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

Parliamentary Procedure

Challenges, Opportunities and Change

Reviews of five great new books

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

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

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

From the Editor

It is with great pleasure that I introduce this Edition of the *Australasian Parliamentary Review*. This volume has a focus on parliamentary procedure, and the many diverse ways procedural rules, practices and cultures influence the operation and perception of modern parliaments in the Australasian region.

Steph Lum, Principal Research Officer with the Legislative Scrutiny Unit of the Australian Senate asks 'How effective is parliamentary oversight over executive expenditure authorised by standing appropriations? Thomas Moorhead, Sergeant-at-Arms, Legislative Assembly of Western Australia suggests we may be in a time of 'carne-age', with his take on the Australian High Court's decision in *Crime and Corruption Commission v Carne* and its implications for freedom of speech in parliament.

This volume also includes insightful analysis from Natalie Cooke, from the Australian House of Representatives Procedure Office on the role of the Federation Chamber and its evolution over its thirty-year history. We also hear from senior parliamentary officers from the Parliament of New South Wales, Peta Leemen and Arizona Hart, on the inadequacy of protections for witnesses to parliamentary committee inquiries and the implications this has for public parliamentary engagement, as well as parliamentary procedure.

Kent Blore, Deputy Crown Counsel, Crown Law, Queensland, shares thoughts on the first 'Caretaker' Government in Queensland, and Kelvin Matthews offers a comparative perspective on the interaction between local government and parliament in the Federation of Malaysia.

Parliamentary Inquiry Secretary Miriam Berger takes us 'beyond the bench' to consider the influence of cross bench members on contemporary Australian House of Representatives process and procedure, whilst Dr Evan Smith from the South Australian Parliament provides an update on the South Australian Parliament's moves towards greater gender inclusivity in Standing Orders.

We are also pleased to share reflections from Caroline Spencer, Auditor General for Western Australia on the relationship and role of auditors and parliament, within the context of the doctrine of separation of powers.

The volume also includes five book reviews on exciting new contributions to scholarship in the field of parliamentary studies, with Hiroya Sugita reflecting on Anika Gauja, Marian Sawer and Jill Sheppard's edited collection *Watershed: The 2022 Australian Federal Election*; Sonia Palmieri offering perspectives on Marian Sawer and Maria Maley's *Toxic Parliaments and What Can Be Done About Them* and some thoughts of my own on David Judge and Cristina Leston-Bandeira's edited volume *Reimagining Parliament*. Bryan Moulds follows Michael Easson *In Search of John*

Christian Watson: *Labor's First Prime Minister,* and Frank Bougiorno shares his expert insights in response to Iola Mathew's loving and erudite tribute to *Race Mathews: A Life in Politics*. Together these reviews provide a compelling and thoroughly enjoyable summer reading list for any keen following of parliamentary affairs!

I also wish to acknowledge the many decades of editorial contribution from Dr David Clune, University of Sydney, who has had a long association with the Australasian Parliamentary Review and will be taking a rest from our Editorial Board.

I express deep gratitude to all authors and reviewers involved in this publication and commend the contents to you.

Sarah Moulds

Associate Professor in Law, University of South Australia, November 2024

Speeches

In the absence of angels: the role of auditors and Parliament within our system of checks and balances

Caroline Spencer[1]

Auditor General for Western Australia

INTRODUCTION

Firstly, a personal reflection on why I chose to speak to you on this topic. I have observed if we don't keep ourselves in check, then the results are generally unexpected to us and ugly. In public life, it is often called a dramatic fall from grace, or a train wreck. In private life, it is often isolation and loneliness that will result from not being able to control our urges. The ability to cope with critique and correction, is vital to keep or bring us back on track. We talk of teams, community and diversity. But if we can't cope with people telling us what we don't want to hear, but need to, then it is just that – talk.

Checks and balances are perhaps more prevalent in our lives than we may first appreciate. Many provide a level of assurance we welcome. As surgical patients it is partly bemusing, but ultimately comforting, to have multiple people check our name and planned procedure before losing consciousness. As parents, it's good to know

[1] Caroline Spencer has served as the 19th Auditor General for Western Australia since May 2018. This is the transcript of the keynote address Ms Spencer delivered in Perth, Western Australia, on 22 April 2024 at the 17th Biennial Conference of the Australasian Council of Public Accounts Committees. Ms Spencer would like to thank the co-Chairs of the Australasian Council of Public Accounts Committees for the invitation to deliver the address on the lands of the Whadjuk people of the Noongar nation. She would also like to acknowledge the work of her former Principal Adviser, Mr Tim Hughes, who assisted with preparing this address. Mr Hughes previously served for six years as Principal Research Officer to the WA Public Accounts Committee and his blended insights were of great benefit.

assessments are moderated to ensure marking standards are maintained at key stages of our children's education. Admittedly, as sporting fans, we may have more mixed views of checks and balances depending on whether our team has been on the right side of a contentious Decision Review System (DRS), Bunker, or Video Assisted Referee (VAR) decision.

The ubiquity of checks and balances in our society reflects our fallibility as a species. They also exemplify the inherent suspicion we hold regarding the capacity or motive of those we grant authority. This suspicion is heightened with the liberties we cede through our various laws and taxes.

Systems of government in liberal democracies have evolved out of a deep-rooted doubt as to the altruism of those we place in positions of power. This sentiment is echoed in the words of one of the Founding Fathers of the US Constitution, James Madison. In 1788, Madison argued:

> *… what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.*[2]

All of us attending this conference are part of an expansive network of controls that has developed in the absence of angels that Madison observed 236 years ago, and for government to work, each of us who serve as a control on government need to do our jobs. As each of us in this room know, sometimes, this may require us to be just a little bit brave.

I thought it might be apt to set the scene for the next two days by revisiting how our systems of institutional checks and balances evolved. I will focus on the history of our respective roles as Auditors General and parliamentary committees charged with scrutinising the public accounts – be they Public Accounts Committees (PACs) or upper House equivalents. I will then share my views – mainly from a Western Austrailan (WA)

[2] 'Federalist Paper #51', as quoted in: Elgin Hushbeck, *The United States Constitution: A History*. Gonzalez, Florida: Energion Publications, 2022, p. 16. James Madison went on to serve as the fourth President of the United States.

perspective – on the value of the working relationship between PACs and Auditors General and how this promotes transparency and accountability.

I hope to prompt both thought and discussion by highlighting some of the current challenges democracies are facing. In particular, the growing view that public trust is declining in an era of misinformation. Many of the factors behind this decline are beyond our remit as auditors and parliamentarians – and the valued staff who support us. Yet, I will argue we have the capacity and indeed the duty via our work to provide those robust checks on government that strengthen capability and faith in our democracy. Often the work of performing a control or oversight function seems dry and unheralded. On occasions it may be unwelcome, or even seen as combative. Our commitment to doing our duty as discrete cogs in our system of government, however, will shape our legacy as current custodians of these most vital democratic institutions. And it may well turn back the tide to restore community faith in democracy where it is waning, because the proof of effective democratic government becomes just too compelling.

REFLECTIONS ON HUMAN NATURE RELEVANT TO OUR SYSTEM OF CHECKS AND BALANCES

Our history is littered with prominent figures warning of the darker side of human nature and its tendency towards the arbitrary exercise of power. In the early chapters of Genesis, God was quick to lament that the 'wickedness of man was great on the earth'. Aristotle was an early advocate for checks and balances, describing man as a political being, who, 'when perfected, is the best of animals, but, when separated from law and justice, … is worst of all'. Aristotle's observations were somewhat validated several centuries later when Julius Caesar sought to place himself above the law, briefly declaring himself 'dictator for life'. This act was among Caesar's last, as he was soon terminally checked by scores of knife-wielding Roman Senators who took umbrage to what they deemed an unacceptable abuse of power.

In 1215, the threat of a similar fate at the hands of discontent barons brought England's King John reluctantly to the table to sign the Magna Carta. This pivotal document agreed the vital concept of the rule of law – applicable to all – that remains a foundation principle of liberal democracies across the world. Other key principles including parliamentary sovereignty, universal suffrage and responsible government arose centuries later following periods of bloodied civil upheaval across England, France and the United States.

Enlightenment Era thinkers of this period espoused the need for government but clashed over its ideal form and reach.[3] Several influential schools of thought saw a clear separation of powers as a critical counter to tyrannical tendencies.[4]

The system that prevailed promoted a formal separation of powers across the executive, legislative and judicial branches that is enshrined constitutionally in various forms in many of today's parliamentary and presidential systems.

Despite the emergence of this system, concerns have remained around overreach, particularly within the Executive branch given its influence over our daily lives. Hence our enduring familiarity with quotes like that of Lord Acton 'Power tends to corrupt and absolute power corrupts absolutely.'

Our role as auditors and parliamentary scrutineers of public accounts has emerged in recent centuries out of this concern. We are deliberately inserted as a necessary tension in the system. Under reforms instituted by Lord Acton's contemporary in the House of Commons, William Gladstone, we have become part of a financial accountability framework relied upon by the public we serve. As was noted in the final report of the 1992 WA Inc Royal Commission, accountability measures within such frameworks are not designed to 'prevent a government from governing…. [but] to hold governments, public officials and agencies to account for the manner of their stewardship.'[5]

[3] In his book, *Leviathan,* Thomas Hobbes called for an absolutist form of government to protect from each other in a state of nature that would otherwise render human life 'solitary, poor, nasty, brutish, and short' (see chapter 13). John Locke, alternatively, had a more optimistic view of humans and thought the reach of government should be limited to securing the life and property of its citizens.

[4] See, for example, French philosopher Montesquieu and United States Founding Fathers, John Adams and James Madison.

[5] Royal Commission into Commercial Activities of Government and Other Matters, *The Report of the Royal Commission into Commercial Activities of Government and Other Matters (Part II)*. Perth: Parliament of Western Australia, 12 November 1992, p. 2 - 3.

EVOLUTION OF AUDITORS GENERAL AND FINANCIAL OVERSIGHT COMMITTEES

When looking at how this financial accountability framework developed, I thought I'd start with us auditors given we go back as far as the ancient civilisations of Rome, Greece, China and Egypt. These earliest forms of audit involved checking goods and accounts to placate mutually suspicious merchants. Early references to an auditor of government expenditure date back over 700 years with England's Auditor of the Exchequer.

Most significant was the UK House of Commons 1866 act to establish a Comptroller and Auditor General to audit the accounts of all government departments and report the results to Parliament.[6] This was part of Gladstone's suite of reforms, which also saw the first public accounts committee established five years earlier. In a report commemorating its 150-year history, the UK PAC said that Gladstone's reforms occurred at a time when 'the role of Parliament in the process of [financial] control was limited…. [and] its scrutiny of public spending was weak.'[7]

The antipodean colonies had already given priority to establishing a public audit function by this time. The New South Wales Audit Office is currently celebrating its bicentenary, Tasmania will do so in 2026, and we here in WA will follow in 2029. So important was independent assurance on public spending for WA's first Governor, James Stirling, he formed a Board of Counsel and Audit while *en route* at sea. Stirling wanted to ensure structures were in place to promote transparency and probity over public finances and property before landing in the new Swan River settlement.

New Zealand's first Auditor General was appointed in 1846, while the fourth piece of legislation passed by the Parliament of Australia was the *Audit Act 1901*.[8] This followed the passage of two Supply Acts showing that the newly minted Commonwealth Parliament wanted to ensure an independent set of eyes was in place to check government spending. Former Auditor General of Australia, Ian McPhee, refers to the '100 per cent checking regime' that was in place at the time. This required reconciling

[6] Committee of Public Accounts, *Holding Government to Account: 150 years of the Committee of Public Accounts*. London: Committee of Public Accounts, 2007, p. 12.

[7] Committee of Public Accounts, *Holding Government to Account*, p. 9.

[8] *Audit Act 1901* (Cth).

all transactions of government entities and reporting to Parliament on material anomalies. An arduous task that was soon made more difficult by the expenditure demands of World War One. Auditing at this time involved reconciliation of service personnel's payslips and checks on weapons purchasing. Mr McPhee has referred to stories of audit inspectors demanding to see the returned empty cartridge boxes as proof their contents had been used.[9]

I can only imagine how this particular request would have been received. To give the auditors some credit, perhaps, the audit office had some insight and cause to be alert to risks of panic and opportunism in wartime procurement processes.

As their respective Parliaments evolved, Auditors General across the Commonwealth were given greater autonomy on what to audit and report. This enabled moves toward sample-based financial auditing. From the 1970s onwards, Parliaments sought more information on the effectiveness and efficiency of government spending. This saw Auditors General vested with performance, or value-for-money, auditing responsibilities.

In WA, this took effect through legislative amendments passed in 1985. These amendments also saw the Auditor General required to provide an opinion on the relevance and appropriateness of departmental key performance indicators. From 2006, further amendments added a requirement to assess the reasonableness and appropriateness of a Minister's decision to not provide information to Parliament. Assessment of these section 82 notifications – when lodged by Ministers – remains a unique function of my Office.

From strict transactional and financial statement auditing, the remits of many audit offices have expanded extensively, as their respective Parliaments' demands for information have grown. Looking at recent trends, including the WA PAC's current inquiry and some of the topics at this conference, it could well be that Parliaments may soon start seeking some form of independent monitoring and reporting on the delivery of sustainability/Environmental Social Governance (ESG) outcomes by government entities.

[9] Ian McPhee. 'The Evolving Role and Mandate of the Australian National Audit Office Since Federation'. Accessed at https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop57/c04.

In terms of the parliamentary side of our financial accountability framework, the UK PAC, established in 1861, was the first of its kind and the prototype from which Australasian Council of Public Accounts Committees (ACPAC) member committees originated. Its original purpose was to examine the accounts 'showing the appropriation of sums granted by Parliament to meet the Public Expenditure'.[10]

This was part of the push within Westminster to reassert Parliament's control over the information it required to scrutinise government spending. The Committee quickly began using reports of audited accounts as the basis for questioning departmental officials on whether spending was in accordance with the appropriated purpose. By the late 1800s, the UK PAC was encouraging the Comptroller and Auditor General to report to Parliament on instances of waste.[11] The Committee subsequently supported audit investigations into matters including the costs of shipbuilding and price discrepancies in the War Office's purchase of horses.[12]

ACPAC jurisdictions followed suit, progressively establishing PAC-style committees throughout the 20th Century. I believe NSW has the longest running PAC, having operated continuously since 1902.[13] However, Tasmania and Victoria first established standing committees on Public Accounts as early as 1862[14] and 1895[15] respectively.

Exhaustive research undertaken by local Parliamentary Fellow, Dr Harry Phillips, confirms that WA's PAC was established in our Legislative Assembly in 1971, becoming this Parliament's 'first standing committee with a parliamentary policy or accountability objective'. The WA PAC was quick to leverage off, and support, the work of the Auditor General – a point I will expand upon shortly. It is notable that within two years, the Assembly formed a select committee to consider the establishment of a broader standing committee system. The select committee reported in support of the

[10] Committee of Public Accounts, *Holding Government to Account*, p. 10.

[11] Committee of Public Accounts, *Holding Government to Account*, p. 15.

[12] Committee of Public Accounts, *Holding Government to Account*, p. 15.

[13] Public Accounts Committee, *History of the Public Accounts Committee: 1902-2018*. Sydney: NSW Parliament, 2019, p. vii.

[14] Simon Scott, 'Examining the History of One of the Longest Established Public Accounts Committees in the Commonwealth'. Accessed at https://cpaaus.org/examining-the-history-of-one-of-the-longest-established-public-accounts-committees-in-the-commonwealth/cpaaus.org.

[15] Public Accounts Committee, *History of the Public Accounts Committee: 1902-2018*, p. vii.

proposal, arguing that Parliament had to be modernised to counter what it then saw as an international trend of growing executive dominance.

Despite this report, it would be another 28 years before an Assembly standing committee system came into effect (in 2001). Ultimately, it was the Legislative Council that was first to move in this respect, establishing three foundation standing committees in 1989. One of these was the Standing Committee on Estimates and Financial Operations (EFOC). Like PAC, EFOC quickly became an active supporter and user of Auditor General reports. Indeed, both PAC and EFOC remain critical to the work and effectiveness of my Office, and we are accountable to the Parliament through them.

WORKING RELATIONSHIP BETWEEN AUDITOR GENERALS AND PACS

For more than 150 years now, similar working relationships have emerged and endured across Commonwealth jurisdictions, including those of us within ACPAC. This relationship plays a critical role in our system of institutional checks and balances by helping Parliaments and the people hold governments to account for the expenditure of public monies and the delivery of what are often monopolised services.

While this relationship has manifested in various forms, I would like to spend my time focusing more on its outcomes than its processes, primarily through the WA lens given this is where I am an active participant.

However, to frame my perspectives, I would like to share a quote from former Senator Robert Ray, a 28-year veteran of the Australian Parliament and former Minister in the Hawke and Keating Governments. Mr Ray made these observations in 2010 about the value of the Senate Estimates Committee process:

> *Somewhere, someplace in Canberra right now public servants are making an administrative or a policy decision and one of the key questions they are going to ask is this: will this survive scrutiny at estimates? This has happened day in and day out in Canberra for the last 25 years. What higher testament can a set of Senate committees have than that being in the minds of every public servant? I am sure that often arose when administrative decisions were made in a minister's office, including Senator Hill's office or mine. We wondered if we would be able to survive a cross-examination on this and if we*

> *would be able to justify it. How many billions of dollars do you think have been saved simply by having the threat of Senate estimates committees?*[16]

I see the relationship between audit offices and committees such as PAC and EFOC in WA as mutually beneficial in encouraging a similar pro-active mindset with public servants.

We, as auditors, are a conduit to informed parliamentary scrutiny of the agencies that serve as the delivery arm of executive government. We provide key operational information and intelligence that would often be otherwise unavailable to committee members and other members of the legislature. This provides them with greater opportunity to develop as effective scrutineers of government policies and programs.

In this respect, we act as the Parliament's eyes and ears. Our focus is on providing independent assurance on public spending, while highlighting shortcomings in public administration. We also strive to recommend ways in which quality and standards can be improved across the entire sector, not just within the entities we audit. But we rely on committees like WA's PAC and EFOC to ensure entities pay heed to our recommendations.

As I noted earlier, these committees have played a long-standing role in promoting, supporting, and utilising the work of the WA audit office. In just its third report in 1992, EFOC commenced following up agencies that had been the subject of Auditor General findings reported to Parliament.[17] The Committee soon turned its focus to the Auditor General's annual reporting on the public sector's lagging development of performance

[16] John Hogg, Robert Hill and Robert Ray, 'Throwing Light into Dark Corners: Senate Estimates and Executive Accountability', Senate Occasional Lecture Series, 2010, p. 28. Accessed at: https://www.aph.gov.au/binaries/senate/pubs/pops/pop54/c03.pdf.

[17] Standing Committee on Estimates and Financial Operations, *Third Report of the Standing Committee on Estimates and Financial Operations in Relation to the Leasing of Computer Equipment for the Legislative Council*. Perth: Parliament of Western Australia Legislative Council, 3 February 1992.

indicators that had become a requirement nine years earlier under amended financial management legislation.[18]

I value my regular briefings with the current EFOC, chaired by the Hon Peter Collier, both for the manner in which they hold me to account for the work of the Office and the way in which they seek further information to support their scrutiny of agencies during their extensive Budget Estimates and Annual Report hearings. The Committee's interrogation of the growing number of entities subject to qualified opinions on financial statements and controls in recent years has very much sharpened the focus of many public sector CEOs on the importance of good financial and information systems management practices. Last December it was pleasing to note a reversal in what had been a steep increase over three years in the number of qualified entities, although many entities still have a lot of work in front of them.

PAC's support has been equally enduring, albeit with a greater focus on our performance audit reports. This has ensured valuable coverage of all our varied forms of work. However, PAC was established prior to our performance audit remit. Therefore, its early lens was turned towards our financial audit results. Within a year of forming in 1971, PAC had examined the Auditor General's annual report to Parliament and expressed its concern that criticisms outlined in that report had not been acted on. It then indicated it would start conducting detailed examinations of various departments. It is not surprising that in his next Annual Report, then Auditor General (Will Adams) attributed 'an overall improvement' in public service accounts to the activities of PAC.

So, the value of an enquiry from a parliamentary committee cannot be overstated!

Perhaps in recognition of this point, PAC and my predecessor Des Pearson signed a Statement of Understanding in 1996. The Statement aimed to 'enhance the accountability mechanisms of the Parliament' by improving communication and coordination between the Auditor General and the Committee.[19] Both entities agreed

[18] Standing Committee on Estimates and Financial Operations, *Tenth Report of the Standing Committee on Estimates and Financial Operations in Relation to Performance Indicators*. Perth: Parliament of Western Australia Legislative Council, 10 December 1994.

[19] Public Accounts and Expenditure Review Committee, *Report on Statement of Understanding Between the Auditor General and the Public Accounts and Expenditure Review Committee*. Perth: Parliament of Western Australia Legislative Assembly, 24 October 1996, p. 3.

to cooperate as independent bodies to enhance public sector accountability and performance.[20]

In its introduction to the 1996 Statement, the Committee referred to earlier reports of the Commission on Government that had highlighted a recent weakening of parliamentary oversight of the executive before concluding that 'In an era of expectations of increased accountability and where the flow of information is crucial to such oversight, this Statement will be of great value.'[21]

I was privileged to co-sign a Statement of Understanding in 2021 with current PAC Chair Lisa O'Malley. Initiated by the Committee, this document reiterates the original Statement's aim and common mission. It includes a commitment from PAC to 'review and consider reports tabled by the Auditor General [with a focus on our performance audits] to determine whether to follow-up [report] findings and recommendations.'

This continues the convention established in 1996 and Committee enquiries take varied forms including letters to agencies seeking detailed responses to actions taken, or invitations to appear at a public hearing. Both methods are extremely helpful in holding agencies to account for commitments they make in response to audit report recommendations. Agency heads generally don't welcome the prospect of having to explain any inactions to PAC.

Consistent with the sentiments of former Senator Ray, the spectre of Committee scrutiny is one of the most valuable prompts to improved public administration. And this cycle of responsiveness and accountability is pivotal to maintaining faith in the integrity of our systems of government in a period where attitudes towards democracy appear to be shifting.

[20] Public Accounts and Expenditure Review Committee, *Report on Statement of Understanding Between the Auditor General and the Public Accounts and Expenditure Review Committee*.

[21] Public Accounts and Expenditure Review Committee, *Report on Statement of Understanding Between the Auditor General and the Public Accounts and Expenditure Review* Committee. p. 1.

CHALLENGES FACING DEMOCRATIC SYSTEMS OF GOVERNMENT – DECLINING TRUST

After an extended period of relative peace and prosperity across many liberal democracies, trust in our public institutions appears to be diminishing. A chorus of credible voices has expressed concern at this trend over the last five years. These include Federal Home Affairs and Cyber Security Minister, Hon Clare O'Neil, who in late-2022 stated that 'Democracies around the world are under threat from a range of anti-democratising forces including … populism and polarisation, and declining reserves of public trust.'[22]

Veteran senior public servant, Peter Shergold AC, wrote in 2019 of the 'depressing fact ... that here, as elsewhere, trust in democracy appears to be falling'.[23] This is fed by misinformation arising in what Mr Shergold calls a '"post-truth" era of social media [where] …. civil discourse and political debate has become ever less civil.'[24] Especially online.

In a similar vein, veteran political journalist Paul Kelly has recently written that 'Australia is now a fragmented nation… engaged in a democracy-changing experiment with the smartphone and losing trust in institutional authority.'[25]

While we may not all share the same level of alarm, agreement around the declining trust in democracy appears to be reasonably broad-based. Or perhaps, to not take away from the struggles of our forebearers, it is rather that the arguments we hope have been won are just never settled in some minds.

The recent announcement of the establishment of a Strengthening Democracy Taskforce, managed by the Department of Home Affairs reflects a contemporary acknowledgement of the challenges we face now. As part of its remit, the Taskforce

[22] The Hon Clare O'Neil MP, 'Home Affairs and the long view - National Press Club Address'. Accessed at: https://minister.homeaffairs.gov.au/ClareONeil/Pages/national-press-club-address.aspx.

[23] Peter Shergold, 'Maintaining public trust in government', in Tom Frame (ed), *Getting Practical About the Public Interest*. Redland Bay, Queensland: Connor Court Publishing, 2019, p. 87.

[24] Peter Shergold, 'Maintaining public trust in government'.

[25] Paul Kelly, 'Two former PMs have raised the alarm. Will they be heeded?'. *The Weekend Australian* (online), 1 March 2024. Accessed at: https://www.theaustralian.com.au/inquirer/two-former-pms-have-raised-the-alarm-will-they-be-heeded/news-story/c0da2898d976505c9bf4eef036ddda5b.

acknowledges three 'historic strengths of Australian democracy' currently exposed to a range of 'emerging and evolving threats' impacting other democracies. Two of these strengths relate to the performance of our 'trusted [democratic] institutions' and the credibility of information flows within our 'deliberative public sphere'.[26]

Many of the factors contributing to declining trust in our democratic systems of government lie outside the scope of your or my influence – particularly those relating to nefarious foreign interference.

However, I believe that each of us in this room has a critical role in augmenting public faith in our systems of government – by offering a check and balance against populist and authoritarian sentiments. How do we work respectively to achieve this?

As auditors, through the quality, relevance, and balance of information we provide to Parliaments.

As parliamentarians, through the manner in which you use such information to promote transparency, accountability, and improved performance across government.

And collectively, by fostering a spirit of robust but respectful debate in our work that shows the community how a tolerance for diverse views, and an ability to disagree well, can help us reach consensus views as to how we shall best govern ourselves.

HOW AUDITORS AND PARLIAMENTARIANS CAN HELP RESTORE TRUST

When discussing the challenges we face in helping strengthen democracy, I am mindful of our respective independence and the importance of staying in one's lane. Accordingly, I have sought to offer parliamentarians' perspectives by sharing a collection of relevant musings from those who have served, or continue to serve, in elected office.

Prime Minister Albanese, who served on the Joint Committee on Public Accounts and Audit (JCPAA) across 2015-2016, recently described democracy as 'precious, something we have carefully grown and nurtured' across generations. He went on to argue, validly

[26] Department of Home Affairs, 'Strengthening Democracy Taskforce - About the Taskforce. Accessed at: https://www.homeaffairs.gov.au/about-us/taskforces/strengthening-democracy-taskforce.

in my view, that 'One of our core responsibilities is to make it stronger, and key to that strength is transparency and accountability'.[27]

Speaking at the 2011 ACPAC Conference, former Democrat Senator for WA, Andrew Murray, argued that accountability relies on strong Parliaments and strong parliamentarians. Mr Murray, who served for 11 years on the JCPAA, warned against a system or a Parliament that 'raises the executive above all else, and diminishes the checks and balances explicit in the separation of powers doctrine.'[28]

But how does one navigate their way through a parliamentary system, like ours, where the separation of powers is blurred with members of the executive residing in and drawn from the legislature? Government and opposition members on PACs and their Upper House equivalent committees are confronted with a perennial juggling act between their roles as parliamentarians and politicians. It would be naïve for us to deny the difficulties you face in balancing these responsibilities. It is arguably one of your greatest challenges.

This topic has been discussed at previous ACPAC Conferences and canvassed in Dr Harry Phillips' study of the WA parliamentary committee system.[29] What is notable is the consensus from members across the political spectrum that while political and philosophical differences often feature within committee deliberations, in most instances members work towards bi-partisan outcomes.

Former Senator Murray is among this cohort, describing most Senators he worked with as politicians in the chamber, but 'co-operative colleagues' in the committee room.

This spirit of bipartisanship shows that while politics may be unavoidable in committee work, it need not be detrimental, and it need not preclude committees from tabling unanimous reports with well-informed recommendations aimed at improving the workings of government.

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[27] The Hon Anthony Albanese MP, 'Woodford Folk Festival speech'. Accessed at: https://www.pm.gov.au/media/woodford-folk-festival.

[28] Andrew Murray, 'Parliamentarians Politicians and Accountability', in WA PAC, *ACPAC 2011: A Report on the 11th Biennial Conference of the Australasian Council of Public Accounts Committees*, Report No. 11, 2011, p. 17.

[29] Harry (C.J.) Phillips and Niamh Corbett, *Parliamentary Committees in the Western Australian Parliament: An Overview of their Evolution, Functions and Features*. *Volume 2: 2001–2021*. Perth: Parliament of Western Australia, 2023, pp. 898-907.

I believe those who might despair at the theatrics of Question Time, would have their faith in democracy somewhat restored watching the effort and commitment of committee members working collaboratively, and often tirelessly, to this end.

Certainly, such instances serve the public interest and enhance the institutional credibility of Parliament. Apt is the description of former WA Legislative Council President, Hon Barry House, who retired in 2017 after 30 years in the WA Parliament, that 'Parliamentary committees are one of the most important, and understated, functions of our representative parliamentary democratic system'.[30]

This work is particularly important on PACs and their Upper House equivalent committees given the breadth of their remit across all aspects of government expenditure – remembering that if you don't look after the finances, before too long you can't get much done. The scope for positive public administration outcomes and members' professional growth is considerable.

Reflecting on his time on committees, including four years as PAC Chair, current WA Government Minister, the Hon Dr Tony Buti, said that his experience on committees allowed him to 'delve into the intricacies of how governments work, and the interaction between government agencies and the executive, and the private sector and the public at large.'[31]

He lauded the value of committee membership as something that offers 'great educational value, not only for legislators but also for potential ministers of the crown.'[32]

In its 2012 report, *Holding Government to Account*, the UK PAC wrote of its proud 150-year history focusing on 'the themes of identifying waste, tackling poor performance and making the best use of public funds'.[33]

For what it is worth, as a keen and invested observer, I would urge you to embrace your opportunity on these most pre-eminent and historically significant of committees. Collectively, we are invaluable cogs working cooperatively but independently in a

[30] Harry Phillips and Niamh Corbett, *Parliamentary Committees in the Western Australian Parliament*, p. 900.

[31] Harry Phillips and Niamh Corbett, *Parliamentary Committees in the Western Australian Parliament*, p. 904.

[32] Harry Phillips and Niamh Corbett, *Parliamentary Committees in the Western Australian Parliament*.

[33] Committee of Public Accounts, *Holding Government to Account*, p. 33

system dedicated to financial accountability and transparency. The parliaments and public we serve will be stronger for our diligence and shared commitment to this work.

As auditors, we need to remain fearless and thorough in our approach, but mindful and respectful in our dealings with government and agencies, and be prepared for intermittent periods of discomfort in our role, particularly within the more subjective area of performance auditing. I very much relate to Ian McPhee's recollections of his time as Auditor General for Australia. He has spoken of the 'fairly robust discussions' he experienced on occasions where Ministers and CEOs 'strongly presented their perspective'. He did note, however, that when done properly and respectfully, this 'generally add[ed] to the understanding of the issues on both sides' and ultimately reflected well on our system of government and its respect for our institutional arrangements.[34]

I would argue this has been my experience in WA. I have regularly observed close and respectful senior engagement on audit matters, and a mutual willingness to adjust our positions which has led to better accountability and public administration.

While parties may ultimately agree to disagree, it is important nonetheless that we auditors maintain a no-surprises approach throughout our audit process. Having active liaison at a ministerial, departmental, and parliamentary level within an audit office – while not a guaranteed fail-safe – is still very much a value-add in this regard.

Even so, government will remain understandably wary of our reports due to their impact among the media and also with the public – who are the ultimate scrutineers of performance. Hence the need for balance in our reporting, giving appropriate credit where due. While they may rarely be the focus of media, positive findings recognise effective government and allow other entities outside the audit to identify and implement better practice. Both outcomes give due recognition to dedicated and skilled public servants and help inspire public confidence in our institutions.

I acknowledge such outcomes may offer little consolation to a government immediately following the tabling of an audit report with adverse findings. It certainly surprised no-one at my Office's 190th anniversary celebrations in 2019, when then-Premier, Hon Mark McGowan and Opposition leader, Hon Liza Harvey, both joked with

[34] Ian McPhee, 'The Evolving Role and Mandate of the Australian National Audit Office Since Federation'.

our staff about how much more they preferred our audits and reports when they were on the Opposition benches!

However, it is a credit to our form of democracy when governments accept independent scrutiny of critical issues of public interest and commit to addressing recommendations for improvement. Nothing similar is evident under authoritarian regimes.

I would also argue that while on occasions we may be a thorn in its side, auditors are not a complete anathema to government. Periodic private briefings with Ministers provide opportunities to inform them of matters relevant to their portfolios that have arisen in our financial and performance audits. The occasional phone call to an agency CEO is similarly beneficial as a means of ensuring key government figures are informed of issues impacting effective governance within their entity.

While it is important to help government where possible and appropriate, the reality is that many Auditors General are now defined in statute as independent Officers of the Parliament. To remain credible and effective in our work Auditors General must not abuse this independence, but nor should governments impair it. Parliaments have a key role to play holding both sides to account in this area.

To maintain the confidence and respect of the Parliament, we auditors need to know what our role is, and what it is not, and do that role well. As part of achieving this, we need to be responsive to the issues Parliament has most interest in.

While I have full discretion on what I choose to audit, I am explicitly required to give regard to the audit priorities of the Parliament as expressed by either House, PAC and EFOC. To achieve this, I regularly invite input from those committees, and other members with whom I meet or correspond, on our planned and proposed audit program.

I also avail myself to other committees across both houses where this is relevant to assisting their portfolio inquiry work. I see this as critical to ensuring the Parliament is apprised of the information it requires to perform its vital check and balance function.

The ultimate goal of my approach to relations with Parliament and the Government is to help support robust and functioning institutions essential to a healthy and highly regarded democracy that best serves our community.

CONCLUSION

When presenting to ACPAC in 2011, former Senator Murray suggested that 'Those who serve on scrutiny committees need to have a good sense of history.'[35]

I hope this morning to have conveyed some context relevant to the importance of our respective roles in the Westminster system of checks and balances. This system has evolved out of a fairly dim assessment of human nature and the level of trust we hold towards each other. Particularly those who govern us.

I hold an overall optimistic view of us as a species. I think we are a fundamentally decent and compassionate lot who welcome and crave the relative prosperity and personal freedom democracy strives to deliver. I also think most of us remain prepared to place our trust in those dedicating themselves to positions of responsibility and public office. But this trust is not unconditional. Nor is it unwavering.

There is a growing view that faith in democracy is waning due to a range of factors. We in this room alone are not the panacea for all of democracy's current challenges, but we can play some part in countering the cynicism that is increasingly fed by misinformation and confrontational discourse.

We have the privileged opportunity to deliver credible information and genuine scrutiny to demonstrate that governments in our democratic systems remain accountable and responsive. Far from a quick fix, our work is more of a slow burn requiring sustained vigilance. It is sometimes mundane (depending on your perspective) and often lacks recognition but think of what society would look like without it. More authoritarian and autocratic than what I hope any of us would desire.

So, it would be a worthy and satisfying legacy to leave public confidence in democracy no weaker for our period in service. Hopefully, when our time comes to ascend to the heavens, we'll be able to tell those angels, whose absence James Madison bemoaned, that their services are not required at this time.

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[35] Andrew Murray, 'Parliamentarians Politicians and Accountability', in WA PAC, *ACPAC 2011: A Report on the 11th Biennial Conference of the Australasian Council of Public Accounts Committees*, Report No. 11, 2011, p. 17.

Articles

Beyond the Bench: Crossbench influence on a contemporary House of Representatives

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Abstract The 47th Parliament marked a significant shift in Australian politics with the largest number of independent crossbench members elected to the House of Representatives, reshaping the dynamics of responsible and representative government. This shift coincided with declining public sentiment toward the major parties, signalling a desire of the Australian people for a more effective and accountable government. This article discusses the crossbench's impact on three key aspects of parliamentary procedure: Question Time, the matter of public importance debate and the consideration in detail of bills. The article suggests that the large crossbench has strengthened accountability and transparency in Parliament by bringing fresh perspectives and challenging the established norms and dominance of the major parties. The article concludes by speculating on the 48th Parliament and the need for further research to track the lasting effects of this transformative period in parliamentary history.

INTRODUCTION

The 47th Parliament marked a significant shift in Australian politics with a large number of independent crossbench members elected to the House of Representatives, reshaping the dynamics of responsible and representative government.

This shift coincided with a decline in public confidence and trust in government, consistent since 2007.[1] Voters are now exhibiting increased discontent and distrust

[1] Sarah Cameron, Ian McAllister, Simon Jackman and Jill Sheppard, 'The 2022 Australian Federal Election, Results from the Australian Election Study', *School of Politics and International Relations, ANU College of Arts and Social*

towards the offerings of the two major political parties, with the 2022 election recording the lowest vote for the major parties since 1910.[2] Satisfaction with Australia's democracy in general has also fallen in the last two decades – in 2007, 86 per cent of Australians were satisfied with democracy compared to a record low of 59 per cent in 2019, with only 25 per cent of people agreeing that government can be trusted.[3] It is not surprising that citizens are now electing independents and minor parties in the hope that they may better prioritise the issues that their constituents care about, and enhance government accountability.

While concerning, this decline has paved the way for a re-evaluation of the effectiveness of a contemporary House of Representatives in holding the government to account for its actions and decisions. Since their election in May 2022, the House crossbench have unprecedentedly influenced key aspects of parliamentary procedure, showcasing the impact of a more diversified representation on responsible government. This article discusses three key aspects of parliamentary procedure: Question Time, the matter of public importance debate and the consideration in detail of bills. The article suggests that the large House crossbench has strengthened parliamentary accountability and transparency, ultimately leading to more favourable outcomes for those the Parliament serves—the Australian people. The article concludes by speculating on the 48th Parliament and the need for further research to track the lasting effects of this transformative period in parliamentary history.

THE HOUSE CROSSBENCH

The term 'crossbench' or 'crossbenchers' refers to members who do not align with either the Government or the Opposition. The word derives from their physical location

Sciences, December 2022, p. 27; Ruth Dassonneville and Ian McAllister, 'Explaining the decline of political trust in Australia'. *Australian Journal or Political Science* 56(3) 2021, pp. 281-283.

[2] Amy Nethery, ''If not now, when? If not us, who?' The teals' no-nonsense blow to the two-party system'. *Social Alternatives* 41(4) 2022, p. 15.

[3] Sarah Cameron and Ian McAllister, 'Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019', *School of Politics and International Relations, ANU College of Arts and Social Sciences*, December 2019, p. 98; Dassonneville and McAllister, *Australian Journal or Political Science*, pp. 281-283.

in the House Chamber: the curved seats positioned between the two major parties.[4] The crossbench includes members who are independents, as well as those belonging to minor parties, and they tend to sit slightly to the left of the Chamber on the non-government side. This positioning symbolises their independence from dominant political factions.

In Australia, members of the House are chosen directly by citizens who are of voting age.[5] The federal election of the 47th Parliament marked a historical milestone and a key cultural change in Australian society. The Australian Labor Party and the Coalition experienced a decline in voter support and collectively secured only a little over two-thirds (68 per cent) of the primary vote, with a record 16 crossbenchers elected.[6] This reflected a clear divergence in voter preferences from the major political players.

Among these were 10 independents, seven of whom secured previously safe Liberal Party seats and garnered attention as part of what media outlets dubbed the 'teal wave'.[7] This alluded to their distinctive campaign colour representing a combination of blue (stemming from the Liberal Party) and green (their views on climate).[8] Notably, all seven are women. The remaining elected crossbench comprised of four Australian Greens members (up from only one member in the previous Parliament), one member of Centre Alliance and one member of Katter's Australian Party (see Table 1 for the composition of the 47th Parliament by party).

[4] Glenn Kefford, Hannah Murphy-Gregory, Ian Ward, Stewart Jackson, Lloyd Cox, Andrea Carson, *Australian Politics in the Twenty-First Century: Old Institutions, New Challenges*. Cambridge, UK: Cambridge University Press, 2018, p. 48.

[5] David Clark, *Introduction to Australian Public Law*. Chatswood, NSW: LexisNexis Butterworths, 5th ed, 2016, p. 11.

[6] Australian Electoral Commission Tally Room. '2022 Federal Election House of Representatives – final results'. Accessed at: https://results.aec.gov.au/27966/Website/HouseDefault-27966.htm.

[7] Royce Millar, 'Inside the teal wave: How the independent revolution happened'. *Sydney Morning Herald*, 22 May 2022. Accessed at: https://www.smh.com.au/politics/federal/inside-the-teal-wave-how-the-independent-revolution-happened-20220522-p5ani0.html.

[8] Calla Wahlquist, 'Teal independents: who are they and how did they upend Australia's election?'. *The Guardian,* 23 May 2022. Accessed at: https://www.theguardian.com/australia-news/2022/may/23/teal-independents-who-are-they-how-did-they-upend-australia-election; James C. Murphy, 'The independent "teal" candidates have shaken up the 2022 Australian election campaign, but there are plenty of idiosyncrasies among them'. *Pursuit*, 18 May 2022.

The members of the teal wave were described by the Coalition as 'fake independents' as they were 'well organised and well funded' by corporate outsiders, such as Climate 200.[9] Despite this portrayal, it is important to note that the teal wave are not formally registered as a political party under the Australian Electoral Commission. While they share resources and align on key issues such as climate action, government integrity and gender equality, the teal members lack a firm set of policies, discipline and loyalty. Thus, unlike conventional party structures, the teal wave can vote according to their own political judgment. Political journalist Michelle Grattan (2023) aptly described them as a 'loose network'.[10]

In addition to the initial 16 crossbench members elected in May 2022, the crossbench further expanded throughout the Parliament by two members who resigned from the major parties. In December 2022, the Hon Andrew Gee MP made the decision to leave The Nationals, opting to sit as an independent as he did not agree with the Coalition's position on the referendum to enshrine an Indigenous voice to Parliament in the Constitution.[11] Additionally, Mr Russell Broadbent MP, having lost preselection in November 2023, chose to step away from the Liberal Party to sit on the crossbench as an independent.[12]

[9] Royce Millar, 'A secret party? Immoral? Explaining who the 'teal' independents really are'. *Sydney Morning Herald,* 6 May 2022. Accessed at: https://www.smh.com.au/politics/federal/a-secret-party-immoral-explaining-who-the-teal-independents-really-are-20220505-p5aio4.html.

[10] Michelle Grattan, 'View from The Hill: is the political system letting down the Australian public?'. *The Conversation,* 30 October 2023. Accessed at: https://theconversation.com/view-from-the-hill-is-the-political-system-letting-down-the-australian-public-215790.

[11] Paul Karp, 'Nationals MP Andrew Gee quits party citing its opposition to Indigenous voice'. *The Guardian,* 23 December 2022. Accessed at: https://www.theguardian.com/australia-news/2022/dec/23/nationals-mp-andrew-gee-quits-party-citing-opposition-to-indigenous-voice.

[12] Paul Karp and Benita Kolovos, 'Veteran MP Russell Broadbent quits Liberal party to sit on crossbench'. *The Guardian*, 14 November 2023. Accessed at: https://www.theguardian.com/australia-news/2023/nov/14/liberal-mp-russell-broadbent-quits-party-crossbench-monash.

Table 1. Membership of the House of Representatives in the 47th Parliament by party[13]

Party	No. of members
Australian Labor Party	77
COALITION	
Liberal Party of Australia	25
Liberal National Party of Queensland	21
The Nationals	9
CROSSBENCH	
Australian Greens	4
Centre Alliance	1
Independent	12
Katter's Australian Party	1
TOTAL CROSSBENCH	**18**
TOTAL MEMBERS	**151**

The election of nearly triple the number of crossbench members compared to the 46th Parliament (where there were only five crossbench members) demonstrates a clear shift in the political landscape and is indicative of the major parties struggling to resonate with evolving preferences. The demands of new generations of voters may also have had an influence. The election of the 47th Parliament was the first time in which baby boomers (aged 65 and over) were outnumbered by millennial voters (aged

[13] As of August 2024.

25 to 39) and Generation Z voters (aged 18 to 24) who recorded a large decline in Coalition support.[14]

One of the most immediately notable features of the 47th Parliament was the adoption of Sessional Order 65A to increase crossbench engagement in the Chamber.[15] While it is not unusual for an incoming government to review and amend the Standing Orders, the unprecedented number of members in the crossbench triggered a review to increase opportunities for engagement in parliamentary debates, and 65A was one of a raft of such changes.[16]

Sessional Order 65A requires the Speaker of the House of Representatives to give priority to crossbench members during Question Time, members' statements in the House and Federation Chamber, members' constituency statements and grievance debate in the Federation Chamber and adjournment debate in both chambers. For the matter of public importance discussion in the House, the Speaker should have regard to the proportion of crossbench members when selecting a matter to be discussed.

The following sections will examine the impact of Sessional Order 65A on crossbench engagement during Question Time and the matter of public importance discussion. Following those, the article will discuss how the expanded crossbench has impacted the legislative process through the consideration in detail phase.

QUESTION TIME

Since their election, crossbench members have played a key role in holding the government accountable through their increased participation in parliamentary processes such as Question Time. This shift not only challenges the dominance of the major parties, but also has the potential to rebuild public confidence in Parliament.

A strong democracy relies on executive accountability through representative and responsible government. For responsible government to be effective, the party or

[14] Cameron, McAllister, Jackman and Sheppard, 'The 2022 Australian Federal Election, Results from the Australian Election Study', p. 23; Amy Nethery, ''If not now, when? If not us, who?' The teals' no-nonsense blow to the two-party system'. Social Alternatives 41(4) 2022, p. 15.

[15] T. Burke, *Parliamentary Debates,* House of Representatives, 27 July 2022, p. 71.

[16] T. Burke, *Parliamentary Debates,* House of Representatives, 27 July 2022, p. 71.

coalition of parties that hold a majority must maintain the confidence of the Lower House and remain responsive to public opinion.[17] Individual accountability extends to Government Ministers, who are responsible to the Parliament for both their decisions and the performance of their respective departments. Ministers are held accountable through parliamentary processes, with the most public forum being Question Time. This session, running for just over an hour from 2pm every sitting day, provides an opportunity for the Opposition and members of the crossbench to expose issues and grievances, and as noted by parliamentary scholar, May, serves as a medium to 'press for action' from the government.[18]

In recent years, Question Time has faced criticism for not being effective as an accountability measure.[19] This is mainly due to the increasingly adversarial and aggressive nature of the debate. For example, in August 2024, the Speaker of the House of Representatives, the Hon Milton Dick MP acknowledged that 'there is a distinct audible noise when members of the crossbench or the non-major parties ask their questions'.[20] Teal independent, Ms Allegra Spender MP similarly noted that 'the conduct that is demonstrated in this chamber, particularly during question time, is unlike any workplace I've ever been in'.[21]

The increasing use of orchestrated 'Dorothy Dixers' may have also contributed to the growing distrust of Question Time. Dorothy Dixers are scripted questions prepared by Ministers for government members to ask them. The questions are strategically designed to portray government policies and actions favourably, or to embarrass the

[17] Clark, *Introduction to Australian Public Law*, p. 12.

[18] Department of the House of Representatives, D. R. Elder and P. E. Fowler (eds), *House of Representatives Practice*, Canberra: Department of the House of Representatives, 7th ed, 2018, p. 543.

[19] Gregory Melleuish, 'As question time becomes political theatre, does it still play a vital role in government?'. *The Conversation,* 1 August 2019. Accessed at: https://theconversation.com/as-question-time-becomes-political-theatre-does-it-still-play-a-vital-role-in-government-121177.

[20] M. Dick, Commonwealth, *Parliamentary Debates,* House of Representatives, 14 August 2024, p. 63.

[21] A. Spender, Commonwealth, *Parliamentary Debates,* House of Representatives, 21 August 2024, p. 65.

Opposition. Members themselves are generally dissatisfied with their use[22] and there is nothing in the Standing Orders that prevents them from being used.[23]

In 2010, with the Labor government reliant on the six-member crossbench in the hung Parliament, Standing Orders were amended so that independent members were allowed priority call to ask the sixth question during Question Time each day.[24] This practice was maintained from the 43rd to the 46th Parliaments.

In July 2022, Sessional Order 65A gave crossbench members priority call on three questions to enable a more even debate.[25] Initially, priority call was given on the fifth, 13th and 21st questions but was later amended to the fifth, 13th and 17th questions as Question Time frequently did not continue to 22 questions.[26]

As an example, during the first six Question Times following the introduction of 65A, crossbench members only gained their full three question allocation twice. On 5 September 2022, independent teal wave member Ms Zoe Daniel MP introduced the amendment to Sessional Order 65A.[27] Dr Monique Ryan MP (also a member of the teal wave) seconded the motion and argued in the House:

> *The 47th Parliament has the largest crossbench yet seen in this House, reflecting the fact that one-third of Australians voted for a representative who was independent from the major parties at the most recent federal election. The millions of Australians who make up our electorates have expressed a desire to see politics done differently. … We hold the trust of the public that we use this time*

[22] House of Representatives Standing Committee on Procedure, *A window on the House: practices and procedures relating to Question Time*, Parliament of Australia, Final Report, March 2021, p. 36.

[23] House of Representatives Standing Committee on Procedure, *A window on the House: practices and procedures relating to Question Time*, p. 39.

[24] A. Albanese, *Parliamentary Debates,* House of Representatives, 18 November 2010, p. 3027; Department of the House of Representatives*, House of Representatives Practice*, p. 546.

[25] Department of the House of Representatives, *House of Representatives Standing Orders*, Parliament of Australia, 2 August 2022, SO 65A.

[26] Z. Daniel, Commonwealth, *Parliamentary Debates,* House of Representatives, 5 September 2022, p. 812; Department of the House of Representatives, *House of Representatives Standing Orders*, SO 65A.

[27] Z. Daniel, *Parliamentary Debates,* House of Representatives, 5 September 2022, p. 812.

> *effectively and responsibly. Our electorates want and deserve better than the time wasted in question time. We wish to facilitate a more productive question time in which the important and pressing issues of our time can be discussed in detail and with respect. This country needs an effective opposition and question time needs to include real questions and real answers. The interests of our individual electorates will be better served by a redistribution of questions such as to increase the ability of this crossbench to hold the government to account.*[28]

As aptly put by Dr Ryan MP, despite the limitation on the number of questions available, the allocation of three questions to the crossbench results in fewer opportunities for scripted Dorothy Dixers, and fewer opportunities for Opposition members to ask questions that are 'generally frame[d] in such a way that they can air their grievances openly and forcefully', often provoking responses that do not properly address the question.[29] In addition, in an analysis of questions asked by the crossbench and the Opposition in Question Times from 1991 to 2020, Hebden and Perche found that crossbench members are 'far more likely to use their questions to seek factual information. They also elicit a much better standard of response'.[30] This evidence indicates that a greater presence of crossbench members in the current Parliament may assist in resisting what would otherwise be complete or partial dominance of the executive and ensures a less combative tone of some parliamentary processes.

MATTER OF PUBLIC IMPORTANCE DEBATE

Representation is at the heart of why parliament exists and the way in which political representation and responsible government is exercised is central to the way

[28] M. Ryan, Commonwealth, *Parliamentary Debates,* House of Representatives, 5 September 2022, p. 812.

[29] Gabrielle Appleby, Alexander Reilly, Laura Grenfell, *Australian Public Law.* Docklands, Victoria: Oxford University Press, 2018, p. 237.

[30] Nicholas Hebden and Diana Perche, 'Looking through the 'Window on the House': assessing the standard of Question Time in the Australian House of Representatives, 1991–2020'. *Australian Journal of Political Science* 58(4) 2023, pp. 343, 354.

Australia's democracy functions. Closely linked to Question Time is the matter of public importance (MPI) debate – a platform for private members to submit to the House a matter which is of current public concern for discussion.

MPI is held shortly after Question Time on every sitting day (except on Mondays) for approximately an hour. It can become political and argumentative as topics are often used by the opposition as 'a weapon of accountability' and a 'more effective extension of Question Time'.[31] House of Representatives Practice similarly observed that in practice, the 'great majority of matters discussed are proposed by members of the opposition executive and are usually critical of government policy or administration'.[32]

This practice raises concerns about the limitation it imposes on members to actually represent their constituents in the Chamber. The MPI debate originated in 1901 to allow members to adjourn the House for the purpose of discussing urgent public matters. However, it appears that it is now used by the opposition to attack the government, rather than prompt consideration of important matters or meaningfully hold the government to account.

As discussed earlier, Sessional Order 65A extended opportunities for crossbench members to propose topics to be discussed during the MPI debate by requiring the Speaker to have regard to the number of crossbench members when selecting matters proposed. Since the commencement of the 47th Parliament, crossbench members have successfully proposed 12 topics out of 51 MPIs, addressing concerns voiced by the Australian community.[33] These topics span a spectrum of issues such as immigration detention, housing, cost of living, eating disorders, climate change and the environment, health care, tobacco advertising, and the safety, security and wellbeing of affected communities at a time of international conflict. The topics align with the original purpose of the MPI debate as a 'procedural mechanism to expedite debate on immediate concerns'[34] as they address real-world issues that directly impact the lives of citizens.

[31] John Craig, 'Playing with the Rules'. *Australasian Parliamentary Review*, 21(2) 2006, pp. 78-79.

[32] House of Representatives*, House of Representatives Practice*, p. 591.

[33] As of December 2023.

[34] J. Craig, 'Playing with the Rules', pp. 78-79.

In comparison, the partisan wording used by the opposition creates a confrontational tone to the debate. For example, some of the topics proposed by the opposition between July 2022 and February 2023 include '[t]he government's abandonment of its promise to cut power bills by $275', '[t]his Government's failure to deliver on their commitments to the Australian people on cost of living and energy prices',[35] '[t]he Government's cruel decisions which are hurting regional, rural and remote Australia',[36] and '[t]he continuing consequences of the last Labor Government's defence spending cuts.'[37]

Notably, during an MPI debate on helping households transition away from fossil fuels to cheaper renewable energy, Labor MP Hon Julian Hill emphasised the significance of a sensible and substantive parliamentary debate, stating that:

> *… it is terrific to have a sensible topic for debate for once on the MPI … It's obvious that it's the teals and the crossbench bringing this debate, not the opposition, because it is a sensible topic for the parliament to spend an hour debating.*[38]

This demonstrates the value of the crossbench in representative democracy and potentially restoring public faith and trust in Parliament by actively engaging in meaningful discussions on important issues and contributing to a more robust and authentic democratic process.

CONSIDERATION IN DETAIL OF BILLS

Parliament has historically been under the tight control of the strong discipline exercised by the two major parties, particularly in relation to voting lines. Appleby, Reilly and Grenfell note that 'Australian political parties have some of the strongest party discipline among their Westminster cousins in the UK, Canada and New

[35] M. Dick, Commonwealth, *Parliamentary Debates,* House of Representatives, 4 August 2022, p. 736.

[36] M. Dick, Commonwealth, *Parliamentary Debates,* House of Representatives, 29 November 2022, p. 3773.

[37] M. Dick, Commonwealth, *Parliamentary Debates,* House of Representatives, 14 February 2023, p. 792.

[38] J. Hill, Commonwealth, *Parliamentary Debates,* House of Representatives, 5 September 2022, p. 4941.

Zealand.'[39] However, the large House crossbench has introduced diversity that may challenge this traditional narrative.

A majority of the Chamber order of business is allocated to government business such as the passing of legislation, and has priority over committee, delegation and private members' business (including the introduction of private members' bills) except on Monday mornings from 10.00 am to 12.00 pm. The passing of proposed bills by private members is rare as they typically do not have the backing of at least some of the members of government to carry a motion. In the 46th Parliament, for instance, private members introduced 165 bills and none were passed by the House. Between the 39th Parliament (which commenced on 10 November 1998) and the 46th Parliament, only 14 private members' bills were successfully enacted.[40]

Despite this, the large House crossbench is wielding an influence on the processes of lawmaking in a different way due to the absence of strict party control mechanisms and flexibility to move amendments or vote against the passing of bills. This departure from traditional party dynamics can be seen in the analysis of time spent on the consideration in detail of government bills.

Following the first and second reading, if it is the wish of the House, a bill may be subject to a consideration in detail stage where specific provisions of the bill are considered and amendments are moved and voted on.[41] In the first 18 months of the 47th Parliament, the crossbench moved 532 amendments to government bills and 150 amendments were agreed to. By contrast, during the entire term of the 46th Parliament, only 103 crossbench amendments were moved and two were agreed to.[42]

This data highlights the tangible impact of the presence of a larger crossbench in the House and emphasises their measurable contributions to the process of making legislation and responsible government.

[39] Appleby et al, *Australian Public Law*, p. 246.

[40] Australian Law Reform Commission, 'Lawmaking by Parliamentary Term'. Accessed at: https://www.alrc.gov.au/datahub/topics-of-interest/lawmaking-by-parliamentary-term/.

[41] House of Representatives*, House of Representatives Practice*, p. 373.

[42] Data sourced from the Department of the House of Representatives Procedure Office, correct as of December 2023.

CONCLUSION

The downward trend in public sentiment towards Parliament has paved the way for the election of the largest number of crossbench members in history, signalling a desire of the Australian people for a more effective and accountable government.

At first glance, the crossbench may appear to have little influence over the work of the Parliament due to their size and not having the backing of a major party. As well as this, with the Labor government holding a majority (unlike the hung Parliament in 2010 to 2013), it is not reliant on the crossbench to support the government, pass legislation or oppose no-confidence motions. However, as demonstrated in this article, the election of the crossbench has brought fresh perspectives and flexibility, thereby challenging the established norms and dominance of the major parties in parliamentary processes such as Question Time, the MPI debate and the consideration in detail of bills. Voting patterns since 1990 indicate a continual shift away from the major parties and therefore crossbench members are now increasingly important for Australia's political system.[43] These shifts may well serve as a signal to the major parties that it is time for a change.

This article encourages a broader exploration of how the crossbench has shaped the House of Representatives during the 47th Parliament, including the wider impacts that the introduction of Sessional Order 65A has brought. Looking ahead to the 48th Parliament, it prompts questions about the potential growth and stability of the crossbench. What would the impact be on parliamentary procedure if the Labor government loses seats and relies on the crossbench to form a majority government? If citizens' voting patterns persist, independent members holding the balance of power could become the norm.

[43] Cameron, McAllister, Jackman and Sheppard, 'The 2022 Australian Federal Election, Results from the Australian Election Study', p. 17.

The Federation Chamber at 30: From Main Committee to much more

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Abstract: June 2024 marked 30 years since the first meeting of what is now known as the Federation Chamber—that is, the second chamber of the Australian House of Representatives. While it does not have the same profile as the House, the Federation Chamber now meets almost every day that the House sits and is the forum for members to make a variety of contributions, from constituency statements to considering bills in detail. As the role of the Federation Chamber has evolved, it has come to contribute to a wider range of the work of the House. The article traces the evolution of the second chamber of the House of Representatives over the last 30 years and considers how it has grown to support the House in its legislative, scrutiny, budget-setting, representative and grievance functions.

INTRODUCTION

In 1994, the Australian House of Representatives established the Main Committee, a second debating chamber, intended to reduce legislative pressure by providing an additional venue for certain debates on bills. This 'creation of the House'[2] started as 'modest ambitions' of a secondary chamber that met only when required and with a very limited scope of business.[3] Thirty years later, the Federation Chamber, as it is now known, has grown into a flexible forum which not only facilitates debates on legislation

[1] The author would like to thank Jessica Butler and Glenn Worthington for their advice and assistance in the preparation of this article.

[2] Hon Bruce Scott MP, 'The Federation Chamber of the Australian House of Representatives: 20 years on', 45th Presiding Officers and Clerks Conference, Samoa, July, 2014.

[3] House of Representatives Standing Committee on Procedure, *The Second Chamber: Enhancing the Main Committee*, Canberra, 2000, p. 4.

but also allows members to speak about the concerns of their constituents. What had initially been little more than the 'Committee of the Whole' considering bills now provides opportunities with a range closer in scope to that found in the House itself.

The role of the House—and of its members—can be defined as simply as 'being the house of government and making laws'. Hazell articulates a more comprehensive framework:

- legislation
- deliberation
- scrutiny
- budget setting
- representation
- redress of grievances; and
- making and breaking governments.[4]

As Coghill, Holland, Kinyondo, Lewis and Steinack note, these capture the themes common to many parliaments[5]; they also align closely with the functions of the House as outlined in *House of Representatives Practice*.[6]

This article traces the evolution of the second Chamber of the House of Representatives over the last 30 years and considers how it has grown to support the House in most of these seven functions.

There is one key exception. It is important to understand from the outset that the second chamber was established as a creature of the House. It can meet only when the House is sitting and must suspend when the House divides, so that members may attend divisions. Matters are referred to it on motion of the House, by declaration by

[4] Robert Hazell, 'The Challenges facing our Parliaments: How can we improve their performance?' *Australasian Parliamentary Review* 16(2) 2001, pp. 23-4. This article presents the functions in a different order from Hazell.

[5] Ken Coghill, Peter Holland, Abel Kinyondo, Colleen Lewis and Katrin Steinack, 'The functions of Parliament: reality challenges tradition'. *Australasian Parliamentary Review* 27(2) 2012 pp. 56-8.

[6] David Elder (ed), *House of Representatives Practice*, 7th edn, Canberra: Department of the House of Representatives, 2018, pp. 37-41.

the Leader of the House or Chief Government Whip and by decision of the Selection Committee. Unless otherwise provided, the rules of the House apply to it.[7]

Further, decisions in the Federation Chamber can only be made 'on the voices'. If there is any dissent from a result announced by the Deputy Speaker, the question is unresolved and is reported to the House. The House can then decide the matter. Decisions taken in the Federation Chamber are also reported to the House. The House then considers the report.[8]

Given this subordinate position, the Federation Chamber has no direct role in the making and unmaking of governments. Such matters of confidence are decided on the floor of the House.[9]

This article examines the origins of the second chamber and its meetings before exploring how the Federal Chamber approaches the consideration of legislation, government business and private members' business. It looks at how the Federation Chamber is seen by key actors in the parliamentary system before offering some concluding thoughts on the contributions the second chamber has made to the House's ability to manage its workload.

THE ORIGINS OF THE SECOND CHAMBER

The second chamber began life as the recommendation of the House Standing Committee on Procedure (the Procedure Committee), which in 1993 proposed the creation of a 'Main Committee (Legislation)' to make more time available for the consideration of legislation and increase opportunities for members to contribute to debate on bills.[10]

The Procedure Committee was responding to a need to reduce legislative pressure—in particular to avoid the 'routine practice' of 'guillotining' large numbers of bills towards

[7] See Chapter 14 of *House of Representatives Standing Orders,* (2 August 2022).

[8] Standing order 188.

[9] For a discussion of the making and unmaking of governments, see Elder, *House of Representatives Practice,* 7th edn, pp 37-8.

[10] House of Representatives Standing Committee on Procedure, *About Time: Bills, Questions and Working Hours — Report of the inquiry into reform of the House of Representatives*, Canberra, 1993 p. 7.

the end of a sitting period.[11] The Procedure Committee argued that additional time to debate bills would 'open up fuller opportunities, in the House, for debate on the major controversial items of the Government's legislative agenda'.[12]

In February 1994 the House responded by amending standing orders to provide for a Main Committee which could debate the motion for the second reading of bills and consider bills in detail.[13] 'Consideration in detail' replaced the 'Committee of the Whole' process that the Procedure Committee had argued no longer appeared relevant.[14] The Main Committee was also empowered to debate orders of the day for motions moved in relation to committee and delegation reports.

The Main Committee met only as required, with the standing orders authorising the Deputy Speaker to fix the meeting times for the Main Committee and to take the Chair. It met for the first time on 8 June 1994, when two second reading motions were moved and debated. It met a further 19 times that year.[15]

In 1995, the first full year of its operation, the Main Committee met 35 times, and 55 bills were referred to it. It was now on its way to becoming an institution.

By 2000, there was a 'general feeling' that the name of the Main Committee was 'unsatisfactory, inadequate or misleading', especially due to the confusion it created with the main committee room—that is, the largest committee room in the building.[16] The Procedure Committee recommended changing the name of the Main Committee to the 'Second Chamber'; however, this was not supported by the government and no action was taken.[17]

[11] *About Time: Bills, Questions and Working Hours*, p. 4.

[12] *About Time: Bills, Questions and Working Hours*, pp. 11-2.

[13] Commonwealth, *Votes and Proceedings*, No. 53, 10 February 1994, pp. 754-779.

[14] *About Time: Bills, Questions and Working Hours*, p 7.

[15] All statistics courtesy of the House Procedure Office unless otherwise indicated. All 'to date' statistics are as at close of business 4 July 2024—that is, the last day of the autumn/winter period.

[16] *The Second Chamber: Enhancing the Main Committee*, p. 33-4. When the name was originally proposed, it was envisaged that its meetings would be held in the main committee room; however, this room's central location in a part of Parliament House shared by both houses meant this did not eventuate (K. Sullivan, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1995, p. 2190).

[17] House of Representatives Standing Committee on Procedure, *A History of the Procedure Committee on its 20th Anniversary*, Canberra, 2005, p. 157.

In 2004, the Procedure Committee again recommended renaming the Main Committee, arguing that the name did not emphasise its functions, including the additional functions that had evolved over time.[18] This time the suggestion was for 'the Federation Chamber'—a name preferred over 'Second Chamber', on the basis that that name might create confusion due to its use for upper houses in parts of the world, and over a party-political name, such as one honouring a former Prime Minister. The Procedure Committee favoured including the word 'Federation' in the title as it recognised the fundamental structure of the Australian parliamentary system.[19]

On 8 February 2012, the House agreed to amend standing orders to change the Main Committee's name to the Federation Chamber, the then Leader of the House noting that this recognised 'the importance of the House's second chamber'.[20]

MEETINGS OF THE SECOND CHAMBER

The Main Committee's meeting times were initially simply to be fixed by the Deputy Speaker and notified to all members. In practice, these meetings largely took place on Wednesdays and Thursdays, although it sometimes met earlier in the week.[21] This was eventually reflected in the standing orders through the inclusion of an order of business for the Main Committee.

In 2006, the House adopted a sessional order enabling the Main Committee to meet on Monday afternoons if required to consider orders of the day relating to committee and delegation reports; this was then adopted as a standing order later that year.[22] In 2008, provision was made for the Main Committee to meet on Tuesday and Wednesday afternoons as well, if required.[23] (For a short period, when standing orders

[18] House of Representatives Standing Committee on Procedure, *Renaming the Main Committee*, Canberra, 2004, p. 5.

[19] *Renaming the Main Committee*, p. 7.

[20] Commonwealth, *Votes and Proceedings*, No. 85, 8 February 2012, pp. 1177-9; A Albanese, Commonwealth, *Parliamentary Debates*, House of Representatives, 8 February 2012, p. 211.

[21] Bernard Wright, 'Australia's Main Committee: Sideshow or valuable innovation?' *The Parliamentarian* 2004(2) p. 162.

[22] Commonwealth, *Votes and Proceedings*, No. 81, 9 February 2006, pp. 922-5 (sessional order); Commonwealth, *Votes and Proceedings*, No. 141, 29 November 2006, pp. 1597-1600 (standing order).

[23] Commonwealth, *Votes and Proceedings*, No. 1, 12 and 13 February 2008, pp. 11-26.

were amended to enable Friday sittings of the House, the Main Committee was also able to meet; however, no Friday meetings took place before this provision was removed from the standing orders).[24] A regular routine of business for Monday afternoons and evenings was established by amendments to the standing orders in 2009, including a mix of government business and opportunities for private members.[25] This was extended to Monday mornings in 2010.[26]

Arrangements for meetings of the Federation Chamber reflect that it is subordinate to the House. It is not scheduled to meet during times when most members could be expected to be in the House, such as question time. The Deputy Speaker may set meeting times outside the pattern set by the standing orders. Since 2013, the order of business has also noted that times shown for the start and finish of items of business are approximate.[27] This flexibility is important given that much of the Federation Chamber's program is composed of items of business referred to it by the House.

The figure below sets out the House's hours of sitting and the hours of meeting of the Main Committee or Federation Chamber since 1994.

[24] Commonwealth, *Votes and Proceedings*, No. 10, 12 March 2008, pp. 141-148 and 155.

[25] Commonwealth, *Votes and Proceedings*, No. 110, 17 August 2009, pp 1233-4.

[26] Commonwealth, *Votes and Proceedings*, No. 2, 29 September 2010, pp. 31-43.

[27] Commonwealth, *Votes and Proceedings*, No. 2, 13 November 2013, pp. 47-66.

Figure 1. Number of hours of sitting and meeting by year[28]

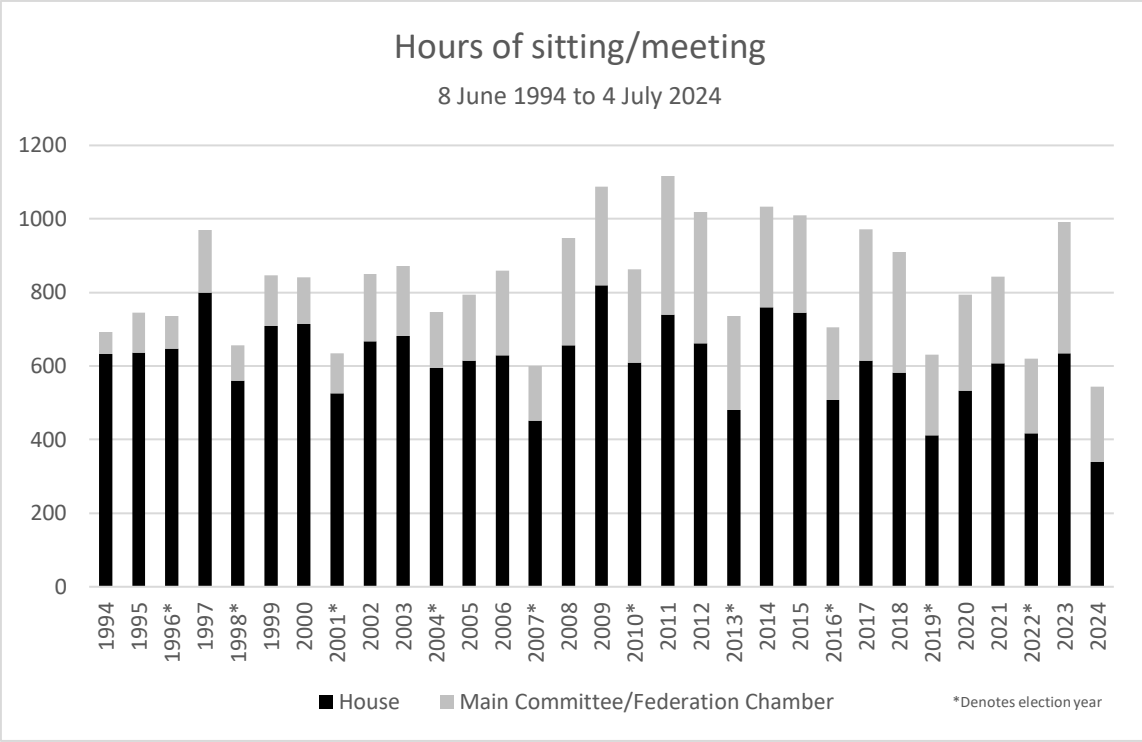

Figure 1 shows that the Federation Chamber now makes a proportionally larger contribution to the total amount of time available to the House than the Main Committee did initially. In its first 10 full calendar years of operation (1995-2004) the Main Committee's meetings constituted 17.3 per cent of the total hours available in both chambers. In the most recent 10 full years (2014-2023), the Federation Chamber's meetings constituted 31.6 per cent of total hours, meeting for close to half the time (46.3 per cent) that the House was sitting.

[28] Source: House of Representatives Procedure Office

CONSIDERATION OF LEGISLATION

The effects of establishing the second chamber to allow more time for debate on legislation was already observable in its first year of operation. Prior to its establishment in June 1994, over 100 bills were 'guillotined' each year between 1991 and 1993. In 1994, 14 bills were guillotined, all in the first half of the year.[29] In 1995, the Procedure Committee considered the Main Committee had significantly relieved pressure and competition for House time,[30] although it later noted:

> *Not all of this can be attributed to the establishment of a second legislative stream: restructuring the parliamentary year in to three periods and the discipline of introducing legislation in the period of sittings preceding that in which it is intended to be passed, have also contributed.*[31]

Taking into account both the use of the guillotine and debate management motions limiting the time available for consideration of bills, on average fewer than 10 bills per year have been subject to some form of limitation of time since 2000, far fewer than the 100-plus bills being 'guillotined' each year from 1991 to 1993.

Time spent on consideration of legislation has increased. Between 1995 (the first full year of operation of the Main Committee) and 2023, the two chambers of the House spent, on average, a combined total of 388.2 hours on first, second and third readings and consideration in detail each year.[32] By comparison, in each year from 1988 to 1993, the House had spent an average of 272.3 hours on these stages.

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[29] House of Representatives Standing Committee on Procedure, *Time for Review: Bills, questions and working hours—Report of the review of procedural changes operating since 21 February 1994* Canberra, 1995, p. 13.

[30] *Time for Review: Bills, questions and working hours*, p. 14.

[31] *The Second Chamber: Enhancing the Main Committee*, p. 23. Amongst the changes were amendments to the Senate deadlines for receipt of bills from the House. *Odgers' Senate Practice* notes that the adoption in 1986 of a deadline for legislation to be received from the House was criticised for aggravating the evil it was intended to remedy; in 1993 there was agreement to a 'double deadline', under which bills had to be introduced earlier in the House and received by a later deadline in the Senate to avoid an automatic deferral to the next sittings. See Rosemary Laing (ed), *Odgers' Senate Practice* 14th edn. Canberra: Department of the Senate, 2016 pp. 307-8 for more detail.

[32] The first and third readings take place in the House.

Since its inception, a total of 1,583 bills have been referred to the second chamber. This includes 40 private members' bills referred for debate.

The second chamber's flexibility has allowed it to contribute to the House's legislative workload and function as a 'pressure valve' when appropriate to allow the House to maximise the work it does without necessarily extending the span of hours members spend in Parliament House.

Consideration of appropriation bills

One specific role the Federation Chamber now customarily plays in the consideration of legislation is as the venue for most of the debate on the second reading of Appropriation Bill (No. 1)—that is, the 'budget debate'.[33] After the Treasurer has introduced the budget and the Leader of the Opposition has made their speech in reply, it is normal practice for the appropriation bills to be referred to the Federation Chamber, where a cognate debate may continue over a period of several weeks.

Debate on the main appropriation bill is exempt from the usual requirement in the standing orders for the second reading debate to be strictly relevant to the bill. Rather, debate on appropriation bills may cover matters relating to 'public affairs'—interpreted to mean any matters concerning government policy or administration.[34] This means the scope of discussion in the budget debate is almost unlimited and provides members with an opportunity to speak about matters of particular interest to them and their constituents.

When, after the second reading has been agreed to, the main appropriation bill is considered in detail, the Federation Chamber first considers the schedule to the bill which contains the proposed expenditure for government departments and agencies. In 2023 and 2024, both the dates for consideration in detail and the times for each portfolio were agreed to by the House when it agreed to a broader debate

[33] *House of Representatives Practice* (7th edn), p. 790, notes this practice began in 1995.

[34] Standing order 76(c).

management motion.[35] In previous years, the Federation Chamber has agreed to the order.[36]

The conduct of consideration in detail of the main appropriation bill has varied over time. In earlier years, the Deputy Speaker encouraged a question and answer format, and an expectation that members' speeches would contain a question continued for some time.[37] Ministers might respond to questions individually or wait until several members had spoken before responding.[38] Since 2008, government backbenchers have also regularly participated. At times this meant that a minister was given the call immediately after a government backbencher had posed a question, in the same way as occurs during question time—a departure from the regular practice of alternating the call during debate.[39] Procedure Committee reports in 2015 and 2016 noted the lack of specific rules in the standing orders for consideration in detail of the appropriation bills and in 2016 the committee recommended the adoption of sessional orders to trial shorter, question and answer style contributions by members.[40] These recommendations were not supported by the government of the day, led by Prime Minister Malcolm Turnbull, and no changes were made.[41]

The call now alternates between government and non-government members, with the practice taking a similar form since 2017. Expectations of how consideration in detail will be conducted are articulated by the Deputy Speaker at the beginning of the debate. As the Deputy Speaker reminded members before debate began on 4 June this year:

[35] Commonwealth, *Votes and Proceedings*, No. 120, 28 May 2024 pp. 1556-8; Commonwealth, *Votes and Proceedings*, No. 55, 22 May 2023 pp. 701-2.

[36] See for example Commonwealth, *Votes and Proceedings*, No. 123, 15 June 2021 p. 1981.

[37] David Elder, Submission to the House of Representatives Standing Committee on Procedure's Inquiry into the consideration in detail of the main appropriation bill, 9 September 2015, p. 3.

[38] Bernard Wright (ed.), *House of Representatives Practice* (6th edn), Canberra: Department of the House of Representatives, 2012, p. 432.

[39] Elder, Submission to the Inquiry into the consideration in detail of the main appropriation bill, pp. 3-6.

[40] House of Representatives Standing Committee on Procedure, *Role of the Federation Chamber: Celebrating 20 years of operation*, Canberra, 2015, pp. 27-9; House of Representatives Standing Committee on Procedure, *Consideration in detail of the main appropriation bill*, Canberra, 2016, pp. 18-20.

[41] Australian Government response to the House of Representatives Standing Committee on Procedure report: Consideration in detail of the main appropriation bill, September 2017.

> *Consideration in detail is a debate, and the call will be alternated between government and non-government members as always. Even though this debate sometimes takes the format of questions and answers, this is not question time.*
>
> *… Members are required to be relevant to the portfolio being examined, but there is no requirement for direct relevance to any questions asked… Each minister and member will have up to five minutes to speak each time they are called, but they may wish to speak for a shorter time.*[42]

Once the main appropriation bill has been considered in detail and returned to the House, the remaining appropriation bills in the budget package are called on one by one. This includes Parliamentary Departments (Appropriation) Bill No. 1, which provides for a separate appropriation for the parliamentary administration as distinct from agencies supporting executive government.[43] It is less common for these bills to be considered in detail, and no timetable is set.

The now standard practice of scheduling much of the second reading debate on the main appropriation bill as well as consideration in detail of the budget bills in the Federation Chamber allows the budget package to be debated over a number of weeks while the House continues to consider other legislation as well.

OTHER GOVERNMENT BUSINESS

It is not just legislation that may be debated during government business time. Since 2004, the Federation Chamber has also been able to consider orders of the day for resumption of debate on any motion when referred by the House.[44] Since 2013, the standing orders have made explicit provision for the referral of further statements on

[42] S Claydon, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 2024, p. 99.

[43] See Michael Sloane, 'The role of the separation of powers and the parliamentary budget setting processes'. *Australasian Parliamentary Review* 29(2) 2014 for a more detailed discussion of this process.

[44] Standing order 183, first adopted 24 June 2004 (Commonwealth, *Votes and Proceedings*, No. 184, 24 June 2004, p. 1744).

a matter when statements have commenced in the House and for items of government business referred from the House by a programming declaration.[45] In 2024 alone, items referred have included the resumption of debate on condolence motions, further statements on the 10th anniversary of the MH17 tragedy and motions to take note of the National Apology for All Australians Impacted by the Thalidomide Tragedy, the Annual Climate Change Statement 2023 and the 2024-25 budget papers.

Another debating opportunity is the 'grievance debate'. This derives from the centuries-old financial procedures of the UK House of Commons. Originally, the question 'That Mr Speaker do not leave the Chair' was debated in Committee of Supply as a way of giving expression to the traditional insistence of the Commons on considering grievances before granting supply to the Crown.[46] In 1963 the procedure was modernised in the House of Representatives to become 'That grievances be noted' and was set as the first order of the day for alternate Thursdays in the House .[47] While the procedural origins of the grievance debate mean that it is listed as an order of the day under government business, it is an opportunity for a wide-ranging debate, as in practice the matter raised does not necessarily need to be a 'grievance'.[48] Any member may speak to the motion; however, it is unusual for a minister to raise a grievance. There is no expectation that a minister will speak in response.

In 2008, standing orders were amended so that the order of the day stood referred to the Main Committee, as it then was, and became the final item on business on Mondays.[49] Since 2016, the grievance debate has been the final item of business in the Federation Chamber on Tuesdays, when up to an hour is allowed for debate each week.[50]

[45] Commonwealth, *Votes and Proceedings*, No. 2, 13 November 2013, pp. 47-65.

[46] Elder, *House of Representatives Practice* 7th edn, p. 586.

[47] JA Pettifer, *House of Representatives Practice* 1st edn, Canberra: Australian Government Publishing Service, 1981, p. 524.

[48] Elder, *House of Representatives Practice* 7th edn, p. 587.

[49] Standing order 192B; see Commonwealth, *Votes and Proceedings*, No. 10, 12 March 2008, pp. 141-148 and 155.

[50] Standing orders 192 and 192B.

COMMITTEE AND DELEGATION BUSINESS

Since its establishment, the second chamber has been empowered to debate orders of the day for motions moved in relation to committee and delegation reports. While its use has varied over the years, it has at times afforded a welcome ability for members to speak to reports when time in the House was otherwise very limited.[51]

Members are also able to present committee and delegation reports in the Federation Chamber. However, only one committee report has been presented there—the Procedure Committee's report celebrating 20 years of operation of the Federation Chamber, with the Chair and the Deputy Chair both making statements in connection with the report.[52] The report noted that committee chairs may not be aware that they can seek a Selection Committee determination their report be presented in the Federation Chamber.[53] While the committee hoped that greater awareness of the standing order might facilitate increased debate in the Federation Chamber, a sustained increase does not appear to have materialised.

The table below sets out the reports referred to, debated in and presented in the Main Committee or Federation Chamber from the beginning of the 42nd Parliament to the end of the autumn/winter 2024 sittings in the current Parliament.

[51] Wright, 'Australia's Main Committee: Sideshow or valuable innovation?' p. 162.

[52] D Randall and M Danby, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2015, pp. 7147-9; see also standing order 247.

[53] *Role of the Federation Chamber: Celebrating 20 years of operation*, p. 24.

Figure 2. Consideration of reports in the Main Committee/Federation Chamber[54]

	Parliament					
	42nd (12.2.08 to 19.7.2010)	**43rd (28.9.10 to 5.8.2013)**	**44th (12.11.13 to 9.5.2016)**	**45th (30.8.2016 to 11.4.2019)**	**46th (2.7.2019 to 11.4.2022)**	**47th (26.7.2022-[4.7.2024])**
No of reports presented in House	187	449	318	374	368	219
No of reports referred to Main Committee/Federation Chamber	70	95	67	78	85	38
No of reports debated in Main Committee/Federation Chamber	52	72	34	51	40	9
No of reports presented in Main Committee/Federation Chamber	0	0	1	0	0	0

PRIVATE MEMBERS' BUSINESS

Although Norton has remarked that there is 'no official job description' for a member of parliament,[55] Gallop observes that, while the 'most understood' role of a member is that of legislator, a member is also a 'representative of the community and all of its activities'.[56] The expansion of the role of the second chamber has increased the opportunities for members to fulfil this role as a representative of their constituency. The next section describes the specific opportunities for private members in the Federation Chamber, particularly in regard to making statements, moving motions and presenting petitions.

Opportunities to make statements

In 1997, the Main Committee began to expand opportunities for private members beyond speaking on bills and committee reports. Earlier that year, the Procedure

[54] Source: House of Representatives Procedure Office

[55] Philip Norton, 'The Growth of the Constituency Role of the MP'. *Parliamentary Affairs* 47(4) 1994, pp. 705-720

[56] Geoff Gallop, 'The role of a Member of Parliament'. *Australasian Parliamentary Review* 24(2) 2009, p. 5.

Committee had conducted an inquiry into whether members needed more opportunity to make short speeches on unspecified matters of concern to them and, if so, whether the Main Committee could be used for this purpose. This had been prompted by a letter from a member highlighting the limited opportunities for members to speak in the adjournment debate in the House; further, a different member had moved a private member's motion proposing additional meetings of the Main Committee for the purposes of constituency statements.[57]

The Procedure Committee noted that extending opportunities beyond the consideration of legislation to provide for short statements 'would result in some change in the Main Committee's nature'.[58] The Procedure Committee's dual objectives in the inquiry were to consider the demand for such statements and 'consider how appropriate provision for them might best be made without compromising the functions of the Main Committee'. In the end, the Procedure Committee recommended a once-weekly adjournment debate like that occurring daily in the House and a trial in the Main Committee of an additional period for 90-second statements. It was at pains to specify that this should not take away from time available for the consideration of legislation but rather that the Main Committee should meet 15 minutes earlier.[59]

Ultimately, the motion put to the House by the Leader of the House, Mr Reith, was for three-minute statements, with Mr Reith indicating that he had received representations that longer statements were preferred. The trial was proposed to apply for the autumn and winter sittings in 1998.[60] The changes were adopted first as sessional orders and then as standing orders. An adjournment debate on Thursdays was also added at the same time.[61]

In 1999, the period of members' statements was extended to Wednesday mornings. This meant each meeting (on Wednesdays and Thursdays) began with approximately

[57] House of Representatives Standing Committee on Procedure, *Provision for Members to make short speeches in the Main Committee*, Canberra, 1997, p. 1.

[58] *Provision for Members to make short speeches in the Main Committee*, p. 1.

[59] *Provision for Members to make short speeches in the Main Committee*, p. 7.

[60] P Reith, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997 p. 12031.

[61] Commonwealth, *Votes and Proceedings*, No. 137, 4 December 1997, pp. 2641-4 (sessional orders); Commonwealth, *Votes and Proceedings*, No. 173, 30 June 1998, pp. 3170-1 (standing orders).

20 minutes of three-minute statements and an adjournment debate brought Thursday's meeting to a close.[62]

Changes made in 1999 also extended the right to make three minute statements to parliamentary secretaries.[63] This was extended further in 2008 when standing orders were amended to change the name to 'three minute constituency statements' and to permit ministers to make statements as well.[64] This allowed ministers, who would not otherwise have the opportunity to do so, to put forward issues of concern to constituents in their electorates.[65] On occasion, the Speaker and the Deputy Speaker have taken the opportunity to make constituency statements in the Federation Chamber.[66]

Since 2004, the standing orders have specified that constituency statements may continue for 30 minutes 'irrespective of suspensions for divisions in the House'.[67] This guarantee of 30 minutes of statements each day suggests the importance placed on the opportunity.

In 2014, a 45-minute period of 90-second statements was added to the Federation Chamber's order of business.[68] Only private members may make 90-second statements.

When the adjournment debate was introduced in 1997, its duration of 30 minutes was specified in the standing orders. While changes in 2002 meant that the duration was no longer fixed, in practice 30 minutes remained the expectation. When the standing orders were substantially revised in 2004, the order of business included a 30-minute adjournment debate.[69] This provision remains in place.

[62] Commonwealth, *Votes and Proceedings*, No. 34, 31 March 1999, p. 486.

[63] Commonwealth, *Votes and Proceedings*, No. 34, 31 March 1999, p. 486.

[64] Commonwealth, *Votes and Proceedings*, No. 32, 24 June 2008, pp. 422-3.

[65] A Albanese, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2008 p. 5791.

[66] See the *Role of the Federation Chamber: Celebrating 20 years of operation*, p. 25; for a more recent example of the Deputy Speaker making a constituency statement see S Claydon, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 March 2024, pp. 2261-2.

[67] Standing order 193.

[68] Commonwealth, *Votes and Proceedings*, No. 18, 13 February 2014, pp. 297-9.

[69] The order of business is indicative and times are approximate.

Today a total of 3 hours 15 minutes is set aside in the Federation Chamber each week for members to make statements—that is, 76 spots:

- Two hours of three-minute constituency statements (that is, 40 speaking opportunities);
- Forty-five minutes of 90-second statements (that is, 30 speaking opportunities, not available to ministers); and
- Thirty minutes of adjournment debate (that is, six five-minute speaking opportunities).

Private members' motions

In 2016, amendments to the order of business for the Federation Chamber meant that Mondays became dedicated entirely to opportunities for private members.[70] There are periods for three-minute constituency statements and 90-second statements, while the remaining time is set aside for committee and delegation business and private members' business.

Since 2004[71] the Selection Committee, a standing committee of the House, has arranged the timetable and order of committee and delegation business and private members' business for each sitting Monday.[72] This includes selecting private members' notices and other items of private members' and committee and delegation business for referral to the Federation Chamber. Private members' motions are vehicles for debate, and it is usual practice for the Selection Committee to determine that consideration is to continue on a future day.[73] Prior to 2004, only the House could refer business to the then Main Committee.

[70] Commonwealth, *Votes and Proceedings*, No. 5, 13 September 2016, pp. 129-142.

[71] The exception is during the 42nd Parliament, when a Selection Committee was not appointed; its functions were managed by whips (see Elder, *House of Representatives Practice* 7th ed, p. 574).

[72] Selection Committee reports are adopted by the House and taken therefore to be orders of the House.

[73] The practical effect of this is that private members' motions selected for consideration on Mondays are not voted on.

Petitioning the House

The centuries-old right to petition parliament for redress of grievances offers 'the only formal avenue by which community concerns can be conveyed directly to Parliament outside elections'.[74] There has always been a mechanism for members to present petitions to the House. Initially, members presented petitions themselves after the Clerk had certified they were in accordance with the standing orders. Following reforms in 1972, the Clerk announced the petitions that had been lodged for presentation, with no opportunity for debate.[75]

In 2000, standing orders were amended to allow those members who wished to present petitions themselves during 90-second statements or three-minute statements in the Main Committee to do so, with the Manager of Opposition Business noting at the time that this would 'enable people to make some contextual remarks in the presentation'.[76] Members may now present petitions in the House or in the Federation Chamber during members' statements, constituency statements, the adjournment debate or the grievance debate.[77]

In 2019 the Standing Committee on Petitions recommended that petitions with at least 20,000 signatures be considered for debate during a dedicated period for petitions debates in the Federation Chamber;[78] to date no action has been taken in response.

PERCEPTIONS, PUBLICITY AND THE PUBLIC

The Federation Chamber, and the Main Committee before it, has not been viewed with unalloyed enthusiasm across time. Responses to a 1998 questionnaire sent to members by a researcher suggested that many members felt that the Main Committee

[74] Daniel Reynolds and George Williams, 'Petitioning the Australian Parliament: Reviving a Dying Democratic Tradition'. *Australasian Parliamentary Review* 31(1) 2016, p. 60.

[75] House of Representatives Standing Committee on Procedure, *Responses to petitions: Report,* Canberra, 1990, pp. 3-5.

[76] R McMullan, Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2000, p. 23542; Commonwealth, *Votes and Proceedings*, No. 160, 6 December 2000, pp. 1982-5.

[77] Standing order 207. Members may also present petitions in the House, and the Chair of the Petitions Committee presents any other petitions received in the House on Monday mornings.

[78] House of Representatives Standing Committee on Petitions, *Your voice can change our future: Inquiry into the future of petitioning in the House*, Canberra, 2019, p. 49.

was 'a Chamber where Members simply put their views on the record'.[79] Six years later the Procedure Committee suggested that 'most Members see the Main Committee as having a lesser but nonetheless unique status' and tried to balance 'appropriate recognition' of it as a subordinate body.[80] Procedure Committee recommendations in 2000 and June 2015 recommended ways to improve the visibility and perception of the House's second chamber, whether that be through better promotion on the Parliament House website or through enhancements to the Chamber itself.[81]

From its inception, the Main Committee was fitted out in a formation mirroring that of the House. Desks formed a horseshoe shape, with the Chair in the centre.[82] At the first meeting of the Main Committee, the Manager of Opposition Business, Mr Howard, remarked:

> *There might be some consideration given to placing an Australian coat of arms behind the Deputy Speaker's chair … I like the full-blown one with the wattle in its complete lustre and bloom.*[83]

Over time, a plaque with the crest has been added to the décor, first on a temporary basis in front of the Chair and then more permanently above the Chair; a table has been added to the centre of the horseshoe, as in the House; and the desk for the Chair and clerks has been redesigned.[84]

The proceedings in the Federation Chamber are open to the public—there is a public gallery on each side of the floor—and can be viewed online.[85] For each meeting,

[79] Sonia Palmieri, 'Cooperation or consideration: An analysis of the Main Committee in the Australian House of Representatives'. *Legislative Studies* 13(1) 1998, p. 72.

[80] In *The Second Chamber: Enhancing the Main Committee*, p. 31.

[81] *The Second Chamber: Enhancing the Main Committee*, pp. xii-xv; *Role of the Federation Chamber: Celebrating 20 years of operation*, pp. xi-xii.

[82] At its first meeting, archival footage shows only one Clerk present; these days both a Clerk and a Deputy Clerks work in the Federation Chamber on a roster.

[83] J Howard, Commonwealth, *Parliamentary Debates*, House of Representatives, 8 June 1994, p. 1728.

[84] See B Scott, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2014, p. 12923; and David Elder, submission to the House of Representatives Standing Committee on Procedure inquiry into the role and operations of the Federation Chamber, 4 December 2014, p. 9.

[85] In 1995 the Procedure Committee recommended investigating ways to encourage visitors to Parliament House to observe proceedings. See *Time for Review: Bills, questions and working hours*, p. 18.

minutes of proceedings are produced and included at the end of the House Votes and Proceedings, and a Hansard transcript is printed at the end of the House Hansard.

The Procedure Committee mooted in 2015 that artwork could enhance the status of the Federation Chamber, after some members told the Committee during a private roundtable that it still did not have a setting suitable to a parliamentary chamber.[86] While historic photos show that busts and prints were on display for a brief period, the room remains largely undecorated.[87] The Australian, Aboriginal and Torres Strait Islander flags have been displayed since July 2022, the beginning of the 47th Parliament, when the three flags also began to be displayed in the House.[88]

Arguments have been made over time that the location of the Federation Chamber—two floors above the House and closer to the centre of the building—was too far away and that it should be moved nearer the main Chamber.[89] However, it continues to meet in the same venue where the Main Committee first met. The costs of such a move have previously been cited as an inhibiting factor.[90]

MORE THAN A MAIN COMMITTEE

In 2004, Hon Bruce Scott, the then Deputy Speaker, expressed his wish that the work of the Federation Chamber be better recognised, in remarks celebrating its 20th anniversary. He noted the 'valuable contribution' it had made to the work of the House.[91] Indeed, within a year of its establishment, the Main Committee had already been considered to be a 'outstandingly successful'.[92] A member who dissented from the original recommendation to establish a second chamber pronounced himself 'a fan'

[86] *Role of the Federation Chamber: Celebrating 20 years of operation*, pp. 31-2.

[87] These are held in the Procedure Office's pictorial collection.

[88] C Madden, 'Flags in the Chambers', *Flagpost*, Parliamentary Library, 22 June 2023. Accessed at: <https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/Research/FlagPost/2023/June/Flags_in_the_Chamber>.

[89] *The Second Chamber: Enhancing the Main Committee*, p. 35; *Renaming the Main Committee*, p 8.

[90] *Role of the Federation Chamber: Celebrating 20 years of operation*, p 31. *Renaming the Main Committee*, p. 8, also noted that architects suggested at the time that the building stage would take eight months.

[91] Scott, 'The Federation Chamber of the Australian House of Representatives: 20 years on', p. 8.

[92] R Brown, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1995, p. 2185.

a year later.[93] The fall in the use of the guillotine was one of the 'striking indicators' of the Main Committee's success in allowing more time for consideration of legislation.[94]

While legislation was the stated focus from the beginning, the routine referral of the appropriation bills from 1995 allowed the Main Committee to play a role in budget setting as well. Debates on government documents have also contributed to deliberation and oversight of government policy. The increasing opportunities to make members' statements and constituency statements and the weekly adjournment debate have offered members the chance to raise issues affecting the communities they represent. Further, the weekly grievance debate and the ability to present petitions in the Federation Chamber are avenues for grievances to be raised for redress.

Ultimately, however, the biggest contribution that the House's second debating chamber has made to the work of the House is time. In 1994, its first year of operation, the Main Committee contributed an additional 10 per cent to the hours available to the House. In recent years, this has averaged 46 per cent. The House faces the competing pressures of making the most of the time members have in Canberra and the impact of long hours on members, their staff and parliamentary staff during sitting weeks.[95] The Federation Chamber is one of its options to assist in balancing these. It has enabled the House to increase the time available for debates and other contributions without expanding its span of sitting hours each day.[96]

This article has tracked the origins of the second chamber, its evolving approach to meetings and its facilitation of both government business and private members' business. It has aimed to shed some light on the key historical milestones and influences that have shaped the modern Federation Chamber and that contribute to

[93] P Filing, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1995, p. 2196.

[94] *Time for Review: Bills, questions and working hours*, p. 13.

[95] See Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*, Sydney, 2021, pp. 268-9; K Pitt, submission to House of Representatives Standing Committee on Procedure inquiry into recommendations 10 and 27 of *Set the Standard*, 21 October 2022, p. 3.

[96] House of Representatives Standing Committee on Procedure, *Raising the Standard: Inquiry into recommendations 10 and 27 of* Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces, Canberra, 2023, p. 36.

the opportunities it presents and challenges it now confronts as a forum for some of the most important functions of the Australian legislature.

Over the last 30 years, the legislatively focused Main Committee has evolved into the Federation Chamber, a microcosm of the House. While it has a relatively low public profile, its capacity to significantly increase the time available to the House when it meets, as well as its flexibility, means that it can contribute to different facets of the work of the House as and when required.

The (in)adequacy of protections for witnesses to parliamentary committee inquiries: recent experience in the NSW Legislative Council

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Abstract Parliamentary committees can be powerful vehicles to oversee government administration, including, on occasion, by bringing to light genuine issues of wrongdoing or impropriety. Balanced against the benefit of transparency is the possible harm that can arise to witnesses who may be reluctantly called into a public and political arena. This was illustrated in the 57th Parliament of New South Wales, which saw the extensive and unprecedented use of committee powers to obtain documents and take evidence in public. This paper takes two inquiries from this period as case studies to explore the use of committee powers and corresponding protections for witnesses. To assess the protections, we use the lens of procedural fairness, a fundamental concept underpinning the legitimacy of many public institutions. We consider the bias rule and the hearing rule, components of procedural fairness in administrative law, and how they can be interpreted in a parliamentary context. We argue that developments such as the speed of online publishing and broadcasting and declining trust in public institutions means there is more imperative than ever for parliaments to ensure that committee powers are exercised in a way that is seen as procedurally fair. While noting the NSW Legislative Council has already gone some way to embedding procedurally fair practices, we find that there is scope for strengthening these, especially around providing reasonable notice of hearings, publishing untested allegations that may cause reputational damage, and protecting privacy and personally sensitive information.

INTRODUCTION

The closing months of the 57th Parliament of New South Wales (2019-2023) saw upper house committees conducting a number of high-profile inquiries into politically sensitive issues. One of these inquiries, into allegations of impropriety surrounding the Hills Shire Council, triggered media reports of a 'state-wide manhunt' for the Premier's

brothers and rumours of one reluctant witness hiding out in a forest in a black ski mask to avoid receiving a summons. The frustrated committee chair said that the committee faced 'unprecedented' challenges in obtaining the evidence of key witnesses, remarking that 'never has a committee been faced with such serious, deliberate and co-ordinated attempts to evade service of a summons'.[1]

The committee's difficulties summoning witnesses led the House to refer a review of the *Parliamentary Evidence Act 1901* (NSW) to the Privileges Committee (currently ongoing), with an eye to modernising it so that parliamentary committees can more effectively exercise their powers to summon witnesses. While acknowledging the need for this review, we believe it is necessary to ask whether, if committee powers were strengthened, the concomitant protections for witnesses would remain sufficient. We take the lead from a discussion paper prepared for Privileges Committee review, which recognised the need to consider whether witness protections should be strengthened simultaneously with committee powers.[2]

The inquiries at the end of the 57th Parliament saw the extensive use of committee powers to obtain documents and take evidence in public. Large numbers of witnesses were called before committees, with hearing transcripts, video recordings, and volumes of published documents attracting significant media attention. Such activities had real-world consequences for some of the individuals involved, causing reputational, professional, social and financial damage.[3] These inquiries provoke questions of how parliamentary committees exercise and use their significant powers to compel and publish evidence that may not otherwise reach the public domain, and whether protections for individuals whose interests may be impacted are adequate in the current era.

[1] Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 'Media Release: Report Handed Down in Inquiry into the Hills Shire Council and Property Developers in the Region'. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/other/18265/Media release - PC7 - Report tabled - Allegations of impropriety against agents of the Hills Shire Council.pdf.

[2] Gabrielle Appleby, 'Inquiry into provisions of the Parliamentary Evidence Act 1901: "Fit for Purpose and Modernised"'. Discussion Paper, Parliament of New South Wales, 2024, p. 27.

[3] See, eg, Paige Cockburn, 'Former investment NSW boss Amy Brown sacked in wake of John Barilaro job saga'. *ABC News*, 19 September 2022. Accessed at: https://www.abc.net.au/news/2022-09-19/amy-brown-sacked-from-departmental-secretary-role/101452794.

Concerns about harm to individuals linked to a parliamentary committee have been around for some time, across many jurisdictions.[4] In 1988, the Senate passed 11 Privileges Resolutions, which included, for the first time, explicit protections for witnesses to committees.[5] Despite this, in 1995 Selby-Smith and Corbet noted increasingly 'difficult situations' encountered by public servants before Senate inquiries, and argued for more 'due process' and protections akin to those available in a court.[6] In their 2013 review of procedural protections for witnesses in parliamentary inquiries, Macknay and Falck argued that, in the information age, with exercise of power subject to more scrutiny than ever, there is a need to incorporate procedural rights into committee rules in order to protect fundamental rights and preserve public trust.[7]

In the decade since Macknay and Falck's paper, there have been developments to codify and enhance procedural protections in New South Wales. At the same time, however, there have also been rapid enhancements in the availability of committee information online, whether through live webcasting of hearings or immediate publication of documents, creating new challenges in how to manage potentially harmful and sensitive information.

This paper takes two recent high-profile, politically charged committee inquiries from the NSW Legislative Council as case studies to explore the use of committee powers and corresponding protections for witnesses. To assess the protections, we use the lens of procedural fairness, a fundamental concept which underpins the legitimacy of many public institutions, including parliament. We consider the bias rule and the hearing rule, components of procedural fairness in administrative law, and how they can be

[4] The death of Dr David Kelly, who took his own life after questioning before the House of Commons Select Committee on Foreign Affairs, prompted significant reflection in the UK: see Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG.* London: United Kingdom House of Commons, 2004, pp. 301-307. In Australia, the then Attorney-General and Solicitor-General considered the adequacy of protections for witnesses in the Commonwealth Parliament in 1972: see IJ Greenwood and RJ Ellicott, 'Parliamentary Committees: Powers Over and Protection Afforded to Witnesses'. Parliamentary Paper No 168, Parliament of Australia, 1972, pp. 16-30, 73-89.

[5] Parliament of Australia, Senate, *Journals*, 25 February 1988, pp. 534-536.

[6] Chris Selby-Smith and David Corbet, 'Parliamentary Committees, Public Servants and Due Process'. *Australian Journal of Public Administration* 54(1) 1995, pp. 19, 21, 38.

[7] Roger Macknay and Julie Falck, 'Oversight as it Intersects with Parliament'. Conference Paper, Australasian Study of Parliament Group Western Australian Chapter Annual Conference, 4 October 2013, p. 19.

interpreted in a parliamentary context. We also compare practices in other parliaments. Our findings, in which we identify areas where the Legislative Council could strengthen its practice, may be informative to other Australian parliaments. Many face similar tensions between recognising the *opportunities* parliamentary committees carry in bringing to light genuine issues of wrongdoing or impropriety, and the *challenges* of protecting witnesses from harm arising from the public airing of untested allegations.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL COMMITTEE SYSTEM

An active committee system is a hallmark of most modern and effective parliaments. Committees are a key forum through which parliamentarians can engage directly with experts and members of the community on proposed policy or law.[8] Committees serve multiple functions: they can improve the legislative process through providing an additional avenue of scrutiny; they enable members of parliament to specialise and contribute to policy making; and they assist parliament to hold the government of the day to account through inquiring into matters of public interest.[9]

Much of the Australian literature on committees and their oversight role focuses on the Australian Parliament, particularly the Senate, which, for most of the period since 1994, has had a committee system that is not government-dominated and is able to examine controversial matters.[10] Although less researched, we suggest the NSW Legislative Council offers examples of powerful and active committees that have been willing to

[8] Sarah Moulds, 'Committees of Influence: The Impact of Parliamentary Committees on Law Making and Rights Protection in Australia'. *AIAL Forum* 97 2019, p. 12.

[9] Sven T Siefken and Hilmar Rommetvedt, 'Investigating the Role of Parliamentary Committees in the Policy Process', in Sven T Siefken and Hilmar Rommetvedt (eds), *Parliamentary Committees in the Policy Process.* Milton Park: Routledge, 2022, p. 3; Helene Helboe Pedersen, Darren Halpin and Anne Rasmussen, 'Who Gives Evidence to Parliamentary Committees? A Comparative Investigation of Parliamentary Committees and their Constituencies'. *The Journal of Legislative Studies* 23(3) 2015, pp. 408-409; Mark Bennister and Phil Larkin, 'Accountability in Parliament', in Cristina Leston-Bendeira and Louise Thompson (eds), *Exploring Parliament.* Oxford: Oxford University Press, 2018, p. 146; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees'. *Australasian Parliamentary Review* 21(1) 2006, pp. 17-19; Macknay and Falck, *Oversight as it Intersects with Parliament*, p. 2.

[10] For commentary on the period after the 2004 election when the Senate committee system was revised to reflect a government majority in the Senate, see Stewart Ashe, 'Undermining Senate Scrutiny? Changes to the Senate Committee System'. *Australian Journal of Public Administration* 66(3) 2007.

test boundaries in the exercise of their oversight role. The NSW Legislative Council has an unbroken history of non-government control since 1988. This has no doubt contributed to its willingness, through successive parliaments, to exert and test its powers to hold government to account in ways few state upper houses have, enabling it to evolve into a robust and active house of review.[11] Legislative Council committees have been directly responsible for exposing significant issues in public administration and bringing about policy and legislative change, demonstrating their influential role in New South Wales politics.[12]

The active committee system in the Legislative Council is a source of considerable pride to members.[13] Having grown from a small start of two standing committees in 1988, the committee system in the 57th Parliament had 16 standing committees, at least nine of which were non-government chaired. In addition, no less than 15 select committees were established during the 57th Parliament, many of which inquired and reported into politically controversial topics. Over the period from 2019-2023, these committees conducted 127 inquiries involving 5,242 witnesses.[14]

[11] See generally, David Blunt, 'Orders for Papers and Parliamentary Committees: An update from the NSW Legislative Council'. Conference Paper, Presiding Officers and Clerks Conference, 10 July 2018; David Blunt, 'Postscripts to an Extraordinary Parliament and a Question for Colleagues'. Conference paper, Presiding Officers and Clerks Conference, July 2023; Gareth Griffith, 'The New South Wales Legislative Council: An Analysis of its Contemporary Performance as a House of Review'. *Australasian Parliamentary Review* 17(1) 2002.

[12] See, eg, Angus Thompson, '$252 million fund designed to win seats and punish councils, inquiry finds'. *Sydney Morning Herald*, 30 March 2021. Accessed at: https://www.smh.com.au/national/nsw/252-million-fund-designed-to-win-seats-and-punish-councils-inquiry-finds-20210330-p57f8p.html; Lucy Cormack and Tom Rabe, ''Manifold unhappy consequences': Damning reports into troubled insurer icare'. *Sydney Morning Herald,* 30 April 2021. Accessed at: https://www.smh.com.au/politics/nsw/manifold-unhappy-consequences-damning-reports-into-troubled-insurer-icare-20210430-p57nqz.html; Tamsin Rose and Josh Butler, 'Flood inquiry finds serious failures by agencies and calls for Resilience NSW to be scrapped'. *The Guardian,* 9 August 2022. Accessed at: https://www.theguardian.com/australia-news/2022/aug/09/flood-inquiry-finds-serious-failures-by-agencies-and-calls-for-resilience-nsw-to-be-scrapped.

[13] Legislative Council Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System.* Sydney: Parliament of New South Wales, 2016, p. vi.

[14] Department of the NSW Legislative Council, *Annual Report 2023*. Sydney: Parliament of New South Wales, 2023, p. 47; Department of the NSW Legislative Council, *Annual Report 2022*. Sydney: Parliament of New South Wales, 2022, p. 7.

A key feature of Legislative Council committee inquiries is that most of the evidence is heard in public.[15] In recent years, the Council has significantly stepped up its efforts to publicise and broadcast the work of committees. Committee hearings are routinely webcast live, with recordings made available through a video-on-demand service introduced in 2021, which assists members and the media to re-broadcast footage.[16] The Council has further endorsed dissemination of recordings from public hearings on the Parliament's YouTube channel.[17] Uniquely among Australian parliaments, hearings at offsite regional locations are also generally broadcast and recorded.

The Legislative Council's inquiry-based committees, which are the focus of this paper (compared to more technical committees like the Selection of Bills Committee) cannot operate effectively without the active participation of external witnesses, who bring expertise, direct knowledge, and different perspectives on issues under inquiry. In most cases, especially where committees are scrutinising legislation or policy development, witnesses are interested stakeholders, experts or community representatives who are willing participants keen to put views on the public record.

In some cases, though, Legislative Council committee inquiries draw in reluctant witnesses. This is especially the case where parliamentary committees, exercising their accountability and oversight role, investigate controversial issues such as potential maladministration or impropriety in the exercise of public functions. At the extreme, these include witnesses who are forced to appear with the committee's power to summon (discussed further below). Even where this power is not used, there are witnesses who appear under threat of summons, or through intense political or media pressure. Such 'unwilling' witnesses may suffer reputational damage or other adverse impacts through giving evidence or being named.

[15] Note, however, that there are exceptions where information before a committee is kept private, such as confidential submissions (and other written material), or transcripts from *in camera* hearings.

[16] Legislative Council Procedure Committee, *Broadcast of Proceedings Resolution.* Sydney: Parliament of NSW, 2022, p. 22.

[17] New South Wales Parliament, Legislative Council, *Minutes*, 19 October 2022, pp. 3747-3749. For background, see Legislative Council Procedure Committee, *Broadcast of Proceedings Resolution.*

POWERS OF NSW LEGISLATIVE COUNCIL COMMITTEES

Uniquely among Australian state parliaments, the NSW Parliament has specific legislation giving committees strong powers to compel written and oral evidence. The *Parliamentary Evidence Act 1901* (NSW) grants committees the power to summon any person in New South Wales (except a member of state Parliament) to attend and give evidence.[18] If a person does not attend, in disobedience of the summons, a warrant may be issued to bring them before the relevant committee.[19] The power to summon is used reasonably frequently by Legislative Council committees, but the procedure for refusal to appear has never been used (despite coming close on one occasion).[20]

The legislated power to summon is unique to New South Wales parliamentary committees. While other jurisdictions retain the possibility of punishing individuals for failing to appear before a committee, none have the proactive powers to summon available in New South Wales for bringing a recalcitrant witness before a committee.[21] This arguably makes witnesses to New South Wales inquiries especially vulnerable and therefore deserving of strengthened protections.

The *Parliamentary Evidence Act* also contains powers relating to questions. Committees can require witnesses to truthfully answer lawful questions.[22] Failure to answer a lawful question may constitute contempt of parliament and carries a punishment of up to one month imprisonment.[23] Wilfully providing a false answer carries a punishment of five years' imprisonment.[24] These powers may allow committees to require witnesses to answer questions even where doing so would override common law privileges, such as the privilege against self-incrimination, legal professional privilege or public interest

[18] *Parliamentary Evidence Act 1901* (NSW) s 4.

[19] *Parliamentary Evidence Act 1901* (NSW) ss 7-8.

[20] In the Inquiry into the Gentrader transactions (2010-2011), the Legislative Council General Purpose Standing Committee No. 1 resolved to write to the President of the Legislative Council to request that she certify the non-attendance of several witnesses, in disobedience of a summons, to a judge of the Supreme Court. However, the President declined to do so: Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice* (2nd ed). Sydney: The Federation Press, 2021, p. 801.

[21] Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 32.

[22] *Parliamentary Evidence Act 1901* (NSW) ss 11, 13.

[23] *Parliamentary Evidence Act 1901* (NSW) s 11.

[24] *Parliamentary Evidence Act 1901* (NSW) s 13.

immunity.[25] However, there remains some uncertainty as to the meaning of a 'lawful question'.[26]

PROTECTIONS FOR WITNESSES TO NSW LEGISLATIVE COUNCIL COMMITTEES

Witnesses appearing before NSW Legislative Council committees derive protections against the exercise of committee powers from a number of sources. The most obvious protection is parliamentary privilege itself, specifically the immunity flowing from Article 9 of the *Bill of Rights 1689,* which protects proceedings of Parliament from being impeached in court proceedings, and which extends to witnesses in parliamentary committee proceedings.[27] In New South Wales this is supplemented by section 12(1) of the *Parliamentary Evidence Act 1901*, which provides assurance against legal reprisal for evidence given to a parliamentary committee, under oath or otherwise.[28]

In 2018, the Legislative Council, noting the lack of statutory requirements for parliamentary committees to provide procedural fairness, introduced a procedural fairness resolution.[29] Drawing from established NSW Legislative Council practice, and the Senate Privileges Resolution No. 1,[30] it contains the following basic guidelines:

- Witnesses are 'normally' invited to make a written submission before giving oral evidence
- Witnesses are invited to appear at a public hearing, unless the committee decides that a summons is warranted

[25] See Frappell and Blunt, *Legislative Council Practice,* pp. 809-813; Beverly Duffy and Sharon Ohnesorge, 'Out of Step? The NSW Parliamentary Evidence Act 1901'. *Public Law Review* 27 2016, pp. 41-45.

[26] Frappell and Blunt, *Legislative Council Practice,* p. 808.

[27] Frappell and Blunt, *Legislative Council Practice,* pp. 90-91, 94-95, 817.

[28] Frappell and Blunt, *Legislative Council Practice,* pp. 94-95, 817.

[29] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246. For background, see Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants.* Sydney: Parliament of New South Wales, 2018. This resolution has continuing effect.

[30] Commonwealth Parliament, Senate, *Journals*, 25 February 1988, p. 534-536. For a description of the Senate's procedural fairness resolution in practice, see Rosemary Laing (ed), *Odgers' Australian Senate Practice (14th ed).* Canberra: Commonwealth of Australia, 2016, pp. 551-560.

- Witnesses are 'normally' given reasonable notice of a hearing, and are provided the committee's terms of reference, membership, and a copy of the resolution before appearing
- Witnesses may request to give evidence *in camera*, and the committee will consider this request
- Witnesses may, with prior agreement of the committee, attend with a legal adviser or support person, and have reasonable opportunity to consult with a legal adviser during the hearing
- The committee chair will ensure questions put to witnesses are 'relevant to the inquiry'
- Witnesses may object to answering a question, and the committee should consider the request
- Witnesses may be given an opportunity to respond to adverse reflections made about them
- Where evidence is given that places a person at risk of serious harm, a committee will consider expunging that information from the transcript of evidence
- Witnesses may request that documents provided to a committee be kept fully or partially confidential, and the committee will consider the request.
- Witnesses 'will be treated with courtesy at all times'.[31]

The wording of the resolution was carefully chosen to give members different levels of flexibility in applying it, and in some areas, such as dealing with adverse reflections, it is less prescriptive than the Senate resolution.[32] Given the resolution was designed to reflect existing practice, it is arguable whether it has given witnesses greater protection. However, as a normative signal (if not an enforceable set of rights), it ensures witnesses and members are more aware of what protections exist.

Committee chairs play an important role in enforcing the procedural fairness resolution. Their function has been described as being analogous to that of the

[31] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[32] Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* pp. 12-14.

President in the House.[33] The standing orders grant them 'the powers necessary to conduct the committee's proceedings in an orderly and expeditious manner'.[34] One of the procedural fairness guidelines explicitly mentions the chair.[35] At hearings, chairs will often be called upon to adjudicate points of order and it is not uncommon to see them refer to the procedural fairness resolution in making rulings, demonstrating members' awareness and use of the resolution.

Committees often enact additional protections in inquiries involving vulnerable witness groups, such as those with disability or children and young people.[36] Some of these protections could be conceived of as procedural fairness guarantees. However, to date, these have not been codified or published, although there are internal guidelines used by committee staff.

THE CONCEPT OF PROCEDURAL FAIRNESS

In the NSW Legislative Council, like in other jurisdictions, procedural protections for witnesses are described as ones providing 'procedural fairness' to inquiry participants. This concept is most closely linked with administrative law, although it has deeper roots in the concept of 'natural justice', which can be traced variously to Roman law, theology, and Enlightenment philosophy.[37] A normative commitment to procedural fairness runs deep in the conventions and philosophies that underpin many public institutions in democratic societies, including parliament.[38]

Below, we outline the rules of procedural fairness in administrative law. While procedural fairness as a concept is certainly embedded within parliament, the specific rules applicable in administrative law, having been developed for a different context,

[33] Frappell and Blunt, *Legislative Council Practice,* p. 753.

[34] New South Wales Legislative Council, *Standing Rules and Orders.* Sydney: Parliament of New South Wales, 2023, p. 77 (Standing Order 218(2)).

[35] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[36] Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 24; Frappell and Blunt, *Legislative Council Practice,* pp. 819-820.

[37] James Edelman, 'Why do we Have Rules of Procedural Fairness?'. *Australian Journal of Administrative Law* 23 2016, pp. 145-148.

[38] Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 22; Edelman, *Rules of Procedural Fairness*, pp. 153-154.

are not. Nonetheless, we consider that they provide concrete and useful benchmarks through which to assess practice. In the final section of this paper, we use two case studies to assess the protections for witnesses to parliamentary committees through the lens of procedural fairness in Australian administrative law.

THE RULES OF PROCEDURAL FAIRNESS IN ADMINISTRATIVE LAW

In administrative law, there is a common law presumption that a decision maker must observe procedural fairness.[39] This applies to decisions that affect the rights, interests or legitimate expectations of an individual, where they are affected in a direct and immediate way.[40] This may include decisions that affect legal rights, proprietary interests, financial interests, reputation, status, personal liberty, preservation of livelihood, and social interests.[41] A 'legitimate expectation' can include a reasonable expectation that a legal right or liberty will be obtained or renewed, or will not be unfairly withdrawn or cancelled.[42]

There are two basic rules of procedural fairness: the hearing rule and the bias rule. The hearing rule, in essence, requires that a person subject to a decision be given a fair hearing and an opportunity to be heard.[43] At a minimum, this will usually include (reasonable) notice that a decision is going to be made, provision of a summary of the case against them, and the opportunity to make submissions to answer that case.[44] On

[39] LexisNexis, *Halsbury's Laws of Australia.* Online: LexisNexis, 2023, [10-12630], [10-12700]; Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position'. *Australian Journal of Administrative Law* 23 2016, p. 164.

[40] LexisNexis, *Halsbury's Laws of Australia,* [10-12645].

[41] LexisNexis, *Halsbury's Laws of Australia,* [10-12645].

[42] LexisNexis, *Halsbury's Laws of Australia,* [10-12655]. Note, however, that in recent years courts have begun to move away from the concept of a 'legitimate expectation' on the basis that it may distract from the central question, which is whether procedural fairness was required or not: Justice Alan Robertson, 'Natural Justice or Procedural Fairness'. *Australian Journal of Administrative Law* 23 2016, pp. 159-161; Rundle, *The Stakes of Procedural Fairness*, p. 170.

[43] Sarah Withnall Howe, *Administrative Law* (3rd ed). Chatswood: LexisNexis Australia, 2020, pp. 366, 394; Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 75.

[44] LexisNexis, *Halsbury's Laws of Australia,* [10-12760], [10-12765], [10-12775]; Robertson, *Natural Justice or Procedural Fairness*, pp. 162-163.

the latter, this can sometimes (but not necessarily) require the opportunity to have an oral hearing; it may also involve the opportunity to be represented by an agent.[45]

The bias rule, simply, requires that the decision be made by an unbiased decision maker. There are two ways to demonstrate that a decision maker is biased – either that they are *actually* biased, or (more commonly) that there is a *reasonable apprehension* of bias.[46] There are a range of scenarios in which an apprehension of bias could arise; for example, if the decision-maker has previously expressed views on the matter or the parties involved, has a close personal relationship or association with a party to the proceedings, is in the position of accuser or prosecutor, or hears extraneous or one-sided information.[47]

WHY IS PROCEDURAL FAIRNESS IN PARLIAMENTARY COMMITTEES IMPORTANT?

A procedurally fair committee system can protect witness' interests, improve public trust, generate legitimacy, and lead to better outcomes. We expand on these reasons below.

Committee inquiries impact rights, interests and legitimate expectations

As described above, the rules of procedural fairness as articulated in administrative law apply to decisions that affect the rights, interests or legitimate expectations of an individual. While the focus of these rules is on decisions made by the executive arm of government, we argue that actions by parliamentary committees can equally have impactful consequences for individuals. This suggests that more concrete standards and expectations of procedural fairness in the parliamentary context may be warranted for witnesses who face potentially serious consequences for their involvement in committees.

[45] LexisNexis, *Halsbury's Laws of Australia* [10-12830]; Robertson, *Natural Justice or Procedural Fairness*, p. 163.

[46] If a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question: LexisNexis, *Halsbury's Laws of Australia*, [10-12885]; Howe, *Administrative Law*, pp. 433-434.

[47] LexisNexis, *Halsbury's Laws of Australia,* [10-12895], [10-12900], [10-12925], [10-12930], [10-12940]; Howe, *Administrative Law,* pp. 438, 443, 452.

Some Legislative Council committee inquiries, like the ones that we examine in the case studies below, are held in highly contested and adversarial environments. They become 'arenas of political confrontation' in which the primary goals are to attract media attention and highlight failures by political opponents.[48] Witnesses can face robust questioning, often at length, by committee members. Reports can contain criticisms of witness' character and evidence and make findings adverse to them. Some inquiries are even explicitly focussed on one or two named individuals.[49]

Participants to committee inquiries can experience significant consequences for their involvement.[50] For example, a witness may face reputational damage, professional implications or social consequences if members use privilege to make harmful allegations about them, or even if the witness gives poor evidence because they are forced to appear at short notice or under threat of summons. Witnesses have also faced harassment or intimidation because of (or in anticipation of) their participation in a committee inquiry, or experienced harm to their mental health.[51]

Such impacts are, of course, heightened in the context of the widespread access to committee hearings facilitated by technology, which allow proceedings to be broadcast instantly and widely. Digital media can prolong the reputational impact of an inquiry, with evidence and findings permanently linked to a participant's name by a quick Google search.[52]

[48] Laura Chaqués-Bonafont and Luz M Muñoz Márquez, 'Explaining Interest Group Access to Parliamentary Committees'. *West European Politics* 39(6) 2016, p. 1281.

[49] For example, the inquiry into the Appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner, and Senior Executives and Department Liaison Officers in 2023 (2023) or the inquiry into the Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (2022).

[50] Macknay and Falck, Oversight as it Intersects with Parliament, pp. 2, 12-13.

[51] Frappell and Blunt, *Legislative Council Practice,* pp. 819-821.

[52] Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named in the ICAC's Investigations*. Sydney: Parliament of New South Wales, 2021, pp. 5, 21-22.

A procedurally fair committee system can improve public trust and confidence in parliament

Trust in democratic institutions has been declining across the Western world.[53] In a recent debate in the Legislative Council, crossbench members described 'an era of mistrust of politicians, when our democracy is being eroded'[54] and 'a period of heightened mistrust in our politics and our parliaments'.[55] Intensifying this, no doubt, is the recent publication of several reports about parliamentary culture (including the 'Broderick Report' in New South Wales), which have highlighted poor experiences in parliamentary workplaces including allegations of bullying, sexual harassment and discrimination.[56]

Contributing to such mistrust may be a perception that parliamentarians abuse their powers and mistreat members of the public through the committee process.[57] Raising the standards by which witnesses are treated can seek to address this.

This is not a new idea. A paper prepared for the Commonwealth Parliament in 1972 observed that a law dealing with the rights of witnesses before committees 'could have the advantage of maintaining an acceptable public image of Parliament' and 'should reveal the Commonwealth Parliament as an institution concerned to protect individuals before it from any possible abuse or excess of power.'[58] The NSW Legislative Council's Privileges Committee commented in 2018 that procedural fairness for inquiry participants 'serves to uphold the reputation of Parliament by protecting against perceptions of arbitrary use of power'.[59]

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[53] Christopher Carman, 'The Process is the Reality: Perceptions of Procedural Fairness and Participatory Democracy'. *Political Studies* 58 2010, p. 732; Carolyn Hendriks, Sue Regan and Adrian Kay, 'Participatory Adaptation in Contemporary Parliamentary Committees in Australia'. *Parliamentary Affairs* 72 2019, p. 281.

[54] Abigail Boyd, New South Wales, *Parliamentary Debates,* Legislative Council, 20 September 2023, p. 51.

[55] Sue Higginson, New South Wales, *Parliamentary Debates,* Legislative Council, 20 September 2023, p. 53.

[56] Elizabeth Broderick & Co, *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces 2022.* Sydney: Elizabeth Broderick & Co, 2022. See also Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces.* Sydney: Australian Human Rights Commission, 2021.

[57] Macknay and Falck, Oversight as it Intersects with Parliament, p. 5; Duffy and Ohnesorge, The NSW Parliamentary Evidence Act 1901, pp. 47-50.

[58] Greenwood and Ellicott, *Parliamentary Committees*, p. 78.

[59] Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* p. 21.

Procedural fairness gives legitimacy to outcomes

Providing procedural fairness for witnesses can give legitimacy to the findings and outcomes of parliamentary inquiries. A principal rationale for the existence of procedural fairness in many democratic institutions is to secure public confidence.[60] The basis for this is that participants are more likely to accept a decision when they believe the process that led to it was fair, and therefore accord legitimacy to its outcomes.[61]

In the committee context, this can mean that the public may be more likely to accept the findings and recommendations of inquiries if the participants in them are treated fairly. This has also been acknowledged by the NSW Privileges Committee, which noted in 2018:

> *a committee's findings and recommendations are open to question in the public arena if the committee has not accorded a fair hearing to participants or sought to avoid bias.*[62]

Procedural fairness can improve the quality of committee inquiries

Providing adequate protections for witnesses may improve the breadth and quality of evidence before committees. For one, it may encourage witnesses to participate in inquiries in the first place. All witnesses to upper house inquiries are first invited to appear voluntarily (before committees move to consider coercive means of securing attendance). It is reasonable to suspect that some witnesses, reading media reports of robust and intense questioning at parliamentary committees, may choose to decline for fear of ill treatment.[63] An improved public perception of parliament, facilitated by better protections for witnesses, may serve to increase witnesses' willingness to participate. This in turn may lead to a wider mix of evidence, creating compound

[60] Edelman, *Rules of Procedural Fairness*, p. 148.

[61] Kris Dunn, 'Voice and Trust in Parliamentary Representation'. *Electoral Studies* 31 2012, pp. 395, 403; Carman, *The Process is the Reality*, pp. 736, 747; Moulds, *Committees of Influence*, p. 28; Robertson, *Natural Justice or Procedural Fairness*, p. 162; Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* p. 10.

[62] Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* p. 10.

[63] See, eg, Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* p. 21.

benefits, as the diversity of participants in parliamentary processes can be 'an important indicator of effectiveness and impact'.[64]

Improved witness protections may also lead to better quality evidence being given. For example, witnesses who are given adequate notice of the timing and content of hearings are far more likely to provide well-prepared and accurate evidence. Similarly, 'the best evidence is adduced in a calm and judicial atmosphere where the witness is free of any external pressures'.[65] This type of atmosphere also has the potential to prompt more deliberative decision making by committee members, because it creates conditions for people to speak more openly, compose more relevant statements or thoughts, consider the perspective of others, and acknowledge other important factors or interests that may be relevant.[66] Better evidence may, in turn, lead to better reports and better informed recommendations.

ISSUES IN PROCEDURAL FAIRNESS: RECENT EXAMPLES FROM THE NSW LEGISLATIVE COUNCIL

Among the 127 inquiries conducted by NSW Legislative Council committees during the 57th Parliament were several high-profile, politically charged inquiries into allegations of impropriety and maladministration.[67] In this section we examine 'twin' inquiries that took place in the lead up to the 2023 election, both examining 'allegations of impropriety' involving property developers and 'agents of' local councils.

The compressed timeframes, overtly partisan nature of the allegations and heightened political atmosphere associated with these inquiries means they are not 'typical' examples. They also raise questions about whether parliamentary committees, in the immediate lead up to a state general election, were the most appropriate vehicles to investigate such serious issues. However, despite (or perhaps, because of) the unusual

[64] Moulds, *Committees of Influence*, p. 18.

[65] Greenwood and Ellicott, *Parliamentary Committees*, p. 74.

[66] Robertson, *Natural Justice or Procedural Fairness*, p. 162; Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 21.

[67] High-profile examples from the 57th Parliament include Legislative Council Public Accountability Committee, *Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (Final Report)*. Sydney: Parliament of NSW, 2023; Legislative Council Public Accountability Committee, *Transport Asset Holding Entity*. Sydney: Parliament of NSW, 2022.

nature of these inquiries, they are worthwhile case studies to examine the effectiveness of protections for witnesses. Both inquiries involved potentially serious allegations of 'impropriety,' and significant use of the Parliament's powers to summon witnesses. They involved individuals outside the Parliament who stood to suffer real-world consequences as a result. The timing and intense focus meant the inquiries tested application of the procedural fairness guideline to deliver a process seen to be 'fair' in the eyes of external participants.

Case Study 1: Inquiry into allegations of impropriety against agents of the City of Canterbury Bankstown Council ('Canterbury Bankstown inquiry')

The Canterbury Bankstown inquiry was referred by the Minister for Local Government, the Hon Wendy Tuckerman MP to the (Liberal National government-chaired) Standing Committee on State Development on 24 November 2022.[68] It was established to investigate allegations made in Parliament on 20 September 2022 by (then) Labor member for Bankstown, Ms Tania Mihailuk MP, concerning the involvement of the Mayor of Canterbury Bankstown, Mr Khal Asfour, in certain planning matters, and his pre-selection as a Labor candidate for the Legislative Council.[69] Its terms of reference covered: 'matters in regards to the City of Canterbury Bankstown Council', including 'any matters relating to integrity, processes of Council, employees and elected officials of Council' and 'any other related matter'. [70]

The committee's final report made four findings, relating to Canterbury Bankstown Councillors' relationships with property developers; Mayor Khal Asfour's expenses claims; use of Council resources to assist a Labor candidate; and the time taken to provide documents.[71] It recommended the initial allegations be referred to the Independent Commission for Corruption (ICAC) for investigation. [72]

[68] Legislative Council Standing Committee on State Development, *Allegations of impropriety against Agents of the City of Canterbury Bankstown Council.* Sydney: Parliament of NSW, 2023.

[69] Tania Mihailuk, New South Wales, *Parliamentary Debates,* Legislative Assembly, 20 September 2022, pp. 9143-9144.

[70] Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council,* p. iv.

[71] Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council,* p. viii.

[72] Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council,* p. ix.

Having reviewed the committee's report, ICAC advised that the allegations did not warrant further investigation.[73] Nevertheless, Mr Asfour withdrew his candidacy for the NSW Legislative Council and resigned as Mayor of Canterbury Bankstown in May 2023.[74]

Procedural fairness issues raised by witnesses

Correspondence from the Canterbury Bankstown Council's legal representatives to the committee shows a number of areas where external stakeholders considered the committee procedures fell short of their procedural fairness expectations. Issues they raised included:

- The broad terms of reference and absence of detail provided upfront of any particulars or allegations that the committee would be looking into[75]
- Short notice of hearing dates and failure to give particulars of allegations to be addressed, meaning witnesses would not have the opportunity to prepare[76]
- The onerous nature of the broad scope and timeframe of documents requested by the committee, including the expense to council of complying with that request, and unreasonably short timeframes to comply[77]
- Disclosure to the media of unpublished correspondence from council representatives to the committee, and lack of guarantee of confidentiality in respect of documents produced[78]
- The conduct of hearings, including committee members apparently having access to information about specific allegations not shared in advance with witnesses, witnesses being criticised for seeking to take questions on notice, and 'gratuitous' discourteous comments about witnesses.[79]

[73] Correspondence from the Hon Paul Lakatos SC to the Hon Aileen MacDonald OAM MLC, 12 July 2023. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/other/18328/Letter from the Hon Paul Lakatos SC Commissioner, ICAC.pdf

[74] Anthony Segaert and Jordan Baker, ‘'Time is right': Embattled Khal Asfour to quit as Canterbury-Bankstown Mayor’. *Sydney Morning Herald*, 8 May 2023. Accessed at: https://www.smh.com.au/national/embattled-khal-asfour-to-quit-as-canterbury-bankstown-mayor-20230508-p5d6p4.html

[75] Compiled correspondence between the Hon Aileen MacDonald MLC and the City of Canterbury Bankstown Council, 2 December 2022 to 24 February 2023. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/other/18170/City of Canterbury Bankstown Correspondence Bundle.pdf pp. 3, 11, 28-31, 35-36.

[76] *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council,* pp. 28-31.

[77] *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council,* p. 4.

[78] *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council,* pp. 17, 25-27.

[79] *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council,* pp. 28-31.

Case study 2: Inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region ('The Hills inquiry')

The Hills inquiry was self-referred by Labor members of the (cross-bench chaired) Portfolio Committee No. 7 on 8 December 2022, after an unsuccessful attempt to include the matters in the terms of reference for the Canterbury Bankstown inquiry.[80] It was set up to investigate allegations made in Parliament on 23 June 2022 by Mr Ray Williams MP, Liberal Member for Castle Hill, concerning possible links between members of the Liberal State Executive and a property developer, and the replacement of Liberal members of the Hills Shire Council before the December 2021 local government elections.[81] Its terms of reference were to inquire and report on matters in regards to the Hills Shire Council and property developers in the region, in particular: any matters relating to integrity, processes of Council, employees and elected officials of Council; the matters raised by the Member for Castle Hill in a speech to Parliament on 23 June 2022; the role and influence of property developers and their interactions with councillors and MPs in the region, and; 'any other related matter'.[82]

The inquiry attracted significant media attention for its (ultimately unsuccessful) efforts to summon key witnesses linked to the allegations.[83] The report, tabled on the last day of the 57th Parliament, made several adverse findings about the non-cooperation of several witnesses who evaded service of summons. It recommended the original allegations be referred to ICAC for investigation. It also recommended a review of the *Parliamentary Evidence Act 1901*.[84]

ICAC was reported to be investigating the allegations,[85] however made no official statement to that effect. After the committee's report was published, and ICAC was reported to be

[80] Legislative Council Portfolio Committee No. 7, *Allegations of Impropriety against Agents of the Hills Shire Council and Property Developers in the Region.* Sydney: Parliament of NSW, 2023, p. v; Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council,* pp. 15-16.

[81] Ray Williams, New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 June 2022, pp. 9118-9119.

[82] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* p. v.

[83] For a summary, see Vanessa O'Loan, 'The Power to Compel the Attendance of Witnesses and the Giving of Evidence before Committees – Lessons from the NSW Legislative Council'. *Australasian Parliamentary Review* 38(2) 2023, pp. 178-181.

[84] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. ix-x.

[85] For example, Tamsin Rose, 'NSW Labor will hold off on Hills Shire council inquiry at request of Icac'. *The Guardian,* 17 April 2023. Accessed at: https://www.theguardian.com/australia-news/2023/apr/17/hills-shire-council-icac-nsw-labor-inquiry; Alexandra Smith, 'ICAC asks for special surveillance powers as it investigates Toplace'. *Sydney Morning Herald*, 23 August 2023. Accessed at: https://www.smh.com.au/politics/nsw/icac-asks-

investigating, one adversely-named witness took leave as a Hills Shire Councillor for four months.[86] In mid-2023, NSW Police issued a warrant for the arrest of a property developer of interest to the inquiry, for reasons not directly linked to the inquiry.[87] On 20 September 2023, the Legislative Council referred the provisions of the *Parliamentary Evidence Act 1901* for review by the Privileges Committee, with a view to ensuring it is fit for purpose and modernised, including in relation to the summoning of witnesses.[88]

Procedural fairness issues raised by witnesses

The committee published a significant volume of correspondence from reluctant 'witnesses' (who were seeking to avoid being summoned) and other stakeholders. Procedural fairness concerns raised in this correspondence include:

- Short notice of invitation to appear at hearings making attendance unfeasible, or leaving witnesses unable to get legal advice[89]
- Stress caused to witnesses and alleged harassment of third parties by process servers engaged to serve summonses on proposed witnesses[90]
- Publication by the committee of an anonymous document containing adverse reflections on individuals[91]
- Complaints about publication of personal information and requests for privacy and redaction of personal details to avoid unwelcome media interest[92]
- Accusations that the committee was partisan and politically motivated, timed just before an election and that bias meant witnesses would not receive procedural

for-special-surveillance-powers-as-it-investigates-toplace-20230823-p5dyxn.html. See also the Hon Ron Hoenig MP, 'Minister for Local Government Response to Report of Portfolio Committee No. 7 – Planning and Environment Allegations of impropriety against agents of the Hills Shire Council and property developers in the region'. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2908/Government response - Hills Shire Council.pdf.

[86] Michael McGowan, 'Councillor takes four months leave amid ICAC probe into Hills Shire'. *Sydney Morning Herald,* 19 April 2023. Accessed at: https://www.smh.com.au/politics/nsw/councillor-takes-four-months-leave-amid-icac-probe-into-hills-shire-20230418-p5d1ds.html.

[87] Tamsin Rose, 'Arrest warrant issued for controversial Sydney property developer Jean Nassif'. *The Guardian*, 9 June 2024. Accessed at: https://www.theguardian.com/australia-news/2023/jun/09/arrest-warrant-issued-for-controversial-sydney-property-developer-jean-nassif.

[88] New South Wales Parliament, Legislative Council, *Minutes*, 20 September 2023, pp. 510-511.

[89] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 116-117, 126, 165.

[90] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 115, 134-135, 137-18, 158.

[91] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 116, 122, 165-166.

[92] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 115, 121, 124, 153.

fairness[93]

- Some committee members having a potential conflict of interest, having been members of the Liberal Party State Executive and voted on preselection decisions relevant to the inquiry.[94]

As can be seen in the case study descriptions, many of the criticisms made by stakeholders of the committee proceedings could be informed by expectations of procedural fairness principles that apply in other contexts, such as in court proceedings. In the following section, we examine how some of the key criteria of procedural fairness as understood in administrative law (in particular the 'hearing' and 'bias' rules) are applied in the context of parliamentary committees, and how relevant those administrative law principles may be in the parliamentary context.

'REASONABLE NOTICE' TO WITNESSES: ARE CURRENT PRACTICE ADEQUATE?

Witnesses in both the Canterbury Bankstown and The Hills inquiries expressed concerns about short notice and lack of detail given in advance of a hearing, creating difficulties for them to obtain legal advice or prepare to appear. As outlined above, the 'hearing rule' in an administrative law context would require that a person about whom a decision is going to be made would be given reasonable notice, a summary of the case against them, and the opportunity to make submissions to answer that case. However, the degree to which the decision maker must give notice – and the extent to which they must outline particulars of the allegations – depends on the facts and the circumstances of each case.[95]

Elements of the 'hearing rule' are incorporated into the NSW Legislative Council's procedural fairness resolution, which, as well as providing that a witness will 'normally' be given the opportunity to make a submission, requires that: 'A witness will normally be given reasonable notice of their hearing and will be provided with the inquiry terms of reference, a list of committee members and a copy of these procedures'.[96]

[93] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 150, 153, 157, 158, 161, 165.

[94] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* p. 173.

[95] Howe, *Administrative Law,* pp. 400-401.

[96] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

The resolution is silent as to what constitutes 'reasonable notice' in terms of timeframe, and there is no minimum notice period as a standard practice. While most committees do aim to give witnesses as much notice as possible, it is not unusual in a fast-paced, politically charged environment for witnesses to be given less than a week's notice of a hearing, or for hearing times to change at short notice. In circumstances where witnesses are being asked to answer or speak to serious allegations, the expectation that witnesses will appear at short notice can produce situations that are difficult for witnesses. While recognising that there is value in parliamentary committees being able to obtain evidence promptly in some circumstances, and that what is seen as 'reasonable' notice may be highly contextual, setting a clear expectation around minimum notice to witnesses could help alleviate some circumstances where the timeframes set by committees are seen as unfair.

In addition to short notice of hearings, some witnesses in both the Canterbury Bankstown and The Hills inquiries raised concerns about the lack of specific information prior to the hearing on what exactly they would be required to give evidence about, or whether there were specific allegations concerning them. Where the hearing rule would require a witness to be provided with a summary of a case against them, the NSW Legislative Council's procedural fairness resolution simply requires that a witness be provided with the inquiry terms of reference and a copy of the procedural fairness resolution. It is silent on any requirement to provide witnesses with a specific outline of allegations or evidence concerning them before a hearing.[97]

As seen in both case study inquiries, terms of reference can be very broad and give witnesses little assistance in preparing for a hearing. In the Canterbury Bankstown inquiry, when legal representatives raised concerns about the broad scope of the inquiry's terms of reference, and insufficient information on what witnesses would be questioned about, the committee chair responded by stating that committee members were able to ask 'lawful questions that fall within the terms of reference'.[98] This response appears to have been simultaneously correct, in terms of the Parliament's procedural fairness requirements, and unsatisfactory for the witnesses.

[97] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[98] *Compiled correspondence between the Hon Aileen MacDonald MLC and the City of Canterbury Bankstown Council,* pp. 12, 33.

Similar issues were raised by witnesses invited to appear before The Hills inquiry: there was no onus on the committee to articulate its reasons for inviting a witness, yet several witnesses, in declining to appear, responded that they knew nothing of the matters in question that could assist the committee.[99] The practice around summoning witnesses under the *Parliamentary Evidence Act 1901* meant committees could proceed to summon witnesses where the witness had declined an invitation, without having to provide specific information on what they would be questioned on, or whether they were the subject of a particular allegation.

We note the New Zealand Parliament's Standing Orders set out much more specific requirements for select committees, in that they are required to provide witnesses due to appear before them with any material containing allegations that may damage their reputation.[100] We suggest this is an area where the NSW Legislative Council could consider strengthening its practice, in the interest of procedural fairness.

APPREHENDED OR ACTUAL BIAS: SHOULD COMMITTEES HAVE SPECIFIC PROCEDURES?

Both The Hills and Canterbury Bankstown inquiries involved explicitly party-political allegations, and it is not altogether surprising that accusations of bias were raised about the committees, which by their nature have members aligned with political parties. The Hills inquiry in particular saw concerns of both apprehended and actual bias raised: first, there were witnesses who attacked the 'partisan' nature of the committee, claiming that it was not going to provide procedural fairness as a result of having a Labor-Greens majority. Second, allegations were aired both by a member of the Legislative Council, and in an anonymous document, that the Liberal members on the committee had conflicts of interest, as they had been members of the Liberal Party

[99] See, eg, Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* p. 130.

[100] New Zealand House of Representatives, *Standing Orders of the House of Representatives.* Wellington: Parliament of New Zealand, 2023, pp. 66-67 (Standing Order 241). See also Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees.* Wellington: New Zealand House of Representatives, 2010, pp. 16, 28-29.

State Executive when it made decisions that were central to the allegations being investigated.[101]

The NSW Legislative Council's procedural fairness guidelines have nothing akin to the 'bias' rule seen in administrative law. It could be argued that, as a microcosm of a democratically elected house, with elected members explicitly representing political interests, the 'bias rule' is not a necessary or practical element of procedural fairness for this context. There is some regard to preventing actual bias in the Standing Orders, which provide that no member who has a 'direct pecuniary interest' may take part in a committee inquiry.[102] The members' Code of Conduct requires members to 'take reasonable steps to draw attention to any conflicts between their private interests and the public interest in any proceeding of the House or its committees.'[103] However, management of non-pecuniary conflicts of interest (perceived or real) are left to individual members, with no prescribed role, for example, for the committee chair, to make determinations on whether conflicts are adequately managed.[104]

In The Hills inquiry, several Liberal committee members made declarations of their involvement with the Liberal State Executive and certain individuals of interest early in the inquiry.[105] Nevertheless, Labor committee members raised a possible conflict of interest as an issue at the committee's first public hearing, seeking advice from the committee chair about options for the committee in relation to the participation of those members.[106] As the inquiry developed, and after seeking the Clerk's advice, the

[101] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 173, 272-274.

[102] New South Wales Legislative Council, *Standing Rules and Orders,* p. 77 (Standing Order 217(10)).

[103] New South Wales Parliament, Legislative Council, *Minutes*, 24 March 2020, pp. 865-868.

[104] While Standing Order 217(10) prevents members taking part in an inquiry where that member has a pecuniary interest, there is variability in whether members have been removed or stood aside from inquiries over other possible conflicts of interest: see Frappell and Blunt, *Legislative Council Practice,* pp. 746-749. See also Correspondence from Committee Clerk to Legislative Council Portfolio Committee No. 7 – Planning and Environment, 16 February 2023. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/other/18202/Email - Advice from Committee Clerk, recieved 16 February 2023.pdf.

[105] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* p. 31; Hon Chris Rath MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, p. 2; Hon Aileen MacDonald MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, p. 2.

[106] Hon John Graham MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, pp. 2-3; Hon Penny Sharpe MLC, Evidence to Legislative Council

two Liberal members recused themselves from certain public hearings, and later from any further involvement in the inquiry, meaning they were not present when the committee's final report was considered.[107]

In this particular inquiry, strongly put accusations from some proposed witnesses of a lack of 'procedural fairness' due to bias could well be put down to political motives or to an unwillingness to be publicly questioned on serious allegations. However, we suggest that having clearer processes to deal with claims of apprehended bias could assist committees examining matters of alleged impropriety to demonstrate that they take this aspect of procedural fairness seriously and should be seen as legitimate bodies to undertake serious inquiries. These would need to be nuanced for the political context of parliament where members will as a matter of course have party political affiliation or known views on particular issues.

There are examples elsewhere of parliamentary committees having processes to deal with apprehended bias. Notably, the New Zealand Parliament's Standing Orders provides that a complaint of apparent bias may be made by a person appearing or about to appear before a committee whose reputation may be seriously damaged.[108] The committee chair would then decide on whether that member would be excluded.[109]

PUBLICATION OF INFORMATION THAT COULD DAMAGE A REPUTATION – ADVERSE MENTION PROCEDURES

As seen in our case study inquiries, parliamentary committees investigating allegations of impropriety frequently receive evidence that may damage a person's reputation. Possible reputational damage to witnesses is considered in the procedural fairness resolution. This provides that where evidence is about to be given that may 'seriously

Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, pp. 2-3.

[107] Legislative Council Portfolio Committee No. 7, *Hills Shire Council,* pp. 43, 49, 52.

[108] New Zealand House of Representatives, *Standing Orders,* p. 65 (Standing Order 237). See Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees,* pp. 16-17, 28.

[109] New Zealand House of Representatives, *Standing Orders,* p. 65 (Standing Order 237(3)). Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees,* pp. 16-17, 28.

damage the reputation of a person or body', the committee 'may consider' hearing the evidence *in camera*.[110] Where evidence has been given in public that may 'seriously damage the reputation of a person or body', the committee 'may consider' keeping some or all of it confidential, and/or 'may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.'[111] It is up to committees themselves to decide which of these procedures is used, with the advice in *NSW Legislative Council Practice* being that: 'a committee needs to balance the potential harm caused by adverse reflections, the importance of the evidence to the inquiry and the public interest in committees conducting their proceedings as far as practicable in public'.[112]

Members of the NSW Parliament are alive to the possibility of harm to individuals arising from being publicly named in connection with allegations of impropriety, as seen in a recent committee inquiry into the reputational impact on individuals of being adversely named in ICAC investigations.[113] That report showed members carefully considering how reputational damage could be a side effect of public hearings, and the need to balance ICAC's powers to combat corruption with protections for innocent individuals.[114]

Our case studies show Legislative Council committees grappling with decisions of whether material containing adverse references should be kept confidential, versus choosing to publish and allowing named individuals the opportunity to respond. It may be seen that parliamentary committees tend to favour taking evidence in public, rather than the more cautionary approach of keeping evidence confidential until a response can be sought, the allegation tested against other evidence, and a considered finding made. There is a procedural fairness reason why this would be the case, in that there are times when *not* publishing evidence that informs the committee's deliberations

[110] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[111] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[112] Frappell and Blunt, *Legislative Council Practice,* p. 822.

[113] Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named*.

[114] Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named,* pp. 1-3.

could be seen as procedurally unfair to witnesses.[115] It is also a reflection of the importance given to transparency in exploring issues of public interest. Nevertheless, publication of untested adverse reflections that are unfounded can cause reputational damage to individuals who have done nothing wrong, and who have no recourse to the law of defamation due to privilege.

We note that, while Legislative Council committees do seek to meet the requirements of the procedural fairness resolution, the resolution itself is less prescriptive than in some other parliaments. The wording of the resolution was deliberately made more flexible than that of the Senate's Privilege Resolution No. 1, for example.[116] Standing Orders of the New Zealand Parliament contain much more detail on handling of evidence containing allegations, including an explicit Standing Order relating to 'irrelevant or unjustified allegations'.[117] We suggest that strengthening procedures to prevent unfounded allegations being aired publicly before the subject has time to respond would be worth considering, both to enhance the protection of witnesses, and also to enhance the reputation of the committee process itself.

PUBLICATION OF SENSITIVE INFORMATION: PRIVACY AND CONFIDENTIALITY REQUESTS

Handling information that contains personal details or sensitive information about individuals is another issue that can arise in committee inquiries, as it has in relation to the exercise of the Legislative Council's extensive use of orders for government papers. The Legislative Council has grappled in recent years with large volumes of documents containing personal information being received under Standing Order 52, and the implications of electronic publication of such information.[118] A 2022 Procedure

[115] This has been observed by witnesses in recent inquiries, see for example: Mr Mark Steele SC, Evidence to Legislative Council Portfolio Committee No. 4 – Regional NSW, Parliament of New South Wales, 18 July 2024, pp. 21-23; Mr Peter V'Landys, Evidence to Legislative Council Select Committee on the Proposal to Develop the Rosehill Racecourse, Parliament of New South Wales, 9 August 2024, pp. 48-50.

[116] Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants,* p. 12.

[117] New Zealand House of Representatives, *Standing Orders,* pp. 65-67 (Standing Orders 238-242). See Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees,* pp. 14-16, 28-30.

[118] A Procedure Committee inquiry in 2022 heard from government that there have been occasions where parliament's publication of documents had resulted in disclosure of sensitive personal information that was

Committee inquiry resulted in amended standing orders to create a new process to manage papers that contain personal information.[119]

For committees, there are standard committee procedures to redact personal information such as emails or phone numbers before publication. There are also provisions in the procedural fairness resolution for witnesses to request both documentary and oral evidence to be kept confidential by a committee.[120] However, it is ultimately up to a committee, having considered any confidentiality requests, to decide whether it will publish evidence received or not. Parliament is not bound by public sector privacy legislation, and committees can, and sometimes do, publish sensitive information without the consent of those concerned.[121]

A number of privacy issues were raised in our case study inquiries. Correspondence to The Hills inquiry contains several complaints from (proposed) witnesses of alleged privacy breaches as potentially sensitive personal information was contained in documents published by the committee. The Canterbury Bankstown inquiry received a large volume of administrative documents which posed a challenge to publish with personal information redacted. Even with standard redaction of personal contact details, there are occasions when publication of an organisation's internal documents has been criticised for breaching privacy, for example, publishing names of junior staff or details of private conversations that are not pertinent to the inquiry.[122]

As noted, Parliament is not bound by privacy legislation, and there can be both public interest and procedural fairness reasons for favouring publication of evidence. That said, in an age of significant and increasing public concern about privacy, and the potential for misuse of personal information published online, we suggest that practices around protection of private personal and sensitive information is one area

'contrary to privacy principles and the public interest'. Legislative Council Procedure Committee, *Operation of Standing Order 52*. Sydney: Parliament of New South Wales, 2022, p. 13.

[119] Legislative Council Procedure Committee, *Operation of Standing Order 52*, pp. 13-14. The new procedure is found in New South Wales Legislative Council, *Standing Rules and Orders,* pp. 17-18 (Standing Order 52(7)).

[120] New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

[121] For example, Legislative Council Public Accountability and Works Committee, *Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (Interim Report).* Sydney: Parliament of NSW, 2023, pp. 59, 71, 75. See *Privacy and Personal Information Act 1998* (NSW) s 3(1) (definition of 'public sector agency').

[122] See, eg, Correspondence from Ms Louise Capon to Mr David Shoebridge MLC, 14 February 2022. Accessed at: https://www.parliament.nsw.gov.au/lcdocs/other/16974/Letter from KPMG to the Chair.pdf.

that many parliamentary committees could well pay some attention to, in order to prevent unintended harm to individuals.

CONCLUSION

The interplay between the powers of committees and the protections for witnesses who participate in them is an ongoing source of tension in Parliaments across Australia. Committees must balance the use of powers to hold robust inquiries in the public interest with the need to build and maintain public trust in the legitimacy of those same committees, which could be undermined through manifestly unfair treatment of individuals in an overtly political process. This tension is clearly demonstrated in the NSW Legislative Council, which sees participation of thousands of people in its committees each year and which has uniquely strong coercive powers to ensure witness attendance.

The two case studies in this paper exemplify this tension. Our analysis finds that the existing protections and practice for inquiry participants could be strengthened, to accord with ideas of 'natural justice', and to better align with practices in other arenas. In reaching this conclusion, we draw on the rules of procedural fairness in the administrative law context. We do not argue that these should be adopted wholesale in New South Wales. To effectively play their oversight role, parliaments need to be able to examine controversial issues, and have the flexibility to set their own standards. However, we *do* argue that the Legislative Council should, guided by procedural fairness expectations, continue to review and strengthen its protections for witnesses to prevent unfair harm to individuals and build legitimacy in the public eye.

Areas we suggest could be strengthened include the requirement to provide reasonable notice of hearings, in terms of both time frame and issues to be canvassed, and processes to deal with apprehended bias of members. In addition, we suggest that greater attention to protection against reputational damage through publication of untested allegations, and protection of privacy and personally sensitive information may be warranted, given the rapid dissemination of information made possible through live streaming and online publication.

Any such changes must come from within the NSW Legislative Council itself. The unique nature of the parliamentary context means that external bodies, like independent experts, oversight panels, or even parliamentary staff, lack the power to change the functions of upper house committees. We suggest there are good reasons for the Council to revisit its protections for witnesses. The committee system is a source of pride for upper house members, who in a recent debate spoke of the value that

committees bring in providing an opportunity to hear directly from citizens, to shape the laws of the State, and to do deep interrogation in the name of accountability.[123] Members are also aware of current trends of mistrusting public institutions such as parliament and are keen to build that trust back. Ensuring committees use their powers in a way that is seen to be fair, including being seen to meet standards of procedural fairness, is one way they could earn that trust.

While this paper has focused on the NSW Parliament, we suggest the issues are not unique to New South Wales. At a time of rising mistrust in public institutions, and when information published online can be accessed instantaneously and used maliciously, the need for parliaments to ensure protections for citizens who encounter them is greater than ever.

[123] Penny Sharpe, New South Wales, *Parliamentary Debates,* Legislative Council, 30 November 2023, p. 124; Sue Higginson, New South Wales, *Parliamentary Debates,* Legislative Council, 30 November 2023, p. 127.

Carne-age: Article IX in Australia Today

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Abstract: This article examines the continuing relevance of Article IX of the Bill of Rights 1688 in Australian law, with particular attention to the recent case of *Crime and Corruption Commission v Carne*.[2] Article IX, which enshrines the principle that parliamentary proceedings should not be questioned in any court, remains a cornerstone of parliamentary privilege in Australia. However, the Carne case has challenged this long-standing principle, raising important questions about its application to documents received by parliamentary committees. Through an analysis of the statutory, constitutional, and common law foundations of Article IX in Australian jurisdictions, the article argues that the High Court's decision in Carne undermines the protections guaranteed by Article IX, particularly regarding the handling of committee documents. The case exemplifies judicial skulduggery concerning parliamentary processes, weakening the constitutional principle of mutual respect between the judiciary and parliament. Ultimately, this article advocates for a reaffirmation of Article IX as a foundational principle in Australia's constitutional framework, warning that further judicial interference could erode the essential privileges of parliament and disrupt the balance of power between branches of government.

[1] This article was first written for the Parliamentary Law, Practice and Procedure Course, 2023.

[2] *Crime and Corruption Commission v Carne* [2023] HCA 28

INTRODUCTION

Article IX of the *Bill of Rights 1688* (Article IX) is often cited as the foundational text for the privilege of freedom of speech in parliaments and the enshrinement of the single most important of all the parliamentary privileges.[3] Its importance cannot be overstated.[4] The text of Article IX is:

> *That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.*[5]

This article seeks to defend the view that the principles espoused in Article IX remain the authoritative statement of the law of the free-speech privilege in Australia. This view must be defended, as in the recent case of *Crime and Corruption Commission v Carne*,[6] (Carne) the judges of the High Court reached a conclusion at odds with the principles of Article IX.

The article will first discuss the basis of Article IX in Australian law. It will then consider the application of Article IX to receipt of documents by parliamentary committees. This will permit a short exegesis of the Carne litigation, and an argument that a proper appreciation of Article IX as encapsulated in the relevant Queensland legislation could only have led to a different decision. Finally, the article concludes that the approach of the superior courts in Carne, and their reluctance to engage with Article IX, is concerning for the constitutional fabric of our Commonwealth, and inimical to the 'ethic of mutual respect' upon which it is partly based.

[3] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report* (House of Lords Paper No 43, House of Commons Paper No 214, Session 1998-99) p. 17.

[4] *R v Chaytor* [2011] 1 AC 684, 174 per Lord Judge CJ.

[5] *Bill of Rights* [1688] 1 Will and Mar Sess 2, Ch II.

[6] *Crime and Corruption Commission v Carne* [2023] HCA 28.

CONSTITUTIONAL, STATUTORY AND COMMON LAW STATUTORY FOUNDATIONS FOR ARTICLE IX

The *Bill of Rights 1688* is a valid Act of the UK parliament that remains in force.[7] Although some doubt has been raised as to when, if at all, Article IX of the Bill of Rights was 'received' into the fledgling colonies of the antipodes,[8] the Australian colonies resolved this doubt through legislation shortly following the achievement of responsible government (or later).[9] They did this in three ways.

First, by repeating the text of Article IX in the text of a statute.[10] Secondly, by containing a provision in either the State's constitution,[11] or in an express statute on parliamentary privilege, which ties the privileges of the jurisdiction's parliament to those of the 'the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees…'.[12] It follows that the privileges and immunities of the Commons House of parliament include the Article IX protections.[13] Through linking the privileges of a parliament to the Commons House, that parliament can also enjoy the same privileges.[14] The third incorporation is by enacting a statute that declares that the Bill of Rights is in force in

[7] *Bill of Rights* [1688] 1 Will and Mar Sess 2, Ch II.

[8] Colin Huntly, 'Reception issues? Check your regional settings' (Conference Paper, ASPG Conference, September 2023).

[9] Prior to States gaining Constitutions, it was generally held that the laws of the parent country were the laws of the colony as far as they can be applied to the local conditions: *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5 per Forbes CJ.

[10] See *Parliament of Queensland Act* 2001 (Qld) s 8, *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 4, *Imperial Acts Application Act 1969* (NSW).

[11] For example: *Constitution Act 1975* (Vic) s 19; Australia, *Commonwealth of Australia Constitution Act 1901* s 49; *Constitution Act 1934* (SA) s 38. The Australian Capital Territory is one step further removed from the Commons, pegging their privileges to the House of Representatives: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 24.

[12] *Parliamentary Privileges Act 1891* (WA) s 1. The point in time at which the privileges and immunities of the Commons are tethered to the Australian legislatures differs from jurisdiction to jurisdiction, but all are much later that 1688.

[13] 'The privilege was clearly and widely established, in both Houses, and was largely protected from outside interference, whether by the Crown intent on stifling poetical initiatives or "indecorous" criticism, by the courts, as in 1629': Erskine May, *Parliamentary Practice.* London: Butterworths, 22nd ed, 1997, p. 73.

[14] *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223, [95] per Hall J.

the jurisdiction,[15] or by enacting a specific statute to cover the field, such as the *Parliamentary Privileges Act 1987* (Cth).

Another source of Article IX can be found in the common law, or the *lex et consuetudo parliamenti*.[16] Although there has been some dispute as to whether the law of parliament is separate and distinct to the law of the land, the *lex terrae*,[17] both will be taken to be part of the common law administered by the courts for the purposes of this article.[18]

In Australia and other former colonies of Great Britain, the common law position is that only powers and privileges of Westminster 'reasonably necessary for the proper exercise of their functions and duties' were automatically imported into the colonial legislatures.[19] What is reasonably necessary depends upon what the conventional practices are of the House.[20] It has been held that the foundational principle espoused in Article IX meets the test of reasonable necessity in Australian parliaments.[21]

The discussion above demonstrates the entrenched nature of the principles contained in Article IX in modern Australian law and highlights its ongoing influence on the shape and scope of parliamentary privilege. This article will now turn to discuss what Article IX protects, in the context of parliamentary committees.

PROCEEDINGS IN PARLIAMENT - COMMITTEES

The Article IX protection of proceedings in parliament captures a variety of matters, and as Erskine May notes, '… comprehensive lines of decision have not emerged and

[15] *Imperial Acts Application Act 1969* (NSW) s 6.

[16] *Kielly v Clarkson* [1842] 4 Moore PC 63; (1842) 12 ER at 236.

[17] Josh Chafetz, 'Lex Parliamenti vs. Lex Terrae' in *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*. New Haven: Yale University Press, 2007.

[18] 'The privileges of the House are as much a part of the law of the land as the statute, ecclesiastical, or admiralty law, all of which must be noticed and determined by the courts of common law, when brought before them in the ordinary course of justice': *Stockdale v Hansard* (1839) 9 Ad & Ell 96; 112 ER 1112.

[19] *Kielly v Clarkson* [1842] 4 Moore PC 63.

[20] *Egan v Willis* (1998) 195 CLR 424, 454 per Gaudron, Gummow and Hayne JJ.

[21] *Gipps v McElhone* (1881) 2 LR NSW 18; *Chenard & Co. v Joachim Aressol* (1949) AC 127.

indeed it has been concluded that an exhaustive definition could not be achieved'.[22] Rather than reviewing all possibilities for what could be considered a proceeding,[23] this article will limit the discussion to a penumbral question of whether documents provided to a committee fall under Article IX's auspices[24]

It is generally accepted that committee proceedings are covered by Article IX.[25] This includes what is said at a committee meeting or hearing, submissions to a committee, and other committee documents such as its meeting papers.[26] However, not all documents received by a committee are protected by Article IX *simpliciter*. Junk mail in a committee inbox, for example, is not protected.[27] The courts have held that some act must be done to enliven parliamentary privilege: 'the question again is whether it can properly be said that creating, preparing or bringing those documents into existence were "acts" done for purposes of or incidental to the transacting of … business'.[28]

If a permanent commission of inquiry prepared a report for submission to a parliamentary committee, does privilege attach to the document prepared and provided to the committee? This scenario was considered by the Supreme Court of Queensland, the Queensland Court of Appeal and the High Court of Australia, with learned judges in the three courts taking starkly different approaches, which will now be discussed.

[22] David Natzler et al (eds), *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*. LexisNexis; 25th edition, 2019.

[23] The boundaries of what constitutes a proceeding are not 'clear cut': *The President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223, [175] per Hall J.

[24] HLA Hart, 'Positivism and the Separation of Law and Morals' *Havard Law Review* 71(4) 1958.

[25] Gerard Carney, *Members of Parliament: Law and Ethics*. NSW; Prospect Media, 2000, pp. 210-11.

[26] An enumeration of protected proceedings can be found in s 16 of the Commonwealth *Parliamentary Privilege Act 1987*, which has been judicially considered to be declarative of the common law position: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335; [1994] 3 All ER 407 per Lord Browne-Wilkinson.

[27] *Rowley v O'Chee* [1997] QCA 401, 11. See also *Victorian Taxi Families Inc v Taxi Services Commission* [2018] VSC 59.

[28] *O'Chee v Rowley* (1997) 150 ALR 199, 209.

CARNE V CRIME AND CORRUPTION COMMISSION

This litigation concerned a report (the report) prepared by the Corruption and Crime Commission of Queensland (CCC) into allegations against Mr Carne, who was the Public Trustee of Queensland at the time.[29] The CCC provided the report to the Parliamentary Crime and Corruption Committee (the PCCC), which was anticipating it.[30] The PCCC is the Committee of the Queensland Parliament which oversees the CCC and reports to the parliament. The PCCC gave the CCC a certificate upon receipt of the report, as required by statute,[31] that the report was 'prepared for the purposes of, or incidental to, transacting business of the [PCCC]'.[32] The Commission requested that, pursuant to the *Crime and Corruption Act 2001* (Qld) (the CC Act),[33] the PCCC direct that the report be given to the Speaker of Queensland Parliament for tabling. Mr Carne commenced proceedings against the CCC with the ultimate aim of preventing the report's publication.[34]

The issues in the case turned on the statutory functions of the CCC, and whether the report fell within the business of the CCC, which would enliven Article IX.[35]

In the Supreme Court

In the first instance, the trial judge Justice Davis dismissed Carne's application, finding there was 'no doubt' that the report was authorised by the relevant sections of the *Crime and Corruption Act 2001* (Qld) and protected by parliamentary privilege.[36] His Honour found that presenting or submitting a document to the Assembly, a committee

[29] Summary of facts derived from the joint judgement of McMurdo and Mullins JJA in Carne v Crime and Corruption Commission [2022] QCA 141,

[30] *Carne v Crime and Corruption Commission* [2022] QCA 141 at [89] ('*Carne*').

[31] *Parliament of Queensland Act 2001* (Qld) s 55.

[32] As above n 28.

[33] Section 69(1)(b).

[34] Facts taken from the judgement of McMurdo and Mullins JJA in *Carne v Crime and Corruption Commission* [2022] QCA 141.

[35] There have been several pieces of excellent scholarship which have dealt with aspects of the Carne case, notably by Neil Laurie; *Mount Erebus to Ann Street: Forty years of judicial supervision of ad hoc and permanent commissions of inquiry and the intersection with parliamentary privilege and doctrines of mutual respect*, delivered at the 2023 ASPG Conference, Perth.

[36] *Carne v Crime and Corruption Commission* [2021] QSC 228 per Davis J.

or an inquiry squarely falls under the definition of 'Proceedings in the Assembly' under section 9 of the *Parliament of Queensland Act 2001* (Qld). Justice Davis firmly stated that 'delivery to the PCCC is, relevantly, delivery to the Assembly. Privilege attaches to the report'.[37]

In the Queensland Court of Appeal

The majority of the Court of Appeal decided in favour of Carne. Justices Mullins and McMurdo found that the CCC did not have the authority to make the report, as the report did not fulfill one of the statutory functions of the CCC. This was because the outcome of the investigation into Carne was that there will be no criminal or disciplinary proceeding against him.[38] The majority reasoned that as the report was made in 'purported, but not actual performance of the Commission's functions', privilege did not attach.[39]

Justice Freeburn in dissent found that the report *was* prepared by the CCC in performance of its statutory functions.[40] Like the trial judge, Freeburn J also found that on the 'expansive' wording of section 9 of the *Parliament of Queensland Act 2001* (Qld),[41] the report was a proceeding of the Assembly, and that it was

> *…protected [by] privilege… the appellant cannot ask the court to, for example, declare that, in preparing the report, the Commission failed to observe the requirements of procedural fairness. Any impeachment or questioning of the report, or the report's preparation, is a matter for parliament rather than the courts.*[42]

[37] *Carne* QSC at [121].

[38] *Carne v Crime and Corruption Commission* [2022] QCA 141 at [59].

[39] *Carne* QCA at [81].

[40] *Carne* QCA at [125]-[138].

[41] *Carne* QCA at [144]

[42] *Carne* QCA at [159].

In the High Court of AUstralia

The High Court of Australia, in two separate judgements, upheld the majority decision of the Queensland Court of Appeal.[43]

Chief Justice Kiefel and Justices Gageler and Jagot based their reasons in large part upon the 'purposes' of the CCC in preparing the report, and found that as the CCC's purposes for preparing the report were not those of the PCCC, the report did not meet the statutory requirements of a report.[44] The majority found that the CCC Act did not authorise the report on Mr Carne, and that on the facts the 'requisite connection' to the business of the Committee was not established.[45] The Justices did note that if the 'requisite connection' was established, the 'large question' of parliamentary privilege would have to be determined.[46]

Justices Gordon and Edelman similarly found that no question of privilege arose in the case as no act was done in the course of, or for the purposes of or incidental to, transacting business of the PCCC to which parliamentary privilege could attach.[47] This followed the requirement for an 'appropriative act' established in *Rowley and O'Chee*.[48] Their Honours found that '[it] is unnecessary and inappropriate to determine the metes and bounds of parliamentary privilege in this case'.[49]

THE LARGE QUESTION, THE LARGE PROBLEM

This article contends that the 'large question' alluded to by the High Court *was* enlivened by the Committee's possession of the report, and that contrary to the High Court's reasoning, based on what the CCC can and cannot do under the CCC Act, parliamentary privilege attached to the report as soon as the Committee had it.[50] The

[43] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[44] *Carne* HCA at [24]-[25].

[45] Carne HCA [38]-[39].

[46] See above n 42.

[47] Carne HCA at [78].

[48] See above n 25.

[49] Carne HCA at [114].

[50] An official report from a statutory body of which the Parliamentary Committee had knowledge is fundamentally different to junk mail in a Member's inbox, to distinguish *O'Chee v Rowley [2000]* 1 Qd R 207.

judgments do not acknowledge that the PCCC might have its own purposes. The consequence of the High Court of Australia's decision, in side-stepping the privilege issue, is that they have stymied the PCCC and by extension the parliament in dealing with a document that was before it.

The argument that no act was done to distinguish the CCC's report from other documents in the Committee's 'post box'[51] ignores the reality that, were the litigation not commenced, more would have been done by the Committee in transacting its business on the matter. The High Court acknowledges as much: '[h]ad the Committee commenced consideration… the report may have been the subject of its business, but that point was not reached'.[52]

It is difficult to see how the report was not a proceeding of the Parliament. The Clerk of the Parliament of Queensland puts it succinctly:

> *the preparation of the report was anticipated by the PCCC, it was clearly prepared for the PCCC's consideration, and it was presented to the Committee and was under its consideration when the action was taken in the Supreme Court. What further acts needed to be taken?*[53]

It is for the parliament through its Committee, rather than the courts, to decide whether the report was one they could properly table, and that judicial intervention following court action by a person who is adversely referred to in a report, is an improper trespass onto the province of the legislature by the judicial arm of government.[54] This decision potentially allows any aggrieved person who may wish to force a parliament's hand into not tabling papers, to apply to the court for declarative or injunctive relief, raising arguments based on 'purpose' and statutory interpretation rather than meaningfully adhering to the constitutional principle contained in Article

[51] *O'Chee v Rowley* at [115].

[52] *O'Chee v Rowley* at [39].

[53] Neil Laurie, 'Removing the watchdog's bark: Crime and Corruption Commission v Carne', *AUSPUBLAW* (Blog Post, 24 October 2023) Accessed at https://www.auspublaw.org/blog/2023/10/removing-the-watchdogs-bark-crime-and-corruption-commission-v-carne.

[54] Michael McHugh, `Tensions Between the Executive and The Judiciary'. *Australian Law Journal* 76(9) 2002, pp. 567-580: 'none is supposed to trespass into the other's province'.

IX.[55] That Article IX is a constitutional principle in the context of this case cannot be doubted. Following from the earlier discussion, the Queensland Constitution provides that the powers, rights and immunities of the Legislative Assembly and its members and committees are the powers, rights and immunities defined under an Act; and this definition has happened.[56] This is true in the Commonwealth also, with section 49 of the *Australian Constitution* allowing the House to declare its privileges.[57] It has been said recently that in regards to an important case concerning section 92 of the Australian Constitution,[58] that the High Court was '…weak, timorous, and engaged in an absurd debate about vague conceptions….'.[59] It is a suggestion of this article that the High Court of Australia has behaved similarly here.

The Ethic of Mutual Respect

Now that the dust has settled on the Carne case, what is to prevent the parliamentary Committee forwarding the CCC report to the Speaker for tabling after all? It is entirely within the power of the Committee to do so.[60] If this was to occur, the 'large question' is put and it is hard to see what action might be taken by Carne or one of the other branches of government. The tabled report would unquestionably form part of the proceedings of the Assembly, and one would hope that in such a case Article IX would certainly prevent any further intervention.

It could be said that the PCCC's decision to postpone its consideration of the report until the conclusion of the Carne litigation is due to parliament's adherence to the 'ethic

[55] In this instance the courts judged that the privilege did not exist, but did note that 'it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise': *R v Richards; Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157 at [7] per Dixon CJ for the Court.

[56] *Constitution of Queensland 2001* (Qld) s.9, *Parliament of Queensland Act 2001* (Qld) s.9.

[57] Which it did with the *Parliamentary Privileges Act 1987* (Cth).

[58] *Palmer v Western Australia* (2021) 272 CLR 505.

[59] Allan Myers AC, KC, 'Two Recent Constitutional Cases', *The Thirteenth Sir Harry Gibbs Memorial Oration*, (Melbourne, 33rd Conference of The Samuel Griffith Society, 26 August 2023).

[60] Both by virtue of s 69 of the *Crime and Corruption Act 2001* (Qld) and s 50 of the *Parliament of Queensland Act 2001* (Qld).

of mutual respect'.[61] The Committee allowed the curial consideration of the matter to take its course, not because it was obliged to, but because that is respecting the province of the courts. However, the parliament in allowing the court to do its work on the matter before taking any action regarding the report in the Committee or in the House, has in respecting the judiciary allowed them to not follow suit and go so far as to suggest what the work of a parliamentary committee is.[62] This would seem to stretch the ethic of mutual respect, which is crucial for the proper maintenance of the rule of law.

Awesome Power

The High Court has an 'awesome power' and in practice its power '…is bounded only by [its] own prudence in discerning the limits of the Court's constitutional function'.[63] This article has attempted to demonstrate that the High Court has, through the exercise of its power, cast doubt on the absolute protection afforded by Article IX of the *Bill of Rights 1688*. Article IX is a 'fundamental aspect of the democratic process because it ensures that the processes and debates of parliament remain in the control of the community's elected representatives'.[64] It can only be hoped that, if the case arises, the High Court can cast off its timorous outlook and uphold the ethic of mutual respect and the *lex et conseutuedo parliamenti* in future decisions.

POSTSCRIPT: THE CARNIVAL OF REFORM

The ramifications of the decision in *Carne* were abrupt and seismic.[65] The CCC Commissioner immediately clamoured for legislative change.[66] The Commissioner

[61] For further discussion of this notion, see The Hon Wayne Martin AC, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect'. *Australasian Parliamentary Review* 30(2) 2015, pp. 80-98.

[62] See *Crime and Corruption Commission v Carne* [2023] HCA 28 at [36].

[63] *Trop v Dulles* (1958) 356 US 86 at 128 per Frankfurter J.

[64] *Barilaro v Shanks-Markovina* (No 2) [2021] FCA 950 at [80] per Rares J.

[65] Cloe Read and Matt Dennien, 'Former deputy premier wins bid to gag CCC report'. *Brisbane Times,* 3 October 2023.

[66] Bruce Barbour, 'Statement from CCC Chairperson following High Court of Australia decision' (Media Release, Crime and Corruption Commission Queensland, 13 September 2023.

estimated that 32 corruption investigation reports and 256 media releases related to corruption investigations over the past 26 years would have fallen foul of the decision in the case.[67] The Shadow Attorney-General introduced a Private Members Bill into the Queensland Parliament to, inter alia, 'remedy a "deficiency in the reporting powers" of the CC Act as found by the High Court … to explicitly allow the [CCC] to table and publish reports on its corruption investigations'.[68]

Since the introduction of the Bill, the Queensland Government announced on 15 February 2024 that it had commissioned an independent review by the former Chief Justice of Queensland into the reporting powers of the CCC. That review was published on 20 May 2024, and made 16 recommendations for legislative change to the CC Act to allow reports, the first group of which 'concerns the circumstances in which, and subject matter on which, the Commission should be able to report for publication'.[69] The Queensland Government has accepted all of the recommendations.[70] Interestingly, one of the recommendations was to cut out the PCCC from the tabling procedure, as

> *[c]ontinuation of the previous convoluted arrangement, by which the Commission would ask the Parliamentary Crime and Corruption Committee to direct it … to provide a report to the Speaker, is undesirable.*[71]

The former Chief Justice noted in her report that 'there is very little scholarship responding directly to the High Court's decision in CCC v Carne, and in particular the point regarding the desirability of public reporting on individual investigations (as

[67] Letter from Crime and Corruption Commission to Parliamentary Crime and Corruption Committee, 26 August 2022; Letter from Crime and Corruption Commission to Parliamentary Crime and Corruption Committee, 20 October 2022. Accessible at https://documents.parliament.qld.gov.au/com/PCCC-8AD2/C-A72F/221020%20-%20IN%20-%20Crime%20and%20Corruption%20Commission%20-%20Data%20on%20investigations%20reports_media%20releases%20in%20relation%20to%20CCC%20investigations.pdf

[68] Crime and Corruption Amendment Bill 2023 (Qld).

[69] Catherine Holmes AC SC, *Report of the Independent Review into the Crime and Corruption Commission's reporting on the performance of its corruption functions*, p. 2.

[70] Yvette D'Ath, 'Government accepts anti-corruption reporting powers review recommendations' (Media Release, 29 May 2024).

[71] Catherine Holmes AC SC, *The Independent Crime and Corruption Commission Reporting Review*, p. 3.

opposed to the parliamentary privilege point).'[72] While this article builds upon the little scholarship there is, it does so on the parliamentary privilege point, which, for those concerned with the study and working of parliaments, is titanic.

[72] Catherine Holmes AC SC, *The Independent Crime and Corruption Commission Reporting Review*, p. 32.

How effective is parliamentary oversight over executive expenditure authorised by standing appropriations?

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Abstract: For the executive to spend money, the Parliament must legislate an appropriation from the Consolidated Revenue Fund. To ensure accountability, the Senate has established the Budget Estimates process to examine and conduct public parliamentary scrutiny over executive expenditure in the annual appropriation bills. However, this amounts to approximately just one quarter of authorised expenditure—the other three quarters is authorised in various 'standing' appropriations with no dedicated ongoing review mechanism. This article considers what standing appropriations are and the challenge they pose to responsible government, and what mechanisms currently exist to provide government accountability and parliamentary oversight within the Australian Senate as the house of review. It concludes by offering some recommendations for the Senate to improve parliamentary oversight in order to ensure that standing appropriations remain fit for purpose and the executive are held accountable for spending authorised under them. Specifically, this article recommends that the Senate: request more information be provided in ministers' second reading speeches and explanatory memoranda accompanying bills that establish standing appropriations, to assist in their scrutiny; include sunset clauses and provisions requiring review in new standing appropriations to ensure regular oversight and scrutiny over standing appropriations once enacted; and publish online a running list of standing appropriations with additional information to improve transparency and aid in understanding the context within which the Parliament can consider proposed standing appropriations.

[1] Thanks to Rachel Callinan, Laura Sweeney and Anita Coles for helpful comments. The views in this article are my own.

INTRODUCTION

> *Proper parliamentary supervision and control of expenditure, and the proper application of section 53 of the Constitution, require that all government expenditure be approved annually in specified amounts by Parliament…[t]here is no reason for this situation not being achieved, except an executive desire to avoid unwelcome parliamentary attention.*[2]

One of the Australian Parliament's key functions is to pass legislation that authorises the executive to spend money, called 'appropriations'. In line with the principle of responsible government, the government must remain accountable to the Parliament, as representatives of the people, for how appropriated monies are spent.[3] To ensure this accountability Parliament needs to retain some oversight over expenditure and, to this end, the Senate has established a rigorous system for examining annual appropriations through what is known as the Budget Estimates process. However, annual appropriations only account for approximately 25% of government expenditure, while standing appropriations (also known as 'special appropriations', and which exist in legislation over multiple years or indefinitely) account for the other 75% and are not subject to this kind of examination.[4] This removes Parliament's direct oversight over significant amounts of spending and challenges Parliament's role as the ultimate authority on expenditure.

While much has been written on the constitutional basis for appropriations and associated jurisprudence in Australia,[5] little examination has been given to the Australian Parliament's oversight over executive expenditure authorised by standing

[2] Rosemary Laing (ed), *Odgers' Australian Senate Practice: as revised by Harry Evans*. Canberra: Department of the Senate, 14th ed, 2016, p. 397.

[3] Gabrielle J Appleby and John M Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate?'. *Public Law Review* 20(3) 2009, p. 203.

[4] Department of Finance, 'Budget 2023-24 Agency Resourcing: Budget Paper No. 4', 9 May 2023, p. 111 ('*Budget Paper No. 4*').

[5] See for example *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth of Australia* (2012) 248 CLR 156; *Wilkie v Commonwealth* (2017) 263 CLR 487; Anne Twomey, 'Wilkie v Commonwealth: A Retreat to Combet over the Bones of Pape, Williams, and Responsible Government'. Accessed at: auspublaw.org/2017/11/wilkie-v-commonwealth/; Glenn Ryall, '*Wilkie v Commonwealth* and Parliamentary Control of Appropriations'. *Papers on Parliament No. 70*, 2019, pp. 77–97.

appropriations. This article considers what standing appropriations are and the challenge they pose, and what mechanisms exist to provide parliamentary oversight and ensure government accountability. This article limits its scope to what the Australian Senate, as the house of review, can do to ensure more effective oversight over standing appropriations, though acknowledging that there is a role more broadly for the Parliament as a whole and the government. It concludes by offering some recommendations for the Senate to improve its oversight to ensure proper parliamentary supervision and control of expenditure.

WHAT ARE APPROPRIATIONS?

Laws that authorise expenditure comprise of annual appropriations, introduced each year in appropriation bills forming the federal budget,[6] and standing appropriations, which typically exist indefinitely in other legislation.[7] Both kinds of appropriations allow for money to be spent from the Consolidated Revenue Fund, for a purpose determined by Parliament.[8]

Proposals for annual appropriations are introduced into the Australian Parliament each year in main and additional appropriation bills and, as noted, account for approximately 25% of government expenditure.[9] As these bills appropriate money for particular entities and outcomes for a specific amount of money, the executive must periodically

[6] This includes Advances to the Finance Minister (AFMs), provisions in the annual appropriation bills which enable the Finance minister to allocate additional funds up to a certain amount (in the 2024-25 financial year, this was $1 billion across Appropriation bills No.1 and No. 2 2024-2025) to entities when satisfied there is an urgent need for expenditure and the existing appropriations are inadequate. The Australian National Audit Office undertakes independent assurance reviews on AFMs issued.

[7] A 'special account' is not a standing appropriation in itself but is a mechanism to increase or decrease an existing standing appropriation that exists under the *Public Governance, Performance and Accountability Act 2013*. This Act provides that if a determination made by the Finance Minister (section 78) or an Act (section 80) establishes a special account and identifies the purposes of the special account, then the Consolidated Revenue Fund is appropriated for expenditure for those purposes, up to the balance for the time being of the special account. While this mechanism raises similar oversight and accountability concerns, the focus of this paper is on standing appropriations.

[8] *Australian Constitution* s 81; Ryall, '*Wilkie v Commonwealth* and Parliamentary Control of Appropriations', p. 82.

[9] Department of Finance, *Budget Paper No. 4*, p. 111. Of note, the Budget Paper No. 4 for the financial year 2024-2025 did not specify the percentage of government expenditure via standing appropriation.

request the Parliament to appropriate further monies for them.[10] This process forces the Parliament to continually examine these expenditures before approving them. These bills are also examined by the Senate through the Budget Estimates, a rigorous and public process in which the Senate legislation committees examine in public hearings and report on expenditure proposed under different government portfolios.[11] The Budget Estimates hearings form an integral part of the Parliamentary calendar, occurring three times a year. They provide rigorous accountability mechanisms by providing space for senators to directly question ministers and government officials and receive written responses if the questions are taken on notice rather than responded to immediately. This process allows for regular parliamentary scrutiny over the performance of the executive and its expenditure of monies appropriated through these bills.[12]

Conversely, standing appropriations authorise continuous expenditure for specific purposes over multiple years. The drafting of a standing appropriation provision is typically quite simple. For example, '[a] payment under this Act is made out of the Consolidated Revenue fund, which is appropriated accordingly'[13] or '[t]he Consolidated Revenue Fund is appropriated for the purposes of making a payment under [specific provision in the Act]'.[14] Where these appropriations are limited in amount or duration, for example in the *Fuel Security Act 2021* (Cth),

[10] Daniel Weight, 'The Commonwealth Budget: a quick guide'. *Research Paper Series*, 2018, p. 8.

[11] Department of the Senate, 'Consideration of Estimates by the Senate's Legislation Committees'. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief05.

[12] John Hogg, 'Senate Estimates Committees', *Australasian Parliamentary Review* 16(2) pp. 72–172; G. Bowrey, C. Smark & T. Watts, 'Financial Accountability: The Contribution of Senate Estimates', *Australian Journal of Public Administration* 75(1) 2016, pp. 28–38.

[13] See, for example, section 238-12 of the *Higher Education Support Act 2003* which provides that '[a]mounts payable by the Commonwealth under this Act are payable out of the Consolidated Revenue Fund, which is appropriated accordingly'. This Act provides for grants for higher education, scholarships and assistance to students and is unlimited in amount or duration.

[14] For example, item 14 of Schedule 1 to the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* inserts section 846B into the *Corporations Act 2001* to provide that '[t]he Consolidated Revenue Fund is appropriated for the purposes of making a payment under an arrangement authorised under section 846A'. In this case, the appropriation indefinitely authorises spending up to $5 billion, to be made by a non-disallowable legislative instrument for crisis resolution over financial clearing and settlement facilities.

> *[t]he Consolidated Revenue Fund is appropriated, to the extent of $2,047 million, for the purposes of paying fuel security services payment under this Part in relation to quarters ending on or before 30 June 2030,' new legislation is required if the government wants to change the amount or duration of the standing appropriation.*[15]

Typically, however, standing appropriations authorise money to be appropriated for indefinite amounts and indefinite duration.[16] In the early 1900s, standing appropriations accounted for about 10% of all Commonwealth expenditure, and has steadily grown over the decades to approximately 80% in the early 2000s and 85% in 2011.[17] This has reduced since then and the 238 standing appropriations that currently exist account for approximately 75% of Commonwealth expenditure.[18]

Standing appropriations fund kinds of payments that are considered independent from the government's annual budget priorities. The Department of Finance provides a list of examples of when a standing appropriation may be more suitable than an annual appropriation, including to: create a legal entitlement to be provided to everyone who satisfies specific criteria; give effect to inter-governmental or industry arrangements by providing a specific amount to certain persons or bodies under stated conditions; demonstrate the independence of an entity from parliament and the executive by providing for automatic payment of the remuneration of its officeholders (for example, the salaries of judges, statutory officeholders, and the Auditor-General); demonstrate Australia's ability to meet its financial obligations independently of parliamentary approval of funds (for example, the repayment of loans); transfer the balance of a special account being ceased to a receiving body; or where implementing transitional arrangements.[19] In line with this, existing standing appropriations fund

[15] *Fuel Security Act 2021* (Cth) s 58.

[16] Department of Finance, 'Chart of Special Appropriations – 30 June 2024'. Accessed at: https://www.finance.gov.au/special-appropriations-background.

[17] Rosemary Laing (ed), *Odgers' Australian Senate Practice: as revised by Harry Evans*. Canberra: Department of the Senate, 14th ed, 2016, p. 397.

[18] Department of Finance, 'Chart of Special Appropriations – 30 June 2024'; Department of Finance, *Budget Paper No. 4*, p. 111.

[19] Department of Finance, 'Special Appropriations: Background. Accessed at: https://www.finance.gov.au/special-appropriations-background#summary.

intergovernmental agreements,[20] judges' salaries,[21] compensation and debt repayments,[22] and authorise expenditure for amounts received through industry-specific levies and charges back to relevant industry bodies.[23] Additionally, standing appropriations are set up for a range of other payments, including funding for housing programs,[24] various welfare entitlements including pensions, paid parental leave and student loans,[25] and programs to incentivise investment in particular industries.[26] Including authorisation for these expenditures in standing appropriations allow the executive to 'spend unspecified amounts of money for an indefinite time into the future,'[27] and they 'may grow exponentially in cost over the years', for example where many more people may become eligible for a particular kind of payment than was originally considered and approved.[28]

The significant amount of expenditure authorised via standing appropriations is not mirrored in other jurisdictions. While Canada has a relatively commensurate proportion of expenditure through standing appropriations, known as 'statutory expenditures', at 71%, the United Kingdom authorises approximately 24% of expenditure through 'consolidated fund standing services' and New Zealand approximately 15% through 'permanent legislative authorities'.[29] In some of these jurisdictions, there has been some criticism from parliamentary committees and other commentators on the use of

[20] See, e.g., *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 90(2).

[21] See, eg, *High Court of Australia Act 1979* (Cth) s 13.

[22] See, e.g., *Native Title Act 1993* (Cth) s 54(2); *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 90D, 97N(2) and 97QC(2); *Guarantee of State and Territory Borrowing Appropriation Act 2009* (Cth) s 5.

[23] See, e.g., *Wine Australia Act 2013* (Cth) s 32; *Primary Industries Levies and Charges Disbursement Act 2024* (Cth) ss 37, 52 and 62.

[24] See, e.g., *Housing Australia Future Fund Act 2023* (Cth) ss 10 and 25.

[25] See, e.g., *Higher Education Support Act 2003* (Cth) s 238-12; *Social Security (Administration) Act 1999* (Cth) ss 123ZN and 242; *Paid Parental Leave Act 2010* (Cth) s 307.

[26] See, e.g., *Automotive Transformation Scheme Act 2009* (Cth), ss 10 and 21(5); *Clean Energy (Household Assistance Amendments) Act 2011* (Cth) sch 2 s 36(5).

[27] Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2005 Accountability and Standing Appropriations*. Canberra: Department of the Senate, 30 November 2005, p. 272 ('*Scrutiny of Bills Report of 2005*').

[28] Senator Andrew Murray, *Review of Operation Sunlight: Overhauling Budget Transparency*, June 2008, p. 30 ('*Murray Review*').

[29] Australian National Audit Office, 'Management of Special Appropriations'. *Audit Report No. 35*, 2017-18, p. 17.

standing appropriations and the need to ensure parliamentary oversight over them.[30] In New Zealand, 'permanent legislative authorities' are limited to debt repayments and judicial salaries and these are presented with the annual appropriations for review.[31]

Given the amount of executive expenditure authorised through standing appropriations, relatively little attention is paid in the Australian Parliament as to whether they are suitable to provide accountability for government expenditure. During the 47th Parliament, little time has been spent debating proposals for new standing appropriations. As of August 2024, sixteen bills have been introduced with new standing appropriations,[32] but only two, the National Reconstruction Fund Corporation Bill 2022 and the Housing Australia Future Fund Bill 2023, engaged any debate or comment in Parliament about the suitability of the mechanism used to fund the appropriation,[33] with the exception of four bills recently introduced and commented on by the Scrutiny of Bills committee and discussed later in this article.[34] Similarly, a number of amendments made (or 'requests for amendments' where

[30] See, eg, Standing Committee on Government Operations and Estimates, *Improving Transparency and Parliamentary Oversight of the Government's Spending Plans*. Canada: House of Commons, January 2019, p. 47; David Wilson (ed), *McGee Parliamentary Practice in New Zealand*. New Zealand: House of Representatives, 5th ed, 2023, p. 548.

[31] David Wilson (ed), *McGee Parliamentary Practice in New Zealand*, p. 548.

[32] Defence, Veterans' and Families' Acute Support Package Bill 2022 (Cth) sch 1 cl 160(1B); Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022 (Cth) sch 1 cl 9; Financial Sector Reform Bill 2022 (Cth) sch 3 cl 1069P; National Anti-Corruption Commission Bill 2022 (Cth) cl 280(3); National Reconstruction Fund Corporation Bill 2022 (Cth) cl 51; Safeguard Mechanism (Crediting) Amendment Bill 2022 (Cth) sch 1 cl 22XNM(4); Housing Australia Future Fund Bill 2023 (Cth) cl 10; Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth) cl 60-145; Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023 (Cth) sch 1 cl 1069P(2); Housing Australia Future Fund Bill 2023 (No. 2) (Cth) cl 10; Primary Industries Levies and Charges Disbursement Bill 2023 (Cth) cls 47, 52, 62 and 86(5); Help to Buy Bill 2023 (Cth) cl 27(4).

[33] See, in relation to the National Reconstruction Fund Corporation Bill 2022 (Cth), Melissa McIntosh, Commonwealth, *Parliamentary Debates,* House of Representatives, 8 March 2023, p. 1531; Angie Bell, Commonwealth, *Parliamentary Debates*, House of Representatives, 8 March 2023, p. 1483; James Stevens, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 2023, p. 1064; Sussan Penelope Ley, Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2023, p. 669. In relation to the Housing Australia Future Fund Bill 2023 (Cth), James Stevens, Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2023, p. 890.

[34] Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024 sch 3 item 1; Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 sch 1 item 14 cl 846B; Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 sch 6 item 7 cl 22; Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024 sch 1 item 200 cl 423(da); sch 2 item 106 cl 423(caa) and sch 3 item 14 cl 423(cb).

introduced in the Senate)[35] that increase expenditure under an existing standing appropriation raised no discussion on the appropriateness of the original authorisation of expenditure under a standing appropriation. The relatively little time spent considering standing appropriations in bills is significant. This is because once enacted, the government is largely unaccountable for standing appropriations as they are not subject to any regular parliamentary review and bypass the scrutiny they would receive if introduced in annual appropriations.[36] If not coupled with sufficient executive accountability and parliamentary oversight, standing appropriations could be considered an inappropriate delegation of legislative power, posing a challenge to the Parliament as the ultimate authority on control of expenditure and the doctrine of responsible government.[37]

A recent example of a proposed amendment to a standing appropriation demonstrates this point. The Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 was introduced in the House of Representatives on 5 June 2024. Schedule 6 of the bill seeks to amend the *Federal Financial Relations Act 2009*. Currently, section 12 of the *Federal Financial Relations Act 2009* provides for a lump sum, as indexed each financial year, to the States for national skills and workforce development payments. It provides that the minister may, by legislative instrument, determine the manner in which the total amount is to be indexed for a particular financial year and must include a statement of the total amount for that financial year.[38] It further provides that financial assistance is payable to a State on condition that the financial assistance is spent on skills and workforce development.[39]

[35] Section 53 of the Constitution provides that the Senate may not amend proposed laws imposing taxation or amend any proposed law so as to increase any proposed charge or burden on the people. As such, the Senate cannot amend these laws, but can return a bill to the House of Representatives and 'request' the omission or amendment of items in these bills.

[36] Senator Andrew Murray, *Review of Operation Sunlight*, p. iii. While through the Budget Estimates hearings standing appropriations could be examined given departmental administration of programs is subject to scrutiny, in practice the process is solely focused on the proposed annual expenditure of government departments.

[37] Peter Gerangelos, 'The relationship between the executive government and parliament in Australia: Accommodating responsible government with the separation of powers', *Journal of International and Comparative Law* 5(2) 2018, pp. 289–313; Glenn Patmore and Kim Rubenstein (eds), *Law and democracy: contemporary questions*, 1st edn. Canberra: ANU Press, 2014.

[38] *Federal Financial Relations Act 2009*, subsection 12(4).

[39] *Federal Financial Relations Act 2009*, subsection 12(6).

The Bill seeks to repeal section 12 and replace it with a flexible funding model whereby financial assistance to the States is payable 'in accordance with the skills and workforce development agreement', which is currently the National Skills Agreement that took effect from 1 January 2024 and as amended from time to time.[40] The National Skills Agreement is a 5-year joint agreement between the Commonwealth, states and territories outlining the priorities and funding in the vocational education and training sector. The Bill seeks to provide that the financial assistance payable to a State is on condition that it be spent in accordance with the skills and workforce development agreement and subject to any other terms and conditions set out in the agreement. In order to make these payments, the bill seeks to amend the appropriation provision in section 22 of the *Federal Financial Relations Act 2009* such that national skills and workforce development payments made in accordance with the skills and workforce development agreement are to be made out of the Consolidated Revenue Fund.

Where currently we have an Act that specifies a dollar amount to be paid to the States subject to indexation, the manner of which must be set out in a legislative instrument (and therefore registered and publicly accessible on the Federal Register of Legislation), this Bill seeks to move the amounts payable to the National Skills Agreement, an agreement made between the Commonwealth, states and territories and not subject to parliamentary agreement or oversight. The National Skills Agreement can be amended at any time and could change the amounts to be paid to the States, which then would become automatically payable through the standing appropriation, again with no parliamentary agreement or oversight. The explanatory memorandum explains that this change 'employs a flexible funding model' and the current funding arrangements are 'not fit for purpose'.[41] While there may be sound reasons to move the funding arrangement into a separate agreement, doing so has fundamentally shifted the degree of oversight and transparency over Commonwealth spending, and this proposed change is not matched with any additional oversight mechanisms (for example requirements for review or reporting). It amounts to an almost complete delegation of Parliament's power under section 96 of the Australian Constitution for Parliament to make grants to the states and determine the terms and conditions that

[40] Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 sch 6.

[41] Explanatory memorandum to the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024, p. 105.

attach to them.[42] Aside from a Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) report raising concerns about the degree of oversight and scrutiny over the appropriation mechanism in the bill,[43] there has been no debate or comment about this proposal in the Parliament.

While Parliament can delegate its constitutional role in making grants to the states and can authorise the executive to spend money through standing appropriations without designated means to monitor the spending, Parliament ultimately has the role to hold the executive to account and there is broadly a public expectation that this occurs. Where agreements like the National Skills Agreement are made and proposed to be included by reference into Commonwealth law to then determine spending to the States without ongoing parliamentary oversight, there is a risk that this can impact public expectations and perceptions of legitimacy for both government and the Parliament. To this end, it is helpful to consider what oversight mechanisms do exist.

EXISTING OVERSIGHT MECHANISMS

While there is no regular ongoing review of standing appropriations, there are some mechanisms in place to consider them both in the Parliament and within government. Additionally, while this article focuses on parliamentary and government ongoing review mechanisms, some entities have considered standing appropriations over the years in discrete reviews and offered recommendations for change.

Discrete reviews

The Australian National Audit Office (ANAO) has conducted two audits into standing appropriations in 2004-05 and 2018,[44] various parliamentary committees have

[42] Subject now only to Parliament amending the bill either before passage (at the time of writing, it is before the Senate) or once enacted via an amending bill.

[43] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024*. Canberra: Department of the Senate, 26 June 2024, pp. 55–58; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024*. Canberra: Department of the Senate, 14 August 2024, pp. 83–86.

[44] Australian National Audit Office, 'Financial Management of Special Appropriations'. *Audit Report No. 15*, 2004-05; Australian National Audit Office, 'Management of Special Appropriations'. *Audit Report No. 35*, 2017-18.

conducted inquiries,[45] and former Senator Andrew Murray reviewed the 2008 Labor Government's budget transparency agenda, *Operation Sunlight* (*Murray Review)*.[46] These reviews found that standing appropriations posed a problem for parliamentary accountability and recommended that standing appropriations be subject to regular parliamentary and government review.[47]

While these reports identified several issues with standing appropriations, over time some changes have been made in response. In its 2004-05 report, ANAO identified that, during 2002–03, there were 414 standing appropriations in existence. ANAO identified issues with the management of standing appropriations, including that: many had not been repealed even though no longer needed; in some instances, entities obtained more than one appropriation for the same purpose; no entity claimed responsibility over some appropriations; or multiple entities claimed they were administering the same appropriation.[48] However, in its 2018 report, ANAO found a number of improvements had been made, including that, amongst other improvements, entities were largely compliant with the regulatory requirements and a substantial number of unused or exhausted appropriations had been repealed.[49] While these issues relate to the management and internal processes of entities administering appropriations, these changes are helpful in providing some assurance over their use and, if reported back to Parliament, can aid in providing some government accountability and parliamentary oversight.[50] These reviews considered some of the core concerns with standing

[45] Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2005 Accountability and Standing Appropriations*. Canberra: Department of the Senate, 30 November 2005; Joint Committee of Public Accounts and Audit, '*Report 404: Review of Auditor-General's Reports 2003-3004 Third & Fourth Quarters; and First and Second Quarters of 2004-2005'*. Canberra: Department of the Senate, October 2005; Senate Standing Committee on Finance and Public Administration, *Transparency and accountability of Commonwealth public funding and expenditure*. Canberra: Department of the Senate, March 2007.

[46] Senator Andrew Murray, *Review of Operation Sunlight*, pp. 29-32.

[47] See, for example, Australian National Audit Office, 'Financial Management of Special Appropriations'. *Audit Report No. 15*, 2004-05, pp. 16-17; Senate Standing Committee on Finance and Public Administration, *Transparency and accountability of Commonwealth public funding and expenditure*. Canberra: Department of the Senate, March 2007, p. xi-xiii; Senator Andrew Murray, *Review of Operation Sunlight*, p. 32.

[48] Australian National Audit Office, 'Financial Management of Special Appropriations'. *Audit Report No. 15*, 2004-05, p. 12.

[49] Australian National Audit Office, 'Management of Special Appropriations'. *Audit Report No. 35*, 2017-18, p. 8.

[50] Australian National Audit Office, 'Financial Management of Special Appropriations'. *Audit Report No. 15*, 2004-05, p. 14.

appropriations and Parliament's limited ability to scrutinise them once they exist. However, while they can provide recommendations for change, they cannot not provide a mechanism for ongoing parliamentary review of existing appropriations, and it is to that which the rest of this section considers.

The Scrutiny of Bills committee

The Scrutiny of Bills committee considers all bills introduced into the Parliament against the scrutiny principles outlined in Senate standing order 24(1)(a). This includes standing orders 24(1)(a)(iv), as to whether bills 'inappropriately delegate legislative powers' and 24(1)(a)(v), 'insufficiently subject the exercise of legislative power to parliamentary scrutiny'. The Scrutiny of Bills committee therefore has a role in considering standing appropriations before they are enacted. In 2005, the Scrutiny of Bills committee conducted an inquiry into standing appropriations, finding they are 'an increasing problem for parliamentary accountability' and denies 'the Parliament the opportunity to approve expenditure through its annual appropriations processes'.[51] Since this inquiry, under the standing orders referenced above, the committee has listed bills which contain standing appropriations in its Scrutiny Digests to draw them to senators' attention and provide some transparency to the Parliament. The Scrutiny of Bills committee initially made numerous comments on standing appropriations. The Scrutiny of Bills committee regularly noted the inclusion of standing appropriations and in some instances wrote to the relevant minister seeking further information to justify its inclusion as a standing rather than annual appropriation,[52] and from mid-2008 began expressing a preference for the inclusion of sunset clauses to make standing appropriations finite.[53] The Scrutiny of Bills committee guidelines, a document published in 2022 outlining the committee's expectations in relation to its scrutiny

[51] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny of Bills Report of 2005*, pp. 270–271.

[52] See, eg, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1 of 2006* 'Aged Care (Bond Security) Bill 2005'. Canberra: Department of the Senate, 8 February 2005, pp. 6–7; *Alert Digest 6 of 2007* 'Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Bill 2007'. Canberra: Department of the Senate, 13 June 2007, pp. 57–60; *Alert Digest 3 of 2008* 'Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008'. Canberra: Department of the Senate, 14 May 2008, p. 24.

[53] A sunset clause is a provision in an Act that provides that a law automatically ends on a particular date. See, eg, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 9 of 2008* 'Safe Work Australia Bill 2008'. Canberra: Department of the Senate, 17 September 2008, pp. 16–17.

principles, further explains its expectation that where a bill establishes or expands a standing appropriation, the explanatory memorandum to the bill should address: why it is appropriate to include a standing rather than annual appropriation; whether the bill places a limitation on the amount of funds that may be appropriated; and whether the standing appropriation is subject to a sunset clause and, if not, why such a clause has not been included in the bill.[54] While this process draws some attention to standing appropriations introduced, in some years the Scrutiny of Bills committee has not made any comment on standing appropriations in bills beyond listing those that are introduced in its reports. The Scrutiny of Bills committee has, however, recently commented on four bills introducing new standing appropriations or expanding existing standing appropriations and sought further information from the responsible minister, asking questions relating to the appropriateness of the standing appropriation, what mechanisms exist for oversight and review, and whether consideration has been given to including a sunset clause.[55] These issues are yet to be considered in the Parliament further in debating the passage of a bill. However, all correspondence from ministers is published on the committee's website, providing some transparency regarding decisions made in relation to standing appropriations.[56]

Department of Finance

An additional measure to improve transparency, since the 2008–09 Budget, is that standing appropriations are now listed in Portfolio Budget Statements. These include estimated amounts to be spent under standing appropriations and estimates for the financial year ahead for each departmental portfolio.[57] Actual expenditure is required

[54] Senate Standing Committee for the Scrutiny of Bills, *Guidelines*. Canberra: Department of the Senate, 2nd ed, July 2022, p. 22.

[55] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024* (Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024). Canberra: Department of the Senate, 15 May 2024, pp. 48-50; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024 (*Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024; Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024). Canberra: Department of the Senate, 26 June 2024, pp. 42-44 and 55-58; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024). Canberra: Department of the Senate, 14 August 2024, pp. 26-27.

[56] Department of the Senate, Parliament of Australia, 'Scrutiny Digest'. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest.

[57] Department of Finance, *Budget Paper No. 4*, p. 112.

to be shown in agencies' annual financial statements.[58] The Department of Finance also maintains a Chart of Special Appropriations which outlines the number of standing appropriations that exist and lists the non-corporate government entity administering them, the Act and provision which authorises it and whether the appropriation is 'unlimited', 'limited' or 'one-off' in nature.[59] Where spending is different from the estimated amount no additional bill is necessary,[60] but nevertheless this information is important in providing some accountability to Parliament as to estimated expenditure authorised under standing appropriations and what standing appropriations currently exist. This can then help inform Parliament's consideration of a bill with a new standing appropriation or generally inform Parliament and others about current standing appropriations. However, the information is limited in the Chart of Special Appropriations in that it is not clear what each standing appropriation is authorising without reading each Act it is authorised under and it is not clear what government programs are being funded by them. Conversely, the Government of Canada lists in 'statutory forecasts' a brief description of each standing appropriation by department, agency or Crown corporation, along with the previous years' expenditure and forecast expenditure.[61]

Senate standing legislative committees

Other mechanisms that exist include the work of the Senate standing legislative committees which consider bills referred to them by the Senate.[62] These committees can look at all aspects of a bill, including a standing appropriation, and can make comments when they report back to the Senate. Also, when conducting Senate Estimates, they can consider the estimated standing appropriations outlined in Budget

[58] Australian National Audit Office, 'Financial Management of Special Appropriations'. *Audit Report No. 15*, 2004-05, p. 24.

[59] Department of Finance, 'Chart of Special Appropriations – 30 June 2024'.

[60] Jón R. Blöndal et al, 'Budgeting in Australia'. *OECD Journal on Budgeting* 8(2) 2008, pp. 50–51.

[61] Government of Canada, '2023-24 Statutory Forecasts'. Accessed at: https://www.canada.ca/en/treasury-board-secretariat/services/planned-government-spending/government-expenditure-plan-main-estimates/2023-24-estimates/statutory-forecasts.html.

[62] The Senate standing legislative committees include: Community Affairs; Economics; Education and Employment; Environment and Communications; Finance and Public Administration; Foreign Affairs, Defence and Trade; Legal and Constitutional Affairs; and Rural and Regional Affairs and Transport.

Paper No. 4.[63] While in practice this does not appear to occur, there would be scope for a committee to recommend changes be made to a standing appropriation including, for example, to consider sunset or review clauses over these appropriations. The Senate committees could also seek further information on what government programs are being funded by various standing appropriations and consider how effective they are.

While these mechanisms provide various degrees of transparency and oversight, there is no dedicated mechanism to consider standing appropriations in a broader context outside of the specific bills they are located in, and there is no mechanism for regular oversight once a bill has passed to consider whether standing appropriations remain necessary or justifiable. There appears to be little engagement with the Scrutiny of Bills committee's comments on standing appropriations during debate on bills and no clear evidence of political will more broadly to ensure greater scrutiny and improve the current mechanisms in place.

KEY FINDINGS AND RECOMMENDATIONS

Having considered the challenge to parliamentary oversight that standing appropriations pose and the limited mechanisms that currently exist to provide rigorous accountability and scrutiny, this section considers findings and recommendations for future action.

Include more information in ministers' second reading speeches and explanatory memoranda

Currently, when a standing appropriation is included in a bill introduced, the minister's second reading speech usually makes no mention of it and the explanatory memorandum provides very little additional information. In the current Parliament a number of bills have been introduced with new standing appropriations, however no sunset clause has been introduced and typically little justification is provided in the explanatory memorandum as to why these standing appropriations are appropriate, whether there is any limitation on the amounts that may be appropriated, or why a

[63] Department of Finance, *Budget Paper No. 4*, p. 111–122.

sunset clause was considered inappropriate.[64] Without adequate information in the explanatory memorandum or any attention drawn to them in a second reading speech, Parliament is not able to sufficiently understand the nature of the appropriation and whether it is fit for purpose.

It is suggested that the Scrutiny of Bills committee consider renewing and continuing its practice of seeking further information from the minister responsible for bills introducing standing appropriations, using its existing powers and practice of dialogue with proponent ministers to ask for this information to be included in explanatory memoranda.[65]

Include sunset clauses in future standing appropriations

Currently, there is no automatic mechanism for review of standing appropriations once enacted. The inclusion of sunset clauses would require a standing appropriation to be reconsidered after a certain amount of time and re-enacted if Parliament is satisfied it continues to be appropriate. The inclusion of sunset clauses was recommended in the *Murray Review*,[66] however the government did not support this recommendation, stating that it could introduce uncertainty.[67] While sunset clauses in any legislation may lead to some uncertainty,[68] it is nevertheless appropriate that Parliament retains a mechanism for regular oversight over the approval of expenditure rather than leaving an ongoing expenditure which could also grow significantly from what was initially considered during enactment. As suggested in the *Murray Review*, depending on the

[64] Some exceptions in the current 47th Parliament where at least some justification has been provided, though none mention sunset clauses, include the: Financial Sector Reform Bill 2022 (Cth), explanatory memorandum, p. 83; National Anti-Corruption Commission Bill 2022 (Cth), revised explanatory memorandum, p. 318; Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth), explanatory memorandum, pp. 23–24; Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort Bill 2023, explanatory memorandum, p. 31.

[65] Department of the Senate, *Standing orders and other orders of the Senate*, October 2002, Senate standing order 24.

[66] Senator Andrew Murray, *Review of Operation Sunlight*, pp. 30–32.

[67] Australian Government, *Commonwealth Government Response to Operation Sunlight - Overhauling Budgetary Transparency*, 9 December 2008, pp. 6–7.

[68] Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses: An historical and normative analysis*. 1st edn, Oxford: Routledge, 2016.

specific appropriation, sunset clauses could be made for a long time in the future but at least will require Parliament to reconsider the appropriation at some point.

It is suggested that any new standing appropriations be introduced with a sunset clause and for the Scrutiny of Bills committee and other Senate legislation committees to recommend this in their bill inquiries.

Conduct regular reviews of standing appropriations

Regular review of standing appropriations would help in providing ongoing parliamentary oversight. The *Murray Review* recommended that the Department of Finance undertake a review, at least annually, of standing appropriations and report back to Parliament 'as to whether there is a continuing need' for them, and recommended that Parliament, through the appropriate committee, undertake periodic reviews of standing appropriations.[69] In response to this, the government noted the recommendation and agreed that standing appropriations should be regularly reviewed. It stated it would 'consider including formal review clauses in special appropriation legislation, requiring governments to review and report to Parliament on a periodic basis on the continuing need for the legislation and whether the existing focus of the legislation remains valid.'[70] This response was provided in December 2008 yet to date this has not been implemented. Formal review clauses would provide a mechanism to ensure standing appropriations remain appropriate over time. In relation to the proposal for annual review, the government response did not support this due to the high costs involved.[71] However, the relevant Senate legislation committees can already consider standing appropriations that fall within the departmental portfolios allocated to them as they can examine how departments administer their programs. These committees could review, during the Budget Estimates process, the amounts and purposes the standing appropriations are authorising and what programs or services are being administered to fulfil those purposes to ensure the executive remains accountable over expenditure.

[69] Senator Andrew Murray, *Review of Operation Sunlight*, p. 32.

[70] Australian Government, *Commonwealth Government Response to Operation Sunlight*, p. 7.

[71] Australian Government, *Commonwealth Government Response to Operation Sunlight*, p. 7.

It is suggested that review clauses be included in bills alongside standing appropriations and that the Senate legislation committees be required and adequately resourced to conduct regular reviews of standing appropriations within their portfolios.

Improve transparency over existing standing appropriations

The information presented in Budget Paper No. 4 and the Chart of Special Appropriations provides some useful context to consider current standing appropriations,[72] however as noted they are limited in that it is difficult to gauge what the authorisations are for. Greater detail and transparency over existing standing appropriations will aid in the Parliament and its committees considering new standing appropriations and enable it to consider whether existing ones remain suitable.

Currently, the Scrutiny of Bills committee lists all bills introducing standing appropriations in chapter 3 of each Scrutiny Digest with a footnote on what the appropriation authorises. It is suggested that this could be compiled into a running list on its webpage and a link to this included in the committee's newsletter, *Scrutiny News*, to aid in access to this information. It could include additional information to provide greater context, such as: whether a sunset clause or a review clause is included, whether the standing appropriation is limited by amount or duration, for what purpose the standing appropriation is authorising expenditure for, and link to any relevant ministerial correspondence. Additionally, the webpage could link to the Department of Finance's webpage with the Chart of Special Appropriations and note where to find information in the budget papers. This will aid in improving access to information about existing standing appropriations and provide some context to consider them together.

Further, by publishing such a collated listed, the Senate would demonstrate that it considers that standing appropriations are important, it is keeping track of what it is authorising rather than relying on government produced lists of standing appropriations, and reinforcing that it retains ultimate oversight over such authorisations.

[72] *Budget Paper No. 4*, pp. 111-122; Department of Finance, 'Chart of Special Appropriations – 30 June 2024'.

CONCLUSION

The Senate Budget Estimates process provides an important mechanism for rigorous and public parliamentary scrutiny over executive expenditure, but only specifically in relation to about a quarter of authorised expenditure. The other three quarters largely bypasses effective scrutiny and oversight, relying on nominal consideration when a standing appropriation is initially introduced in a bill and often with little to no explanation in accompanying explanatory materials. Once created, the Senate has largely relinquished its role in overseeing how the executive spends monies appropriated through standing appropriations. This article has presented a number of recommendations for immediate steps that can be taken to address this, however further research and consideration should be given to how standing appropriations are managed in other jurisdictions and what lessons can be learned. Ultimately, the considerable lack of engagement by the Parliament in overseeing executive expenditure for the majority of authorised expenditure poses a challenge to the concept of responsible government as the executive remains largely unaccountable for spending authorised by standing appropriations. This paper has provided some context as to the importance of oversight over executive expenditure authorised by standing appropriations and the recommendations seek to ensure that parliamentary attention, even if unwelcome by some, remains ever-present.

Enabling conditions for gradual change: Making South Australian Parliament more 'family-friendly', 1994-2024*

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*Peer reviewed article

Abstract: In 2024, Jayne Stinson, Labor Member for Badcoe, and Ashton Hurn, Liberal Member for Schubert, became the first women MPs in the history of South Australian Parliament to take maternity leave, as permitted by the House of Assembly's Standing Orders. Standing Orders providing maternity leave for members had been implemented in 2023 in both the House of Assembly and the Legislative Council, alongside an order that allowed for the care of small children in both chambers. With a focus on the experiences of women members, these two changes to the Standing Orders have been part of broader efforts to make the Parliament of South Australia more 'family friendly'. This article explores the conditions that led to these reforms to the Standing Orders and uses a historical perspective to trace the push for 'family friendly' provisions back to the 1990s. It highlights that the Joint Committees on the anniversary of women's suffrage in South Australia, held in 1994 and 2018-19, were specialised parliamentary bodies which helped to gradually shift the momentum towards greater accommodations for members (primarily women members) with young children.

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INTRODUCTION

In May 2024, the Labor member for Badcoe, Jayne Stinson MP, became the first Member of the Parliament of South Australia to officially take maternity leave as stipulated in the House of Assembly Standing Orders. A few weeks later, Liberal member for Schubert, Ashton Hurn MP, also took maternity leave. Prior to this, maternity leave in South Australian Parliament was at the discretion of the House or the Legislative Council and only offered on an ad hoc basis. The Standing Orders that allowed maternity leave to be taken by the two MPs had been introduced on a sessional basis in 2021, alongside another amendment to the Standing Orders which allowed Members of the House to bring their infant child into the chamber for feeding. The Parliament of South Australia is, at the time of writing, unique amongst Australian jurisdictions to have these two measures included in the Standing Orders in both houses.

This article will explore what historian John Tosh has called the 'enabling conditions' that led to the implementation of these changes to Standing Orders in South Australia from the mid-1990s to the present day.[2] These include gradual cultural changes across the country to make parliaments more 'family-friendly' and greater public debate about the experiences of women in politics. Through an analysis of committee documents, parliamentary debates and Standing Orders, the paper will argue that reforms were implemented incrementally, sometimes in reaction to shifts in political culture, while at other times, leading these shifts – first raised by specialised parliamentary bodies dedicated to women's involvement in parliament and then taken up by a series of Standing Order Committees. After years of gradual change, there has been a shift in the Parliament of South Australia's policy regarding maternity leave and the care for young children. While it is limited, particularly as it explicitly refers to members who are pregnant as being eligible for this form of leave, it is arguably leading the way amongst Australian jurisdictions.

[2] John Tosh, 'Public History, Civic Engagement and the Historical Profession in Britain', *History*, 99, no. 335 (2014) p. 210.

SCHOLARSHIP ON WOMEN IN AUSTRALIAN PARLIAMENTS

The push for South Australian parliament to become more family-friendly has predominantly been discussed as a means for creating greater opportunities for women in parliament. Parliament, as Sonia Palmieri, Blair Williams and Marian Sawer argue, is a gendered workplace.[3] Over the last two decades, there has been much discussion about how to make parliaments in Australia more gender inclusive, encouraging women to run for public office and furthermore, maintaining their presence in parliament. This discussion has been multi-faceted and has included conversations about many of the different issues faced by women parliamentarians, such as sexual harassment, sexist discrimination, sexist coverage in the media, harassment from the public and sexist language used in parliament or by parliamentarians.[4] Describing the Federal Parliament in Canberra, Pia Rowe called it '[o]verwhelmingly dominated by white, heterosexual men' and 'known for an adversarial and often hostile culture that continues to present a barrier for women's participation'.[5] In other words, Sonia Palmieri has argued that parliament is 'an institution saturated in gendered expectations, norms, rules and practices that have traditionally conferred institutional power upon men.'[6]

Pushing against this are efforts to create more 'gender-sensitive' parliaments where 'gender equality is not just an additional issue to consider, but rather, informs an approach by which all issues are considered.'[7] This, as Palmieri proposes in a recent book chapter with Lenita Freidenvall, requires institutional changes dependent on

[3] Sonia Palmieri, Blair Williams & Marian Sawer, 'Parliament as a Gendered Workplace', *Australasian Parliamentary Review*, 36, no 2 (2021) p. 8.

[4] For scholarship on this, see: Marian Sawer, 'Misogyny and Misrepresentation: Women in Australian Parliaments', *Political Science*, 65 no 1 (2013) 105-117; Carol Johnson & Blair Williams, 'Still Lacking Her Rights at Work: The Treatment of Women Politicians in the Australian Parliament and Print News Media', *Australasian Parliamentary Review*, 36, no 2 (2021) pp. 110-129; Zareh Ghazarian & Katrina lee-Koo (eds) *Gender Politics: Navigating Political Leadership in Australia* (Sydney: NewSouth, 2021).

[5] Pia Rowe, 'Essential Part of Life or Essentially Ignored? Combining Care Labour with Parliamentary Duties', *Australasian Parliamentary Review*, 36, no 2 (2021) p. 93.

[6] Sonia Palmieri, 'Parliaments as Gendered Workplaces', in *How Gender Can Transform the Social Sciences*, edited by Marian Sawer et al. (Cham: Palgrave Macmillan, 2020) p. 50.

[7] Sonia Palmieri, 'Feminist Institutionalism and Gender-Sensitive Parliaments: Relating Theory and Practice', in *Gender Innovation in Political Science*, edited by Marian Sawer and Kerryn Baker (Cham: Palgrave Macmillan, 2018) p. 182.

critical acts, critical actors and a critical culture. Critical acts mean the acts or initiatives undertaken to change the position of the minority (in this case, women), while critical actors are those who make change happen – which, unfortunately, has often fell to women parliamentarians to advocate against the prevailing system without full support from male colleagues.[8] Palmieri and Freidenvall suggest that more widespread reforms need to come as a result of an underlying critical culture in parliament that 'accepts the need for gender equality, socially, economically and politically and that thereby encourages and legitimises critical actors in their transformational acts.' This means shifting the onus to a broader range of critical actors inside parliament, both men and women, and the varying bodies that determine cultural norms within parliament, including political parties, the executive, cross-party groups and parliamentary services. They define 'critical culture as 'one that engages with existing power structures in an institution', but arguably more importantly for this article, 'is also critical in the sense that it is an "essential" component of change'. Critical culture, the authors put forward, 'should be seen as a useful platform or starting point for facilitating discussion, initiation and implementation of transformational gender equality reforms'.[9]

For Sawer and Alicia Turner, such critical actors for promoting gender equality in parliament have been specialised parliamentary bodies, such as 'dedicated or multi-portfolio standing committees', 'single-party or cross-party women's caucuses' or 'issue-based all-party parliamentary groups'.[10] In another article, Sawer argues that these bodies take the onus off of individual women parliamentarians to undertake critical actions and instead provide a 'collective affirmation of feminist insights', thus 'empowering parliamentarians and enabling them to move beyond cognitive dissonance to be "brave" on issues'.[11] To put it another way, these bodies 'legitimate the conduct of parliamentary deliberation… from a gender perspective'.[12]

[8] Sonia Palmieri & Lenita Freidenvall, 'Critical Culture: The Role of Institutional Norms in Gender Sensitising Parliaments', in *Suffrage and Its Legacy in the Nordics and Beyond*, edited by Josefina Erikson & Lenita Freidenvall (Cham: Palgrave Macmillan, 2024) pp. 229-230.

[9] Palmieri & Freidenvall, 'Critical Culture', p. 230.

[10] Marian Sawer & Alicia Turner, 'Specialised Parliamentary Bodies: Their Role and Relevance to Women's Movement Repertoire', *Parliamentary Affairs*, 69, no. 4 (2016) p. 768.

[11] Marian Sawer, 'Beyond Numbers: The Role of Specialised Parliamentary Bodies in Promoting Gender Equality', *Australasian Parliamentary Review*, 30, no. 1 (2015) pp. 110-111.

[12] Marian Sawer, 'Gender Mainstreaming and Substantive Representation of Women: Where Do Parliamentary Bodies Fit?', *Politics, Groups, and Identities*, 8, no. 3 (2020) p. 650.

In South Australia, the Joint Committee on Women in Parliament, established in 1994, and the Joint Committee on the 125th Anniversary of Women's Suffrage , established in 2018, were the specialised parliamentary bodies that highlighted the issues facing women parliamentarians. To retain women in parliament, the Committees called for more parliaments to be more family-friendly. The Standing Orders Committee, in various incarnations over two decades, took up these issues to instigate reforms, such as the changing of sitting times, the introduction of maternity leave and the allowance for the care of children in the chamber. The two Joint Committees in 1994 and 2018-19 provided the collective affirmation that the Standing Orders Committee then used to push through these reforms.

Alix R. Green has argued that a historical approach can order the 'chaos' of policy-making and this approach will be used to explain how reforms to make parliament more family-friendly took many years.[13] Starting from the Joint Committees established to commemorate the anniversaries of women's suffrage in South Australian in the 1990s and 2010s, making parliament more family-friendly was presented as a way of getting more women into parliament (and keeping them there). From this point, the Standing Orders Committee used the recommendations of the two Joint Committees to argue that it was modernising parliamentary practice and addressing issues that had already been ameliorated in other workplaces. Because the Standing Orders Committee were guided in their actions by previous recommendations of specialised parliamentary bodies created to focus on women in parliament, the family-friendly reforms became concentrated on efforts to provide support to women parliamentarians who were having children, rather than reforms that offered leave for both mothers and fathers. By looking at the history of these reforms over a thirty year period, this article reveals how South Australian parliament eventually changed its Standing Orders to become more family-friendly, as well as recognising how the historical process has generated limitations to these reforms.

[13] Alix R. Green, *History, Policy and Public Purpose: Historians and Historical Thinking in Government* (Houndmills: Palgrave Macmillan, 2016) p. 17.

PARENTAL LEAVE AND CARING FOR CHILDREN IN THE PARLIAMENTARY CHAMBER – A NATIONAL OVERVIEW

A significant part of the discussion of gender inclusivity in parliament has been on women members having children and a lack of support from parliamentary institutions, namely proper access to parental leave and being able to feed or care for their infants inside the chamber. Recognising this, there have been inter-governmental and inter-parliamentary efforts to ensure that 'parliaments should be family-friendly workplaces that support work/life balance for all members and staff'.[14] A 2022 study by researchers at the University of New South Wales argued:

> *Both federal and state parliaments should be a model workplace so there is significant impetus to ensure that the diversity of politicians' experiences and obligations is balanced against broader democratic demands.*[15]

For the researchers, this means allowing those with caring responsibilities – more likely women – to run for, as well as stay in, office, through mechanisms such as changes to Standing Orders to allow parental leave and small children inside chambers. [16]

Much of the scholarship on this topic has focused on developments in the Federal Parliament, which Pia Rowe notes has been 'marred by an extremely slow pace of change'.[17] Since 2003, the Australian Senate has had Standing Orders for the breastfeeding of an infant but it was not until 2016 that an exemption was created for a 'Senator caring for an infant briefly'. This was after Greens Senator Sarah Hanson-Young was told by the President of the Senate to remove an infant child from the chamber who was crying in 2009. Meanwhile the House of Representatives took a different approach by allowing nursing mothers to vote in divisions by proxy, which was established in the Standing Orders in 2008. But after a mishap between the Chief Government Whip and a government frontbencher who missed a division while

[14] Sonia Palmieri & Kerryn Baker, 'Localising Global Norms: The Case of Family-Friendly Parliaments', *Parliamentary Affairs*, 75, no 1 (2022) p. 62.

[15] Rosalind Dixon, Kate Jackson & Matthew McLeod, *Representing Care: Toward a More Family-Friendly Parliament* (Sydney: UNSW/Pathways to Politics, 2022) p. 5.

[16] Dixon, Jackson & McLeod, *Representing Care*, pp. 6-7.

[17] Rowe, 'Essential Part of Life or Essentially Ignored?', p. 93.

breastfeeding in 2015, the Standing Orders were further amended in 2016 to allow infants more broadly into the chamber.[18] In 2017, Senator Larissa Waters from the Greens was 'the first parliamentarian to breastfeed on the floor of the Senate, and the first to breastfeed in the Senate while proposing a legislative motion.'[19]

According to the Parliamentary Library and cited by Marian Sawer and Maria Maley, 13 federal MPs were recorded as having taken maternity leave from the House of Representatives between 1999 and 2016, with an average of 5.6 sitting weeks. Prior to this, the first federal member to give birth while a member, Ros Kelly MP, 'famously came back to parliament with an air cushion one week after giving birth to her first child in 1983.' This maternity leave was granted on an ad hoc basis with permission from the Speaker and would be nullified if they entered the chamber (for example, for a vote).[20] The 2022 *Representing Care* study is the only one to compare state parliaments across Australia and outline which parliaments allow maternity leave or children in the chamber, in Standing Orders or by convention. The below table outlines the different provisions in each parliament.

[18] Marian Sawer & Maria Maley, *Toxic Parliaments - And What Can Be Done About Them* (Cham: Palgrave Macmillan, 2024) pp. 26-27.

[19] Marnie Cruickshank & Barbara Pini, 'Fleshy Citizenship: Representations of Breastfeeding Politicians in the Australian Media', *Feminist Media Studies*, 21, no 5 (2017) p. 775.

[20] Sawer & Maley, *Toxic Parliaments*, p. 28.

Table 1 – Provisions for maternity leave and infants in the chamber by jurisdiction[21]

Jurisdiction	Maternity/Parental Leave	Children in chamber
Commonwealth of Australia	Subject to member's vote	Standing Order (both chambers)
New South Wales	Subject to member's vote	Sessional Order (Legislative Council only)
Victoria	Subject to member's vote	Discretion of Speaker (Legislative Assembly only)
Queensland	Subject to member's vote	Discretion of Speaker
South Australia	Standing Order (both chambers)	Standing Order (both chambers)
Western Australia	Subject to member's vote	Standing Order (Legislative Council only)
Tasmania	Standing Order (House of Assembly only)	Standing Order (House of Assembly only)
Northern Territory	Subject to member's vote	Standing Order
Australian Capital Territory	Subject to member's vote	Standing Order

This table shows that South Australia is unique in that maternity leave and the allowance of children in the chamber is enshrined in the Standing Orders in both the House of Assembly and the Legislative Council. Tasmania's House of Assembly provides similar Standing Orders, but the corresponding Legislative Council does not. A question to be asked is how did South Australia reach this unique position within Australian parliaments?

[21] Dixon, Jackson & McLeod, *Representing Care*, pp. 23-29; NT Legislative Assembly, *Annotated Standing Orders* (July 2023) p. 79; ACT Legislative Assembly, *Standing Orders* (June 2024) p. 61.

WOMEN IN SOUTH AUSTRALIAN PARLIAMENT AND EARLIER FAMILY-FRIENDLY REFORMS

South Australia was the first jurisdiction in the world to allow women to not only vote in elections in 1894, but also to allow them to stand for parliament.[22] However it was not until the 1959 election that women were elected to the South Australian parliament, with Liberal Joyce Steele winning the seat of Burnside in the House of Assembly and Jessie Cooper becoming a Liberal MLC. Prior to this, 17 women had stood unsuccessfully for election in South Australia since 1918.[23] Since 1959, there have been 77 women as members of parliament, with the current parliament having 27 women across the House of Assembly and the Legislative Council.

Since the 1990s, there have been efforts by parliament to make the institution more gender inclusive and family-friendly, emphasising that more family-friendly conditions encouraged women to join and remain in parliament. After the Federal Joint Standing Committee on Electoral Matters conducted an inquiry titled *Women, Elections and Parliament* in 1993-94 and the celebrations for the centenary of women's suffrage in South Australia, a Joint Committee on Women in Parliament was established in May 1994.[24] One issue raised in the Joint Committee's interim report was the late sitting times for parliament. The interim report stated that 'late night sittings and the timings of the system of Parliamentary sitting are seen by many as incompatible with family life' and that there was 'overwhelming support for an earlier start and earlier finish for parliamentary sitting.'[25] In this report, the Joint Committee recommended:

> *The system of the days of sitting, and the sitting hours be changed to make them more suitable for Members with family responsibilities. Due consideration should be given to school holidays in the*

[22] Vicki Crowley, 'Acts of Memory and Imagination: Reflections on Women's Suffrage and the Centenary Celebrations of Suffrage in South Australia in 1994', *Australian Feminist Studies*, 16, no 35 (2001) p. 225.

[23] Jenny Tilby Stock, 'How Joyce Steele and Jessie Cooper Became South Australia's First Women MPs', *Journal of the Historical Society of Australia*, 44 (2016) pp. 103-116.

[24] Joint Standing Committee on Electoral Matters, *Women, Elections and Parliament* (Canberra: Parliament of the Commonwealth of Australia, 1994); Joint Committee on Women in Parliament, *Final Report*, PP 209, 48/3 (Adelaide: Parliament of South Australia, 1996) p. 3.

[25] Joint Committee on Women in Parliament (hereafter JCWP), *Interim Report*, PP199, 48/2 (Adelaide: Parliament of South Australia, 1996) pp. 2-3.

> *organisation of sitting days, and late night sittings should be avoided.*[26]

This recommendation was reiterated in the final report.[27] It also noted that this issue had 'hardly been likely as a topic for consideration' in the past because 'the system was not designed to cater for the "private" sphere of family life'.[28]

In the conclusion to its final report, the Joint Committee posed the question, 'are our parliaments out of step with society?' and asserted, 'while gender discrimination issues may be being addressed within society, within parliaments they are not'.[29] The issue of women's representation in parliament had seemed to reach a new height in Australia in the 1990s.[30] In South Australia, the centenary of women's suffrage and events surrounding it drew a focus to the progress that had been made, and also to what steps could be taken to make the political sphere more gender inclusive.[31]

In 2001, the Select Committee on Parliamentary Procedures and Practices adopted the 1994 Joint Committee's recommendations and proposed that to accommodate parliamentarians more with their family, sittings on Wednesday should begin at 11am and adjourn at 6pm, but the other sitting days would still sit later as important party and Executive Council business precluded earlier start and end times.[32] However it was

[26] JCWP, *Interim Report*, p. 5.

[27] JCWP, *Final Report*, p. 26.

[28] JCWP, *Final Report*, p. 5.

[29] JCWP, *Final Report*, p. 22.

[30] See: Marian Sawer & Marian Simms, *A Women's Place: Women and Politics in Australia* (Crows Nest, NSW: Allen & Unwin, 1994); Hester Eisenstein, *Inside Agitators: Australian Femocrats and the State* (Philadelphia: Temple University Press, 1996); Elizabeth Van Acker, *Different Voices: Gender and Politics in Australia* (South Yarra, VIC: Macmillan Education, 1999).

[31] See: Department for Education and Children's Services, *Women's Suffrage Centenary Celebrations Report* (Adelaide: DECS, 1994); Women's Suffrage Centenary Steering Committee, *A Woman's Place: Celebrating Women in Politics 1894-1994 – An Exhibition to Mark the Centenary of Women's Suffrage* (Adelaide: Women's Suffrage Centenary Steering Committee, 1994).

[32] House of Assembly Select Committee on Parliamentary Procedures and Practices, *Interim Report*, PP 223, (Adelaide: Parliament of South Australia, 2001) pp. 6-7.

In the 1980s, the Bannon Government had introduced reforms to sitting times, including sittings to end at midnight and for Thursday sittings to start at 11am. The ending of sittings at midnight was sold as a benefit to younger members with families, while the earlier starting time on Thursdays was to accommodate private

not until 2007 that the recommendation regarding sitting times was enacted, with the House of Assembly's Standing Orders Committee (HOA SOC) noting that this had been proposed in both 1995 and 2001.[33] By this time, the appetite for changing the sitting times had grown and the Committee considered earlier starts for Tuesdays, Wednesdays and Thursdays.[34] It is also arguable that the parliament under the Rann Government at this time was less turbulent than the previous parliaments of the late 1990s and early 2000s and more agreeable to parliamentary reform.[35]

Michael O'Brien MP, one of the members of HOA SOC, justified the change to sitting times by arguing that South Australia was 'the last parliament in Australia to adopt morning sittings' and that the sitting hours were 'now seriously at odds with conventions and expectations of the world around us'. Mr O'Brien cited the Joint Committee on Women in Parliament's previous work on this issue and declared, 'Our sitting hours were considered to be the major obstacle to increasing female representation in this parliament.'[36] Despite arguments that earlier starting times would impede regional members of parliament and increase accommodation costs for travelling members, Sessional Orders allowing for earlier start times came into effect in April 2007.[37] These Sessional Orders regarding earlier sitting times then became Standing Orders in November 2017.[38]

members' business. House of Assembly, *Hansard*, 6 March, 1986, p. 1064; House of Assembly, *Hansard*, 19 February, 1986, p. 315.

[33] House of Assembly Standing Orders Committee, *Report on Sitting Times and a Right of Reply*, PP, 51/1 (Adelaide: Parliament of South Australia, 2001) p. 1.

[34] HOA SOC, *Report on Sitting Times and a Right of Reply*, p. 2.

[35] For an account of the South Australian parliament in this period, see: Greg McCarthy, 'The Revenge of the Legislature: The South Australian Election 2002', *Australasian Parliamentary Review*, 17/2 (2002) pp. 22-34.

[36] Michael O'Brien, *House of Assembly Hansard*, 24 April 2007, p. 24.

[37] HOA SOC, *Report of the Standing Orders Committee*, PP 377, 53/2 (Adelaide: Parliament of South Australia, 2017) p. 1.

For discussion of opposition to changes to sitting times, see: *House of Assembly Hansard*, 24 April 2007, pp. 20-29.

[38] HOA SOC, *Report of the Standing Orders Committee*, p. 1.

PARLIAMENTARIANS AS MOTHERS - A GRADUAL SHIFT IN CULTURAL NORMS

Whilst efforts were made to make parliament more family-friendly through a revision of sitting hours, other aspects, such as allowing the care for small children in the chamber, were not accommodated for a longer time. In late 1998, Karlene Maywald, the then Member for Chaffey, was the first South Australian MP to have a baby while in office, but when parliament resumed the following year, she was not allowed to bring her daughter onto the floor of the Chamber. Maywald was permitted to vote from the Stranger's Gallery while nursing. A few years later, in 2003, the first South Australian Minister to have a child while in office, Trish White MP, asked the Speaker's permission to take her child onto the floor of the Chamber, which was denied.[39] Speaker Peter Lewis MP claimed in the media at the time:

> *To change the standing orders, ultimately you'd find one member is on their feet making some points and if another member, who has a mischievous mind, should tweak the toe of the baby and make it cry … That's why there's a rule about strangers. Members of Parliament are there to do a job and your mind has got to be focused.*[40]

Leave for women who had given birth was also administered on an ad hoc basis and was not always granted. Maywald told *InDaily* in 2021 that she was 'never offered maternity leave' and returned to work three weeks after giving birth.[41] Meanwhile in 2015, Liberal Michelle Lensink MLC was granted maternity leave by a vote of the Legislative Council, from October 2015 until the first sitting day in 2016. When the motion was passed, John Dawkins MLC called this a 'momentous occasion', as it was 'the first time… that maternity leave has been needed to be granted in the Legislative Council'.[42] Lensink's leave was extended when parliament resumed in February 2016

[39] Rick Crump, David Pegram & Josh Forkert, *Manual of the Practice, Procedure and Usage of the South Australian House of Assembly (Blackmore)* (Adelaide: Wakefield Press, 2024) p. 256.

[40] Cited in, Crump, Pegram & Forkert, *Manual of the Practice, Procedure and Usage of the South Australian House of Assembly*, pp. 256-257.

[41] Stephanie Richards, 'SA Parliament to Finally Consider MP Maternity Leave', *InDaily*, 29 March, 2021, https://www.indaily.com.au/news/2021/03/29/sa-parliament-to-finally-consider-mp-maternity-leave (accessed 9 August, 2024).

[42] Legislative Council, *Hansard*, 15 October, 2015, p. 1848.

and she was able to take six months' leave overall.[43] These incidents, alongside similar events in federal parliament, brought the issue to the fore and highlighted one of the barriers to women's involvement in parliament.

In 2015, Canberra's House of Representatives Standing Committee on Procedure inquired into provisions for a more family-friendly chamber. The Committee's report stated that 'to encourage a more representative Parliament, we need to create an environment where Members can balance work and family.' It acknowledged that vote by proxy was the current provision in the House of Representatives to allow Members who were nursing mothers to have their vote counted while caring for their baby and recommended that this practice continue.[44] It also recommended that:

> *the House amend standing orders to allow Members to bring their infants into the Chamber and Federation Chamber to breastfeed, bottle feed and at other times when needed.*[45]

However it must be noted that the Standing Committee did not make any recommendations about parental leave for Members, but did state, 'Given their unique role, it is difficult for a Member of Parliament to take extended maternity or paternity leave.'[46]

Akin to the push for the revision of sitting hours after the events celebrating the centenary of women's suffrage in South Australia, the 125th anniversary of women's suffrage in 2019 also drew attention to issues regarding barriers for women involved in parliamentary politics. One of the findings of the Joint Committee on the 125th Anniversary of Women's Suffrage, held 25 years after the aforementioned 1994 Joint Committee, was that:

[43] Legislative Council, *Hansard*, 10 February, 2016, p. 2899; 8 March, 2016, p. 3210.

[44] House of Representatives Standing Committee on Procedure (hereafter HOR SCP), *Provisions for a More Family-Friendly Chamber* (Canberra: Parliament of Australia, 2015) non-paginated foreword.

[45] HOR SCP, *Provisions for a More Family-Friendly Chamber*, non-paginated foreword.

[46] HOR SCP, *Provisions for a More Family-Friendly Chamber*, p. 1.

> *Parliament has an obligation to ensuring that women do not face impediments to participating in political life and to continually review its Standing Orders and physical space to ensure it remains a family-friendly environment.*[47]

The Committee thus recommended that the Joint Parliamentary Services Committee and the Clerks of both chambers carry out an audit of 'ways in which Parliament could become more family-friendly', as well as the Standing Orders Committee undertake 'a review of the Standing Orders for gender neutrality and to ensure the Orders do no impede women entering political life.'[48] The Committee noted that Standing Orders had already been altered to make sitting hours more family-friendly, such as sitting earlier and not sitting during school holidays, but more provisions to support parents could be included, such as the provisions of places for nappy changing, family dining experiences, and nursing mothers to feed or express breast milk.[49]

THE ROLE OF THE STANDING ORDERS COMMITTEE

The Joint Committee's interim report did not mention care for children in the chamber nor parental leave explicitly, limiting mentions of children to extra facilities in the parliamentary building for their care. However when these initiatives were eventually considered by the Standing Orders Committee in 2020-21, the Joint Committee's recommendations were front and centre of Standing Orders Committee's thinking, alongside the 2015 House of Representatives report.

In the HOA SOC report, it stated that introducing maternity leave was 'consistent with many other legislatures that use a similarly worded standing order to provide members with the potential to be granted a period of leave in respect to maternity or paternity leave.'[50] It did not specifically identify the other legislatures with maternity leave provided for members, with only Tasmania's House of Assembly having such provisions

[47] Joint Committee on the 125th Anniversary of Women's Suffrage (hereafter JCAWS), *Interim Report*, PP 196, 54/1 (Adelaide: Parliament of South Australia, 2018) p. 3.

[48] JCAWS, *Interim Report*, p. 4.

[49] JCAWS *Interim Report*, p. 14.

[50] HOA SCP, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, PP 302, 54/2 (Adelaide: Parliament of South Australia, 2021) p. 2.

at this time (and still is the only chamber besides those in South Australia today). The wording of the Tasmanian House of Assembly's Standing Order is different to that which was proposed in South Australia, giving members 12 weeks leave and requiring that 'such leave to be taken in a consecutive period'.[51]

The HOA SOC also expressed that reform to the Standing Orders would align with various other industrial awards and noted that public sector employees in South Australia were at the time afforded 20 weeks of paid parental leave.[52] By the 2010s, the right to unpaid parental leave and job protection, as well as at least 18 weeks paid parental leave, had been implemented at the Commonwealth level, with the *Fair Work Act 2009 (Cth)* and the *Paid Parental Leave 2010 (Cth)*.[53] However a decade on, parliaments around Australia, except for Tasmania's House of Assembly, did not extend these same rights to its members.

The HOA SOC proposed a 20 week period of maternity leave, which was consistent with what was offered to South Australian public sector employees.[54] Chris Picton, an Opposition Labor MP and member of the Committee, noted in a subsequent parliamentary debate that prior to this change, maternity leave required a motion to be passed by the house and said, 'it is unreasonable that a woman in that situation would have to submit herself for approval of the house to be able to take maternity leave in the same way that would be automatic if she were a public servant'.[55]

Unlike the Tasmanian Standing Order, the Committee explicitly stated that it was 'of the view that maternity leave as an entitlement should not be subject to forfeiture by attending the service of the House before the expiration of a period of maternity leave.' The HOA SOC acknowledged that this was dissimilar to leaves of absence for those who were physically unable to attend the House due to ill health or being away from

[51] HOA SOC, *Report of the Standing Orders Committee on Proposed Revision of the House of Assembly Standing Orders and Rules*, No 13 (Hobart: Parliament of Tasmania, 2017) p. 25.

[52] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, p. 2.

[53] Marian Baird, Myra Hamilton & Andreea Constantin, 'Gender Equality and Paid Parental Leave in Australia: A Decade of Giant Leaps or Baby Steps?', *Journal of Industrial Relations*, 63 no 4 (2021) p. 550.

[54] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, p. 2.

[55] House of Assembly, *Hansard*, 30 March, 2021, p. 5095.

Adelaide, because 'maternity leave does not prevent a member from attending the House'.[56]

Supporting the notion to make parliament more gender inclusive, the Committee pronounced in its report that incorporating the provision for maternity leave into the Standing Orders 'sends a strong message to women that the standing orders are not impeding women from entering political life.' The same point was made in the report in relation to allowing the care for small children in the chamber, incorporated into the Standing Orders at the same period of time. The HOA SOC, echoing sentiment from the 2019 Joint Committee, declared that 'parliament should better align itself with contemporary social values by adopting modern workplace and practices that encourage parents and in particular women to enter politics'. In this case, 'by offering the opportunity to participate fully in the work of the House while caring for an infant.'[57]

This demonstrates that while cultural norms about women's role in the workplace were already shifting in broader society, similar shifts inside parliament needed a push from certain parliamentarians to make the necessary changes. The wording of the two revised Standing Orders were as such:

> *Leave of absence from the service of the House may be granted to any Member on notice* of motion stating the reason and period of absence. Except that a Member who is pregnant shall be entitled, without a vote of the Assembly, to 20 weeks maternity leave of absence, and that leave shall commence at a time notified by the Member to the Speaker.*
>
> *A Member is excused from service in the House or on any committee for the period of the leave of absence.*

[56] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, pp. 2-3.

[57] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, pp. 3-4.

> *A Member who has leave of absence forfeits that leave (except for a period of maternity leave) by attending the service of the House before the expiration of the leave.*
>
> **See Constitution Act 1934, sec 31(1)(a)*
>
> *No Member may bring any stranger into any part of the House appropriated to the Members of the House while the House or Committee of the whole House is sitting.*
>
> *(1) A stranger does not include an infant cared for (which includes feeding and breastfeeding) by a Member.*[58]

Both were recommended as Sessional Orders before becoming Standing Orders, noting that if the Sessional Orders were successful, they could then be adopted or modified in light of practice.[59] This was common practice for the introduction of Standing Order reforms in the House of Assembly.

It is worth noting that both the South Australian and Tasmanian Standing Orders specifically referred to maternity leave, rather than parental leave, with the South Australian orders making leave exceptions only for 'a Member who is pregnant', rather than a Member who was welcoming a new child. The HOA SOC documents do not reveal the reason for this wording, but it may be a legacy of the push for a more family-friendly parliament being initially raised by specialised parliamentary bodies that focused on women in parliament. Marian Baird, Myra Hamilton and Andreea Constantin have argued that parental leave policies were originally introduced as a means of improving workplace gender equality, but risked reinforcing the perception of women as primary caregivers.[60] As this article will later demonstrate, this was raised in parliament when the Standing Orders were eventually consolidated in 2023.

[58] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, pp. 3-4.

[59] HOA SOC, *Response to the Interim Report of the Joint Committee in the 125th Anniversary of Women's Suffrage*, p. 3, 5.

[60] Baird, Hamilton & Constantin, 'Gender Equality and Paid Parental Leave in Australia', pp. 547-548.

SETTING THE STANDARD

While reforms to Standing Orders may have been gradually changing expectations of women parliamentarians, it must be remembered that this also occurred in a time when sexist and discriminatory behaviour in parliaments, at both federal and state level, became issues of national attention. In 2020, there were allegations of sexual harassment in Parliament House and in November of that year, the then Attorney General, Vicki Chapman, moved a motion for the Equal Opportunity Commissioner to conduct a review of harassment in the parliamentary workplace. The report was presented in February 2021.[61]

In the same month, revelations by Brittany Higgins of an alleged sexual assault at Parliament House in Canberra were made public and this led to a widespread discussion about sexism and sexual harassment in the Australian political landscape. The following month, Kate Jenkins, the Sex Discrimination Commissioner, was tasked with undertaking an inquiry into bullying, sexual harassment and sexual assault in the Commonwealth parliamentary workplace. The *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* report (often called the Jenkins report) was released in November 2021.[62] Marian Sawer and Maria Maley described this report as a 'watershed moment', with 28 recommendations that were 'radical and wide-ranging' to ensure that parliament as a workplace was safe and respectful.[63] Part of the report was dedicated to making parliament more gender inclusive and noted 'carer-friendly infrastructure and practices' that had been implemented by other parliaments, writing:

> *Parliaments have established childcare centres; family rooms and breastfeeding rooms; ensured that all staff have access to adequate parental and carer's leave; increased travel allowances for family members to accompany parliamentarians while on duty; and have instituted particular measures for parliamentarians to balance their*

[61] Equal Opportunity Commission, *Review of Harassment in the South Australian Parliament Workplace* (Adelaide: EOC, 2021) p. 7.

[62] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Canberra: AHRC, 2021) pp. 8-11.

[63] Sawer & Maley, *Toxic Parliaments*, p. 104.

> *chamber duties, including voting, with caring responsibilities. These measures include proxy voting, pairing, and permission for infants/children to accompany their parents into the chamber.*[64]

The report suggested that the parliament 'should encourage and better accommodate the needs of working parents and carers' and should consider good practice leave entitlements for parliamentarians and parliamentary staff.[65] While both the House of Representatives and Senate did already allow children into the chamber, the report also suggested that in the chamber, 'party whips could encourage parliamentarians' greater use of proxy votes, pairing provisions and hybrid parliamentary arrangements' that would assist parents and carers to undertake their parliamentary duties without having a physical presence in the chamber.[66]

Similar to the impact of the Jenkins report nationally, the South Australian report had significant impact on parliament at state level and made 16 recommendations regarding workplace practices and cultural change in parliament.[67] When the report was released, there was bipartisan agreement that its recommendations were to be taken seriously and aspects, such as the implementation of a code of conduct, were endorsed on both sides of the House of Assembly.[68]

The report found that there were 'limited arrangements currently in place to support employees with family caring responsibilities, including flexible working arrangements, carer's leave and breastfeeding facilities'.[69] The report also mentioned the interim report of the Joint Committee on the 125th Anniversary of Women's Suffrage and highlighted the recommendation that the Standing Orders be revised to encourage women to participate in political life, as well as ensuring parliament remained 'a family-friendly environment'.[70] Thus, Recommendation 3 of the South Australian report stated:

[64] AHRC, *Set the Standard*, p. 163.

[65] AHRC, *Set the Standard*, p. 172.

[66] Dixon, Jackson & McLeod, *Representing Care*, p. 12; AHRC, *Set the Standard*, p. 172.

[67] EOC, *Review of Harassment in the South Australian Parliament Workplace*, pp. 149-155.

[68] House of Assembly, *Hansard*, 16 March, 2021, pp. 4865-4872.

[69] EOC, *Review of Harassment in the South Australian Parliament Workplace*, p. 36.

[70] EOC, *Review of Harassment in the South Australian Parliament Workplace*, p. 85.

> *That to ensure flexible work practices that support inclusivity operate across the parliamentary workplace:*
>
> *The Houses as a matter of priority amend the Standing Orders to allow for women to breast or bottle feed infants in the Houses.*
>
> *The Standing Order Committee, in accordance with recommendation 6a of the Interim Report of the Joint Committee on the 125th Anniversary of Women's Suffrage 'in collaboration with the Clerks, undertakes, and reports to the Houses, a review of the Standing orders for gender neutrality and to ensure the Orders do not impede women entering political life'…*[71]

In a subsequent debate in the Legislative Council, Connie Bonaros asked the President if the Standing Orders were to be changed in line with this recommendation, to which the President replied that the Standing Orders Committee had met to consider these suggestions and was to do so again in the near future.[72]

FURTHER CHANGES

The two external reports on harassment within the parliamentary workplace, at both Commonwealth and state level, dovetailed with existing, yet gradual, efforts to make South Australian parliament more family-friendly. The House of Assembly had been working on changing the Standing Orders after the Joint Committee on the 125th Anniversary of Women's Suffrage report was tabled in 2018 and Sessional Orders were introduced the month after the Equal Opportunities Commission report was released.

At the same time, the Standing Orders of the Legislative Council had not been reviewed since 1999 and the suggestions made in the reports by both the Equal Opportunities Commission and the Joint Committee on the 125th Anniversary of Women's Suffrage were taken into consideration as part of a broader review of Standing Orders in the

[71] EOC, *Review of Harassment in the South Australian Parliament Workplace*, p. 87.

[72] Legislative Council, *Hansard*, 17 March, 2021, pp. 2920-2921.

upper chamber.[73] The Committee stated that it was 'of the view that an infant being breast or bottle fed by a Member should be admitted to the body of the Chamber without order or vote' and recommended 'a new Standing Order giving that effect'. Furthermore, the Committee expressed that 'there should be specific recognition in the Standing orders for maternity leave entitlements for Members similar to that available in most industrial instruments' and that 'such entitlements should not be subject to a vote of the Council'. Similar to the House of Assembly, the Legislative Council Standing Orders Committee recommended that an amendment be made 'to provide for a 20 week period of maternity leave to Members who are pregnant, for that leave not to be subject to a vote and for that leave not to be forfeited by attending the service of the Council before the expiration of that leave.'[74]

The eventual Standing Order for maternity leave was worded as such:

> *33. Leave of absence may be given by the Council to any Member for any sufficient cause to be stated to the Council. With the exception that a Member who is pregnant shall be entitled, without vote of the Council, to twenty weeks maternity leave of absence, and that leave shall commence at a time notified by the President.*
>
> *34. Notice shall be given of a motion for giving leave of absence except for a period of maternity leave, to any Member, stating the cause and period of absence.*[75]

As with the House of Assembly Standing Orders, the new Standing Order explicitly referred to 'a Member who is pregnant' as being entitled to leave. Meanwhile, the wording of the Standing Order related to infants being allowed in the Chamber now said:

> *447a. An infant being breast or bottle fed by a Member shall be permitted to the body of the Council Chamber, either within or*

[73] Legislative Council Standing Orders Committee, *Report*, 54/2 (Adelaide: Parliament of South Australia, 2021) p. 1.

[74] LC SOC, *Report*, pp. 2-3.

[75] Legislative Council, *The Standing Orders of the Legislative Council Relating to Public Business Together with the Joint Standing Orders Agreed to by Both Houses* (Adelaide: Parliament of South Australia, 2022) p. 8.

> *without the Bar, while the Council or a Committee of the Whole is sitting.*[76]

Unlike the House of Assembly, these were recommended to be implemented as Standing Orders directly, while the lower house opted for Sessional Orders at first.

In Parliament, Committee member and the then Treasurer the Hon Rob Lucas stated that the proposed Standing Order of allowing infants to be fed on the chamber floor broadly reflected practice in other chambers and noted that one of these was now the adjoining House of Assembly. On the issue of maternity leave, MrLucas did comment that prior to the proposed new Standing Order:

> *by convention of the chamber, we have been well served in that we have been very generous, and sensible in my view, in terms of the way we have responded to individual requests from members for, on occasions, extended leave, whether it be for maternity-related leave and parenting or, in a number of cases, as a result of ill health.*

But also stated that there was 'a united view to support' the changing of the Standing Orders to enshrine a 20 week period of maternity leave for Members of the Legislative Council.[77]

By the end of the year, the House of Assembly Standing Orders Committee also decided to consolidate their Sessional Orders around maternity leave and children in the chamber into Standing Orders. The report suggested that this transition was taking place as an election was approaching and there was desire to maintain these Orders into the next parliament. It stated, 'These changes provide for a more family-friendly environment which may encourage more women to become Members and to participate in the democratic process', and adding these changes 'will go some way to ensure the House operates as a modern workplace, by taking account of the work, health and safety of staff and members'.[78] This suggests the influence of the Equal

[76] LC, *Standing Orders*, p. 101.

[77] Legislative Council, *Hansard*, 9 September, 2021, p. 4210.

[78] HOA SOC, *Third Report of the House of Assembly Standing Orders Committee on Changes to Standing Orders*, PP 415, 54/2 (Adelaide: Parliament of South Australia, 2021) pp. 1-2.

Opportunities Commission's report, which focused heavily on the concept of parliament as a modern workplace.

However due to the 2022 state election, it was not until March 2023 that the Standing Orders were finally changed. The Sessional Orders first introduced during the 54th Parliament were again adopted by the new 55th Parliament in May 2022 and the Standing Orders Committee reiterated the call for the orders to be made permanent.[79] In parliament, the Minister for Women and the Prevention of Domestic, Family and Sexual Violence, Labor's Katrine Hildyard MP, celebrated the changing of the Standing Orders, pronouncing:

> *In making the change before us, recommended by the Standing Orders Committee, we acknowledge this progress and we respect that women in their numbers are now taking their rightful place in this house. Gender equality in decision-making makes for better decisions, decisions that are much more reflective of community expectations. Our parliament should be an exemplar of equal representation. It should be representative of the diversity of our community, and our standing orders should reflect that there are men and women in this place.*[80]

This shows that parliament was responding to wider changes in the community and recognising action needed to be taken to move parliament in line with societal expectations.

Rhiannon Pearce, Labor member for King, pointed to a cultural change in terms of children being allowed on the chamber floor across Australian parliaments, such as the ACT, Queensland and Western Australia, while also acknowledging '[m]any reports in recent times [which] have detailed the important work that is required to make our workplace safer'. The implementation of the revised Standing Orders, Mrs Pearce argued, was 'one of the glaringly obvious ways our parliament can be brought into the

[79] HOA SOC, *First Report of the House of Assembly Standing Orders Committee on Changes to Standing Orders*, PP 212, 55/1 (Adelaide: Parliament of South Australia, 2023) p. 2.

[80] House of Assembly, *Hansard*, 9 March, 2023, p. 3356.

present day' and 'ensure a more family-friendly workplace that we can continue to work on improving'.[81]

Jayne Stinson, who would eventually be the first member to take advantage of the new Standing Order relating to maternity leave, also spoke in support of the reforms. She also raised that with parliament being more gender neutral, the needs of members of fathers regarding the care of children also should be considered. She commented:

> *we should ensure that this is a welcoming place for women at all stage of their life, but also maybe as importantly or possibly more importantly, we should make sure that men feel that they can engage in caring responsibilities as part of their work, and that that is encouraged in this place as well.*[82]

This is a significant point. Much of the discourse surrounding the care of children by parliamentarians has centred around encouraging increased participation by women. However there is a risk that this reinforces the notion that care for children is the duty of women, when it should be shared by men and women. Greater gender inclusivity in parliament, similar to elsewhere in society, requires both men and women to take responsibility for various duties, including parental and caring duties. As the *Representing Care* report stated, 'While care is disproportionately allocated to women, it is far from solely a women's issue.'[83]

[81] House of Assembly, *Hansard*, 9 March, 2023, p. 3359.

[82] House of Assembly, *Hansard*, 9 March, 2023, p. 3362.

[83] Dixon, Jackson & McLeod, *Representing Care*, p. 29.

CONCLUSION

On 1 May, 2024, the Speaker of the House of Assembly announced:

> *This is a first for the South Australian parliament. I inform members that, pursuant to standing order 62, 20 weeks maternity leave has been granted to Ms Stinson commencing on 1 May 2024.*

Two weeks later, Ashton Hurn was also granted maternity leave by the House's new Standing Orders. It was reported in *The Advertiser* in the same month that Ms Stinson's child was 'the first baby to be on the floor of the parliament without needing special permission',[84] as Ms Stinson took advantage of the clause in the Standing Orders which stated that maternity leave would not be forfeited if the member chose to attend parliament.

These actions were the result of a gradual process within the South Australian Parliament to make parliament more family-friendly, particularly encouraging greater accommodations for women parliamentarians with children. Issues facing women in parliament in South Australia were increasingly raised from the mid-1990s onwards and it was over a period of nearly 30 years that Standing Orders were changed to make the institution more family-friendly and inclusive to women – first through changing the sitting times and then the introduction of maternity leave and care for small children in the chamber.

This was often responding to broader societal trends, but also prompted by recognition of the anniversaries of women's suffrage in South Australia. The Joint Committees formed to recognise these anniversaries in 1994 and 2019 were specialised parliamentary bodies which became catalysts for promoting reforms to parliamentary procedure that would encourage more women to enter and remain in parliament. From there, various incarnations of the Standing Orders Committee in both the House of Assembly and Legislative Council who saw these changes into fruition. These were reactive to community pressure about the treatment of women in Australian politics,

[84] Kathryn Bermingham, 'Badcoe MP Jayne Stinson Opens Up on Her Journey to Motherhood Following the Birth of Baby Son Quinn Earlier This Year', *The Advertiser*, 8 May 2024, Accessed at https://www.adelaidenow.com.au/news/south-australia/badcoe-mp-jayne-stinson-opens-up-on-her-journey-to-motherhood-following-the-birth-of-baby-son-quinn-earlier-this-year/news-story/c519c1d0a098a6f4138fdd4a1662721d.

while concurrently proactive in comparison with several jurisdictions around the country, especially concerning leave for new mothers. Against the background of the increased formal recognition of parliament *as a workplace*, South Australia has made considerable strides towards greater gender inclusivity in parliament through its Standing Orders, while, as Ms Stinson's comments in *Hansard* attest, further challenges lay ahead.

The First 'Caretaker' Government*

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Abstract: This article attempts to trace the origins of the caretaker convention. Most commentators look back no further than Sir Winston Churchill's caretaker government formed in the extraordinary circumstances that existed in the final days of World War II. The wartime coalition had broken up, leaving Churchill to form a new government, promising to act with restraint pending the first general election in Britain in nearly a decade. But the story neither begins nor ends there. Churchill's government was not the first to be called a 'caretaker' government and even his caretaker government did not align with the modern concept. Searching for the first 'caretaker' government reveals a complex interaction between the label and the convention that played out over a century from 1885 to 1987 and beyond. The full story also suggests there may be a deeper rationale for the caretaker convention than the need for restraint while a government is not responsible to Parliament—the need for restraint while a government has impaired legitimacy.

INTRODUCTION

Parliamentary democracies are characterised by the principle of responsible government, which is the principle that the government is accountable for its actions to Parliament. But in times of transition, a government may find itself in power even though it is no longer accountable to Parliament. In those situations, the caretaker convention calls for restraint. The caretaker convention is the unwritten rule that once a government is no longer accountable to Parliament—either because Parliament has

[1] The views expressed in this article are those of the author and not those of Crown Law or the Queensland Government. The British newspapers referred to in this article can be found at: https://www.britishnewspaperarchive.co.uk. The Australian newspapers can be found at: https://trove.nla.gov.au.

been dissolved pending a general election or because the government has lost majority support—the government is to perform only routine tasks, avoiding major policy decisions or significant appointments that would fetter its successor.[2] A government enters into caretaker mode when the Parliament or the lower house is dissolved pending an election,[3] and continues in caretaker mode either until the election result is clear, if the government is returned, or until the new government is sworn in, if the government changes hands.[4] By calling for restraint, the caretaker convention minimises the need for accountability while the government is not accountable. In this way, the convention fits neatly with the principle of responsible government, but the two did not always go hand in hand. The principle of responsible government had become entrenched long before anyone recognised the caretaker convention.

2024 is the year of the election, with close to half of the world's population heading to the polls this year.[5] Among Westminster systems—including in the United Kingdom, India, Pakistan and Bangladesh—that makes 2024 the year of the caretaker government.[6] In Australia, by the end of 2024, there will have been caretaker governments in four States and Territories: Tasmania, the Northern Territory, the

[2] John Wilson, 'Constitutional Conventions and Election Campaigns: The Status of the Caretaker Convention in Canada'. *Canadian Parliamentary Review* Winter, 1995-6, pp. 12, 14.

[3] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*. Cambridge: Cambridge University Press, 2018, pp. 519-522. Though some commentators suggest that the caretaker convention might commence earlier when the election is called, or later when the writs for the election are issued if there is any delay: Greg Taylor, *The Constitution of Victoria*. Sydney: Federation Press, 2006, p. 191; Glyn Davis, Alice Ling, Bill Scales and Roger Wilkins, 'Rethinking Caretaker Conventions for Australian Governments. *Australian Journal of Public Administration* 60(3), 2001, pp. 11, 14; George Winterton, 'Constitutional Position of Australian State Governors', in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives*. Sydney: Lawbook Co, 1992, pp 274, 317.

[4] Twomey, *The Veiled Sceptre*, pp. 522-526. Or until the appointment of a new government 'virtually certain' to enjoy the confidence of the lower house: Winterton, 'Constitutional Position of Australian State Governors', p. 320; George Winterton, 'Tasmania's hung Parliament, 1989'. *Public Law* 1992, pp. 423, 438.

[5] Koh Ewe, 'The Ultimate Election Year: All the Elections Around the World in 2024'. *Time*, 28 December 2023. Accessed at: https://time.com/6550920/world-elections-2024/.

[6] In presidential systems, there is a related concept of a 'lame duck' government: see Rivka Weill, 'Constitutional Transitions: The Role of Lame Ducks and Caretakers'. *Utah Law Review* 3, 2011, pp. 1087-1129. For a discussion of the caretaker convention in other European countries with responsible government including Ireland, Germany and Scandinavia, see: Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel S Roberts and Hannah Schmidt, 'Caretaker Government and the Evolution of Caretaker Conventions in New Zealand'. *Victoria University of Wellington Law Review* 28(4) 1998, pp. 629, 632-634.

Australian Capital Territory and Queensland.[7] Sometime this year or next, the federal government in Australia will also enter into caretaker mode.[8] In the year of the caretaker government, it is timely to ask: if the caretaker convention did not come with the advent of responsible government, when did it first arise? When was the first caretaker government?

WAS IT CHURCHILL'S 1945 'CARETAKER' GOVERNMENT?

Some commentators, such as Ian Killey, trace the caretaker convention to the 1945 British election.[9] One theory is that journalists coined the term 'caretaker government' in 1945 to describe the extraordinary circumstances Sir Winston Churchill found himself in at the close of World War II.[10] The circumstances were certainly extraordinary.[11] The last general election in Britain had been held in 1935 before the outbreak of World War II. During the war, the major parties had agreed to an electoral truce whereby no general elections were held and by-elections were unopposed by the other major parties (though minor party and independent candidates did contest seats).[12] From 1937 to 1940, Neville Chamberlain of the Conservative party had been Prime Minister, but after the Allies were forced to retreat from Norway, Chamberlain considered that a government supported by all parties was required. As the Labour and Liberal parties would not join a government headed by him, he resigned in May 1940 in favour of Winston Churchill who then formed a coalition government comprising all three parties—the so-called Grand Coalition.[13]

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[7] See e.g. Queensland Government, *The Queensland Cabinet Handbook*. 2024, p. 83 [11.0].

[8] Australian Government, *Cabinet Handbook*. 15th ed, 2022, p. 19 [123].

[9] Ian Killey, *Constitutional conventions in Australia: an introduction to the unwritten rules of Australia's constitutions*. London: Anthem Press, 2014, p. 236; Nazrul Islam, 'Non-Party Caretaker Government in Bangladesh (1991-2001): Dilemma for Democracy?'. *Developing Country Studies* 3(8), 2013, pp. 116, 117; JC Johari, *The Constitution of India: A Politco-Legal Study*. New Delhi: Sterling Publishers, 4th ed, 2007, pp. 139-140.

[10] Stephen Holt, 'The mother of all caretaker governments'. *The Sydney Morning Herald*, 8 August 2013. Accessed at: https://www.smh.com.au/opinion/the-mother-of-all-caretaker-governments-20130807-2rh04.html.

[11] See generally: Ivor Jennings, *Cabinet Government*. Cambridge: Cambridge University Press, 3rd ed, 1980, pp. 84, 531; Rodney Brazier, *Constitutional Practice: The Foundations of British Government*. Oxford: Oxford University Press, 3rd ed, 1999, pp. 44-45, 52-53.

[12] Henry Pelling, 'The 1945 General Election Reconsidered'. *The Historical Journal* 23(2), 1980, p. 399.

[13] Pelling, 'The 1945 General Election Reconsidered', p. 400.

Following the defeat of Germany on 8 May 1945, Churchill proposed either an early election (to capitalise on his wartime reputation) or an extension of the coalition until the end of the war against Japan.[14] The Labour party refused to extend the coalition, sparking Churchill's resignation on 23 May 1945. Later that same day, the King invited Churchill to form a new administration pending an election.[15] Churchill gave an undertaking to the palace to confine his government to routine matters.[16] The remarkable thing about that undertaking is that it appears to have been given the day Churchill was recommissioned on 23 May 1945, while Parliament was continuing to sit.[17] The House of Commons was not dissolved until 15 June.

Polling day was set for 5 July 1945, but to give enough time for votes to come in from soldiers still serving overseas, the counting of the votes was delayed until 26 July 1945.[18] So there was a two-month interlude between the collapse of the wartime coalition and the emergence of a new government, all against the background that no government could pretend to enjoy much democratic legitimacy anymore after nearly ten years since the last election. Churchill had not won that election; not even his party or his predecessor Prime Minister had.

In those unusual circumstances, Churchill embraced the label of his government as a 'caretaker government', even before the House of Commons was dissolved. On 26 May 1945, only three days into the new government, Churchill said

[14] Pelling, 'The 1945 General Election Reconsidered', p. 401; Martin Gilbert, *Churchill: A Life*. London: Pimlico, 2000, p. 845.

[15] Jennings, *Cabinet Government*, p. 84.

[16] Mike Codd, 'National elections: caretaker conventions and arrangements for transition'. *AIAL Forum* 1996, p. 23. See also Gilbert, *Churchill: A Life*, pp. 845-6; Roy Jenkins, *Churchill*. London: Macmillan, 2001, p. 791.

[17] 'Premier again visits King', *Dundee Evening Telegraph*, 23 May 1945, p. 4 ('It was assumed that this audience was given by the King for the purpose of the Premier's taking of office again with his "caretaker" Government'). The caretaker Cabinet was not commissioned until 26 May 1945, but even that was before Parliament was dissolved: 'The Caretaker Government', *Evening Despatch*, 26 May 1945, p. 1.

[18] Roger Hermiston, *All Behind You, Winston – Churchill's Great Coalition, 1940-45*. London: Aurum Press, 2016, pp. 359-360; Maxwell Philip Schoenfeld, *The War Ministry of Winston Churchill*. Ames, Iowa: Iowa State University Press, 1972, p. 38-39; Jenkins, Churchill, p. 795.

> *They call us 'the Caretakers'; we condone the title, because it means that we shall take every good care of everything that affects the welfare of Britain and all classes in Britain.*[19]

Churchill did practise restraint, famously involving the leader of the Labour party, Clement Attlee, in the post-war negotiations at Potsdam, in case Attlee won the election (which turned out to be the case).[20] There was also an expectation of restraint in the press coverage. According to one newspaper, the caretaker government would 'lack authority to take decisions',[21] and another said that the interim government would be relegated to performing a 'purely subordinate task'.[22] One newspaper went so far as to say that, even before Parliament was dissolved, the caretaker government 'must be practically powerless' to pass 'all but agreed legislation'.[23] On the other hand, Churchill did not consult with Attlee before taking the very serious step of giving Britain's 'unanimous, automatic, unquestioned agreement' to the use of atomic weapons against Japan.[24]

But contrary to popular belief, the press did not invent the term 'caretaker government' on the spot the day Churchill resigned and formed a new interim government. Speculation had been swirling for some months about when Churchill would quit the coalition and form what the journalists were already calling a 'caretaker government'.[25] The wave of newspaper references to the anticipated 'caretaker government' can be traced back to an initial spike on 1 November 1944, the day after Churchill introduced a Bill to extend Parliament by a further year.[26] Churchill had taken the opportunity to

[19] Hermiston, *All Behind You, Winston*, p. 364; Gilbert, *Churchill: A Life*, p. 846.

[20] Pelling, 'The 1945 General Election Reconsidered', pp. 404-5. Churchill may have proposed continuing on as Prime Minister for a short period after the election results were clear, however, apparently, 'the King felt strongly that it would be wrong for a "lame-duck" PM to return to the Potsdam peace conference to represent Britain': Kevin Theakston, *Winston Churchill and the British Constitution*. London: Politico's, 2003, p. 227.

[21] 'Election Plans', *The Scotsman*, 23 May 1945, p. 4.

[22] 'To Rise again', *Gloucester Citizen*, 16 March 1945, p. 4.

[23] 'Caretaker Government', *Portsmouth Evening News*, 17 November 1944, p. 2. See also 'Behind the Scenes', *Sunday Mirror*, 6 May 1945, p. 2 ('No minister will be found among the caretaker Government willing to risk his reputation or waste his time trying to get an actual Act through Parliament').

[24] Killey, *Constitutional conventions in Australia*, p. 238.

[25] See e.g. 'Premier May Delay His War Review: Autumn Election?' *Coventry Evening Telegraph*, 9 April 1945, p. 3.

[26] See e.g. 'Caretaker Govt', *Newcastle Journal*, 1 November 1944, p. 3; 'Stop gap govt to follow Coalition', *Daily Herald*, 1 November 1944, p. 1; 'Parliament', *Birmingham Mail*, 1 November 1944, p. 3 ('Mr Churchill presumably

outline what he envisaged for the first general election after the war ended. With the return to party politics, he said, the wartime coalition would need to be disbanded, leaving to the majority Conservative party the task of arranging the election.[27] In response, Arthur Greenwood—the Leader of the Opposition and a Labour man—'laid his finger on the doubtful spot, the gap, in which there would have to be a caretakers' Government'.[28] Under Churchill's proposal, the Conservatives would go to the election with the benefit of incumbency. As Greenwood said to the House of Commons, it would 'give an initial advantage to the caretaker Government which is in charge during those two or three months'.[29]

So it was a politician, not a journalist, who first called Churchill's proposed interim government a 'caretaker government'. But Greenwood was not even the first Member of Parliament to use that pejorative term. Churchill himself had stood up in the House of Commons much earlier in 1930 to speak about another caretaker government. When discussing British interference in Egypt, he described the Egyptian government that had been installed as a 'caretaker Government in power'.[30] Even Churchill knew about caretaker governments before he formed one.

WAS IT SALISBURY'S 1885 'CARETAKER' GOVERNMENT?

The truth is Churchill knew about caretaker governments because his father—Lord Randolph Churchill—had served in the first government to be described as a 'caretaker' government in 1885. When Winston Churchill published a biography of his father in 1908, he entitled the chapter on that period, 'The Ministry of Caretakers'.[31] As a young man, Lord Randolph Churchill had been influential in the Conservatives. For a time, he

will form a caretakers Government for the two or three months of the electoral period'); 'Electoral Outlook', *Yorkshire Post and Leeds Intelligencer*, 1 November 1944, p. 2.

[27] Mr Churchill, United Kingdom, *Parliamentary Debates*, House of Commons, 31 October 1944, vol. 404, col. 662-7.

[28] 'Churchill: War Should Last Till Spring: No Election For Seven Months', *Yorkshire Observer*, 1 November 1944, p. 4.

[29] Arthur Greenwood, United Kingdom, *Parliamentary Debates*, House of Commons, 31 October 1944, vol. 404, col. 672.

[30] Mr Churchill, United Kingdom, *Parliamentary Debates*, House of Commons, 29 July 1930, vol. 242, col. 336-7.

[31] Winston Churchill, *Lord Randolph Churchill*. London: Macmillan, 1906, vol. 1, pp. 423-473.

and the Marquis of Salisbury had led opposing factions of the Conservatives, but in 1885, they combined forces to defeat the Liberal Gladstone Government.

On 8 June 1885, the Liberal Gladstone Government fell on the floor of the House of Commons when it was defeated on an amendment to its budget.[32] Prime Minister Gladstone had only the previous year secured the passage of the controversial *Reform Act 1884*,[33] which would extend the franchise from approximately one-third of the adult male population to two-thirds, giving great swathes of the middle and working classes an electoral voice.[34] The next general election—at which the enlarged franchise would vote for the first time—was anticipated to be held in November in six months' time. As Winston Churchill later put it, there were 'two million intelligent citizens, newly enfranchised, impatiently await[ing] the opportunity of casting their votes'.[35]

The Gladstone Government fell while Queen Victoria was away at Balmoral in Scotland, so it was not until 11 June that she summoned the leader of the Conservatives, Lord Salisbury, to invite him to form government.[36] By the afternoon of 13 June, as Liberals assembled in Greenwich for the annual Cobden Club Dinner, rumours had arrived by telegraph from the north that Lord Salisbury had 'intimated to her Majesty his unwillingness to attempt to form an Administration'.[37] The situation was a 'somewhat embarrassing one' for Lord Salisbury because the Conservatives were still in a minority in the House of Commons.[38]

So on 13 June 1885, the Tories scrambled to form government without a majority in the House of Commons, and the coming election reminded everyone, not least the middle and working classes, that the House of Commons was itself elected by far less

[32] United Kingdom, *Parliamentary Debates*, House of Commons, 8 June 1885, vol. 298, col. 1514; Clive Bigham, *The Prime Ministers of Britain 1721-1921*. London: John Murray, 1922, pp. 303-304, 316.

[33] *Representation of the People Act 1884*, 48 Vict, c 3. See W. Cunningham Glen, *The Representation of the People Act, 1884, with introduction, notes and index*. London: Shaw and Sons, 1885.

[34] Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History*. Oxford: Hart Publishing, 2006, pp. 76-77.

[35] Churchill, *Lord Randolph Churchill*, vol. 1, p. 425 (internal quote removed).

[36] Mr Gladstone, United Kingdom, *Parliamentary Debates*, House of Commons, 12 June 1885, vol. 298, col. 1528.

[37] 'The Pamphlet Collection of Sir Robert Stout: Volume 54 – Cobden Club Dinner', p. 1. Accessed at: http://nzetc.victoria.ac.nz/tm/scholarly/tei-Stout54-t7-body.html. Also reproduced in Henry W. Lucy (ed), *Speeches of the Right Hon. Joseph Chamberlain MP*. London: George Routledge and Sons, 1885, pp. 145-6.

[38] G. Barnett Smith, *The Prime Ministers of Queen Victoria*. London: George Routledge and Sons, 1886, p. 398.

than a majority of the population. Against that political backdrop, a member of the outgoing Cabinet, Joseph Chamberlain, took to the stage at the Cobden Club. Chamberlain was a radical unionist who had made a name for himself by denouncing the aristocracy as a class 'who toil not, neither do they spin'.[39] His speech that night was littered with references to electoral reform and 'the hope that the Reformed Parliament will do much in the direction of completing the work which previous Reformed Parliaments have commenced'.[40] He then turned his attention to Lord Salisbury and the Conservatives. As a minority government, Chamberlain said, the Conservatives would need to adopt the policies of their opponents to retain the support of the House. As his speech reached a kind of fever pitch, Chamberlain had the sudden inspiration to call Lord Salisbury a 'caretaker':

> *I look forward with interest to the spectacle which I believe will shortly be presented of a great party with indecent expedition hastening to divest itself of a whole wardrobe of pledges and professions which it has accumulated during the past few years, stripping off every rag of consistency, and standing up naked and not ashamed, in order that it may squeeze itself into office. (Cheers and great laughter.) That is the position, gentlemen. It is only upon those terms that what will be known in history as the 'Stop-gap' Government can invite the toleration of its opponents. They must not undo our work. (Loud cheers.) They must not jeopardise the results already accomplished. They must continue on the main lines of the policy that they have so often and so vehemently condemned. But if they are willing to do that, for my part I see no reason why they should not remain as caretakers on the premises—(great laughter and cheering)—until the new*

[39] Henry W. Lucy (ed), *Speeches of the Right Hon. Joseph Chamberlain MP*. London: George Routledge and Sons, 1885, p. 41.

[40] 'The Pamphlet Collection of Sir Robert Stout: Volume 54 – Cobden Club Dinner', p. 10.

> *tenants are ready in November for a prolonged—and, I hope, permanent—occupation. (Great cheering and laughter.)*[41]

The label soon spread.[42] According to one newspaper two days later, Chamberlain 'ha[d] supplied a phrase which w[ould] be heard on every Liberal platform, and w[ould] infallibly stick'.[43] The phrase certainly did stick.

At that stage, the label was more of a political insult. But already, the rhetoric carried with it the imputation that the government *should* act with restraint. For example, a few months into the Salisbury government, the House of Commons debated whether a royal commission should be appointed to inquire into the education system. One Liberal Member of Parliament said

> *It was not fit that an avowedly stop-gap Government should go to the expense of appointing a Royal Commission* [or] *that they should prejudge great and important questions of this kind as they had done—questions which would have to be decided by the great masses now enfranchised.*[44]

However, the Salisbury government did not act as though it *must* act with restraint. For example, as Salisbury's Secretary of State for India, Lord Churchill ordered the third Anglo-Burmese war in November 1885, hardly an example of routine administration.

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[41] 'The Pamphlet Collection of Sir Robert Stout: Volume 54 – Cobden Club Dinner', p. 11. The Oxford English Dictionary also traces the origins of this sense of 'caretaker' to the Cobden Club Dinner: J.A. Simpson and E.S.C. Weiner (eds), *The Oxford English Dictionary*. Oxford: Clarendon Press, 2nd ed, 1989, vol. 2, p. 897.

[42] See e.g. 'Our London Letter', *Eastern Evening News*, 16 June 1885, p 2 ('The "caretaker" Government may yet make excellent play for the regular tenants'); 'Our London Letter, *Norfolk News*, 27 June 1885, p. 5 ('The Tory Government can earn no worthier title than caretakers'); 'Our London Letter', *Eastern Evening News*, 11 July 1885, p. 2 ('Pity a poor Caretaker Government'); 'A "Caretaker" Government: Extraordinary Suggestions', *Birmingham Daily Post*, 13 May 1903, p. 7; 'Overtures and Propositions: A Caretaker Government', *Daily News* (London), 13 May 1903, p. 7.

[43] 'Norwich, Monday, June 15', *Eastern Evening News*, 15 June 1885, p. 2.

[44] Mr Lyulph Stanely, United Kingdom, *Parliamentary Debates*, House of Commons, 5 August 1885, vol. 300, col. 1249-1250 (Lyulph Stanley). As another example, one newspaper noted that Russia would not have proceeded on the basis that war might be declared by the Salisbury government: 'She is not so simple as to imagine that a caretaker Government could do anything more than carry out their predecessor's policy': 'Our London Letter', *Eastern Evening News*, 27 August 1885, p. 2.

Without that necessary sense of obligation to act with restraint, a convention had not yet arisen.[45]

WAS IT BEFORE 1885?

The Salisbury government in 1885 was the first caretaker government in name, but Anne Twomey points out that the caretaker convention had been recognised in nascent form long before that.[46] As one illustration, she points to a Canadian example from 1858, when a government had fallen on a vote of no confidence. The Governor-General, Sir Edmund Head, appointed George Brown to form a new government, but insisted that the new government confine itself to 'matters necessary for the ordinary administration of the government of the province' until such time as he faced Parliament and established whether he had the confidence of the lower house.[47] On the other hand, Ian Killey points to opposing examples that show governments before 1945 did not feel constrained by a convention during election periods. In Britain, Prime Minister Gladstone threatened to spend the government's surplus when his government was defeated in 1870. In 1880, Prime Minister Disraeli arranged for his private secretary to be elevated to the peerage following the defeat of his government.[48]

OR WAS IT AFTER 1945?

Even Churchill's caretaker government of 1945 may not mark the beginning of the convention. One newspaper at the time complained that the label of caretaker 'ha[d] no constitutional meaning'.[49] As late as 1961, Sir Ivor Jennings still treated the 1945 caretaker government as an exception owing to extraordinary circumstances, rather

[45] The three elements of a convention are a common practice, a sense of being bound to follow the rule, and a good reason for the rule: Ivor Jennings, *The Law and the Constitution*. London: University of London Press, 2nd ed, 1938, p. 131.

[46] Twomey, *The Veiled Sceptre*, pp. 509-513.

[47] Alpheus Todd, *Parliamentary Government in the British Colonies*. London: Longmans, Green & Co, 2nd ed, 1894, p. 764.

[48] Killey, *Constitutional Conventions in Australia*, pp. 236-237.

[49] 'London Letter: The Next Government', *Liverpool Daily Post*, 23 May 1945, p. 2.

than the rule.[50] What Churchill did do was popularise the label of a caretaker government, especially in political reporting. Both the concept and the label continued to evolve.

Four years later, in Australia, Prime Minister Ben Chifley called a federal election. On 1 November 1949, the day following the issuing of the writs, *The Canberra Times* reported that 'the Government now becomes a "caretaker" Government which will act until the elections.'[51]

Back in Britain after the next general election in 1950, the media referred to Attlee's returned government as a 'caretaker administration' as it had won a majority of seats but with a minority of votes overall. For example, *The Canberra Times* wrote:

> *It is difficult to understand how the Governments of other British countries, each of which does represent an unequivocal majority of electors, can regard the Attlee Government as being more than a caretaker administration and having more authority to commit future British policy in Commonwealth affairs than any other caretaker. The best that can be expected is that the caretaker will behave accordingly and that at a not distant date the electors of the United Kingdom will be given an opportunity to decide in clearer terms their choice of Government.*[52]

Later when Attlee changed his ministry, he is reported as having 'decided that, instead of regarding the new Government as a "caretaker administration," it should remain in office as long as possible.'[53] Thus, at the time, the media appear to have used 'caretaker' to describe any government with impaired democratic legitimacy.

The following year in 1951, Prime Minister Robert Menzies wrote to his Ministers in the lead up to a double dissolution election in Australia, advising that they 'should not make decisions on matters of policy or those of a contentious nature without first referring

[50] Jennings, *Cabinet Government*, pp. 86 n 1, 531.

[51] 'Parliament Dissolved for Elections', *The Canberra Times*, 1 November 1949, p. 2.

[52] 'Pyrrhic Victory', *The Canberra Times*, 27 February 1950, p. 2.

[53] 'Attlee Rebuffs Left Wing', *The Advertiser* (Adelaide), 2 March 1950, p. 2.

the matter to myself'.[54] Commentators such as Jennifer Menzies and Anne Tiernan identify this letter as the beginning of the caretaker convention in Australia.[55] However, Killey notes that Prime Minister Menzies may not have been acting on the basis that he was bound by precedent:

> *Menzies' prime objective and possibly his only objective may well have been to apply central control over electoral strategy and he may not have sought to issue instructions to limit the exercise of powers due to caretaker reasons … Whatever Menzies's objectives, this letter, and similar letters which were sent during following elections (it became established practice for the Prime Minister to send similar letters to Ministers by 1961) are now seen as an acknowledgement of the operation of the conventions in Australia.*[56]

By then, 'caretaker' had entered the lexicon. For example, while *The Canberra Times* had not used 'caretaker' in this sense prior to 1945, between 1946 and 1960, it used 'caretaker' in coverage of at least 16 international political crises.[57] Domestically,

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[54] 'Special Articles: Caretaker Conventions and Other Pre-Election Practices' in *Prime Minister and Cabinet Annual Report 1986-87*. Canberra: Australian Government Publishing Service, 1987, pp. 39, 40.

[55] Jennifer Menzies and Anne Tiernan, *Caretaker Conventions in Australasia: Minding the Shop for Government*. Canberra: Australian National University Press, 2nd ed, 2014, pp. 16. See also e.g. Alice Ling, 'Conventions about Caretaker Government in Australia'. Thesis, University of Queensland, 2001, pp. 29-30; Barry Dunphy, 'Government Caretaker Conventions – How do they work in practice?'. *Australian Resources and Energy Law Journal* 37(1) 2018, pp. 23, 24.

[56] Killey, *Constitutional Conventions in Australia*, p. 239 (footnote omitted).

[57] 'Indian Viceroy to Form "Caretaker" Government of Officials', *The Canberra Times*, 28 June 1946, p. 1; 'Pakistan Premier Denounces Accession to India', *The Canberra Times*, 6 November 1947, p. 1; 'Caretaker Government in Persia', *The Canberra Times*, 15 June 1948, p. 1; 'Spaak to Form "Caretaker" Government', *The Canberra Times*, 7 May 1948, p. 1; 'Election Ordered in Belgium', *The Canberra Times*, 1 May 1950, p. 1; 'Caretaker Government to Hold Greek Elections', *The Canberra Times*, 7 January 1950, p. 1; 'Israeli Govt Defeated', *The Canberra Times*, 19 October 1950, p. 1; '"Caretaker" Cabinet for Egypt', *The Canberra Times*, 5 November 1949, p. 1; 'Nahas Pasha to Lead Ministry', *The Canberra Times*, 13 January 1950, p. 4; 'Indonesian Govt to Resign', *The Canberra Times*, 17 August 1950, p. 4; 'Queen Juliana Asks Socialists to Form Cabinet', *The Canberra Times*, 3 February 1951, p. 4; 'M Pinay Declines French Post', *The Canberra Times*, 25 June 1953, p. 1; 'Caretaker PM for Tunisia', *The Canberra Times*, 4 August 1954, p. 2; 'New Japanese Premier Promises Early Poll', *The Canberra Times*, 10 December 1954, p. 1; 'Russian Hand with Egypt in Jordan Riots', *The Canberra Times*, 10 January 1956, p. 1; 'Governor Takes Control of Malta', *The Canberra Times*, 25 April 1958, p. 1; 'Five Ministers Removed From Ceylon Cabinet', *The Canberra Times*, 10 December 1959, p. 8.

'caretaker' was used to describe attempts to form a coalition government in Victoria in 1952 to bring about electoral reform,[58] as well as the New South Wales Premier in 1959 in the period between the death of the former premier and the official vote of caucus confirming the deputy as leader.[59]

Although Prime Minister Menzies wrote letters to his Ministers each election advising caution, the development of the caretaker convention in Australia largely stagnated through the Menzies era because there was seen to be little prospect of a change of government. Towards the end of the 1960s, the convention regained relevance.[60]

In 1972, Prime Minister McMahon refused Gough Whitlam permission to meet with public servants prior to the election to discuss the administrative implications of Labor's policies.[61] This provided the impetus for the guidelines tabled by Prime Minister Malcolm Fraser in 1976 in the House of Representatives. These guidelines dealt with consultations by the Opposition with the public service during election periods.[62]

In 1987, Gareth Evans tabled guidelines in the Senate concerning the handling of government business during election periods,[63] the same day that Parliament was dissolved for a double dissolution election.[64] These guidelines incorporated the earlier 1976 guidelines. They were soon followed by a special article in the 1986-87 annual report of the Department of Prime Minister and Cabinet.[65] Since then, the Department of Prime Minister and Cabinet has regularly updated the summary of the caretaker convention in the Cabinet Handbook, which has served as the model for the States'

[58] 'Labour-Holloway Group Now Able to Stop Supply Bill in Victorian Upper House', *The Canberra Times*, 15 October 1952, p. 1.

[59] 'Mr Heffron Sworn in as Premier', *The Canberra Times*, 24 October 1959, p. 1.

[60] Menzies and Tiernan, *Caretaker Conventions in Australasia*, p. 17.

[61] G. Hawker and P. Weller, 'Pre-election consultations: A proposal and its problems'. *Australian Quarterly* 46(2) 1974, p. 100.

[62] Malcolm Fraser, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 1976, p. 3591.

[63] Gareth Evans, Commonwealth, *Parliamentary Debates*, Senate, 5 June 1987, p. 3668.

[64] Letter from Prime Minister Bob Hawke to the Governor-General, Sir Ninian Stephen, 27 May 1987, tabled by John Button, Commonwealth, *Parliamentary Debates*, Senate, 28 May 1987, p. 3140.

[65] 'Special Articles: Caretaker Conventions and Other Pre-Election Practices' in *Prime Minister and Cabinet Annual Report 1986-87*. Canberra: Australian Government Publishing Service, 1987, p. 39.

Cabinet Handbooks.[66] For example, the first draft of the Queensland Cabinet Handbook included a chapter on the caretaker convention in nearly identical language to the 1987 special article,[67] which survived in a slightly truncated form in the first edition of the Queensland Cabinet Handbook in 1992.[68] By that time, there can be no doubt that the caretaker convention had become firmly ingrained.

The label and the concept of the caretaker convention continue to evolve today. Caretaker guidelines have gradually expanded to include related conventions with distinct rationales, such as restrictions on government advertising and the use of government resources during election periods, as well as rules designed to ensure that public servants remain neutral during the election campaign.[69] Whereas the caretaker convention is grounded in the principle of responsible government, these related conventions are based on the principle of fair play during an election campaign and the ethos of the public service as independent and impartial.[70] But housing them in the same document has led to an expansion of the label. 'Caretaker conventions' in the plural now encompasses the caretaker convention as well as these related conventions. A public servant can now be accused of breaching the 'caretaker conventions',[71] or even the Opposition. During the 2024 State election in Tasmania, the Liberal Government accused the Labor Opposition of a 'clear breach of election caretaker provisions' when the Leader of the Opposition used an ambulance as a backdrop to announce a health policy.[72] That anyone other than a member of a caretaker government could be accused of breaching the 'caretaker conventions' goes to show how far the language around 'caretaker' has moved.

[66] Killey, *Constitutional Conventions in Australia*, pp. 240-241; Menzies and Tiernan, *Caretaker Conventions in Australasia*, pp. 18-19.

[67] Cabinet Office Queensland, *Departmental Copy, Queensland Cabinet Handbook*. 20 March 1990, pp. 91-96.

[68] *Queensland Cabinet Handbook*. Government Printer, 1st ed, 1992, pp. 110-114.

[69] See e.g. Australian Government, Department of the Prime Minister and Cabinet, *Guidance on Caretaker Conventions*. 2021, pp. 5-11 [7]; Queensland Government, Department of the Premier and Cabinet, *2024 State General Election: Guidelines on the Caretaker Conventions*. 2024, pp. 7-8 [4], 10-12 [6], 14 [8].

[70] Twomey, *The Veiled Sceptre*, pp. 514-5, 519, 536.

[71] See e.g. Crime and Misconduct Commission (Qld), *The Tugun Bypass Investigation*. July 2004, pp 25-9.

[72] 'Labor Party under fire for using ambulance as "political prop" during election campaign'. *Pulse Tasmania*, 3 March 2024. Accessed at: https://pulsetasmania.com.au/news/labor-party-under-fire-for-using-ambulance-as-political-prop-during-election-campaign/.

The concept of the caretaker convention is also still evolving. While everyone now agrees that the government should act with restraint when it is no longer accountable to Parliament, the finer details of the convention are constantly being worked out every time the convention is observed or not observed. Disputes arise from time to time as to whether particular appointments are 'significant' enough or particular decisions are 'major' enough to attract the caretaker convention. Disputes also arise over the timing of a decision and whether it was made within the caretaker period.[73]

Disputes even arise over whether a caretaker government is responsible for a particular decision at all. That can be seen in the recent controversy from the Tasmanian State election over a blowout in a contract for the construction of new Spirit of Tasmania ferries. Two days before election day, the board of a government-owned corporation committed to paying an additional $80 million for the ferries. Following their defeat at the election, Labor complained that such a major decision during the caretaker period amounted to a breach of the caretaker convention, especially as the Opposition had been 'kept in the dark'.[74] In response, Premier Jeremy Rockliff said that the board had only informed the government of its decision some days after election day, and in any event the decision was a commercial one made by the board, not the government. He told Parliament, 'I want to make it clear it was a decision for the board, not the ministers'.[75] This example raises interesting questions about what role the caretaker convention plays in an era of privatisation and the outsourcing of government work.[76] There are no clear answers.[77] Certainly, the political actors involved disagreed about

[73] See e.g. the controversy that arose in Victoria in 1999 when a decision was made to make a significant appointment before the election but with the appointment to take effect during the caretaker period: Davis, Ling, Scales and Wilkins, 'Rethinking Caretaker Conventions', p.18.

[74] David Killick, 'Labor says it was kept in the dark over TT-Line ferries in lead-up to state election'. *The Mercury*, 16 August 2024; Rob Inglis, 'TT-Line compelled to explain $8m Spirit of Tasmania payment, set to front public inquiry'. *The Mercury*, 23 June 2024; David Killick, 'Cover-up claims over TT Line ferry cost blowout'. *The Mercury*, 23 May 2024. Accessed at: https://www.themercury.com.au/.

[75] Jeremy Rockliff, Tasmania, *Parliamentary Debates*, House of Assembly, 15 May 2024, p. 25. See also Dean Winter at p. 10.

[76] The Guidelines in Queensland now state that government-owned corporations 'should observe the conventions and practices unless to do so would conflict with their legal obligations or compelling organisational requirements': Queensland Government, Department of the Premier and Cabinet, *2024 State General Election: Guidelines on the Caretaker Conventions*. 2024, p. 2 [1.4].

[77] After mounting political pressure, the Deputy Premier resigned from the infrastructure portfolio, but apparently on account of his handling of the project, not any breach of the caretaker convention: Adam Holmes, 'Infrastructure Minister Michael Ferguson resigns over Spirit of Tasmania port debacle'. *ABC News*, 26 August

whether the caretaker government was responsible for the actions of a government-owned corporation. But it is through controversies like these that we will continue to learn the full metes and bounds of the caretaker convention.

SO WHEN WAS IT?

When was the first caretaker government? The answer depends on what you mean. By the mid-nineteenth century, there were examples of governments in the colonies that had practised restraint because their legitimacy had been impaired, meaning—in a Westminster system—that their responsibility to Parliament had been impaired. But the rule—if it could be called that—was still honoured in the breach, and the practice still went without a name.

The name came like a thunderbolt at the Cobden Club Dinner in 1885. The label of 'caretaker' stung because it insinuated that the Salisbury government lacked legitimacy, not because it was not accountable to Parliament, but because the Parliament to which it was accountable was itself unrepresentative. Britain was on the cusp of expanding the franchise to another third of the adult male population. The Salisbury government was seen as minding the shop until then.

The label stuck, including in the mind of a young Winston Churchill, whose father—Lord Randolph Churchill—had served in the Salisbury government. A generation later, the label resurfaced to describe another government with impaired legitimacy in extraordinary circumstances. Churchill's 1945 caretaker government was accountable to Parliament, but the Parliament itself had not faced the electorate during the war for nearly a decade. Churchill undertook to practise restraint pending the election, though he appears to have given that undertaking while Parliament was still sitting.

The wide press coverage of events in 1945 meant that the label took on a life of its own. It was used over and over again to describe any government that lacked legitimacy. Over time, at some point between the 1950s and the 1980s, the label and the modern concept of a caretaker government came to align. The only measure of legitimacy that came to count was whether the government was accountable to Parliament. A

2024. Accessed at: https://www.abc.net.au/news/2024-08-26/tas-michael-ferguson-resigns-over-spirit-of-tas-debacle/104269586.

caretaker government came to mean a government that is no longer accountable to Parliament, either because Parliament has been dissolved or because the government has lost a confidence vote and fallen on the floor of the house. A government that finds itself in that situation is now bound by convention to act with restraint. In Australia, perhaps the first government to feel bound was Menzies' government in 1951, or perhaps Hawke's government in 1987, when the government tabled caretaker convention guidelines immediately before dissolving Parliament for the election.

Yet the origins of the label indicate that the caretaker convention may be concerned with a much deeper sense of democratic legitimacy. In a system of parliamentary democracy, ordinarily, democratic legitimacy is expressed through Parliament. But the original caretaker governments of 1885 and 1945 show that that is not always true. In extreme scenarios—such as a reduced franchise or a prolonged war—the government may lack democratic legitimacy because the Parliament lacks it. No one can tell what the future may hold. Extreme scenarios like that may arise again in the future. A government deeply unpopular with children might find itself in power on the cusp of the franchise being expanded to children,[78] or a pandemic may prevent elections from being held for many years.[79] There would be precedent for calling such a government, a 'caretaker' government.

[78] Settled understandings of the need to exclude children from the franchise may not survive scrutiny: *Make It 16 Inc v Attorney-General* [2022] 1 NZLR 683, 702-704 [52]-[56], 707 [72] (Ellen France J, Winkelmann CJ, Glazebrook and O'Regan agreeing).

[79] As feared at the start of the COVID-19 pandemic. See e.g. the contingencies introduced in case local government elections were cancelled: *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld) s 16.

Local Government in the Federation of Malaysia – A Comparative Context*

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Peer reviewed article.

Abstract: This article provides a comparative analysis between the local government structure and operations in the Federation of Malaysia and Australian local government. In doing so, literature will be referenced where relevant to the application of local government legislation in the Federation of Malaysia to Australian local government as well as reference data from several case studies of selected Malaysian local governments in regard to how the system of local government legislation in Malaysia compares to local government legislation in Australia. In particular, this will also include a comparison between the legislative arrangements of the Malaysian Federal Territories of Kuala Lumpur and Putrajaya that are governed directly by the federal government and the Australian non-self governing external territories of Christmas Island, Cocos (Keeling) Islands and Norfolk Island. The article will not only provide an historical account of the development of local government in the Federation of Malaysia to the present day, but also place this narrative in a comparative context with the Australian local government contemporary environment. In doing so, the local

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government community (sector) in Australia can/should consider the opportunities in the Malaysian local government sector for any application to the Australian local government system that would have positive benefits. These opportunities are further explored throughout the applicable sections of this article.

INTRODUCTION

On 1 August 1957 the Federation of Malaya became a free and independent country under a Yang Di-Pertuan Agong (paramount ruler), elected every five years from among the nine Malay Rulers.[2] The federation emerged as the post-colonial solution to demands for Malayan independence as well as the struggles taking place elsewhere in the region among British colonies. The Federation of Malaysia consists of thirteen largely autonomous states that occupies the tip of the Malayan Peninsula and part of the island of Borneo and is located roughly midway between Europe and Australia, and between Europe and the Far East.[3] Having achieved independence within the British Commonwealth in 1957, Malaya expanded to become Malaysia in 1963, though Singapore left the federation in 1965.

Malaysia's federal government is constituted along the same lines as the Westminster model adopted by many former British colonies.[4] In addition to the 13 states, nine of which are sultanates, there are three federal territories. Today, Malaysia is a constitutional elective monarchy, its leader chosen for five years among the nine sultans. The parliament is located in the capital Kuala Lumpur and consists of two houses – the Chamber of the Nation (Dewan Negara) and the Chamber of the People (Dewan Rakyat). The Chamber of the Nation (Dewan Negara), or Senate, consists of 70 senators comprising of 44 appointed by the king (Yang di-Pertuan Agong as the head of state) and 26 members elected by the State Legislative Assembly to represent 13 states (with each state represented by 2 members).[5] The lower House of Representatives (Chamber of the People – Dewan Rakyat) consists of 222 elected members and each

[2] Saw Swee Hock, *The Population of Peninsular Malaysia.* Singapore: Institute of Southeast Asian Studies, 2007, p. 3.

[3] M. Bakri Musa, *Towards a Competitive Malaysia*, Selangor: Strategic Information and Research Development Centre, 2007, p. 200

[4] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis,* Oxford: Hart, 2012, p. 85.

[5] Parliament of Malaysia Official Portal, Accessed at: www.parliament.gov.my/senate/generalinformation.

member represents a Parliamentary Constituency.[6] A General Election is held every five years to elect members of the House of Representatives.[7]

THE HISTORICAL DEVELOPMENT OF LOCAL GOVERNMENT IN THE FEDERATION OF MALAYSIA

Modern day local government in the Federation of Malaysia is very much a product of British colonial rule. Ibrahim and Nordin note that the local government system which was first introduced in the country in 1801 can be considered as a legacy of the colonial era, especially its concept of democracy, although the British system of government was an imposition upon the country's socio-political system.[8] This is supported by Hughes, Orr and Yusoff who note that the historical development of the local government system in the Federation of Malaysia is in part a British colonial legacy but has experienced incremental reform since the country gained independence in 1957.[9] Ibrahim and Nordin also note that although Malaysia operates under a Federal system, it functions more like a unitary system where the central government enjoys vast power vested upon it by the Federal Constitution.[10]

The local government system in Malaysia therefore bears many similarities to the British system of local government given its historical origins. The two main divisions of local government are enshrined in Part II of the Malaysian Local Government Act 1976, being rural district councils and urban centres.[11] City councils govern large urban centres, often state administrative centres. Municipal Councils have sizeable populations, whilst District Councils are in more rural areas with populations which are smaller and of lower density.

[6] Parliament of Malaysia Official Portal, Accessed at: www.parliament.gov.my/senate/generalinformation.

[7] Harding, *The Constitution of Malaysia,* p. 85.

[8] Nik Hashim Ibrahim and Mohd. Yahya Nordin*, Local Government System in Malaysia: A General Perspective,* Kuala Lumpur: National Institute of Public Administration Malaysia, 1984, p. 147.

[9] Jeffrey Hughes, Kevin Orr and Mazian Yusoff, *Strategizing for Grand Challenges: Economic Development and Governance Traditions in Malaysian Local Government.* Los Angeles: International Review of Administrative Sciences, Sage Publications, 2021, p. 5.

[10] Hashim et al, *Local Government System in Malaysia,* p. 168.

[11] *Administration of local authorities (Local Government Act) 1976* (Malaysia), s 3.

All types of local governments perform the same or similar functions such as public health and sanitation, waste removal and management, town planning, environmental protection, health and building control, social and economic development and general maintenance functions of urban infrastructure. City Councils are led by Mayors, while municipalities and districts are led by Presidents. The state governments exercise considerable control over local government affairs, to the extent of appointing Mayors, Presidents and all Councillors.[12] The appointments are for two or three-year terms, but individuals may be reappointed and this is uniform across the country.

Tricia Yeoh notes that despite the spirit of federalism, in reality, Malaysia has practised a highly unitary system experiencing centralism within the federal government over time, starting with the abolishment of local government elections in Penang in 1951 and Kuala Lumpur in 1952 and with the current Local Government Act 1976 being promulgated, local government elections across Malaysia were permanently abolished.[13] In fact, this provision is enshrined in section 15 (1) of the *Local Government Act 1976* whereby 'notwithstanding anything to the contrary contained in any written law, all provisions relating to local government elections shall cease to have force or effect'.[14] This is of course very different to Australian local government where Councillors are elected by their community and in some cases, Mayors are elected directly by the community with Presidents usually being elected by their peers (Councillors) either prior to, or at the next full Council meeting following the election.

MALAYSIAN LOCAL GOVERNMENT SYSTEM AND LEGISLATION

The definition of Malaysian local government being a local authority is prescribed by the Local Government Act 1976 legislation whereby a local authority means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 4 of the *Federal Capital Act 1960*.[15] In this regard the Malaysian *Local*

[12] *Councillors (Local Government Act) 1976,* (Malaysia) s 10.

[13] Tricia Yeoh, *Reviving the Spirit of Federalism: Decentralisation Policy Options for a New Malaysia.* Kuala Lumpur: Institute for Democracy and Economic Affairs, The Lower House, 2019, p. 3.

[14] *Provisions relating to local government elections ceasing to have effect (Local Government Act) 1976* (Malaysia) s 15.

[15] *Local authority (Local Government Act) 1976,* (Malaysia) s 2.

Government Act 1976 essentially prescribes the form, organisational structure, functions and responsibilities of a local authority. The council decision-making process and conduct of business is in accordance with the legislation provided for in Part IV of the *Local Government Act 1976*.[16]

In this regard the Australian local government system has similar parallels whereby legislation in all Australian States prescribe the process and conduct of council meetings. In accordance with section 10 (2) of the Malaysian *Local Government Act 1976*, Councillors (including the Mayor and/or President) are appointed by their state governments from amongst persons the majority of whom shall be persons ordinarily resident in the local authority district who in the opinion of the State Authority have wide experience in local government affairs or who have achieved distinction in any profession, commerce or industry, or are otherwise capable of representing the interests of their communities in the local authority district.[17] Again, this differs markedly from the Australian local government system whereby Councillors (including the Mayor and/or President) are elected directly by the community.

Executive powers in Malaysian local government lie with the Mayor in the city councils, and Presidents in the municipal and district councils and the state government also sets remuneration annually. The respective state governments establish executive committees, which are chaired by the Mayor or President. Councils can establish other general or specific committees at their discretion. While there is no definitive legislative direction that prescribes the appointment of a Chief Executive Officer/General Manager in local government, the Malaysian Association of Local Government (MALG) note that each Council is required to have an executive Mayor or President who is the head of the paid service as Chief Executive Officer.[18] This is in contrast to the Australian Local Government system whereby the local government authority is responsible for (legislatively) appointing a Chief Executive Officer/General Manager (terminology differs from each State jurisdiction) to oversee the management of the organisation.

The three Malaysian Federal Territories include the Kuala Lumpur City Council located in the national capital, Putrajaya which is the administrative centre of the federal

[16] *Conduct of business (Local Government Act) 1976,* (Malaysia) s 19.

[17] *Councillors (Local Government Act) 1976* (Malaysia) s 10.

[18] Commonwealth Local Government Forum, 'Malaysia: Key Facts'. Accessed at: https://www.clgf.org.uk/regions/clgf-asia/malaysia/.

government and Labuan that serves as an 'offshore financial centre' and are governed directly by the Ministry of Federal Territories. The local government structure for the three territories vary, with the capital Kuala Lumpur being administered by Kuala Lumpur City Council led by an appointed

Mayor (*Datuk Bandar*), that is, the *Federal Capital Act 1960* (as revised 1977) prescribes that the municipal affairs of the City of Kuala Lumpur shall be administered by the Commissioner of the City of Kuala Lumpur and the Commissioner shall be appointed by the Yang di-Pertuan Agong for a term of five years or, if the Yang di-Pertuan Agong in any particular case so determines, for such shorter term as may be so determined.[19] Putrajaya is administered by the Putrajaya Corporation pursuant to the Malaysian Federal Constitution (as revised 2010) that prescribes the Federal Territory of Putrajaya is established in accordance with section 4 of the *Constitution (Amendment) Act 2001*. Similarly, the Labuan Corporation is established under section 4 of the *Constitution (Amendment) Act 2001* and where all such Federal Territories shall be territories of the Federation and the Federation shall exercise sovereignty over the Territories with each being led by an appointed Chair.[20] Labuan being an island located in East Malaysia near the State of Sabah.

The Malaysian Councils (Kuala Lumpur City and Johor Bahru City Councils) that participated and responded to the authors survey question 'How does the *Local Government Act 1976* effect your municipality?' provided differing responses based on their legislative jurisdiction. The Kuala Lumpur City Council Deputy Director of Corporate Planning, Hasliza Binti Abdul Hamid responded that 'elected members are appointed by the Federal Government for a two year period' and therefore not elected per se by the community and where the organisational structure of Kuala Lumpur City Council is more an Advisory Board than an elected Council.[21] This is consistent with section 10 (2) of the *Malaysian Local Government Act 1976* as noted earlier and supported by Hughes, Orr and Yusof who note that Councillors are government rather than elected appointments.[22] Tricia Yeoh supports this by noting that Malaysia now

[19] *Federal Capital Act 1960* (Malaysia) s 4

[20] *Federal Constitution (Amendment) Act 2001* (Malaysia) part 2.

[21] KJ Matthews, *'Survey Questionnaire Response – Kuala Lumpur City Council and Johor Bahru City Council.* Malaysia, 2022, pp. 3 – 5.

[22] Hughes et al, *Strategizing for Grand Challenges*, p. 6.

practices a highly unitary governance system experiencing increasing centralism within the federal government as a result of the abolishment of local government elections.[23]

The Johor Bahru City Council Mayor, Noorazam Bin Dato Haji Osman responded to the question 'What is the legislation for the Johor Bahru City Council that is overseen by the Johor State Government?' that the Johor Bahru City Council 'must have approval from the Johor State Government for the creation of all policies, by-laws and guidelines (Circulars) and can directly veto the implementation of such by the Council'.[24] This process also applies to administrative and financial matters where the annual budget must be firstly approved by the State Government and in some instances this prior approval is also necessary for expenditure purposes, especially large capital expenditure items.[25]

Australian local government is not so prescriptive in this regard where policy and budgetary matters do not require prior approval from the State government. Local governments are only required to adhere to the provisions of the local government legislation such as the Local Government Act that prescribes policy making and the Financial Management Regulations that require compliance with the audit process of financial matters. In regard to the question of elected members, the Mayor responded that the (the Mayor) and the Secretary of Johor Bahru City Council are appointed by the Johor State Government as well as the 24 councillors.[26] Again, this is in contrast to Australian local government where all elected members in each State and Territory are elected by the community for a defined legislative term.

The functions undertaken by the Johor Bahru City Council are similar to those of compatible size and demographics in Australian local government. For example, waste management, leisure parks and sporting complexes, roads and streets, building, town planning and health functions, and parking/ranger service.[27] The Mayor summarised that the Johor Bahru City Council was very much under the control and scrutiny of the Johor State Government in accordance with Part 11 of the *Local Government Act 1976*.

[23] Tricia Yeoh, *Reviving the Spirit of Federalism: Decentralisation Policy Options for a New Malaysia,* p. 3.

[24]Matthews, *Survey Questionnaire Response,* p. 4.

[25] Matthews, *Survey Questionnaire Response,* p. 4.

[26] Matthews, *Survey Questionnaire Response,* p. 4.

[27] Matthews, *Survey Questionnaire Response,* p. 5.

Local government in Malaysia is a national constitutional right where the functions of local government and the relationship between central, state and local governments are stipulated in Chapter 7 of the *Federal Constitution* and in relevant local government legislation. That is, local government in Malaysia has had its basis in the nation's Constitution since independence in 1957 that prescribes there should be a 'National Council for Local Government' (NCLG) which recognises local government as essential to democracy and establishes it as part of the nation's system of governance. To this extent, Chapter 7 also prescribes that the State is to consult the NCLG in respect of any proposed legislation dealing with local government, and for any other local government matters, and for the NCLG to legislatively advise both tiers of Government (Federal and State) regarding local government matters.[28] This is also supported by Hughes, Orr and Yusoff who note that Malaysian local government has experienced some incremental reform since the country gained independence in 1957.[29] However, Harding notes that since the promulgation of the *Local Government Act 1976*, local government elections were definitively abolished.[30] In this regard, it appears that the reform of Malaysian local government, certainly since 1976 has diminished the concept of 'transparent democracy' for Malaysian local government to some degree, despite the intent and purpose of the NCLG.

AUSTRALIAN LOCAL GOVERNMENT SYSTEM

In contrast to the Federation of Malaysia, local government in Australia is not recognized in the *Australian Constitution*. As Lyndon Megarrity notes there have been several attempts to recognise local government in the Australian Constitution.[31] An attempt by the Whitlam Government to enshrine a direct financial link between the Commonwealth and local government within the Australian Constitution failed when put to the people via referendum. A subsequent referendum proposal by the Hawke Government to provide constitutional recognition to local government also failed. Both

[28] *Federal Constitution 2010* (Malaysia) part 7.

[29] Hughes et al, *Strategizing for Grand Challenges,* p. 5.

[30] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis,* p. 159.

[31] Lyndon Megarrity*, Local Government and the Commonwealth: an evolving relationship,* Research Paper No. 10, 2010-11 Canberra: Parliamentary Library Services, Commonwealth of Australia, 2011, p. 1.

the Whitlam and Hawke Governments were unable to convince the electorate that the federal system required reform.[32]

The latest attempt by the local government sector for constitutional recognition was undertaken on behalf of all Australian local governments by the Australian Local Government Association (ALGA) in 2013, seeking a referendum to amend the *Australian Constitution* to provide specifically for financial recognition of local government. In this regard a successful referendum would have had the potential to introduce increased scope for the Commonwealth to bypass the states in allocating funding directly to local governments. In late 2012 the Commonwealth established a Joint Select Committee to inquire into and report on the findings of the Expert Panel on Constitutional Recognition of Local Government that recommended that a referendum on the financial recognition of local government be put to Australian voters at the 2013 federal election.[33] The referendum did not proceed due to an early federal election being called by the (then) Prime Minister in August 2012 that ended the possibility of a referendum in 2013 to coincide with the election. However, it could equally be argued that there was little appetite on behalf of the federal government to pursue the question of local government recognition by referendum, especially given little information was disseminated other than by the local government sector to the broader community.

The local government system in Australia (and WA) therefore owes its existence to the Constitution(s) of each State, and in the case of WA, the WA local government system had its origins in Part IIIB, sections 52 and 53 of the 1889 WA Constitution which provides that:

> *the legislature shall maintain a system of local governing bodies elected and constituted in such manner as the legislature may from time to time provide and each elected local governing body shall have such powers as the Legislature may from time to time provide being*

[32] Megarrity*, Local Government and the Commonwealth*, p. 1.

[33] Joint Select Committee on Constitutional Recognition of Local Government, *Final Report on the Majority Finding of the Expert Panel on Constitutional Recognition of Local Government: the Case for Financial Recognition, the Likelihood of Success and Lessons from the History of Constitutional Referenda,* Canberra:: Parliament of the Commonwealth of Australia, 2013, p. 13.

> *such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.34*

In December 1979 an amendment to section 52 of the WA Constitution 1889 was made by the (then) Court Liberal government to recognise (WA) local government as an integral component to the system of government as a result of the recommendation by the Federal Advisory Council for Inter-government Relations to recognise local governments in each Australian state.[35] This however did not translate nationally where the proposal in the 1985 Constitutional Convention for local government recognition to be included in the Australian Constitution failed at a subsequent referendum in 1988.[36]

Constitutional recognition for local government continued to be the subject of advocacy throughout the 1990s and 2000's by the Australian Local Government Association (ALGA) and all State and Territory local government associations to the extent where a (further) referendum was planned for 2013 to coincide with the September 2013 federal election. As noted earlier, unfortunately the referendum was abandoned due to a late change to the federal election date and the incoming coalition government was not supportive of a further referendum.[37] Accordingly, the status quo remains in terms of local government recognition in the Australian Constitution.

Local Governments (and WA local government) play a key role in the Australian Federation system and provide democratic representation and a range of services to their respective local communities. The local government system in Australia is the *third tier* of government in Australia and is administered by the States and Territories, who in turn are the *second tier* of government. Fisher and Grant note that in the Australian context, local governments are overseen by other tiers of government and conceptualised as political/administrative entities, rather than 'local polities' overseeing 'local administrations' and that municipal governments are creatures of

[34] *Local government (WA Constitution) 1889* (Perth: WA) ss 52-52.

[35] C. Berry, *To Dwell in Unity.* Fremantle: Fremantle Press, 2021, p. 369.

[36] Berry, *To Dwell in Unity,* p. 370.

[37] Berry, *To Dwell in Unity,* p. 467.

respective states and territories.[38] This is also noted by Donald Purdie in his earlier publication *'Local Government in Australia – Reformation or Regression?'* where local government in Australia lacks any constitutional safeguards for its functions and resources and where its powers flow from State laws.[39] Australian local government is therefore governed directly by State and Territory legislation which is prescriptive in regard to the (limited) autonomy that Australian local governments can exercise. For example, the process of making Local Laws by WA local government authorities (Councils) in accordance with section 3.18 of the WA *Local Government Act 1995* is subject to scrutiny by the WA Joint Standing Committee on Delegated Legislation (JSCDL) who retain the power to disallow and/or amend the local law(s).[40] Indeed, a major role of the JSCDL is to review local government local laws and where the Committee may find that a local law could offend one or more terms of reference of the JSCDL, it will usually seek a written undertaking from the local government authority to amend or repeal the instrument in question. Where a local government does not comply with the Committee's request for an undertaking, the Committee may, as a last resort, resolve to report to the (WA) Parliament recommending the disallowance of the instrument in the Parliament. In this regard, local government can be interpreted as being sub-servient to its relevant States and Territories legislation. This is similar to the prescriptive control and scrutiny the Malaysian State government has over Malaysian local government.

Unlike Malaysia, there is only one level of local government in each Australian State and Territory, with no 'statute' distinction between metropolitan and regional local governments, or municipalities. For example, Part 2, Division 1 of the WA *Local Government Act 1995* deals with the constitutional framework of the system of elected local government in the State be maintained as required by Part IIIB of the *Constitution Act 1889*. In particular, where a local government district may be divided into wards and representation.[41] This section does not define the statute distinction between

[38] Josie Fisher and Bligh Grant, *Public Value: Positive Ethics for Australian Local Government,* Journal of Economic and Social Policy, Volume 14, Issue 2 Special Edition on Local Government and Local Government Policy in Australia, Lismore: Southern Cross University Publishing House, 2011, p. 12.

[39] Donald Purdie, *Local Government in Australia – Reformation or Regression?* Melbourne: The Law Book Company Limited, 1976, p. 16.

[40] *Functions of local governments (Local Government Act) 1995* (WA) Part 3.

[41] *Constitution of local government (Local Government Act) 1995* (WA) Part 2.

District (rural/regional) or urban (metropolitan) and only refers to the definition of a metropolitan region for the purposes of the WA *Planning and Development Act 2005*.[42] Accordingly, there is no statute distinction in Australia such as in Part II, section 3 (d) of the Malaysian *Local Government Act 1976 – Declaration and Determination of the Status of Local Authority Areas* where there is a clear legislative distinction between rural district councils and urban metropolitan councils. Other comparative differences between the Malaysian and Australian local government system(s) are summarised later in the article.

AUSTRALIAN EXTERNAL TERRITORIES AND MALAYSIAN FEDERAL TERRITORIES

As noted earlier in this article, Malaysia has three Federal Territories being, Putrajaya Corporation, Kuala Lumpur City Council (which are both located in the national capital) and Labuan that serves as an 'offshore financial centre' and is located in East Malaysia. All three are governed directly by the Ministry of Federal Territories. Part 1, section 1 (4) of the Malaysian Federal Constitution prescribes the establishment of the Federal Territory of Kuala Lumpur, the Federal Territory of Putrajaya and the Federal Territory of Labuan.[43] As Harding notes with regards to Kuala Lumpur City Council, the *Datuk Bandar* (Mayor) is directly appointed by the Federal government for a period of five years and the Kuala Lumpur City Council is placed under the Prime Minister's Department. The NCLG, comprising of Federal and State appointees, coordinates policy for the development, promotion and control of the local government and for the administration of the local government.[44] In other words, the Kuala Lumpur City Council is directly controlled and administered by the Malaysian Federal Government that can be interpreted as the Malaysia Federal Government exercising more of a direct unitary system approach as opposed to the concept of federalism, especially in the context of the Malaysian Federal Territories that appear to have spread to all Malaysian local governments. This substantiates Yeoh's comments that Malaysia was originally formed

[42] *Introductory matters (Local Government Act) 1995* (WA) Part 1.

[43] *Federal Territories (Federal Constitution), 2010,* (Malaysia) Part 1.

[44] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis,* p. 156.

as a federation but in recent decades it has experienced rapid centralisation at the federal level of service.[45]

In contrast, the non-self-governing (inhabited) territories of Australia are Christmas Island and the Cocos Keeling Islands comprising the Indian Ocean Territories (IOTs), and Norfolk Island. These non-self-governing territories are administered directly by the Commonwealth government in Canberra. As Roger Wettenhall notes, Australia's three small off-shore island territories – Norfolk Island in the Pacific Ocean and Christmas Island and the Cocos (Keeling) Islands Group in the Indian Ocean – can be seen as monuments to 19th century British-style colonisation, though their early paths to development took very different courses. Their transition to the status of external territories of the Australian Commonwealth in the 20th century – early in the case of Norfolk and later in the cases of Christmas and Cocos – put them on a common path in which serious tensions emerged between local populations which sought autonomous governance and the Commonwealth government which wanted to impose governmental systems similar to those applying to mainstream Australians.[46]

As there is no direct Commonwealth legislation to govern the IOTs, they are governed through an 'applied laws' agreement (or Service Delivery Agreements SDA's) between the WA State and the Commonwealth that occurred without any direct consultation with the community. Until recently, this system also applied on Norfolk Island between the NSW State and the Commonwealth when the Norfolk Island Assembly was abolished in 2016 by the Commonwealth. The governance legislative arrangements for all three of the Australian non-self-governing external territories were introduced as a result of the Commonwealth *Islands in the Sun* Parliamentary Inquiry into the legal regimes of Australia's External Territories in March 1991 which recommended the introduction of an applied legislative system within a broader package of initiatives and actions.[47] The *Islands in the Sun* Inquiry recommendations therefore formed the basis for the current legislative regime that was formally introduced in 1992 whereby they

[45] Tricia Yeoh, *Reviving the Spirit of Federalism: Decentralisation Policy Options for a New Malaysia,* p. 20.

[46] Roger Wettenhall*,* 'Decolonizing through integration: Australia's offshore island territories'*. Islands Study Journal*, 11(2), 2016, p. 1.

[47] *Islands in the Sun Report – The Legal Regimes of Australia's External Territories, Commonwealth Standing Committee on Legal and Constitutional Affairs,* Australian Government Publishing Services, Canberra: March 1991, pp. 193, 206 and 221.

(the non-self-governing territories) can therefore still be considered 'subordinate' to the Commonwealth.

The most obvious difference(s) therefore between the Federal Territories of Malaysia and the non-self-governing (inhabited) territories of Australia are its legislative and governance arrangements, and where these arrangements impact on local government. From these legislative and governance arrangements come financial and service delivery arrangements. The *Malaysian Constitution*, the Malaysian *Local Government Act* and subsidiary legislation clearly prescribe the status of the Malaysian Federal Territories. That is, where Part 1, section 1(4) of the *Malaysian Constitution* clearly prescribes the establishment of the Federal Territories of Kuala Lumpur (City), Putrajaya and Sabah.[48] Further, the Malaysian *Federal Capital Act 1960* specifically provides for the Local Government of the City of Kuala Lumpur. The Australian Constitution conversely does not define the status of its federal territories other than section 122 of the *Australian Constitution*. That is, section 122 of the *Australian Constitution* is the applicable constitutional instrument relevant to the non-self-governing territories of Australia that allows the representation of the three (inhabited) territories in either House of the Australian Parliament to the extent and on the terms which it thinks fit.[49]

COMPARATIVE LESSONS OF MALAYSIAN AND AUSTRALIAN LOCAL GOVERNMENT SYSTEMS

While there are numerous similarities between the Malaysian local government system and Australian local government, there are also numerous differences as highlighted throughout this article and summarised below that can provide potential theoretical reform options.

- Constitutional recognition - first and foremost there is no constitutional recognition (or mention) of local government in the Australian Constitution. At the time of Federation in 1901 and in the decades of debate leading to final Federation, the composition of the 'colonial' local governments was much different than today.

[48] 'Federation: Destiny and Identity'. Canberra: Parliamentary*Federal territories (Federal Constitution) 2010* (Malaysia) Part 1.

[49] *Government of Territories (The Australian Constitution) 2006* (Cth) s 122.

Similarly, the roles and responsibilities of the colonial local governments (Road Boards in rural areas or Municipal Boards in urban areas) were also vastly different, being confined to mainly roads and streets, and health and sanitation functions. It could also be argued that at the time of the Federation debate, recognition of local government in the final constitution was simply not that important in comparison to working through the issues of formulating an acceptable Australian Constitution and federal system to all the colonies that eventually borrowed from the United States and worked on the principles of Westminster.[50] Conversely, Malaysian local government is recognised in the Malaysian Constitution as referenced throughout this article to Part VI of the Malaysian Constitution when independence of the Federation of Malaya in 1957 was granted in accordance with the British Westminster model that embraced federation and the constitutional monarchy. Any such consideration for local government recognition in the Australian Constitution would require a referendum in accordance with section 128 seeking to change the constitution. As noted by Megarrity, this seems very unlikely given the lack of importance the Australian community has in local government and the lack of bipartisan support at the federal political level.[51]

- Elections and appointed terms - voting in Australian local government is promoted and prescribed in each State and Territory legislation (either compulsory or voluntarily) that differs from the Malaysian local government system as outlined by several academic sources in this article such as Yeoh and Harding. That is, local government elections in Malaysia were abolished in accordance with the *Local Government Act* in 1976 and to date have not been restored, despite numerous recommendations since then that they be restored as noted by Harding and Yeoh in this article.

- Finance models - the Commonwealth government has generally been compelled to provide (financial) subsidies to local government indirectly: that is, through the States. For example, financial grants are provided to local governments through the federal Grants Commission process.[52] Similarly, section 39 of the

[50] John Hirst, *Federation: Destiny and Identity.* Canberra: Parliamentary Library Services Papers on Parliament No. 37, 2011, p. 162.

[51] Megarrity, *Local Government and the Commonwealth,* p 11.

[52] *Distribution of Commonwealth funds (Local Government Grants Act) 1978* (WA) s 16.

Malaysian *Local Government Act 1976* prescribes that the revenue of a local authority shall consist of all other revenue accruing from the Federal Government or of any State and to distribute to local governments and known as Revenue of a local authority.[53] Purdie wrote in his 1976 publication that many local governments depend on the income from the FAGs source in order to financially survive.[54] More recently, Berry also notes that the introduction of Commonwealth financial assistance grants saved some Councils from the brink of financial revenue accruing from the Government of the Federation or of any State, together with other revenue sources.[55] Harding notes that (Malaysian) local governments derive their revenue from rents, fees for services and licences, as well as from Federal and State Governments by fiscal transfers. Fiscal transfers in the form of equalisation grants are made to local governments however these represent only approximately 10 percent of the shortfall in revenue against the local governments assessed needs, therefore requiring local authorities to source other revenue needs.[56] This differs comparatively with Australian local government where the fiscal equalisation grants provided by the Commonwealth in the 2023-24 financial averaged approximately $3.2 billion in untied funding with WA receiving circa $394 million for distribution.[57]

- Separation of powers - separation or delegation of executive powers differ between Malaysian local government and Australian local government. Malaysian local government clearly defines the process of executive management appointments and subsequent delegation of executive powers through its applicable governance and legislative instruments. In particular, where Ibrahim et al reference section 3 of the *Local Government Act 1976* that provides the State authority with powers to appoint a Secretary (CEO) of the local authority along with powers to also approve other (senior) staff appointments.[58] That is, supported by the survey

[53] *Revenue of the local authority (Local Government Act) 1976* (Malaysia) s 39.

[54] Donald Purdie, *Local Government in Australia – Reformation or Regression?* Melbourne: The Law Book Company Limited, 1976, p. 153.

[55] Berry, *To Dwell in Unity*, p. 425.

[56] Harding, *The Constitution of Malaysia: A Contextual Analysis,* p. 156.

[57] Department of Infrastructure, Transport, Regional Development, Communication and the Arts, 'Territories, Regions and Cities: Local Government – Financial Assistance'. Accessed at https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government.

[58] Ibrahim and Nordin, *Local Government System in Malaysia*, p. 153.

respondents interviewed by the author whereby both the Mayor of the Johor Bahru City Council and the Deputy Director of Corporate Planning at Kuala Lumpur City Council confirmed that the Secretary of both Councils are appointed by their respective State and Federal Governments.

- Conversely and in accordance with Part 5, Division 4, section 5.36 of the WA *Local Government Act 1995* that is also reflected in other Australian State/Territory local government legislation, the local government authority itself is responsible for the recruitment and appointment of a Chief Executive Officer/General Manager (terminology differs from each State jurisdiction) to oversee the management of the organisation.[59]

- Levels of local government services - service delivery responsibilities differ in several instances between Malaysian Local Government and Australian local government as highlighted in this article. For example, where Part XII, section 101, sub sections (a) to (u) of the Malaysian *Local Government Act 1976* prescribe several functions such as the establishment and control of botanical and zoological gardens and aquaria or to establish and maintain an ambulance service that are not included in any Australian local government legislation.[60]

As with any mature democracy (such as Malaysia and Australia) there is scope to evolve democratic systems through ongoing review. This article has attempted to explore the differences between the Malaysian and Australian local government systems that also includes comparisons between the Indian Ocean Territories (Christmas Island and Cocos Keeling Islands) and Norfolk Island as non-self-governing external territories to that of the directly administered Malaysian Federal Territories to highlight the comparative difference in the areas of constitutional recognition, electoral processes, financial arrangements, separation of executive powers and the levels of service delivery responsibilities.

[59] *Local government employees (Local Government Act) 1995* (WA) s 536.

[60] *Further powers of local authority (Local Government Act) 1976* (Malaysia) s 101.

Reviews

Watershed: The 2022 Australian Federal Election, edited by Anika Gauja, Marian Sawer and Jill Sheppard, 2024, pp.430 RRP $69.95, ISBN: 9781529226980.

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For more than 40 years, it has been a wonderful tradition of political scientists in Australia to produce post-election book. A volume on the 2022 election, *Watershed: The 2022 Australian Federal Election*, was released online as well as printed form in August 2023. It is truly an enjoyable book with valuable information and data. I have been editing a university textbook on the Australian politics (in Japanese). The project has nine authors including myself and it was quite a task to make them (and me) submit manuscripts in a reasonable timetable. I would like to acknowledge the efforts and hard work by editors, Anika Gauja, Marian Sawer and Jill Sheppard to assemble 27 high-quality scholars and complete the book.

This book consists of three parts. Part 1 analyses election campaign and its context, salient issues, campaign matters and the media. Part 2 analyses actors of the election. In addition to established parties, this part has separate chapters on independents and minor parties, on the Community Independent movement and on the third-party campaigning organisations. Part 3 analyses the election results in the House of Representatives, the Senate, seat-by-seat polling results and the rise of early voting. All the chapters are of top quality, easy and enjoyable to read.

As far as I understand, this wonderful tradition of post-election books began in the 1970s.[1] Present format, online free publication as well as printed version for purchase,

[1] See e.g. HR Penniman (ed) *Australia at the Polls: The National Elections of 1975*. 1977: American Enterprise Institute for Public Policy Research; Howard Penniman, *The Australian national elections of 1977*, American Enterprise Institute for Public Policy Research, Washington, 1979. See also Carol Johnson, John Wanna and Hse-Ann Lee, *Abbott's Gambit: The 2013 Australian Federal Election*. 2013: ANU Press, Preface.

started in 2010. This arrangement should be greatly appreciated. Considering the publishing environment in Japan, it is unthinkable and indeed enviable that not only the online edition but also the printed edition of these books are colour-printed. *Watershed* continues the series' wonderful tradition of succinct titles such as *The Greening of Australian Politics*, *The Politics of Retribution*, *Mortgage Nation*, *Double Disillusion* and *Morrison's Miracle*.[2] Just like *Double Disillusion* and *Morrison's Miracle*, the title is matched visually with an excellent choice of photo. While I was told that this photo was not necessarily the editors' first choice, the photo of Dr Monique Ryan MP's campaign team on the election night with their facial expression of anxiety and expectation encapsulates the mood of the election so well. The cover photo is one of the benefits to purchase printed version.

When I reviewed *Double Disillusion* six years ago, I noted the book has 690 pages with 30 chapters and weighs 1.22 kg while *The Greening of Australian Politics*, the post-election book for the 1990 election, has around 230 pages with nine chapters and weighs 280 grams. For the 2019 and 2022 post-election books, the editors seem to have made considerable effort to rein in the size of the book. *Watershed* has 19 chapters, 430 pages and weighs 885 grams. Of course, increase in volume from the 1990s is a reflection of massive changes in the Australian politics. It must be a difficult task to reduce 690 pages in 2016 down to 490 pages in 2019 to 430 pages in 2022. As each election throws up new issues, new actors and changes, new chapters have to be added. And this means some of the previous chapters need to make way for new ones. So, what changed this time?

In *Double Disillusion*, there were eight chapters on policy areas; economy, industrial relations, social issues, environment/energy, refugees, indigenous affairs, gender/sexuality and migration. These policy-related chapters were taken out from *Morrison's Miracle*. While a chapter on industrial relations survived as separate chapters on business and unions, they were removed in *Watershed*. Therefore, there is no chapter in *Watershed* on specific policy area except for gender/sexuality which

[2] Clive Bean, Ian McAllister *and* John Warhurst, *The Greening of Australian politics,* Longman Cheshire, 1990; Clive Bean, Scott Bennett, Marian Simms , John Warhurst (Eds), *The politics of retribution : the 1996 Australian federal election* St. Leonards, NSW, Australia : Allen & Unwin, 1997; M Simms, J Warhurst, R Nile, *Mortgage nation : the 2004 Australian election*, Perth: Curtin University of Technology, 2005. Anika Gauja, , *Double Disillusion : The 2016 Australian Federal Election*, Canberra: ANU Press, 2018; A Gauja, M Sawer & M Simms, *Morrison's Miracle: The 2019 Australian Federal Election*, Canberra: ANU Press, 2020.

happened to be one of the salient issues. A chapter on States and Territories also left the scene this time. I do not think these reductions adversely affect the quality of the book. As the major feature of the 2019 election was the totally unexpected 'Morrison's Miracle' victory and all the opinion polls, including exit polls, predicted wrongly, it is natural that *Morrison's Miracle* had a chapter titled 'National polling and other disasters' along with 'The perilous polling of single seats'. As the 2022 election did not deviate from polls as much as the 2019 election, the chapter on polling disaster exited.

I feel a bit sad and disappointed about this omission because a chapter on voting or electoral behaviour is no longer included. Analysis on voting behaviour based on the Australian Election Study (AES) had long been the main feature of the post-election book. I recall that in the 1990s almost the entire book was based on the analysis of the AES data. The reason for the absence of the AES data or analysis from *Watershed* is probably because it had already been published in December 2022 by Sarah Cameron, Ian McAllister, Simon Jackman and Jill Sheppard.[3] The paper by Cameron et al, especially on socio-demographic influences, was fascinating. It would have been excellent if this publication were reproduced as an appendix to the online edition, if not in the printed version, of *Watershed*.

I read *Watershed* twice, for the first time when it was published and for the second time to write this review. When I read, I seek answers to the following questions.

- What were the distinctive features of this election?
- Why was this election regarded as a 'watershed'?
- How sustainable are these changes? Did the 2022 election show the arrival or just the harbinger of electoral realignment of the Australian party system?

The 2022 election was conducted under the shadow of COVID-19 pandemic. Fittingly, the book is bookended by Michael Maley's comprehensive information and deep insight into the Australian Electoral Commission's administrative arrangement[4] and Ferran Martinez i Coma and Rodney Smith's resourceful analysis on the 'rise and rise'

[3] Sarah Cameron, Ian McAllister, Simon Jackman and Jill Sheppard. 2022. *The 2022 Australian Federal Election: Results from the Australian Election Study*. Canberra: The Australian National University. <https://australianelectionstudy.org/publications/>.

[4] Michael Maley, 'Administrative issues in a time of Covid' in Anika Gauja, Marian Sawer and Jill Sheppard, *Watershed: The 2022 Australian Federal Election*, 2024: ANU Press, Chapter 2 pp. 23-36.

of early voting.[5] Less than half of the voters voted at the polling place on the polling day. It seems to me that the prediction of large pre-poll voting might have prompted the ALP to carry out its campaign launch earlier than usual. The authors also note that most of the pre-poll votes were cast inside the last five days of the campaign. It is interesting to see if this "rise and rise" of early voting continues beyond the obvious influence of the pandemic.

The first part of the book, in seven chapters, offers an excellent narrative of Australian politics between 2019 and 2022. In the third chapter, A.J. Brown provides us comprehensive account of integrity, which was one of the most salient issues.[6] In the fifth chapter, another salient issue, treatment of women is capably covered by Blair Williams and Marian Sawer.[7] The chapter discusses gender diversity of candidates as well as that of the 47th Parliament, campaign discourse and each party's policy. It is an excellent chapter. It would have been more insightful if some of the gender-based voting behaviour published in Cameron et al[8] were included. Chapters on the media and visual images illustrate how the media landscape has changed recently. The seventh chapter on the media coverage now describes not only traditional (legacy) and non-traditional online media but also campaigns via social media. A chapter on visual images used to deal only with cartoons (which I think are Australia's hidden national treasures): now it includes analysis on TikTok 'videos, memes, etcetera'.[9]

On the second question about this election as a 'watershed' moment, I think there are three elements which make the term 'watershed' appropriate. The 2022 election resulted in a change of government, for the seventh time in half a century (if the 1975 election is counted as one). More significantly, the share of votes for the two major parties declined to near record low. As a consequence, 16 crossbench members were elected. And in a further 11 seats, the final contest was non-traditional, that is not a

[5] Ferran Martinez i Coma and Rodney Smith 'The rise and rise of early voting', in Gauja et al, *Watershed*, Chapter 19 pp. 413- 432.

[6] A. J. Brown, 'The integrity election: Public trust and the promise of change' in Gauja et al, *Watershed*, Chapter 19 pp. 413- 432, Chapter 3 pp. 39-57.

[7] Blair Williams and Marian Sawer, 'High-vis and hard hats versus the care economy' in Gauja et al, *Watershed*, Chapter 5 pp. 79-99.

[8] Cameron et al, *The 2022 Australian Federal Election*.

[9] Andrea Carson and Simon Jackman, 'Media coverage of the campaign and the electorate's responses' in Gauja et al, *Watershed*, Chapter 7, pp. 121-144.

contest between the Labor and the Coalition. As the authors note in various chapters in the second part of the book, the election was not necessarily a resounding victory for Anthony Albanese. The ALP managed to win 77 out of 151 seats. The Coalition, with only 58 seats, was the clear loser. The winners are sixteen crossbenchers, four Greens, one Centre Alliance, one Katter's Australia Party and ten Independents.

Just like *Double Disillusion* and *Morrison's Miracle*, Watershed has two chapters on minor parties and independent candidates.[10] However, there is a subtle but noticeable change. Previously, minor parties (by Glenn Kefford) and independents (by Jennifer Curtin in *Double Disillusion*, Curtin and Sheppard in *Morrison's Miracle*) had separate chapters. This time, Sheppard writes a combined chapter on independents and minor parties.[11] Carolyn Hendriks and Richard Reid write a chapter on Community Independents.[12] This demarcation makes sense. Perhaps the most distinctive feature of the 2022 election was the growth of the 'Voice For' movements and the Community Independents. Hendriks and Reid trace the trajectory of the movement from Cathy McGowan's Indi campaign in 2013 (most notably the Get-Elected national online convention in February 2021, in which I participated) and explain various types of the 'Voice For' organisations in their origins, organisational modus operandi, approach to election, selection or non-selection of candidates and mode of campaign. I think it is important for Hendriks and Reid to use the more inclusive term 'Community Independents' rather than more publicly familiar but metropolitan-limited 'Teals'.

Perhaps, one of the difficult tasks for the authors was to define and demarcate which candidates should be discussed in Chapter 13 or Chapter 14. Chapter 13 refers to Bob Katter, Dai Le, David Pocock, Rebekha Sharkie and Andrew Wilkie as 'outside the 'Voice For' and Teal movements' and discuss them there rather than in Chapter 14 (it must be an error that Sharkie was omitted from the analysis).[13] However, Climate 200 nominated Pocock, Sharkie and Wilkie as its candidates[14] and the Climate 200 list

[10] Lucien Leon and Richard Scully 'Talking pictures (and cartoons, videos, memes, etcetera)' in Gauja et al, *Watershed*, Chapter 5, pp. 145- 177.

[11] Jill Sheppard 'Independents and minor parties' in Gauja et al, *Watershed*, Chapter 13, pp. 259-278.

[12] Carolyn Hendriks and Richard Reid 'The rise and impact of Australia's movement for Community Independents' in Gauja et al, *Watershed*, Chapter 14, pp. 279-303.

[13] Jill Sheppard 'Independents and minor parties' in Gauja et al, *Watershed*, Chapter 13, p. 266.

[14] Climate 200 Website, '2022 Election'. Accessed at https://www.climate200.com.au/2022-election.

mostly overlaps with Cathy McGowan's Community Independent candidates. As Chapter 14[15] (in my view) correctly includes candidates from the 'Voices For' movement but outside Climate 200 such as Penny Ackery and Susie Holt or Rob Priestly (he was neither from the 'Voice For' nor Climate 200 candidate but supported by Cathy McGowan), I wonder if Pocock, Sharkie and Wilkie should have been dealt in Chapter 14. In addition, Dai Le is neither from the 'Voice For' movement nor supported by Climate 200 and she openly dissociated herself from the 'Teals'. Nevertheless, she is also a (small c) community Independent and on many occasions in the parliament works with other Community Independents.

Reading this book again now, within less than a year from next election, provides me new perspectives on many issues confronting the Australian politics. Editors of this wonderful book are bold and courageous enough to title this as *Watershed* without a question mark (or an exclamation mark). It is my personal wish that the 2022 was truly the 'watershed' moment and Australia's party system has been irreversibly realigned. We will have to wait and see what will happen at the election next year.

[15] Carolyn Hendriks and Richard Reid 'The rise and impact of Australia's movement for Community Independents' in Gauja et al, *Watershed*, Chapter 14, pp. 289.

In Search of John Christian Watson: Labor's First Prime Minister by Michael Easson, 2024, Connor Court Publishing, pp 193 RRP $29.95, ISBN 9781923224155

Bryan Moulds

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Michel Easson, in his monograph *In Search of John Christian Watson: Labor's first Prime Minister*, explains his aim was to explore a comment from noted Labor movement historian Bede Nairn that John Christian Watson 'was the great figure produced by NSW Labor, who shaped the movement more than anyone else'.[1] Given that he only served as Prime Minister for only 113 days 120 years ago and in legislative terms only six Bills were passed could clearly form only part of his 'significance'.

Easson's approach is to widen his assessment and to explore not just Watson's Labor Party career, but to add a broader second lens of his later adventurous, successful and influential business life. In this respect Easson's book presents a different perspective to the earlier works of Al Grassby, Silvia Ordonez[2] or Ross McMullen.[3]

Easson is particularly qualified to explore this dual perspective, as Watson resembles his own career as a long-term Labor member and successful business leader. His insight makes a compelling case that Watson's most powerful influence on his Party was his ability to deliver pragmatic and decisive leadership qualities. Qualities that because of the brevity of his Prime Ministership, were demonstrated in most in his abilities to

[1] Michael Easson, *In Search of John Christian Watson: Labor's First Prime Minister by Michael Easson*. 2024, Connor Court Publishing: Brisbane.

[2] Al Grassby and Silvia Ordonez, *The Man Time Forgot: The Life and Times of John Christian Watson*. 2001, Pluto Press: London.

[3] Ross McMullen, *So Monstrous a Travesty: Chris Watson and the World's First National Labour Government.* 2004, Scribe Publications: Melbourne.

navigate the 'three elevens' characteristic of the early Parliaments,[4] where the balances of power were in a cycle of flux between the Protectionists, Free Traders and Labor.

Whilst Easson does not dwell particularly on Watson's career in NSW politics, he does show in greater detail the machinations of Labor Party itself in these early times and Watson's ability to bring members together or reconcile internal tensions. More precisely he presents a case for judging Watson's skills in his Commonwealth era as managing the bigger, bolder political figures of his time such as Alfred Deakin, George Reid, King O'Malley, Andrew Fisher and Billy Hughes. In doing so, he argues Watson showed to the emerging nation that the Labor movement was a legitimately broad Party capable of sound Government. Indeed, as Judith Brett in *The Enigmatic Mr Deakin* notes, Deakin himself was full of praise for Watson as 'an honourable, capable, open minded and amiable public man'.[5]

Watson, before leaving parliament, in 1909-10 spent time absent in South Africa managing mining operations which appear to have excited a broader interest for him. During this time of his absence the non-Labor parties coalesced under Deakin, and Labor was led by Andrew Fisher. Watson finally left Parliament in 1910.

Easson has traced in detail, Watson's influence, involvement and ultimate demise from the issue of conscription that dominated Labor and then national political battlegrounds throughout the early 1900's and especially leading up to and during the First World War. Watson, though a strong singular voice in the issues, aligned with Billy Hughes' advocacy and was ultimately expelled from the Party following the split in 1916-17.[6] Easson's chapters on these issues are enlightening of the Watson character, and the commentary provides a close understanding of the battles that raged in those times. Watson's position from these chapters is perhaps better understood than in many other commentaries of these times from other sources.

Where Easson is most able to bring a new appreciation of the Watson character, and his not insignificant skills, is in the brief but well-argued chapter on his life as a business

[4] Easson, *In Search of John Christian Watson*, p. 56.

[5] Judith Brett, *The Enigmatic Mr Deakin*. 2017, Text Publishing: Melbourne.

[6] Easson, *In Search of John Christian Watson*, p. 4.

person.[7] Particularly as the inaugural President of the National Roads Association in 1920 and subsequently the National Roads and Motorists Association (NRMA) until his death in 1941. He was clearly a major strategic figure in business and public policy during these times. Indeed, Watson is described as 'sort of the unofficial PM of Auto-Australia'[8] and Easson notes him as exuding 'the image of the quintessential, reasonable man'.[9] There is, in this short part, an insight of Watson that reflects Easson's own business career.

In the end perhaps it remains equivocal as to whether Watson was *the* great or *a* great figure of the early Labor Party. Certainly though, Easson has shown that John Christian Watson was at least as enigmatic a political figure of his times as contemporaries Deakin, O'Malley, Fisher or Hughes.

[7] Easson, *In Search of John Christian Watson*, pp. 117-132.

[8] Easson, *In Search of John Christian Watson*, p. 123.

[9] Easson, *In Search of John Christian Watson*, p. 178.

Race Mathews: A Life in Politics by Iola Mathews, Monash University Publishing, 2024, pp 360 RRP $39.99, ISBN: 9781922979810.

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There are many good reasons to welcome this life of Race Mathews. It is mainly written by his wife Iola, an accomplished journalist, author, feminist, unionist and recent memoirist,[1] but with the first four chapters a moving account by Race himself on his early life. As the work of a spouse, *Race Mathews: A Life in Politics* has an intimacy that is impossible to achieve at a greater distance: it comes as no surprise to learn that one of the books Iola read for inspiration was Susan Crosland's biography of her husband, the British author and politician Anthony Crosland.[2] Iola Mathews' book captures otherwise obscured aspects of personal, family and emotional life but it also does an excellent job of telling the story of the public career of an impressive Australian politician and intellectual – and they don't often go together in this country.

There has indeed always been something a little donnish about Race Mathews, even before the two doctorates completed after he left parliament.[3] He is probably the closest we have had to a figure such as David Marquand of the British Labour Party (and later the Social Democrats). Mathews, a self-confessed Anglophile, might enjoy the comparison.

[1] Iola Mathews, *Winning for Women: A Personal Story*, Clayton: Monash University Publishing, 2019.

[2] Susan Crosland, Tony Crosland, London: Cape, 1982.

[3] Race Mathews, 'Subsidiarity and Agency: the British Distributism, Antigonish and Mondragon Experiences', PhD Thesis, Monash University, 1998; Race Mathews, 'Manning's Children: Responses to *Rerum Novarum* in Victoria 1891 to 1966', Doctor of Theology Thesis, University of Divinity, Melbourne, 2014.

As the book reveals, Mathews made his political mark in four significant ways.

First, he was an inveterate organiser who revived the Fabian Society at the beginning of the 1960s, turning it into both a forum for discussion of innovative policy and ideas, and a training ground for some who would contribute in diverse ways to the Labor Party from the 1970s through to the 1990s. The Society would continue to play its part in the political and intellectual life of the nation, and Mathews had a leading role at times, but it has never been as important as it was for a few years under Mathews' leadership in the 1960s.

Then there was the Whitlam era, when Race was Principal Private Secretary to Gough Whitlam for five critical years leading up to December 1972. The election that month brought Race into the federal parliament as the member for Casey but, as the biography shows, it was somewhat anti-climactic – 'the biggest mistake of his political life',[4] he is recorded as having later thought. Once you have been at the heart of policymaking, working alongside a man such as Whitlam, being 'Midwife to Medibank', three years on the backbench of a turbulent and sometimes disorganised government could be unrewarding and frustrating. And the dismissal of the government was followed by an election that saw Mathews lose his own seat, as so many else did in the 1975 bloodbath.

That brings us to the third of Mathews' contributions: as a cabinet minister in the Cain Labor government in Victoria during the 1980s. The states have been especially poorly served in terms of biographies of major politicians – becoming premier for an extended period has usually been the threshold unless you've generated a scandal or two. But Race Mathews was not an accident-prone politician. The closest his career can approach to 'scandal' is the theft of Pablo Picasso's *Weeping Woman* from the National Gallery of Victoria.

Mathews' combination of portfolios – police and the arts –always seemed rather odd. But for a couple of weeks there in August 1986, they came together in perfect alignment. Poor Race was described as a 'tiresome old bag of swamp gas'[5] in one of the ransom letters sent by the thieves, who called themselves Australian Cultural Terrorists and wanted more funding for the arts. In the end, their threat to destroy the

[4] Iola Mathews, *Race Mathews: A Life in Politics*, Melbourne: Monash University Publishing, 2024, p. 178.

[5] Mathews, *Race Mathews*, p. 217.

painting was not implemented, and the painting would be picked up in a railway station locker. It is nonetheless one of the ironies of public life – in Mathews' case, a long and productive one – that it is probably this incident more than any other that has found its way into collective memory.

The fourth of Race Mathews' contributions is as historian and political thinker. He wrote a thesis and published a book on the early history of Fabianism in Australia, which he followed by further postgraduate study and publications on cooperatives, the distributist tradition, and Catholic social thought.[6] He has also remained an advocate of Labor Party reform – a cause to which he devoted many a waking hour in the 1960s when the Victorian Labor Party, under its post-split hard left leadership, was unelected and unelectable, as well as a drain on the ALP nationally.

The subtitle of this book – *A Life in Politics* – is apposite. It is indeed a book about a life – or, rather, about lives – and they had more than their fair share of tragedy. Mathews married young and his first wife, Jill, who had like Race trained as a teacher, died of cancer at the age of 34, leaving Race a widower with young children.

We learn from Iola, his second wife, of some of the burdens that political careers impose on families. She writes with insight, candour and love: we are allowed to see just enough to understand a little better what serious, generous and enduring political commitment means for those who live it to the full, rather than just treating politics as a stepping stone to greater glory or – more commonly these days – greater earnings.

It may be, then, that this book is also a kind of political elegy.

[6] Race Mathews, 'Victoria's First Fabians, 1890-1910', MA Thesis, University of Melbourne, 1989; Race Mathews, *Australia's First Fabians: Middle-class Radicals, Labour activists and the Early labour Movement*, Cambridge: Cambridge University Press, 1993; Race Mathews, *Jobs of Our Own: Building a Stake-holder Society: Alternatives to the Market and the State*, Sydney: Pluto Press, 1999; Race Mathews, *Of Labour and Liberty: Distributism in Victoria, 1891-1966*, Clayton: Monash University Publishing, 2017.

Reimagining Parliament, edited by David Judge and Cristina Leston-Bandeira, 2024, pp 180 RRP GBP 19.99, ISBN: 9781529226980.

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Reimagining Parliaments is a collection of essays carefully curated and introduced by two highly regarded political scientists, Professor Cristina Leston-Bandeira (University of Leeds) and Emeritus Professor David Judge (University of Strathclyde, Glasgow).

This fresh, challenging edited collection invites its expert contributors to 'step outside their professional and academic comfort zones' and think 'afresh about how they might reimage parliament'.[1] This in turn takes readers on a future-focused journey, where entrenched 'problems' are presented as reform opportunities, and multi-disciplinary approaches are embraced as possibilities for breaking free of conventional quagmires that have often curtailed the imagination of political scientists and parliamentary procedure specialists.

Although most of the contributors to *Reimaging Parliaments* are based in the United Kingdom, this work has direct relevance to parliamentary practitioners and scholars in Australia and New Zealand, as it engages with shared parliamentary practices derived from Westminster traditions and confronts some of the universal challenges facing modern democracies, including:

> *widespread public dissatisfaction with the practice of … politics, comparatively low levels of trust in parliament and even lower levels of trust in political parties.*[2]

[1] David Judge and Cristina Leston-Bandeira (eds) *Reimagining Parliament*. Bristol University Press, 2024.

[2] Judge and Leston-Bandeira (eds), *Reimagining Parliament,* p. 2.

For example, Emma Crewe's reimagining of 'rhythms, rituals and symbols' invites us to reflect on the impact of the ceremonial and theatrical elements of parliamentary practice, and its potential to exclude, or welcome, alternative perspectives or experiences from its ambit. Crewe suggests that:

> *[w]e should not get rid of rituals and symbols, because we cannot do politics without them, but we can review and reimagine them with certain principles to guide us.*[3]

For Crewe, these principles include the need for a more inclusive approach to what counts as 'knowledge', reforming processes that are more inclusive of and less alienating for minority groups, reflecting on how to promote the wellbeing of key parliamentary actors through changing aspects of parliamentary procedure, and restoring standards and ethics so they become social norms (rather than the exceptions).[4] Crewe encourages us to move away from the 'pervasive fixation on disciplining individuals'[5] and instead focus on 'slowing down' the rhythms of parliament, and focusing institutional attention on the most important national and global challenges as an inclusive collective of decision-makers, bound by a shared commitment to ethical conduct and acting with integrity.[6] This will no doubt resonate with policy makers and parliamentarians in Australia and New Zealand grappling with 'wicked problem' type policy challenges, including responding to climate change and achieving meaningful self-determination for First Nations peoples.

There are also multiple chapters devoted to reimaging parliament as a *workplace* which will resonate with Australian scholars and practitioners seeking to respond to recent reviews and inquiries into workplace culture, including the work of former Australian Sex Discrimination Commissioner Kate Jenkins in the *Set the Standard Report* published in 2021.[7] For example, Hannah White identifies the three sets of key principles that should underpin any mid-21st century workplace, including parliaments.[8] These

[3] Judge and Leston-Bandeira (eds), *Reimagining Parliament,* p. 36.

[4] Judge and Leston-Bandeira (eds), *Reimagining Parliament,* p. 37.

[5] Judge and Leston-Bandeira (eds), *Reimagining Parliament,* p. 46.

[6] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 47.

[7] Australian Human Rights Commission 2021. *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplace*s.

[8] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 86.

include: a safe, secure environment for workers; encouragement of equality, diversity and inclusion among its workers; and the creation and maintenance of a culture and environment that supports its organisational goals.[9] For White, a successfully reimagined parliament would see itself as 'exemplar of, rather an exception to, the rules it has established for other workplaces'.[10]

Lucinda Maer, Deputy Principle Clerk in the House of Commons, takes up the challenge of 'reimagining scrutiny', focusing on identifying the pre-conditions for parliaments to more effectively gather and interrogate evidence and information, connect parliament to the public, and impact the way in which we are governed.[11] Maer reminds us not to underestimate the 'soft power' of select parliamentary committees, who engage in 'quieter scrutiny' than the more confrontational chamber-based scrutiny of question time, to enhance the deliberative quality of the business of parliament, whilst also holding the executive to account.[12]

Retired House of Commons Clerk, Paul Evans, also encourages rethinking four key areas of procedure that currently 'fail the imagination' including: the complexity of standing orders, the experience of 'executive capture' that has disempowered MPs and disengaged them from their critical role in holding the executive to account, and the alienation and illegitimacy of aspects of parliamentary procedure that 'do not resonate with the way we conduct our lives'.[13] Evans points to a range of 'desiderata' that might inform a reimagining of parliamentary procedure, focused on the need to use procedural rules to 'confer legitimacy' of the process of parliamentary lawmaking and parliamentary decision making, and this demands that procedure 'encourage rather than discourage participation' and 'bring in expertise, but not only experts'.[14] A reimagined approach to parliamentary procedure would, according to Evans, 'empower parliament, not just the executive' and have an inbuilt capacity to respond to changing community expectations.[15]

[9] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 86.

[10] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 94.

[11] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 113.

[12] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 124.

[13] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 126.

[14] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 129.

[15] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 130.

A specific example might be to challenge the current clause by clause committee of the whole stage of debate on a Bill to include the opportunity for the broader public to engage directly with the content of a draft law, and the opportunity for technical 'revision' prior to voting on proposed amendments, to ensure that the proposed new law is readily understood by the public, fit for purpose, and clearly drafted to avoid any unintended consequences.[16] According to Evans, the goal would be to promote less partisanship and more deliberation, moving beyond the 'time-bound bearpit of the plenty' and placing the 'more open-ended world of committees' at the centre.[17] These observations are apposite for Australian parliaments, many of which are grappling with how to ensure the more innovative, inclusive practices of committees are reflected on the floor of the House.[18]

It is tempting to see this edited collection as a catalogue of the many complex, intersecting 'problems' with modern, Westminster inspired parliaments. However, in fact, when taken as a whole, this is an *optimistic* read, that reminds us of the power of the shared 'belief in the *principle* of democracy'[19] and our collective ability to 'reimagine' our shared democratic future.

[16] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 134.

[17] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 139.

[18] See e.g. *Australasian Parliamentary Review* Volume 37(2) Special Edition on Connected Parliaments, published in November 2022 and available at https://www.aspg.org.au/a-p-r-journals-2/spring-summer-2022-vol-37-no-2/.

[19] Judge and Leston-Bandeira (eds), *Reimagining Parliament*, p. 2.

Toxic Parliaments and What Can Be Done About Them, by Marian Sawer and Maria Maley. Palgrave MacMillan, 2024, pp. 125 Paperback RRP EUR 39.99 ISBN: 978-3-031-48327-1.

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The word 'toxic' is perhaps a contested descriptor of Westminster parliaments, but as Marian Sawer and Maria Maley have prosecuted in their new book, *Toxic Parliaments and What Can Be Done About Them,* it is clearly applicable. In 2023, I appeared before the Australian House of Representatives' Procedure Committee and was encouraged to reflect on the universality of the term:

> *Mr Boyce: I have a couple of observations. You are operating on the presumption that parliament is a toxic workplace. What grounds have you based that on? Given that assumption, is this a toxic meeting? I don't think it is. We are all relatively friendly and courteous to one another. Sure, there are some instances in parliament that happen and shouldn't happen, but to generalise to the greater public that parliament is a toxic workplace is incorrect.*[1]

Mr Boyce (Member for Flynn, Liberal National Party of Queensland) further argued that describing the Australian parliamentary workplace as toxic was a 'limited minority view versus an overall view'.[2] Minority or majority view, the term has triggered largescale reform in the Australian parliamentary context, and indeed elsewhere.

[1] House of Representatives Standing Committee on Procedure, *Inquiry into recommendations 10 and 27 of Set the standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*. 2023: Parliament of Australia, p. 5.

[2] House of Representatives Standing Committee on Procedure, p. 5

As Sawer and Maley contend, parliamentary toxicity stems from widespread allegations of sexual harassment, intimidation and bullying that has been uncovered in parliaments in the wake of the #MeToo movement. They define a toxic parliament as 'a parliamentary work environment in which employees and elected members do not feel safe', a workplace that is 'harmful and injurious'.[3] Describing the gendered institutional practices evident in the parliaments of Australia, Canada, New Zealand and the United Kingdom, Sawer and Maley illustrate the hostile environments in which representatives, political and parliamentary staff operate. Strong examples in this regard are the 'struggle to make parliaments family friendly' and changes to the 'sitting hours and sitting calendar'.[4] Westminster conceptions of appropriateness have traditionally kept 'strangers' off the floor of the chamber, even when those strangers are infants in need of a feed. Changing these norms has involved a confluence of new norms articulated at the international level and women members with young children lobbying for change. Likewise, the idea that parliaments can limit the number of days that representatives need to travel to the capital, away from their constituencies, by sitting longer hours, sometimes well into the night, has been challenged by international guidance and women MPs who were dissatisfied with the distinctly family *un*friendly nature of these hours.

The innovation of the book lies in the detailed analysis of experience in the four case studies in 'trying to turn parliament into a model workplace'.[5] With careful precision, these chapters outline the challenges inherent in 'creating robust systems to tackle sexual and sexist misconduct in parliaments'.[6] The authors argue that parliaments need to establish independent bodies that address and adjudicate on grievances, as well as strong, proactive commitment to reform from parliamentary leadership. They note in the United Kingdom, a jurisdiction from which others have learned important lessons because of its pioneering start, complexity has been the enemy of culture change. With 13 different remits and bodies in the current parliamentary standards ecosystem, confusion about where to turn has resulted in an absence of 'high level oversight' and accountability.

[3] Marian Sawer and Maria Maley, *Toxic Parliaments and What Can Be Done About Them*. Palgrave Macmillan, 2024, p. 2.

[4] Sawer and Maley, *Toxic Parliaments*, pp. 26-31.

[5] Sawer and Maley, *Toxic Parliaments*, ch. 5-6.

[6] Sawer and Maley, *Toxic Parliaments*, ch. 5-6.

In Canada, a self-regulatory regime has left the investigation of allegations of misconduct in the hands of party whips who unsurprisingly prioritise the interests of the party over the interests of those who allege misconduct has occurred. Canada is presented as a case where good intentions are simply not enough, and indeed, where the poor design of the standards architecture may even do more harm than good. In New Zealand, the external Francis review resulted in 85 recommendations instigating interesting new measures intended to encourage culture change, including a Parliamentary Culture Committee, Behavioural Statements for the parliamentary workplace and a Positive Workplace Culture awareness program. These initiatives, however, have been insufficient in reversing poor behaviour, particularly in the absence of a strong human resources framework.

The chapter concludes that mechanisms intended to redress sexual and sexist misconduct must be internal to the parliament, and tethered to power, culture and institutional norms. The Australian parliament, coming much later to these issues than its Westminster counterparts, has been able to heed these lessons and added its own: 'a single, authoritative cross-party body' is essential in providing 'leadership of reform'.[7]

Who might *Toxic Parliaments* appeal to? I can think of three groups. First, and perhaps most obviously, parliamentary practitioners: parliamentarians, political staffers, and parliamentary staff. This book provides these actors with tools for action and greater awareness of what works and what doesn't. A second group is of course academics. There is more work to be done in thinking through the elements of culture change we want to see in parliaments, and indeed, in influencing that change from both the inside and outside. Finally, civil society actors will find this book, with its rich data and narratives, very useful for their lobbying work. These groups, however, should not work in silos. For change to be meaningful, practitioners, academics and civil society actors need to collaborate and find strategies in which their work builds on, and extends, the gender sensitivity of parliament. Moreover, while the design of reforms is important, this book uncovers a new pressing need to monitor continuously the implementation of reforms.

[7] Sawer and Maley, *Toxic Parliaments*, p. 96.