and work with parliament, without having to physically attend the building.[127] With these accessibility advancements, parliaments have inadvertently loosened the grip on maintaining control over the source of information. Documents that previously needed to be hand delivered in person with an actual signature are now accepted with a digital signature online.[128] One could argue that this was a necessary change in procedure, whereas arguments against posting or publishing (or tightening the rules around) parliamentary proceedings would be seen as lessening transparency and creating a barrier for the public to access parliament. Submissions to the Victorian Law Reform Commission's project on Artificial Intelligence in Victoria's Courts and Tribunals show that other institutions are also grappling with these challenges.[129]

As previously mentioned, the Parliament of Victoria has made clear its commitment to accessibility and transparency. Although this is undoubtedly important – especially in a representative democracy – considerations must be made to the rapid advancements in technology, particularly in AI and deepfakes within the political context. Victorian Standing Orders in both the Legislative Assembly and Legislative Council emphasise that any broadcast or rebroadcast material must be in context, not misleading and a fair and accurate report of proceedings.[130] Although this is seemingly easy to govern for accredited media in Victoria, social media is fast becoming like the Wild West, with users using fake profiles to spread

Jonathan Malloy, 'The Adaptation of Parliament's Multiple Roles to COVID-19', *Canadian Journal of Political Science* (2020), 53, pp. 305-309

[126] Fotios Fitsilis, Jorn von Lucke, Franklin De Vrieze, *Guidelines for AI in Parliaments,* July 2024

[127] Moulds, Sarah, 'As the First "remote" Sitting Starts in Canberra, Virtual Parliaments Should Be the New Norm, Not a COVID Bandaid'*, The Conversation*, 24 August 2020, Accessed at: https://theconversation.com/as-the-first-remote-sitting-starts-in-canberra-virtual-parliaments-should-be-the-new-norm-not-a-covid-bandaid-144737

[128] E.g. The Victorian Parliament will accept digital copies of tabling letters rather than the original signed copy

[129] Court Services Victoria, *Artificial Intelligence in Victoria's Courts and Tribunals, Response to Victoria Law Reform Commission's Consultation Paper,* 17 February 2025; Victorian Bar Association, *Artificial Intelligence in Victoria's Courts and Tribunals, Response to Victoria Law Reform Commission's Consultation Paper*

[130] Parliament of Victoria, Legislative Council Standing Orders, Chapter 20.04; Parliament of Victoria, Legislative Assembly Standing Orders, Chapter 27, 232 (3).

deepfakes or disinformation. These concerns were echoed in the Australian Senate's inquiry into social media and the resulting child safety laws introduced in Australia.[131]

Australians are increasingly accessing their news content through social media, coinciding with the trend to use accessible and shareable content.[132] As a flow on effect of being both accessible and shareable, it has meant that deepfakes and disinformation can be shared widely.[133] This means that as the public are turning towards social media platforms for their news, it is easier than ever for fake news to be spread and shared.[134] Currently, there are no safeguards or fact-checking with deepfakes like there is with traditional media and news outlets. Effectively, anyone could post and share false news or a deepfake without being aware of it. Deepfakes also appeal to a visceral level more than any text or picture ever would, so they appear particularly credible.[135] Even if something is proven to be fake, more likely than not, the damage is already done.

In light of this, it has become more important than ever that parliamentary footage is kept and used carefully. This may prove to be important to the Victorian Parliament, given that broadcast proceedings are currently only available to live-stream from the Victorian Parliament website, or certain clips from YouTube, which may be prone to misuse. Watermarking – both visible and invisible – is marked as a measure in preventing deepfakes, however given the rapidly advancing technology that can remove watermarks, this is far from fool-proof.[136] Civic education and digital literacy remains to be the last line of defence, the public must be able to identify AI generated threats and manipulation.[137] This has been echoed in the United States, with the US National Artificial Intelligence Advisory Committee listing recommendations for

[131] Social media: the good, the bad and the ugly – Final Report, Senate, Parliament of Australia. Accessed on: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Social_Media_and_Australian_Society/SocialMedia/Final_report; Online Safety Act 2021 (Cth), S4A

[132] Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform*, pp. 983-1013

[133] Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform,* pp. 983-1013

[134] Ray, *Disinformation, Deepfakes and Democracies: The Need for Legislative Reform,* pp. 983-1013

[135] Kwok, A. O. J., & Koh, S. G. M, *Deepfake: A social construction of technology perspective. Current issues in Tourism*, pp. 1-5. Accessed at: https://kr-asia.com/did-myanmars-military-deepfake-a-ministers-corruption-confession

[136] Anna Broinowski and Fiona R. Maron, 'Beyond the deepfake problem: Benefits, risks and regulation of generative AI screen technologies', *Media International Australia*, pp. 1-17

[137] Parliament of Australia, Senate Select Committee on Adopting Artificial Intelligence, November 2024, p. 29

enhancing AI literacy in America.[138]

## CONCLUSION

As parliaments around the world face increasing technological advancements, including AI and deepfakes, the challenge of balancing accessibility with integrity has become more critical than ever. The Parliament of Victoria's strategic commitment to transparency and public engagement underscores its efforts in fostering a more inclusive democracy. Initiatives like live broadcasting and closed captioning have made parliamentary processes more accessible, opening government and parliament operations and fostering trust between parliament and the public.

However, the rise of AI-generated deepfakes poses significant threats to this progress. The potential for political misinformation, reputational damage, and erosion of public trust demands urgent and proactive measures. While traditional broadcasting rules provide guidelines for the ethical and accurate use of parliamentary material, they are limited in scope when it comes to addressing the unregulated nature of social media.

To navigate this evolving landscape, parliaments must adopt multifaceted solutions, such as watermarking parliamentary footage, coupled with civic education and digital literacy programs. Civic education and AI literacy will be critical in empowering the public to critically assess information presented to them.[139] Lessons can also be drawn from international models like the *Artificial Intelligence Act (Regulation (EU) 2024/1689)*, which emphasize accuracy and compatibility, which highlights the value of risk-based approaches in digital content regulation.[140]

Ultimately, the resilience and relevance of democratic institutions like the Parliament of Victoria, depend on their ability to remain open and accessible whilst safeguarding integrity. By striking the right balance between transparency and protection against technological threats, the Parliament can uphold representative democracy, strengthen public confidence, and ensure its operations remain trustworthy and resilient in the face of inevitable technological change.

---

[138] Yucong Lao, Yukun You, 'Unravelling generative AI in BBC News: application, impact, literacy and governance', *Transforming Government People Process and Policy*, 5 April 2024

[139] Juliane Muller, *Meeting the EU AI Act's AI Literacy Goals: Lessons from IDEA,* 16 June 2025, Accessed at: https://www.idea.int/news/meeting-eu-ai-acts-ai-literacy-goals-lessons-idea

[140] European Commission, AI Act, Accessed at: https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai#ecl-inpage-a-solution-for-the-trustworthy-use-of-large-ai-models

# Legal Jurisdictions in a Digital Age: Challenges and Opportunities in Parliamentary Oversight of Social Media Platforms

**Rachel Tan**

Lecturer in Law (University of Waikato, New Zealand).

***Abstract:*** This article explores the challenges and opportunities of legal jurisdictions in the digital age, focusing on parliamentary oversight of social media platforms. The Christchurch shootings in New Zealand highlighted the internet's role in distributing harmful content, underscoring the need for effective regulation. Similarly, the potential TikTok ban in the US demonstrates the complexities of addressing national security concerns, data privacy, and foreign influence through legislative action. This article examines the Harvard Research Draft Convention on Jurisdiction with Respect to Crime and principles of sovereignty, comity, and non-intervention to highlight the evolving landscape of internet jurisdiction. It also emphasises the importance of balancing national laws with international standards to ensure fair and effective regulation.

## INTRODUCTION

To understand legal jurisdiction in the digital age, it is necessary to first look at its traditional form. Jurisdiction has long been tied to geography, where a state's laws apply to people, conduct, and events within its territory.[1] The internet disrupts this logic. Its borderless nature allows communication, trade, and interaction to cross borders instantly, making it harder to identify which laws apply. This means parliaments and courts now face difficulties that older,

[1] Reidenberg, J. R. (2005). Technology and internet jurisdiction. *University of Pennsylvania law review*, *153*(6), 1951-1974

territory-based concepts of jurisdiction are not well equipped to resolve.

The internet's challenge to traditional ideas of jurisdiction can be broken down into two main problems. The first is its lack of a central authority.[2] Unlike other regulated spaces, the internet is not owned or controlled by any single government or company. It operates as a borderless environment, where users move through a space that is everywhere and nowhere at the same time.[3] The second issue is the difficulty of applying geographically-based legal rules to online activities, which often take place across several jurisdictions at once. This is considered further below.

The second problem lies in applying geographically-based laws to activities that cross borders simultaneously, raising questions about how jurisdiction can remain consistent with democratic values.[4]

On 15 March 2019, Brenton Tarrant carried out terrorist attacks on two mosques in Christchurch, killing 51 people and injuring dozens more. The attacks shocked New Zealand and the world, but what made them distinct was Tarrant's use of social media to livestream the massacre in real time. This digital element transformed the crime from a national tragedy into a global event, and it forced New Zealand's legal and regulatory systems to confront the challenge of online content that crosses borders instantly.[5]

What made the attack even more disturbing was Tarrant's decision to broadcast it live. He mounted a camera on his helmet and streamed the killings in real time on Facebook and other platforms.[6] The livestream turned the crime into global content, exposing the weakness of existing laws and demonstrating how acts of extreme violence can spread instantly across borders.[7]

---

[2] Nehaluddin Ahmad and Norulaziemah Zulkiffle, 'Jurisdiction Issues in Cyberspace: An Overview in Respect of Brunei and Malaysia Compared to The United States' System' *Journal of Southeast Asian Research Article* 2022, p.1-10.

[3] Ahmad and Zulkiffle, *'Jurisdiction Issues in Cyberspace: An Overview in Respect of Brunei and Malaysia Compared to The United States' System'*, p. 2.

[4] AllahRakha, N. (2024). Rethinking digital borders to address jurisdiction and governance in the global digital economy. *Int. J. Law Policy*, *2*(1) p. 2.

[5] BBC, 'Christchurch shootings: 49 dead in New Zealand mosque attacks'. Accessed at: https://www.bbc.com/news/world-asia-47578798

[6]Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 , '2. The terrorist attack'. Accessed at: https://christchurchattack.royalcommission.nz/the-report/part-1-purpose-and-process/the-terrorist-attack

[7] *R v Tarrant* [2020] NZHC 2192.

Brenton Tarrant live-streamed his attack on two mosques in Christchurch, New Zealand, broadcasting horrific acts of violence via social media. The Classification Office deemed the livestream objectionable under section 3(1) of the *Films, Videos, and Publications Classification Act* (Classifications Act) due to its extreme violence, cruelty, and potential to incite further radicalisation.[8] This case exemplifies the complexities of applying traditional legal frameworks to digital content, highlighting the urgent need for reform to address internet-related offences effectively. [9]

For Parliament, the livestream exposed a legislative gap. The FVPC Act, drafted for films and publications, was stretched to cover digital livestreaming. This demonstrates the difficulty of relying on existing statutory frameworks without proactive legislative reform. The Classification Office also noted the use of extremist memes and cultural references in Tarrant's footage, including symbols tied to white supremacy and anti-immigrant sentiment. [10] These references, along with his dehumanising portrayal of victims, further justified the classification of the content as objectionable under the FVPC Act, highlighting the dangerous influence such material could have in inciting further violence. [11]

The Classification Office may decide upon examination and classification following section 23(2) of the Classifications Act. The reliance on administrative bodies like the Classification Office underscores the absence of direct parliamentary mechanisms for regulating harmful online content. Oversight remains reactive, which raises questions about whether legislatures are abdicating too much responsibility to regulators. As a result of considering the aforementioned cultural references and with contemplation of section 3(4)(a)-(f) of the Classifications Act[12], the Classifications Office deemed that the livestream footage contained extreme violence and extreme cruelty inflicted on the victims. Upon contemplating those considerations, the Classifications Office rationalised that it is in the public's best interest that the footage is objectionable because:

[8] *Film, Video, and Publications Classifications Act 1993* (NZ) s3(1)

[9] The Classification Office - Te Mana Whakaatu, 'Christchurch Mosque Attack Livestream', Accessed at: <https://www.classificationoffice.govt.nz/news/featured-classification-decisions/christchurch-mosque-attack-livestream/>.

[10] The Classification Office - Te Mana Whakaatu, 'Christchurch Mosque Attack Livestream'.

[11] The Classification Office - Te Mana Whakaatu, 'Christchurch Mosque Attack Livestream'.

[12] The Classification Office - Te Mana Whakaatu, 'Christchurch Mosque Attack Livestream'.

> *1. It would be traumatic for the relatives and friends of victims to view;*
>
> *2. It could bring about re-victimisation for survivors if the video is made public and that strangers are viewing it too;*
>
> *3. It could provide a negative neurological effect on children and young persons as the video is substantially shocking, disturbing, traumatizing to watch. Risk of psychological disturbance;*
>
> *4. It can be used as a propaganda tool to recruit extremist especially those susceptible to being radicalised;*
>
> *5. The video may serve as a form of 'manual' on the manner to conduct a mass murder;*
>
> *6. If the video continues to being shared, the author that is the owner and creator of the video gets recognition and notoriety by way of violent means*[13]

This highlighted the limits of existing legislation when confronting online harms. Usually, as with other criminal offences, the courts will determine if a something is objectionable or not. For it to be deemed *objectionable*, a publication will meet the deliberation of the Classifications Office where the Chief Sensor makes the final judgement.[14] With the Christchurch shooting, the terrorist manifesto that had been written and shared online was also subject to classification proceedings rather than judicial determination.[15] The Classification Office classified the manifesto as objectionable under the Films, Videos, and Publications Classification Act 1993, a decision later upheld by the Film and Literature Board of Review. While the courts did not directly rule on the manifesto's classification, the High Court in *R v Tarrant* acknowledged the role of the manifesto in evidencing the offender's extremist motivations.[16]

The same effect was applied to Tarrant's terrorist manifesto following the Christchurch

[13] The Classification Office - Te Mana Whakaatu, 'Christchurch Mosque Attack Livestream'.

[14] *Film, Video, and Publications Classifications Act 1993* (NZ) s77.

[15]The Classification Office - Te Mana Whakaatu, 'The Great Replacement classification decision' Accessed at: https://www.classificationoffice.govt.nz/news/news-items/the-great-replacement-classification-decision/

[16] *R v Tarrant* [2020] NZHC 2192 at [63].

shootings, which propagated extremist ideologies, such as white supremacy and anti-immigrant sentiment, under the guise of protecting white cultural identity. The manifesto included racist narratives that contributed to its classification as objectionable under New Zealand's Classifications Act. By disseminating such violent and hateful ideas, the manifesto became a dangerous tool for inciting further violence, making its prohibition crucial for preventing harm and deterring the spread of extremist ideologies.

The Classifications Act has often been reactionary, responding to events like the Christchurch shootings rather than proactively addressing the digital age's challenges. This highlights the need for legislative reform. While the judiciary has had to creatively interpret the Act to encompass internet-related offences, such as classifying the terrorist manifesto as objectionable, parliamentary oversight is crucial in updating legal frameworks. This would ensure that laws effectively regulate harmful content across borders.

As part of the response to the recommendations by the Royal Commission of Inquiry into the attacks in Christchurch in 2019[17], the Government at the time put forward the 'Proposal against incitement of hatred and discrimination' ('the Proposal') by the Ministry of Justice. [18] The premise behind these proposals was to address the root causes of extremism and foster social cohesion within the community as there are gaps in the current legislative framework. [19] Additionally, the Proposal emphasised the Crown's obligations under Te Tiriti o Waitangi, a foundational document recognised by government agencies and highlighted by the Royal Commission in framing New Zealand's constitutional context and obligations to Māori.[20] This foundational document holds significant relevance in shaping incitement laws and safeguarding against discrimination, as outlined in both the Human Rights Act and the

[17] Royal Commission of Inquiry Into The Terrorist Attack On Christchurch Mosques (15 March 2019 )'Questions about the Royal Commission of Inquiry', Accessed at: <https://christchurchattack.royalcommission.nz/about-the-inquiry/questions-about-the-royal-commission-of-inquiry/>.

[18] Ministry of Justice, 'Proposal against incitement of hatred and discrimination', Accessed at: <https://www.justice.govt.nz/assets/Documents/Publications/Incitement-Discussion-Document.pdf>.

[19] Ministry of Justice, 'Proposal against incitement of hatred and discrimination'.

[20] Royal Commission of Inquiry Into The Terrorist Attack On Christchurch Mosques (15 March 2019) '5. Recommendations to improve social cohesion and New Zealand's response to our increasingly diverse population', Accessed at:< https://christchurchattack.royalcommission.nz/the-report/findings-and-recommendations/chapter-5 >

recommendations put forth in the Proposal.[21] This is because Māori communities, in particular, face the harmful effects of hate speech and are currently protected under incitement legislation addressing 'race' or 'ethnic origin.'[22] The concepts outlined in the Proposal aimed to strengthen protections for ethnic groups, including Māori, against hate speech.[23] In addition, these enhanced protections will extend to Māori individuals facing discrimination based on other prohibited grounds, such as in the case of takatāpui.[24] Regrettably, the ambitious Proposal outlined above was abandoned following the change in government. The then Labour administration lost the subsequent general elections, which means there is no continuity for this Proposal to progress into a Bill, as it does not align with the objectives or mandates of the current coalition government in 2024. This demonstrates how parliamentary oversight is not only about legal design but also political continuity. Digital regulation can easily stall when priorities shift between governments, showing the need for institutional mechanisms that embed long-term safeguards beyond the electoral cycle.

This case exemplifies the complexities of regulating digital content across borders. It underscores the challenges parliaments face in updating outdated legal frameworks like the FVPC Act to reflect the reality of internet-based offences. In the wake of incidents like the Christchurch attack, parliaments worldwide have recognised the need for tighter regulation of social media platforms.[25] For instance, the New Zealand Parliamentary Service recently banned TikTok from parliamentary devices due to security risks, demonstrating the increasing role of parliaments in overseeing digital platforms.[26]

[21] Royal Commission of Inquiry Into The Terrorist Attack On Christchurch Mosques (15 March 2019 )'Questions about the Royal Commission of Inquiry', Accessed at: <https://christchurchattack.royalcommission.nz/about-the-inquiry/questions-about-the-royal-commission-of-inquiry/>.

[22] Ministry of Justice, 'Proposal against incitement of hatred and discrimination'.

[23] Ministry of Justice, 'Proposal against incitement of hatred and discrimination'.

[24] Te Aka Māori Dictionary, 'Takatāpui' Accessed at: <https://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=takatapui>. *Takatāpui* is defined as (noun) lesbian, gay, homosexual, gay men and women.

[25] House of Representatives Select Committee on Social Media and Online Safety *Social Media and Online Safety* (March 2022) p. 71.

[26] Rafael Gonzalez-Montero, 'Media statement: TikTok on Parliamentary Service devices', *New Zealand Parliament Pāremata Aotearoa*, 17 March 2023, Accessed at https://www.parliament.nz/en/footer/about-us/parliamentary-service/parliamentary-service-media-releases/media-statement-tiktok-on-parliamentary-service-devices/

## THE HARVARD RESEARCH DRAFT CONVENTION ON JURISDICTION WITH RESPECT TO CRIME (HARVARD DRAFT)

The global reach of digital platforms underscores the need for international cooperation on jurisdiction. The Harvard Research Draft Convention on Jurisdiction with Respect to Crime published in 1935 in the American Journal of International Law, was one of the earliest efforts to systematise jurisdictional principles. Expert in Internet jurisdiction, Professor Dan J.B. Svantesson argues that jurisdiction is a relevant matter to the internet and that law enforcement would face challenges arising from both traditional crime and cybercrime if a state adopts a territoriality-centric approach to jurisdiction.[27]

The Harvard Research Draft Convention on Jurisdiction with Respect to Crime, also known as the 'Harvard Draft', was published in the American Journal of International Law in 1935, marking a significant advancement in international law.[28] It is reasonable to assume that the framework remains influential in legal scholarship, though states have diverged in practice.[29]

The Territoriality principle holds immense significance, as highlighted in the Harvard Draft, where it is deemed of primary importance and essential in nature.[30] Notably, applying this concept in today's culture poses considerable challenges, particularly in the context of the internet, where its adaptation has proven to be high.[31] The idea that it is difficult or perhaps impossible to identify the location of activities that take place online was a central theme in early discussions, further complicating the application to online realms.

Continued dialogue remains imperative, especially in the context of cloud computing. However, the ongoing debate has advanced to a critical juncture where the primary concern revolves around the extensive online activities that traverse state borders without establishing substantial, tangible connections to those specific states.[32] This evolution of the conversation underscores the urgency of addressing the complex interplay between online activities and

[27] Dan Jerker B. Svantesson '"Lagom jurisdiction" - What drinking etiquette can teach us about internet jurisdiction and Google France"' *Masaryk University Journal of Law and Technology* 29, 2018, p. 33.

[28] Dan Jerker B. Svantesson, 'A New Jurisprudential Framework For Jurisdiction: Beyond The Harvard Draft'. *AJIL Unbound* 109 2015, p.69.

[29] Svantesson, 'A New Jurisprudential Framework For Jurisdiction: Beyond The Harvard Draft'. *AJIL Unbound* 109, 2015, p.73.

[30] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.73.

[31] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.73.

[32] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.69.

territorial jurisdictions.[33]

Svantesson argues that the ongoing discussions surrounding these issues serve as a potential catalyst, instigating a transformative shift in the way international law grapples with the multifaceted concept of jurisdiction.[34] These debates unfold within a complex framework that encompasses not only the Harvard Draft principles but also intertwines additional elements such as (territorial) sovereignty, comity, and the obligation of non-interference. [35] Svantesson highlights the shortcomings of the current sovereignty-comity paradigm and calls for reform to meet digital challenges.[36] Furthermore, Svantesson emphasises the scarcity of approaches to the challenge of internet jurisdiction.[37] For parliaments, the lesson is that reliance on outdated jurisdictional models risks creating regulatory blind spots. While scholars debate sovereignty and comity, legislators must craft rules that are workable in practice, particularly for oversight of multinational platforms.

The Harvard Draft delineates three fundamental tenets encapsulating the jurisdictional principles. These fundamental principles constrain the exercise of jurisdiction in the absence of binding international law obligations: firstly, establishing a substantial connection between the matter and the asserting state; secondly, the demonstrating of a legitimate interest by the asserting state in the matter; and thirdly, prioritising a delicate equilibrium between the state's legitimate interests and those of other relevant entities.[38]

While this latter principle may not overtly manifest in the Harvard Draft as explicitly as the preceding two, its practical application becomes discernible through an examination of related principles, such as the protective principle, in real-world scenarios.[39] The concerns regarding jurisdictional allegations are significantly influenced by the three core tenets outlined in the Harvard Draft. The pragmatic implementations of these principles, namely in the analysis of concepts such as the protective principle, provide valuable insights into the intricate complexity inherent in the field of international law. As Ryngaert observes, overlapping and concurrent assertions of jurisdiction are an almost inevitable consequence of global

[33] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.69.

[34] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.71.

[35] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.69.

[36] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p 72.

[37] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p 58.

[38] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.69.

[39] Svantesson, 'A New Jurisprudential Framework For Jurisdiction', p.69.

interconnectivity, requiring coordination rather than rigid adherence to territorial exclusivity.[40] More recently, Scher-Zagier warns that digital-era treaties such as the UN Cybercrime Convention risk producing 'jurisdictional creep', as states stretch permissive bases of jurisdiction like passive personality beyond their original limits.[41] These perspectives highlight how enduring principles from the Harvard Draft remain relevant but must be applied cautiously in contemporary digital regulation. For parliaments, the Harvard Draft's principles remain a useful reference point, but legislative frameworks must evolve to clarify how national jurisdiction applies to global platforms.

The internet's borderless nature complicates legal jurisdiction, particularly when regulating platforms like Facebook and Google. An example is Facebook's decision in 2021 to block Australian news organisations after the Australian government introduced a media law to ensure proper compensation for media content.[42] This case underscores how global platforms challenge national jurisdiction when local laws affect international operations. For parliaments, such disputes highlight the difficulty of crafting laws that are enforceable at home yet workable in a global digital environment.

Censorship also presents a jurisdictional challenge. Historically focused on books, censorship now encompasses digital media like caricatures and computer games. For instance, the *Google Inc v Equustek Solutions Inc.*[43] case in Canada demonstrates how censorship can affect international governance. In this case, Google was ordered to globally de-index websites that unlawfully sold intellectual property, raising jurisdictional questions about cross-border enforcement and the limits of local courts' influence over the global internet.[44] For parliaments, Equustek raises the question of whether domestic laws should claim extraterritorial reach, or whether such authority should be pursued only through international cooperation. This goes to the heart of parliamentary oversight: how to set national rules without overstepping global limits.

[40] Cedric Ryngaert "The Principles of Extraterritorial Jurisdiction", *Jurisdiction In International Law* Oxford University Press, London, 2015, p. 101.

[41] Erica Scher-Zagier, 'Jurisdictional Creep: The UN Cybercrime Convention and the Expansion of Passive Personality Jurisdiction' (2024) Yale Journal of Law & Technology 27, p. 15.

[42] Amanda Meade, 'Australia is making Google and Facebook pay for news: what difference will the code make?', *The Guardian*, Accessed at: https://www.theguardian.com/media/2020/dec/09/australia-is-making-google-and-facebook-pay-for-news-what-difference-will-the-code-make

[43] *Google Inc. v. Equustek Solutions Inc.* [2017] 1 SCR 824.

[44] *Google Inc. v. Equustek Solutions Inc.* [2017] 1 SCR 824 at [2].

While censorship can be a tool for limiting harmful content, it also risks infringing on free speech and civil liberties. For parliaments, this underscores the challenge of designing oversight mechanisms that can uphold domestic priorities without clashing with the realities of global platform governance.

## CHALLENGES OF LEGAL JURISDICTION ON SOCIAL MEDIA

The borderless reach of online activities blurs the link between geography and legal authority, sparking complex debates about which legal system should govern digital content that spans multiple states. In New Zealand law, jurisdiction is understood as the authority of a court to decide a case or recognise matters formally submitted to it.[45] Yet this traditional understanding is difficult to apply when online conduct, data, or infrastructure cross national borders.[46] For Parliament, the challenge is to design rules that remain credible in practice; laws that cannot be enforced internationally risk undermining both domestic policy goals and public trust.

Enforcing laws across digital borders present challenges. A court in one country may issue a ruling, but enforcing it across borders-where content or data may be located in different countries-complicates matters. This issue highlights the growing need for coordinated international legal frameworks.

The method in which we communicate with one another, run our businesses, and exchange information has been profoundly altered as a direct result of the proliferation of the internet. On the other hand, due to its worldwide nature, the internet poses a number of difficulties for the exercise of legal authority. At this juncture, it is important to consider the question, 'what are the difficulties associated in exercising legal authority over the internet?'.

The adoption of a territoriality-centric approach to jurisdiction by a state would pose dual challenges for law enforcement, encompassing both traditional and cybercrime scenarios.[47] For a deeper understanding to territoriality, the 'Lotus'[48] case 'Harvard Draft Convention on

[45] Mary Keyes, 'Jurisdiction Clauses in New Zealand Law' (2019) *Victoria University of Wellington Law Review* 50 2019, p. 633

[46] Rosara Joseph, 'Inherent jurisdiction and inherent powers in New Zealand' *Canterbury Law Review* 220 2005, p. 13

[47] Svantesson, 'Lagom jurisdiction', p.33.

[48] SS 'Lotus' (France v Turkey) (1927) PCIJ Series A, No 10.

Jurisdiction with Respect to Crime'[49] will be important as a source of reference.[50] The current paradigm is characterized by a territoriality mentality.[51]

With constant technological innovation over time comes the complexities of regulating both legitimate and criminal operations over social media. The evolution of crime has frequently been outpaced by the development of legislation and law-enforcement capabilities, resulting in disparities or asymmetries between jurisdictions.[52] Technology has also modified some of the core notions on which general criminal law and law are based primarily on areas such as privacy, property and jurisdiction, as they become interwoven into the global network.[53] With this, customary and traditional concepts of criminal jurisdiction and the use of the internet as a means of communication have faced their challenges because of the internet's global nature.

Even if, for a moment, we set aside the sheer number of online publishers that could potentially face prosecution for sharing illegal or posting harmful content online (a task that requires a lot of police and prosecutor resources), the transient nature of online publishers, operating across various countries, presents a significant legal challenge.[54]

## JURISDICTION IN CYBERSPACE

Regarding jurisdiction, the focus lies on the sovereignty of nation-states. It is the state's power to manage and govern its own territory and people. This sets the nature and limits of their jurisdiction.

For clarity, it is essential to comprehend the various jurisdiction-related scenarios. This understanding establishes the context for discussions and facilitates progress in this field. The

[49] The American Journal of International Law "Harvard Draft Convention on Jurisdiction with Respect to Crime" 1935, Vol. 29, Supplement: Research in International Law 439.

[50] Martina Mantovani, 'Jurisdiction, Conflict of Laws and Data Protection in Cyberspace' Accessed at: <https://conflictoflaws.net/2017/jurisdiction-conflict-of-laws-and-data-protection-in-cyberspace/>.

[51] Dan Jerker B. Svantesson, 'Jurisdictional issues and the internet - a brief overview 2.0' *Computer Law & Security Review* 34(715), 2018, p. 722.

[52] Christopher Ram "Cybercrime" in Neil Boister and Robert J. Currie (ed), '*Routledge Handbook of Transnational Criminal Law* Oxford: Routledge, London, 2014, p. 379.

[53] Ram, *Cybercrime,* p. 379.

[54] Peter Coe "The Draft Online Safety Bill and the regulation of online harms and hate speech: have we opened Pandora's Box?" (paper presented to BACL Annual Webinar: The Regulation of Hate Speech Online and Its Enforcement in a Comparative Perspective, London, 31 August 2021).

term jurisdiction is particularly significant in three scenarios that raise substantial concerns for internet intermediaries.[55] These scenarios are as follows:

## *A Community Guidelines or Terms of Service*

The legality of the terms of service that internet intermediaries generally impose on their end-users frequently includes crucial clauses addressing the applicable legislation and jurisdiction.[56] Specifically, in the so-called choice-of-forum and choice-of-law agreements, significant and contentious legal issues arise at the intersection of private international law and internet intermediaries' practices.[57] In context of online hate speech, this involves the examination of the legality of the terms of service that the social media platform typically imposes on its users. Most often, these terms would include such clauses addressing applicable legislation and jurisdiction. These agreements become crucial when legal issues emerge regarding the practices of these platforms and their alignment with internal law.

A choice-of-law clause determines the applicable law in a lawsuit, while a choice-of-forum clause designates the court for dispute resolution.[58] These clauses are commonly found in the terms of services, although studies repeatedly show users rarely read or fully understand these agreements, often agreeing without complete awareness; such as click-wrap or browse wrap agreements. For instance, by engaging on a social media platform that offers its terms of service through a link on the app or website, one might be seen as giving implied consent, even if they have not directly read it, accessed, or explicitly agreed to those terms.[59]

A German case[60] illustrates the limits of leaving content moderation to private contracts. Users challenged Facebook's removal of their posts under its hate speech guidelines, and the Federal Court of Justice ultimately ruled that the platform's terms of service lacked adequate safeguards.[61] It required Facebook to give users notice and an opportunity to respond before

[55] Dan Jerker B. Svantesson, *Internet Jurisdiction And Intermediary Liability*. Oxford: Oxford University Press, Oxford 2020 p. 488.

[56] Svantesson, *Internet Jurisdiction and Intermediary Liability*, p. 488

[57] Svantesson, *Internet Jurisdiction and Intermediary Liability,* p. 488

[58] Maria Hook, 'The Choice of Law Agreement as a Reason for Exercising Jurisdiction' *International and Comparative Law Quarterly* 63(4), 2014, p.964

[59] Jonathan A. Obar and Anne Oeldorf-Hirsch, 'The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media'. *Social Media + Society* 4 2018, p. 3.

[60] Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 29, 2021, 154 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 370, 371 (Ger.).

[61] Columbia Global Freedom of Expression, 'The Case on Facebook's Terms of Service'

takedown or account suspension.[62] This shows that while platforms may regulate content through private agreements, parliamentary oversight is essential to ensure users' rights are protected.

## *Requesting access to user data*

The second scenario concerns circumstances where law enforcement organisations ask internet intermediaries for access to user data. Such cases raise important jurisdictional questions, not only when the requesting law enforcement agency and the internet intermediary are based in different nations, but they may also do so, as was demonstrated in the well-known Microsoft Warrant case when the requested data is stored outside of the nation in which both the law enforcement agency and the internet intermediary are based.[63] For parliaments, the lesson is that data localisation and access regimes must be addressed through legislation and international cooperation, not left to ad hoc litigation.

## *Geographic area*

The third illustration concerns the issue of the geographic area where an online intermediary is needed to take down, remove, block, delist, de-index, or de-reference content.[64] An example of where geographical area becomes a challenge and the measures used in this instance will be illustrated in the case of *Google Inc. v Equustek Solutions Inc.*[65] For parliaments, the case highlights the need to clarify the scope of takedown powers and to balance national interests with global norms.

When it comes to matters of international law, the majority of states develop their own policies and protocols. Private international law is the specific subfield of the legal system that pertains to territorial disputes. The norms of private international law that are applicable in many states provide for jurisdictional and legislative claims to be made over any website that may be viewed in its territory with regards to a wide variety of different types of legal issues. These claims can be made in relation to any website, regardless of where the website is hosted.

The concept of territorial jurisdiction stems from the principles of sovereign equality,

[62] Columbia Global Freedom of Expression, 'The Case on Facebook's Terms of Service'

[63] Columbia Global Freedom of Expression, 'The Case on Facebook's Terms of Service'

[64] Columbia Global Freedom of Expression, 'The Case on Facebook's Terms of Service'

[65] Michael Geist, *'The Equustek Effect: A Canadian Perspective on Global Takedown Orders In The Age Of The Internet'* Oxford: Oxford University Press, 2020 p. 710.

deference, and non-interference by one state in the internal affairs of another and the direction that each state has exclusive sovereignty over its laws and their application to events in its territory.[66] How cybercrime was treated in the beginning is said to be akin to the concept of *terra nullius,* that is, in the cyber sphere, whereby the notion of cyberspace was as if it were a physical location and a new territory.[67] This notion led to initial misconceptions about its governance and regulation.[68]

## LEGAL FRAMEWORKS AND COLLABORATIVE INITIATIVES

In the European Union, the Framework Decision prescribes a set of criteria to determine when a crime should be considered as having been committed within the jurisdiction of a Member State. This is the case if an act, or part of it, which is relevant to establishing the nature of the crime or the identity of the perpetrator, takes place within the territory of the Member State, but also in specific other situations concerning residents and bodies incorporated under national law.[69] Where offences are committed using an information system, the Member State would have to take the necessary steps to ensure that the offence was physically conducted in its territory - regardless of whether the material in question is hosted on a system in its territory or not.[70] This therefore demonstrates the idea that jurisdiction might be based on the physical location of the criminal act rather than the location of the digital information or systems used in committing the offence.

### *Initiatives on online hate speech*

In 2016, the European Commission and leading information technology (IT) companies jointly

[66] Ram, *Cybercrime,* p. 379.

[67] Irene Watson, 'Aboriginal Laws and the Sovereignty of Terra Nullius' *Borderlands e-Journal*, 2002, 1(2), p. 15-32. The term terra nullius has specific significance in the Australian context, where it historically referred to the colonial legal fiction that the land belonged to no one prior to British settlement.

[68] David Livingstone Paul Cornish, Dave Clemente and Claire Yorke, 'Cyber Security

and the UK's Critical National Infrastructure (A Chatham House Report, September 2011) Accessed at: https://www.chathamhouse.org/sites/default/files/public/Research/International%20Security/r0911cyber.pdf

[69] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') 2000 OJ L/178.

[70] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') 2000 OJ L/178, above, n 897, art. 9 (2) (a)

announced and ratified a Code of Conduct.[71] This Code of conduct sets out a series of commitments aimed at fostering collaboration between the European Commission and major tech entities such as Facebook, YouTube, Twitter and Microsoft.[72]

The primary commitments outlined in the Code of Conduct entail a proactive stance by IT Companies against online hate speech. [73] This involves implementing robust and transparent processes within each company, particularly in the diligent review of reported instances concerning hate speech. This includes a clear and effective process established by every IT Company, ensuring prompt assessment for the removal of contentious content.[74] Such procedures are defined within respective *Rule and Community Guidelines*, explicitly prohibiting content that incites violence or promotes hateful conduct. In the event of a breach of these guidelines by an individual or entity, a notification is directed to information technology companies for review and potential content removal, adhering to the strict 24-hour review timeframe.[75] Yet, while this code shows the promise of co-regulation, it also highlights a democratic deficit: major platforms effectively negotiate regulatory frameworks directly with the European Commission, bypassing elected legislatures. For parliaments, the challenge is to ensure transparency and accountability in these arrangements.

Information technology companies are poised to play a critical educational role by enlightening their users about prohibited content in line with their Community Guidelines. They aim to empower users with knowledge on how to report instances of online hate speech or prohibited content. [76] Moreover, there's a strong recommendation for IT Companies to establish swift and effective communication channels with authorities from Member States. This entails seamless procedures for notifying and promptly removing or disabling access to online hate speech

[71] European Commission, 'European Commission and IT Companies announce Code of Conduct on Illegal Online Hate Speech' Accessed at: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1937>.

[72] European Commission, *'European Commission and IT Companies announce Code of Conduct on Illegal Online Hate Speech'*

[73] European Commission, *'European Commission and IT Companies announce Code of Conduct on Illegal Online Hate Speech'*

[74] European Commission, 'The Code of conduct on countering illegal hate speech online' Accessed at: <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1135>.

[75] European Commission, *'The Code of conduct on countering illegal hate speech online'.*

[76] European Commission, *'The Code of conduct on countering illegal hate speech online'.*

content. [77]

To facilitate this exchange of information, the Code of Conduct suggests utilising national contact points jointly appointed by both IT companies and Member States. This collaborative approach seeks to acquaint law enforcement agencies and Member States with effective methodologies for identifying and reporting instances of online hate speech.[78]

## *Initiatives on cyber threats*

Cyber threats are happening more and more, which points to the need for improved national resilience in cyber security. A prime example of this necessity is the May 2021 cyber attack on the Waikato District Health Board, which dismantled services and treatments for an extended period, demonstrating the need for well-thought-out cyber security strategies.[79]

In 2023, an essential document was provided to the incoming Minister for the Digital Economy and Communications. Titled 'Incoming Minister Briefing,' the document prioritizes responsibilities for the Minister related to the highly complex and urgent matter of cyber security policy.[80] At the top of the list, the Minister must supervise the continuous enhancement and coordination of New Zealand's Cyber Security Strategy and its associated initiatives in an effort to keep the country's cyber security not only coordinated but also flexible and adaptable to a rapidly changing threat environment.

Policy development is another critical facet, especially as it relates to the cyber resilience of New Zealand's individuals, businesses, and providers of essential infrastructure.[81] There is also a considerable emphasis on addressing the national security threats associated with digital technologies; especially new and emerging tech and applications. [82] Meeting the challenges these pose requires not just policy development at a high level but also engagement with and

[77] European Commission, *'The Code of conduct on countering illegal hate speech online'.*

[78] European Commission, *'The Code of conduct on countering illegal hate speech online'.*

[79] INPHYSEC, New Zealand, *Waikato District Health Board (WDHB) Incident Response Analysis,* 2 September 2022, p.7

[80] Department of the Prime Minister and Cabinet -Te Tari O Te Pirimia Me Te Komiti Matua (31 January 2023), '*Briefing to the Incoming Minister for the Digital Economy and Communications'*, Accessed at: https://www.beehive.govt.nz/sites/default/files/2023-03/BIM%20-%20Minister%20for%20the%20Digital%20Economy%20and%20Communications%20-%20DPMC.pdf

[81] Department of the Prime Minister and Cabinet -Te Tari O Te Pirimia Me Te Komiti Matua (31 January 2023), *'Briefing to the Incoming Minister for the Digital Economy and Communications'*

[82] Department of the Prime Minister and Cabinet -Te Tari O Te Pirimia Me Te Komiti Matua (31 January 2023), *'Briefing to the Incoming Minister for the Digital Economy and Communications'*

understanding of the technological base and pace that policy has to upkeep in order to remain relevant and to serve the public good.

When cybersecurity incidents occur, it's crucial to establish appropriate policy responses, which include publicly attributing the incidents after consulting relevant ministers to maintain transparency and accountability. Additionally, addressing national security risks posed by cybercrime requires well-coordinated and targeted policy efforts to ensure a comprehensive response. This includes working with global partners and consulting the Minister of Foreign Affairs to ensure New Zealand's cybersecurity strategies are aligned with international standards and practices.[83]

The 2022/2023 Cyber Threat Report by the National Cyber Security Centre (NCSC) outlines key challenges for New Zealand in cyberspace.[84] The country faces a more complex threat environment, with cybercriminals using increasingly sophisticated techniques that challenge traditional defences. Emerging technologies, like generative AI, add new risks to privacy and security. Notably, financially motivated cyber activities have, for the first time, surpassed state-sponsored threats, posing a greater impact on New Zealand's overall security and well-being.[85] For parliaments, these developments underline the need to scrutinise ministers on cyber preparedness and to ensure that New Zealand's policies align with international standards. For Parliament, the Report highlights a dual role: ensuring adequate resourcing for national cyber resilience while scrutinising executive decisions on security. Oversight here is not merely technical but constitutional, safeguarding civil liberties as states expand surveillance powers in response to cyber threats.

Protecting critical infrastructure from cyber threats remains a priority, with efforts to enhance the resilience of essential services and mitigate potential disruptions.[86] Ransomware and extortion activities have a significant presence, with incidents causing substantial recovery efforts and financial impact. The rapid adoption of technologies such as AI requires careful governance to control privacy and security risks associated with their use.

[83] Department of the Prime Minister and Cabinet -Te Tari O Te Pirimia Me Te Komiti Matua (31 January 2023), *'Briefing to the Incoming Minister for the Digital Economy and Communications'*

[84] Government Communications Security Bureau Te Tira Tiaki, 'Cyber Threat Report 2022/2023' Accessed at: https://www.ncsc.govt.nz/resources/ncsc-annual-cyber-threat-reports?url=resources%2Fncsc-annual-cyber-threat-reports%2F

[85] Government Communications Security Bureau Te Tira Tiaki, 'Cyber Threat Report 2022/2023', p. 10

[86] Government Communications Security Bureau Te Tira Tiaki, 'Cyber Threat Report 2022/2023', p. 13

To address growing cyber threats, New Zealand relies on international cooperation for intelligence sharing, including efforts involving parliamentary oversight of digital platforms like social media. [87] Social media can both amplify cybersecurity risks and serve as a tool for public engagement. Parliament's role in regulating and overseeing these platforms is crucial in mitigating risks while ensuring transparency. Strengthening New Zealand's cybersecurity workforce and fostering international policy collaboration aligns with parliament's goals to protect the nation's digital infrastructure and national security interests. Recent developments highlight Parliament's growing role in managing digital risks, as demonstrated by the New Zealand Parliamentary Service's decision to ban TikTok from official devices due to concerns over data security.[88] This exemplifies the critical oversight responsibilities of legislative bodies in regulating digital platforms to safeguard national security while balancing public engagement through social media. These international and domestic developments show that while technical solutions are vital, it is parliamentary oversight that ensures accountability, legitimacy, and public trust.

## CONCLUSION

Legal jurisdiction on the internet is a complex issue that raises a number of challenges for legal systems around the world. The global nature of the internet means that activities may take place in different countries and be subject to different laws and regulations. However, different legal systems have developed a range of approaches to address this issue, from territorial approaches to more flexible frameworks that take into account the global nature of the internet.

The internet is commonly referred to as the 'Wild West' due to the challenges in enforcing laws.[89] The enforcement of court rulings across borders, such as those pertaining to Google, fosters a disregard for legal principles on the internet, leaving internet companies in the challenging predicament of deciding which laws and court orders to adhere to. Disregarding foreign court rulings undermines legal certainty online, promoting cross-border litigation and a worldwide perspective on domestic laws.

In conclusion, the challenges of legal jurisdiction in the digital age, especially concerning social

[87] Government Communications Security Bureau Te Tira Tiaki, 'Cyber Threat Report 2022/2023', p. 18

[88] Radio New Zealand. 'Parliamentary Service bans TikTok on its devices', Accessed at: https://www.rnz.co.nz/news/political/486167/parliamentary-service-bans-tiktok-on-its-devices

[89] Geist, *'The Equustek Effect',* p. 725.

media platforms, demand urgent attention from both national governments and international bodies. The borderless nature of the internet, exemplified by the Christchurch attack, highlights the critical need for updated legal frameworks that address internet-related offences. Parliamentary oversight must evolve to regulate digital platforms effectively, balancing national security and freedom of expression.

This will require robust international collaboration, consistent policy reform, and the strengthening of cybersecurity to protect citizens and critical infrastructure. Only by implementing these comprehensive measures can parliaments safeguard their digital jurisdictions and maintain public trust in the evolving online world.

This article emphasises the importance of continuous adaptation and reform to meet the challenges posed by the global digital landscape. The role of social media, which can both enhance public engagement and introduce cybersecurity risks, must be carefully regulated through effective legislation and parliamentary oversight. Ultimately, parliamentary oversight is essential to ensure that digital regulation protects citizens while upholding democratic freedoms in a borderless online world.

# Book Reviews

# John Hirst: selected writings, edited by Chris Feik. La Trobe University Press in conjunction with Black Inc, 2025, pp. 337. Paperback, RRP $36.99 ISBN 978176064578.

**David Clune**

Honorary Associate, Department of Government and International Relations, University of Sydney

The publication of Chris Feik's edited collection *John Hirst: selected writings* is very welcome. It includes a wide-ranging and judicious selection of his work plus three perceptive assessments by Frank Bongiorno, Alex McDermott and Robert Manne. As Hirst was an active public intellectual and unashamed controversialist, the collection is inevitably skewed towards his shorter, punchier pieces, although his major work on colonial NSW and Federation is not neglected.

It is almost a decade since Hirst's untimely passing. He was without doubt one of Australia's greatest historians. While we have been fortunate to have produced a number of exemplary practitioners of the discipline, only a select few have had the vital spark that distinguished Hirst. He had an uncanny ability to enter into the eras he was researching and to see things through contemporary eyes. As he put it:

> *Great history writing has the poise and wisdom of great literature, not committed to the society it serves but understanding it better than it did itself.*[1]

[1] Chris Feik, ed., *John Hirst: selected writings* , La Trobe University Press , 2025, p 132.

An outstanding analytical ability allowed Hirst to evaluate the past in original ways that led to major historical reinterpretations. Added to this was a crisp, lucid pose style that allowed him to make complex issues comprehensible.

It is impossible to put Hirst into a neatly defined ideological box. In his youth he was an ardent Whitlamite; in later life a prominent conservative. He remained an advocate of some traditional left values but mercilessly skewered the shibboleths of fashionable leftism. A defender of Britain's record as a colonial power in Australia, he was an ardent republican. There was, however, an underlying consistency in Hirst's approach as he was inflexibly committed to hard facts and the truths they revealed.

The book opens, appropriately, with 'Changing my mind'. Hirst describes his Gethsemane moment in response to the liberation movement of the 1970s:

> *It was on this issue that I parted company with left-leaning, progressive people … When authority is attacked my instinct is to come to its defence … The danger, as I saw it, was that democratic principles and rights were being applied to all subordinate institutions, which rendered them less able to do their job.*[2]

As demonstrated in this anthology, Hirst's multi-faceted work developed a comprehensive vision of Australian history, culture and identity. He created a new historical assessment of convict Australia, overturning the orthodoxy that it was a sadistic hellhole of clanking chains and cracking whips. The reality was more positive: 'This so-called penal colony was run according to the principles of ordinary English law … The convicts acquired more legal rights in the colony than they had at home'.[3]

Frank Bongiorno has perceptively summarised other important Hirst historical revisionism:

> *So Geoffrey Blainey thought distance shaped Australia? Hirst was doubtful, and he outlined his case to his colleagues with characteristic eloquence … Russell Ward reckoned that the noble bushman, the pastoral worker, was the typical Australian? What about the pioneer asked Hirst … ; the conservative and patriotic small farmer who was widely noticed and frequently celebrated? The federation of the Australian colonies was a mere*

[2] Chris Feik, ed., *John Hirst: selected writings* , La Trobe University Press , 2025, p 6.

[3] Chris Feik, ed., *John Hirst: selected writings* , La Trobe University Press , 2025, p 16.

> *business deal? Hirst wrote a whole book, and a very good one … putting that one to rest, presenting it instead as the fruit of nationalist idealism.*[4]

Unfortunately, Hirst's intellectual honesty earned him the ire of some in the left intelligentsia which has, to an extent, meant that his achievements are not as well-known as they should be. Hopefully, this readable and stimulating anthology will rekindle interest in Hirst's work and introduce him to a new generation of readers.

[4] Chris Feik, ed., *John Hirst: selected writings* , La Trobe University Press , 2025, p xii.

# Civic Engagement in Australian Democracy, Edited by Sarah Murray and Lachlan Umbers, 2025, Anthem Press, London and NY, pp 234 RRP AUD 110, ISBN: 9781839993534 (Hbk).

**Kim Rubenstein**

Professor (Adjunct), University of Canberra and University of Technology Sydney, Honorary Professor, Australian National University

As an academic whose scholarship, public policy contributions and legal advocacy has revolved around principles of active citizenship, reviewing this collection of essays about civic engagement in Australian democracy is very satisfying. I do so, having recently finished *Eleven Writers and Leaders on Democracy – What it is and why it matters*[1] released in 2024, during a year in which that book notes, over half the world's population exercised the right to vote in dozens of states. As that book identifies, the ability to vote is not necessarily a marker of a true democracy, and faith in democracy requires faith in institutions, the rule of law, and institutional frameworks protecting the rights of citizens.

It is a commitment to this broader conception of democracy that underpins Lachlan Umbers and Sarah Murray's edited collection of twelve chapters, involving 26 authors, that evolved from a workshop at the University of Western Australia's Institute for Advances Studies flowing from the research project 'Seeking to Strengthen Australian Democracy'.

The introduction to this collection opens with the affirming statement '[f]ew would deny the importance of an active citizenry in a democracy' but they too acknowledge that active citizenship is larger than voting. They identify '[o]rganising campaigns, attending demonstrations, petitioning government, knocking on doors and so on' as further expressions of 'rule by the people' – although who 'the people' are, is a contested and ongoing question for many democracies.[2]

[1] Margaret Atwood, Mary Beard, Erica Benner. *Democracy: Eleven writers and leaders on what it is – and why it matters.* London, Profile Books, 2024. The eleven writers are all women and include Margaret Atwood, Mary Beard, Lea Ypi, Elif Shafak and others.

[2] I engage with these issues in Kim Rubenstein, 'When a state seeks to deport non-citizens, who are its citizens? Determining membership in the twenty-first century.' *Griffith Law Review*, 2025 pp. 1-9.

While relevant to all democracies in its themes and concerns, and the editors acknowledge their preparation of the book occurred while democracy is under pressure around the globe, the book is focussed on Australian democracy. Indeed, recent events in Australia provide rich content for examining Australians participation in the democratic process and how that has changed and continues to change.

Moreover, in the last ten years the editors recognise there have been two significant opportunities 'to participate directly in the law-making process'. One was politically motivated, as the government chose to initiate a postal survey identifying the public's views of same-sex marriage in the 2017 plebiscite. Then there was the constitutionally proscribed vote, itself a reflection of the founders of the Australian constitution's commitment to active citizenship. Section 128 of the *Australian Constitution* mandates voters' involvement in any constitutional alteration, required in 2023 when the government responded to the Uluru statement of the Heart, a process itself of active citizenship[3], resulting in an unsuccessful referendum on enshrining an Aboriginal and Torres Strait Islander Voice to Parliament.

These two events help understand the range of chapters in this collection, but they are not confined by those issues and the introductory Chapter 1 helpfully canvasses the spread of political, legal, constitutional and public and private sector issues relevant to strengthening democracy. The book continues with Chapter 2 by four authors, Nicholas Barry, Narelle Miragiotta, Sarah Murray and Zim Nwokora, examining constitutional conventions as part of the robust constitutional framework needed for a healthy democracy. They argue for the 'democratisation of constitutional conventions, beyond the political classes given the 'contemporary changes in the media landscape' and the 'emergent political polarisation' to be more inclusive of citizens. Chapter 3 by Jill Sheppard on 'Compulsory Voting in an Era of Democratic Disengagement' shares the story of Australia's compulsory voting – compulsory active citizenship since 1924. She examines compulsory voting's impact on other forms of engagement and argues it has led to solidifying the two-party political system which has led to lowering satisfaction with the democratic system. Lachlan Umbers' Chapter 4 examines the experience of early voting in Australia and its impact on the Democratic ideal. Paul Kildea then examines in Chapter 5 the experience of the 2017 plebiscite on same sex marriage to examine whether it was merely advisory or effectively binding on governments, ultimately concluding through his detailed analysis that it was effectively binding.

The next three chapters focus on the Voice Referendum, with Chapter 6 by Ryan Cox, reflecting on the experience as a Non-Indigenous Australian from a philosophical perspective, recognising that ultimately many decisions going forward need to be made by Indigenous Australians. Ron Levy and Justin McCaul's chapter 7 as Non-Indigenous and Indigenous legal scholars highlight how the Voice referendum reflects a 'constitutional legitimacy crisis' as earlier coined by

[3] Kim Rubenstein, 'Power, Control and Citizenship: The Uluru Statement from the Heart as Active Citizenship'. *Bond Law Review*, 30, 2018, p.3

Appleby, Levy and Whalan in 2023 and that going forward managing this crisis requires 'open and inclusive deliberation about constitutional foundations, including about questions of sovereignty.'

Chapter 8 then turns to political scientists exploring the Voice referendum to investigate contemporary Australian civic engagement, comparing the strategies of the 'Yes' and 'No' campaigns and social media's role in shaping the discussion, drawing upon 3.3 million social posts. Their chapter highlights the impactful role of negative messaging in the engagement process. This is an interesting segue for Chapter 9 by Murray Wesson examining Free Speech and its place in political communication, considering Australia's constitutional jurisprudence on the topic. As Wesson explains, the High Court's jurisprudence has sourced the implied freedom of political communication in the sovereignty of the people and as an important factor in fostering and safeguarding civic engagement. The changed composition of the Court has led to some uncertainty on how it will continue to evolve. Wesson concludes the chapter acknowledging that a Federal Human Rights Act would provide a more secure framework for freedom of speech as a means of bolstering civic engagement.

The final three chapters illustrate the diverse ways in which civic engagement in democracy may be analysed. Chapter 10 by Ian Murray and Sarah Murray examines the not-for-profit sector as a third sector in democracy, and the potential role the sector plays in strengthening civic engagement. They argue more attention is needed to strengthen the sector's capacity, advocating for less regulation restricting their activities which has limited the breadth of people involved in these organisations. Ten authors join forces for Chapter 11, bringing their perspectives to the place of Australia's African Diaspora both nationally and internationally in civic engagement. Indeed, it is the mix of the national and international that is distinctive about migrant communities' contributions.

Public policy issues beyond the nation state are also relevant to the final chapter by Joo-Cheong Tham, which examines Australian Democracy and the Climate Crisis. This final chapter uses the crisis to highlight three significant democratic challenges to effective climate action – short-termism, vested interests and self-referencing decision makers. Tham recommends changes including developing a 'democratic planning state', the embrace of a solidaristic ethos and fair and inclusive politics.

This review has merely touched the surface of deeply thoughtful chapters engaging with crucial matters for Australian democracy. Each chapter enables us to take up the challenge of the writers of *Democracy: Eleven writers and leaders on what it is – and why it matters* 'to think emotionally and intellectually about the fragility of democracy'[4] and how important civic engagement is to its continuity.

[4] Atwood et al, *Democracy: Eleven writers and leaders*, 2024.