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

Parliament's Resilience in a Changing World

Special Edition

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From the Editor

It is with great pleasure that I introduce this Special Edition of the *Australasian Parliamentary Review* entitled 'Parliament's Resilience in a Changing World', reflecting the title of the 2024 Australasian Study of Parliament Group's Conference in Wellington, New Zealand (Pāremata Aotearoa). This Edition contains a number of papers presented at the ASPG Conference, spanning topics including the psychological wellbeing of parliamentary staff, by Dr Amy Yong from the New Zealand Parliamentary Library, to 'turbo-charging' civics education, by Maria Mead from the Queensland Parliament's Education Team.

Contributors to this edition also explore the impact of technology on the work of parliaments, and the way parliaments interact with the outside world, including strategies for managing inquiries with thousands of submissions (by Stephen Fujiwara, Jessie Halligan and Kara McKee), helping parliamentarians to understand complex research (by Luke Buckmaster and Matthew Thomas), safeguarding parliamentarians from cyber 'threats from the fringe' (by Meredith Ross-James) and bridging the gap in institutional memory with artificial intelligence (by Caitlin Connally). Hong Thi Quang Tran from the Parliament of Victoria asks 'to what extent should parliament embrace remote participation in the digital age?' and Jessica Strout from the Parliament of Victoria invites us to consider 'what's at stake when parliamentary committee inquiries rely on voluntary executive cooperation?'. Leslie Gonye, former Deputy Clerk of the Legislative Assembly of NSW offers hope with an example of 'one member 2seizing an opportunity' and transforming parliamentary practice, and Matthew Johnson from the NSW Legislative Assembly makes the case for the wide use of 'informal evidence' in parliamentary committee inquiries.

This Special Edition also includes an erudite case analysis of the High Court's recent decision in *Attorney-General (Tas) v Casimaty,* where Professor Dr Gabrielle Appleby (UNSW) and Associate Professor Dr Ryan Goss (ANU) explore the implications of the decision for the relationship between parliamentary privilege and the courts in Australia. The legal analysis continues with a fascinating and original contribution from Senior Lecturer Dr Jacinta Dharmananda from the University of Western Australia entitled 'What Parliament *Didn't* Say: The Effect of Silence during Legislative Scrutiny on Statutory Interpretation.' We are also fortunate to include an insight from Dr David C Docherty and Brody Burr on the fall and potential resurgence of the Liberal Party in Canada. I express deep gratitude to all authors and reviewers involved in this publication and commend the contents to you.

Dr Sarah Moulds, Associate Professor in Law, UniSA, May 2025

Comment

The Elephant in the Room: The Liberal Party's Fall and Potential Resurgence in Canada

Dr David C Docherty

President and Vice-Chancellor at Brandon University.

Brody Burr

Brandon University

During Pierre Trudeau's 1969 visit with US President Nixon, Canada's then Prime Minister observed that

> *Living next to you is in some ways like sleeping next to an elephant. No matter how friendly and even tempered is the beast... one is affected by every twitch and grunt.*[1]

The words and actions of new (re) elected US President Donald Trump are much more than mere grunts. On and off again threats of tariffs and repeated references to Canada becoming America's 51st state have turned a once solid friendship and economic partnership into a dangerously frayed relationship. Fears of an economic annexation of our country are real.

However, the aggressive US stance has provided Canada with an opportunity to ditch the polarized political atmosphere that has poisoned our discourse for too long. Canada had joined the long list of nations where ideology is more important than shared national identity. The threat of our sovereignty as a nation has driven us back to our core values, namely patriotism. At the same time, it has reinvigorated a Liberal Party that was seemingly on its last legs.

The current governing Liberal party has held federal office in Canada since 2015. Prime Minister Justin Trudeau, son of Pierre Trudeau, had become a pariah and was subject to public scorn and attacks, both verbal and physical. At first a saviour during COVID, he was eventually derailed by vaccination deniers, frustrated Canadians, and vigorous opponents of the federal

[1] The Sunday Magazine. *CBC News online*. 'Sleeping With a Very Cranky Elephant: The History of Canada-U.S. Tensions'. 15 June 2018. Accessed at: https://www.cbc.ca/radio/sunday/the-sunday-edition-june-17-2018-1.4692469/sleeping-with-a-very-cranky-elephant-the-history-of-canada-u-s-tensions-1.4699017

carbon tax. Not even his January 2025 announcement to step down seemed enough to save his party.

Yet even before his successor was elected as the new Liberal Leader and sworn in as Prime Minister, The Liberal Party miraculously found itself neck and neck with the Opposition Conservative Party of Canada. How did this happen? The recent re-election of Donald Trump and his first few weeks in office have oddly revitalized the governing party that had seem destined to be reduced to third- or fourth-party status in the Commons. Trump's election has fundamentally altered the political landscape in Canada. What seemed like a landslide victory for the Conservative Party of Canada is no longer a certainty.[2]

The political machinations of the latter half of 2024 are in some ways unprecedented yet are also all too familiar. Many of them have happened before, just not at the same time. Two in particular deserve our attention, the internal revolt against the Prime Minister and Trudeau's decision to prorogue Parliament to avoid a motion of non-confidence.

In 2003 Prime Minister Jean Chretien was facing a revolt from his own party. After winning three majority governments in a row, the Prime Minister faced a formidable challenge from his Minister of Finance Paul Martin. Yet there were no internal mechanisms to force the Prime Minister to step down. Long gone are the days when a caucus chooses their leader. Being chosen by Liberal delegates in a leadership convention, the Prime Minister argued that only they could remove him as leader of the Liberal Party. The result was months of internal fighting and a divided party. Only after the threat of a leadership review in late 2003 did Jean Chretien cede to the writing on the wall and announced he was stepping down.[3]

The events of 2003 exposed a serious flaw in the ability to oust a sitting Prime Minister. Our Westminster parliamentary system of democracy requires a Prime Minister to hold the confidence of the House of Commons at all times. To not have the confidence of the House would handcuff the leader and their ability to see their policies through. The irony is that modern leadership candidates do not require the support of their caucus to become leader. Yet once they win the leadership of their party they require the confidence of their caucus and do not have to face the thousands of Canadians who helped them win their place at the head of their party.

[2] The Canadian Press. *Leger Poll: Carney as Leader would have Liberals tied with Conservatives.* CTV News. 11 February 2025. Accessed at: https://www.ctvnews.ca/politics/article/leger-poll-carney-as-leader-would-have-liberals-tied-with-conservatives/.

[3] Docherty, David C. 'Could the Rebels find a cause? House of Commons reform in the Chretien era.' *Review of Constitutional Studies,* 2004, Vol 9, Nos 1&2.

A decade earlier Conservative Member of Parliament (MP) Michael Chong introduced Bill C-586 or the *Reform Act* that looked to amend the *Canada Elections Act and the Parliament of Canada Act.*[4] The goal of the bill was to limit the powers of party leaders, and more importantly the Prime Minister. Chong's Bill addressed the frustrations of the MP's inability to represent their constituents when they conflicted with the party leadership. Within Bill C-586, there was specific focus on replacing a leader from caucus, and mechanisms within the Bill outlined a process for doing so. This included a secret ballot process for caucus to demonstrate confidence (or non-confidence) in their leader. Unfortunately, the Bill was watered down to get enough support to become an Act. This included allowing parties to 'opt out', which the Liberal Party has done. Thus, Justin Trudeau avoided the palace coup.

There was also precedence to prorogue Parliament to avoid a certain vote of non-confidence in a government as Justin Trudeau did earlier this year. In 2008, the Conservative Party of Canada, led by Stephan Harper won re-election with another minority government. The government's Speech from the Throne focused more on punishing the opposition parties than dealing with a major international economic collapse. The three opposition parties threatened not just a vote of non-confidence but also a coalition government of the Liberal and New Democratic parties with support from the sovereigntist Bloc Quebecois. The Prime Minister responded by asking Governor General Michaelle Jean to prorogue Parliament.[5]

This placed the Governor General in a no-win situation. No Governor General had ever refused a request to prorogue Parliament. Likewise, no Governor General had allowed a prorogation that would let a Prime Minister avoid a vote of non-confidence in the House of Commons. Any decision of the Governor General would set a far-reaching precedent.[6] When the Governor General acquiesced to the Prime Minister, it allowed him to both re-fashion a more appropriate Throne Speech and play on many Canadians fears of a coalition government supported by a separatist party. Harper's government held power and subsequently won a majority government in 2011.

As a result, Justin Trudeau had precedent on his side when he asked for a prorogation. Opposition parties cried foul, and two citizens challenged the decision via the courts, but the outrage that greeted Stephen Harper did not emerge to the same degree despite anger from

[4] *Reform Act.* Bill C-559, 41st Parliament, 2013.

[5] Heard, Andrew. 'The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?' Centre for Constitutional Studies; Discussion Paper #7, January 2009.

[6] Russell, Peter H., and Lorne Sossin. *Parliamentary Democracy in Crisis.* Toronto, ON: University of Toronto Press, 2009.

the right.[7] No doubt Trudeau's announced resignation has defused some of the controversy surrounding his survival tactic.[8]

In many ways, the Liberal fall from grace is not unusual in Canadian politics. Modern governments in Canada often have best before dates. Typically, the shelf life of a government is at best around ten years. Table One below illustrates the tenure of governments since Pierre Trudeau's first term in 1968.

Table 1: Tenure of Canadian Prime Ministers 1968-2025[9]

Prime Minister	Party	Elections won	Term as Prime Minister
Pierre Trudeau	Liberal	4	15 yrs, 5 months
Joe Clark	Progressive Conservative	1	273 days
John Turner	Liberal	0	79 days
Brian Mulroney	Progressive Conservative	2	8 yrs, 9 months
Kim Campbell	Progressive Conservative	0	132 days
Jean Chretien	Liberal	3	10 yrs, 1 month
Paul Martin	Liberal	1	2 yrs, 2 months
Stephan Harper	Conservative Party	3	9 yrs, 9 months
Justin Trudeau	Liberal Party	3	9 yrs, 4 months

We note that two of Canada's shortest serving Prime Ministers, Turner and Campbell, served during this time and can be regarded as interim Prime Ministers. Of the nine Prime Ministers listed, one won two elections, three won three times, and Pierre Trudeau won four elections, returning to office after being defeated by Joe Clark. Thus, when we examine the data, it is not surprising that Justin Trudeau's tenure is about as long as one could expect. We should not be surprised that his prospects to repeat his father's record would be challenging.

[7] Hamm, Amy. February 19, 2025. 'Courts Must Not Allow Trudeau to get away with his Self-Serving Prorogation'. *National Post.* Accessed from: https://nationalpost.com/opinion/courts-must-not-allow-trudeau-to-get-away-with-his-self-serving-prorogation.

[8] *In March 2025 the Courts rejected the Citizen challenge.

[9] Library of Parliament. *Prime Ministers of Canada*. Parliament of Canada. Accessed at: https://lop.parl.ca/sites/ParlInfo/default/en_CA/People/primeMinisters.

Justin Trudeau was elected Prime Minister in 2015. He appointed the first cabinet that featured gender equality.[10] He announced the end of partisan appointments to the Canadian Senate and appointed only 'independent' Senators, which also more closely matched the demographic profile of Canada.[11] On the other hand, Trudeau's pre-election commitment that the 2015 election would be the last one held using the single-member plurality vote was not kept. His re-election in 2019 (a minority government) was in part due to weak leadership in the Conservative Party of Canada.

As with many western leaders, the early months of COVID provided the opportunity for the Prime Minister to be seen as compassionate, decisive leader. Emergency relief was provided for those who lost their jobs, and university and college students benefitted from a student relief program.

As the pandemic continued, views of such measures as isolation, masking and eventually vaccines divided the country. A mass rally of truckers that originated in the west drove to Ottawa and for one month effectively shut down the city centre, impeding businesses and residents from functioning as normal. As the national debt mounted, the Liberal government was seen as unable to handle the national crisis and much of the blame fell on Trudeau, particularly in the west.[12]

Justin Trudeau's introduction of a carbon tax was almost reminiscent of his father's National Energy Program, though designed to tackle climate change and not dependence on importing oil. The introduction of both policies have seen the key involvement of ministers from Quebec. Pierre Trudeau looked to nationalize the energy sector with Quebec-based energy minister, Marc Lalone, and Justin Trudeau's environment minister of climate change, Steven Guilbeault who also hails from Quebec, was critical in helping carry out the carbon tax policy.[13] Secondly, the disproportionate effect that both of these policies have had on the western provinces has left voters within the region with similar feelings of frustration. [14] These two approaches can be linked to the fuelling of sentiments of western alienation and are a potential reason why

[10] The Canadian Press. 'Trudeau's 'Because it's 2015' retort Draws International Attention'. *The Globe and Mail.* . 5 November 2015. https://www.theglobeandmail.com/news/politics/trudeaus-because-its-2015-retort-draws-international-cheers/article27119856/.

[11]Independent Senators Group, *Independent Senators Group*. Accessed at: https://www.isgsenate.ca/.

[12] Robyn Urback, 'Infection Point'.*Globe and Mail,* Opinion, 8 March 2025 p. 1 & 5.

[13] Lydia Miljan, 'Trudeau's Emissions Cap Reminds Oil-Producing Provinces of his Father's Hated National Energy Program'. *The Globe and Mail,* 2021.

[14] See Miljan, 'Trudeau's Emissions Cap'.

Conservatives have had a strong voting base within the western provinces due to the backlash received from the National Energy Board crisis, and the current ongoing Carbon Tax policy.

Pressure for Trudeau to step down was present since early 2023. The centre left New Democratic Party supported the Liberals in exchange for the introduction of a national dental and drug plans but made it clear that they were ready to join the Conservatives and bring the government down at any time.

Trudeau resisted attempts to oust him, for much of the year. Perhaps he was cognizant that the success rate of leaders replacing unpopular Prime Ministers was not great. Indeed, Kim Campbell and John Turner lasted only briefly, and Paul Martin won one minority government prior to being defeated. He announced his plans to step down following the conclusion of a 9 March 2025 leadership contest to select his successor.

The 2025 election will soon follow the leadership vote. It will see newly elected Liberal Leader Mark Carney (former Head of the Bank of Canada) face off against Conservative Leader Pierre Poilievre, a twenty-year veteran of the House of Commons. Until Donald Trumps threatened tariffs and annexation, Poilievre had been running an effective campaign. But the election focus has shifted from an election on the carbon tax to the who can best stand up to Donald Trump. The altered focus has changed the tune of many of the political parties campaigning agendas, particularly the Conservatives, shifting the focus from 'axing the tax' to 'Canada First'. This change in strategy can be seen across all party platforms, with the carbon tax election campaign seeming to be pushed into the background.

Given their weak prospects prior to the Trump election, it is not surprising that Liberal Party is attempting to position and equate Poilievre with Trump. The Liberal Party's campaign ads are already using Poilievre's 'Canada is broken' rhetoric against him to draw comparisons to Trumps divisive rhetoric framing Poilievre as a 'MAGA guy' who won't stand up for Canadians.[15] Whether this works or not, remains to be seen. The new Prime Minister may join the ranks of John Turner and Kim Campbell, short term PM's who ushered out an era of political dominance. At the Conservative's plans for a majority government are now under real threat, with a hung parliament a real possibility. The twitches and grunts of the elephant has awakened a new political reality in Canada, and likely will continue no matter who takes charge of the true north strong and free.

[15] Liberal Party of Canada. 'Liberals Launch New Ad', 2025. Accessed at: https://liberal.ca/liberals-launch-new-ad/ .

Articles

Parliamentary Privilege and the Courts in *Attorney-General (Tas) v Casimaty*: A case of grand theories and lost opportunities*

Gabrielle Appleby

Professor, UNSW Law & Justice, Constitutional consultant to the Clerk of the House of Representatives, Director, Centre of Public Integrity.

Ryan Goss[1]

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*Peer reviewed article

INTRODUCTION

For both reasons of opportunity and constitutional principle, the High Court of Australia very rarely contemplates questions of parliamentary privilege.[2] In the 2024 case of *Attorney-General (Tas) v Casimaty*,[3] the Court considered the statutory construction of the Tasmanian *Public Works Committee Act 1914*, and specifically whether the conditions precedent it created for public works expenditure were politically or judicially enforceable. While the case

[1] We are indebted to the Clerk of the Commonwealth House of Representatives, the New South Wales Legislative Council and the Gilbert + Tobin Centre of Public Law for opportunities to discuss this case, and specifically to Lael Weiss, Fiona Roughley, Stephen Frappell, and David Blunt for drawing our attention to various aspects of this case. Of course, all errors and mistakes remain our own.

[2] See e.g. discussion of this relationship in Gabrielle Appleby, 'The 2018 Australian High Court Constitutional Term: Placing the Court in its Inter-Institutional Context'. *University of New South Wales Law Journal* (2021) pp. 267, 291; David Harper, 'Parliament and the Judiciary: Judicial Independence and the Nature of the Relationship Between Parliament and the Judiciary' (2015) 30(2) Australasian Parliamentary Review 12; Rosemary Laing, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?' (2015) 30(2) *Australasian Parliamentary Review* 58*;* Wayne Martin, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' (2015) 30(2) *Australasian Parliamentary Review* 80; Neil Laurie, 'Parliament, Executive and the Courts: Laws of Separation, Conventions of Mutual Respect and Outstanding Flashpoints' (2015) 30(2) *Australasian Parliamentary Review* 132-135. In recent years, the High Court has largely avoided saying anything substantive about parliamentary privilege; See e.g., *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57 and *CCC v Carne* [2023] HCA 28.

[3] *Attorney-General (Tas) v Casimaty* [2024] HCA 31.

presented the High Court with an opportunity to opine on the intersection between the exclusive cognisance of parliament in the realm of ministerial responsibility and judicial review, it did not take up that opportunity.

In this article, we will briefly explain the case and the judgments that were issued by the Court, before making two observations about what the case reveals in relation to the High Court judges' constitutional vision(s), and conception of the role of the Court, particularly in its relationship to the Parliament. There are, as we explain, important differences in the approaches between the six-judge joint judgment (Gageler CJ, Gordon, Steward, Gleeson, Jagot, and Beech-Jones J), and that of Edelman J. The first observation we make relates to the joint judgment's emphasis on statutory construction, and what might be seen as an attempt to exercise judicial *prudence*, or *avoidance*, in relation to the statutory codification of matters within parliamentary privilege and exclusive cognisance. An alternative way of interpreting this is as being a *deferential* approach, which, while it too is a minimalist approach, reflects a grander theory of the appropriate constitutional relationship between the branches. Whatever the explanation – prudence or deference – the approach provides a clear signal to the legislature in relation to the codification of matters such as ministerial responsibility, and that this will not necessarily require a shift from political to legal enforceability. Within this, however, we also observe the judges are comfortable making judicial statements in relation to non-justiciable, parliamentary matters (in particular, ministerial responsibility), where there is no question of the Court enforcing them.

The second observation that we make draws on the different emphasis between the judgments. The joint judgment focuses on accountability through ministerial responsibility, in contrast to Edelman J on accountability through judicial review and the rule of law. This, we observe, reflects distinctly different visions of the Australian constitutional system, the balance between political and legal constitutionalism, and the role of the Court.

In the final part of the article, we make a point in relation to procedure in cases that invoke parliamentary privilege, noting the involvement of the Attorney-General from Tasmania (as a party) and the Attorneys-General of the Commonwealth, South Australia and the Australian Capital Territory (as intervenors), but the lack of representation for parliament as a separate entity before the Court. While this might not have given rise to any tension in this case, we reflect on the potential importance of independent parliamentary representation in cases involving the inter-institutional relationship between the Executive and the Legislature.

BACKGROUND

Attorney-General (Tas) v Casimaty concerned a proposed public work to construct a new highway intersection at the road junction that leads into and out of Hobart Airport. In 2017, as is required by section 16(1) of the *Public Works Committee Act 1914* (Tas), the proposal was

referred to and reported on by a Joint Committee of Members of the Legislative Council and House of Assembly called the Parliamentary Standing Committee on Public Works.

As a fundamental principle of responsible government, in theory, parliament should oversee the expenditure of public moneys.[4] Large capital works funded by government, that is, public infrastructure projects, public-private partnerships, public works, involve the large expenditure of public moneys. History tells us that government can use public works to seek political gain. They can be used to 'pork barrel' money into electorates where there is political gain. At the same time, public works generally involve a level of scale and complexity that it can be hard for the Houses to evaluate them. This combination of principle, history and pragmatism gives rise to the need for specialised, dedicated accountability mechanisms to reinforce parliament's job in overseeing this type of expenditure. The role of public works committees is to impose a discipline and transparency in relation to the purpose and necessity of such works, their costs and benefits, and the risk and possible alternatives. One of the differentiating characteristics of public works committees – in comparison to most other oversight parliamentary committees and mechanisms such as the Auditor-General – is that public works committee scrutinise projects and expenditure *before* they occur. It is this feature that was in issue in the case of *Casimaty*.

At this stage, it is useful to sketch three of the key provisions of the Tasmanian *Public Works Committee Act*, sections 15, 16 and 17:

> *Section 15 sets out the 'Functions' of the Public Works Committee, including that 'the Committee shall…consider and report upon every public work that is proposed to be undertaken by a general government sector body…' where a monetary threshold has been reached.[5] The Public Works Committee's function 'is to 'consider and report' upon the relevant works'; its role is to 'inform or satisfy the Parliament 'as to the expedience' of carrying out the work' only.[6]*

Section 16 is headed 'Conditions precedent to commencing public works'.[7] In its current form, the High Court held, this provision 'stipulates [three] conditions precedent' namely:

[4] See e.g. discussion in *Williams v Commonwealth* (2012) 248 CLR 156, 232-233 (Gummow and Bell JJ); 351-352 (Crennan J)

[5] *Public Works Committee Act 1914* (Tas) s 15(1); See further *Casimaty* [2024] HCA 31, [20].

[6] *Public Works Committee Act 1914* (Tas) s 15; See further *Casimaty* [2024] HCA 31, [20].

[7] *Public Works Committee Act 1914* (Tas) s 16; See further *Casimaty* [2024] HCA 31, [22].

> *that the proposed work has been referred to the Public Works Committee by the Governor;*[8]
>
> *that the proposed work has been reported on to the House of Assembly by the Public Works Committee;*[9] *and*
>
> *that the Public Works Committee has recommended in the report that the proposed work be carried out.*[10]

The Court emphasised that 'in common with its predecessors, s 16 of the Act has been consistently described in headings and marginal notes not as creating an offence or as imposing a prohibition against the carrying out of an unauthorised public work but as setting out 'conditions precedent to commencing public works'.[11]

Section 17 then provides for either house of parliament 'to direct that a public work the estimated cost of which does not exceed the relevant monetary threshold 'shall be referred to the [Public Works] Committee, in which case all the powers and provisions of [the] Act shall be applicable to such work'.[12]

Returning to 2017 and the Hobart Airport intersection: after the Committee reported as was required by these sections, the Government engaged a private company, Hazell Bros Group Pty Ltd, to undertake the works. Mr Casimaty claimed to have an interest in land that would have been affected by the works. In 2020, he brought a writ against Hazell Bros seeking a declaration that the construction was a public work under the *Tasmanian Public Works Committee Act* and an injunction restraining Hazell Bros from commencing the construction until it had been referred to and reported upon by the Committee. In relation to the 2017 report of the Public Works Committee, Mr Casimaty claimed that the road work was different from that which Hazell Bros was about to commence in significant respects. These included the significant increase in price from $38.08-39.99 million in the 2017 proposal to $46.4 million; and that the works themselves did not have the connections that had initially been in the plan and there were two roundabouts in the new plan.

[8] Under *Public Works Committee Act 1914* (Tas) s 16(2)

[9] Under *Public Works Committee Act 1914* (Tas) s 16(4).

[10] See *Attorney-General (Tas) v Casimaty* [2024] HCA 31, [27] (herein referred to as '*Casimaty'*). Under *Public Works Committee Act 1914* (Tas) ss 16(4), (5).

[11] *Casimaty* [30].

[12] *Public Works Committee Act 1914* (Tas) s17; *Casimaty* [2024] HCA 31, [28].

The Tasmanian Attorney-General was joined as a defendant and took over the defence of the case. The Attorney-General sought that the claim be struck out on two alternative grounds:

> *The statement of claim failed to disclose a cause of action in that there was 'no justiciable issue before the Court' (that is, an issue that the Court was able to resolve); or*
>
> *Adjudication by the Supreme Court of issues of fact that were raised in the pleadings would 'offend the principle that parliamentary proceedings are absolutely privileged.'*[13]

In the Tasmanian Supreme Court, the judges divided as to how to resolve these questions. In February 2022, Tasmanian Chief Justice Blow handed down judgment at first instance, striking out an amended statement of claim.[14] Half of Blow CJ's reasons were concerned with parliamentary privilege, and his conclusion was that '[a]djudicating upon [the relevant] matters would contravene Article 9 of the Bill of Rights and is therefore not permitted'.[15] The order was that 'the amended statement of claim be struck out and' the action be dismissed.[16]

In May 2023, almost a year after hearing of oral argument, the Full Court of the Supreme Court of Tasmania allowed Mr Casimaty's appeal, setting aside Blow CJ's orders, and dismissing an interlocutory application.[17] The reasons of Brett J, with whom Pearce J agreed, were primarily concerned with justiciability and parliamentary privilege.[18] Brett J found that the legislation created 'a public obligation enforceable under the general law.' His Honour accepted that the Court would have to compare the facts of the works considered by the Committee in 2017 with the works proposed in 2020, but found that it would not breach privilege.

The matter was appealed to the High Court, and the Attorneys-General for the Commonwealth, South Australia and the Australian Capital Territory sought leave to intervene (this not being a matter under the Constitution it did not give rise to a right to intervene under s 78A of the *Judiciary Act 1903* (Cth)). The points on appeal were similar to the points raised by the Attorney-General in the initial application to dismiss the case:

> *The Supreme Court was wrong to find that s 16(1) created a public obligation enforceable in the courts.*

[13] *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9, [3].

[14] *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9, [33].

[15] *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9, [17]-[33].

[16] *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9, [33].

[17] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2.

[18] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 [1]; [7]-[17]; [24]-[34].

The adjudication of the case would contravene privilege of the proceedings in the Parliament.

The Tasmanian Attorney-General was supported by the South Australia and the ACT on both grounds; the Commonwealth contested the second ground.

In the course of the litigation, the works for the Hobart Airport interchange had continued. Indeed, they were completed in late 2022, well before the High Court heard and decided the appeal.[19] The High Court noted that it was not suggested that this rendered the appeal moot,[20] but in this context there was in oral argument also sign of a little confusion about the relief sought by Mr Casimaty and opposed by the State.

THE HIGH COURT DECISION

In September 2024, the High Court allowed the Attorney-General's appeal, set aside the Full Court's orders, and dismissed the appeal against Blow CJ's orders at first instance.[21] There were two judgments. The first was a joint opinion between Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ. Through an exercise of statutory interpretation, the joint judgment found that there was no judicially enforceable obligation created under s 16(1), and so did not consider the privilege ground. Edelman J issued a concurring separate opinion, coming to the same outcome through substantially different reasons, which included a more extensive discussion of parliamentary privilege.

Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ

Notwithstanding the emphasis of the courts below, the joint judgment reached its conclusion without any detailed discussion of parliamentary privilege. The judges noted that 'In the result, it is unnecessary to address any of the competing arguments on parliamentary privilege.'[22] There was also not detailed consideration in the judgment of justiciability 'as a point of principle'.[23] Instead the Court said that the proposition, that compliance with section 16 'does not give rise to a justiciable controversy', is simply a '*consequence* of reaching the conclusion

[19] Federal Infrastructure, Transport, Regional Development and Local Government Minister 'Media Release: Hobart Airport Interchange Completed' (19 December 2022). Available at: https://minister.infrastructure.gov.au/brown/media-release/hobart-airport-interchange-completed.

[20] *Casimaty* [2024] HCA 31, [8]; [47].

[21] *Casimaty* [43]; [105].

[22] *Casimaty* [11].

[23] *Casimaty* [31].

that s 16(1) of the Act does not on its proper construction create an obligation enforceable by a court'.[24] Thus the key 'underlying question' was said to be 'the proper construction of s 16(1)'.[25]

The joint judgment's reasoning on the statutory interpretation point was heavily influenced by an analysis of the original intentions of the Act. Their Honours traced it back to the *Public Works Act 1888* (NSW) (the 1888 NSW Act), introduced by Sir Henry Parkes, and described the original intentions of that New South Wales precedent:

> *to strengthen parliamentary oversight of executive expenditure on public works by providing a standing parliamentary mechanism for investigating and advising on Ministerial proposals for expenditure on public works. Through the operation of a public works committee, Parkes' Public Works Act of 1888 was 'to preserve the power of [the] Parliament as unimpaired as possible over the whole province of the public expenditure … and at the same time to throw around the expenditure of the public revenues the strongest security [Parkes] could invent to prevent the extravagance or misdirection in the expenditure of public money.*[26]

The substantial scheme and provisions of the 1888 NSW Act were picked up in Victoria, the Commonwealth under the *Commonwealth Public Works Committee Act 1913* (Cth), and in Tasmanian in 1915. The *Commonwealth Public Works Committee Act 1913* (Cth) was introduced by Prime Minister Joseph Cook, who stated the Act 'preserves the power of [the] Parliament over the whole province of public expenditure' and emphasised that the legislative scheme was for Ministerial responsibility 'at every stage.'[27] The introduction of the 1915 Tasmanian Act was explained as intending 'to ensure that members should have needful information on public works proposal'.[28]

The Tasmanian Act creates the Committee and its functions and powers. The joint judgment noted the history of and features of what the judges referred to as the key provisions – being sections 15, 16 and 17. The joint judgment noted the headings of sections15-17 as not forming part of the Act, but as part of the context within which they must be construed, when looking for the legislative purpose that informs meaning. The headings were, the judgment noted, similar to the marginal notes to the relevant sections of the Commonwealth, NSW and Victorian legislation, and the original NSW legislation.

[24] *Casimaty* [31].

[25] *Casimaty* [31].

[26] *Casimaty* [13]

[27] *Casimaty* [14]

[28] *Casimaty* [15].

The joint judgment concluded its historical overview with the following passage:

> *in common with its predecessors, s 16 of the Act has been consistently described in headings and marginal notes not as creating an offence or as imposing a prohibition against the carrying out of an unauthorised public work but as setting out 'conditions precedent to commencing public works.*[29]

Turning then to the question of construction, the joint judgment accepted the argument that section16(1) was non-justiciable, not because such a matter could never be justiciable as a matter of principle, but as a matter of statutory construction of section 16(1), that it was not intended, and did not, create an obligation enforceable by a court. A different statute could have a different effect. The focus was on what the statute intended to be the consequence of non-compliance with the statutory condition. Drawing on cases such as *Project Blue Sky v ABC*, the judgment noted various consequences that might follow from non-compliance with a statutory condition:

> *the statutory consequence of non-compliance with a statutory condition of an exercise of power is as much a question of statutory construction as is the content of the condition. On the proper construction of a statute prescribing such a condition, non-compliance with the condition might result in an exercise of power that is invalid, might result in an exercise of power that is not invalid but that is nevertheless an unlawful act capable of being restrained by injunction, or might give rise only to political, administrative or other non-legal consequences.*[30]

Turning, then, to the power to commence public works, and the accountability for the statutory conditions on the exercise of that power. The joint judgment noted 'the exercise of power is in every case [regardless of its statutory or executive source] one for which, in accordance with the conventions of responsible government, Ministers of the Crown are politically accountable to the House of Assembly and to the Legislative Council.'[31] Quoting Egan v Willis, the judgment noted that under responsible government is where 'the Executive's primary responsibility in its prosecution of government is owed to Parliament.'[32] This is achieved through scrutiny, and maintaining the support of the lower house, and censure. The joint judgment said:

[29] *Casimaty* [30].

[30] *Casimaty* [32], citing *Project Blue Sky v ABC* (1998) 194 CLR 355.

[31] *Casimaty* [34].

[32] *Casimaty* [35].

> *The design of the Act was and remains, like that of its forebears, not to displace that mechanism of political accountability of the Executive Government to the Parliament but to strengthen it.*[33]

We return to the Court's treatment of political accountability and responsible government, below.

Noting the features of sections 15-17, the joint judgment then explained that every aspect of the process that was created remained controlled by the Houses of Parliament. Public works can be withdrawn from the scope of section 15(1) by a resolution adopted by each House, works not within scope can be referred to the Committee by resolution of the House under section 17. Further, the steps in subsections 16(1) and (5) are 'wholly intramural'.[34] That is, 'they are activities undertaken exclusively by Members of the Parliament'.[35]

The joint judgment concluded that if the intention of the Act was to strengthen political accountability, the statutory consequence of non-compliance:

> *is best seen to lie exclusively within the province of that mechanism of political accountability. The consequence of non-compliance is political, such that compliance is to be enforceable by the House of Assembly and the Legislative Council, not legal, such that compliance is to be enforceable by a court.*[36]

The joint judgment notes that the Houses can enforce compliance through public scrutiny, debate and censure, but also in through their ability to decline to authorise expenditure on any public work by refusing to enact the appropriation required to undertake the public work.[37]

In the final part of the joint judgment, the already-reached 'conclusion' is then 'buttressed by two further considerations'. These buttresses included 'the 'traditional view' that a court 'does not interfere' in 'the intra-mural activities of the Parliament''.[38] This fleeting reference is curious. It would appear, then, that core constitutional ideas *have* shaped, or at least, are perceived as relevant to, the context in which the statutory construction analysis has occurred. However, the joint judgment is at pains to state that previously reached conclusion on

[33] *Casimaty* [37].

[34] *Casimaty* [39].

[35] *Casimaty* [39].

[36] *Casimaty* [40].

[37] *Casimaty* [41].

[38] *Casimaty* [42], referring to *Western Australia v The Commonwealth* (1995) 183 CLR 373, 482; *Cormack v Cope* (1974) 131 CLR 432, 454; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81, 184; and *Clayton v Heffron* (1960) 105 CLR 214, 234-235.

statutory construction was already established and merely *buttressed* by this 'traditional view'. We return to this approach, in the context of the broader judgment, below.

The conclusion reached in the joint judgement was also 'buttressed' by a second consideration, explained as:

> *The more specific consideration, which is well illustrated by the circumstances of the present case, is the inconvenience to private contractors engaged by Government departments or State authorities to carry out public works, and to the public for whose benefit those works are carried out, of the carrying out of those works being subjected to legal challenge in the Supreme Court at the instigation of any and all those interests might be sufficiently affected to have standing to seek curial relief.* [39]

This statement is more extraordinary. It is unconnected to the questions of justiciability and parliamentary privilege on which the case was argued. The state's contracting out of public works, that is, private contracting being used as a reason (or at least a 'buttress') against enforceable legal obligations. This seems a perverse consequence of contracting out, and one that is antithetical to the rule of law.[40] Further, the idea that the public would benefit from the works being carried out takes only one view of the public's interest in these matters. Another view is that the public interest is served in having enforceable conditions where there is significant public money involved.[41]

Edelman J

Edelman J described the arguments of the Tasmanian Attorney-General as connected 'the centuries-old puzzle of the extent of the exclusive cognisance of Parliament.'[42] He connected the two questions posed, explaining the Attorney-General's first ground as a claim that any adjudication of a breach of section 16(1) is within the broader exclusive cognisance of the Tasmanian Parliament. The first ground therefore subsumed the second, in that it was a claim that breach of section 16(1) is beyond the power of a court to adjudicate,[43] but Edelman J found

[39] *Casimaty* [42].

[40] See e.g Janina Boughey and Joe Tomlinson, 'Government Outsourcing in the Modern Administrative State', *Public Law: the constitutional and administrative law of the Commonwealth*. (2023), p.187.

[41] On the importance of oversight of the expenditure of 'public monies', see the judgments in *Williams v Commonwealth* (2012) 248 CLR 156 and *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

[42] *Casimaty* [48]

[43] *Casimaty* [49].

it necessary to consider the second ground to determine the scopes of competence of the courts and Parliament.

Importantly, Edelman J started from a wholly different premise to the joint judgment. He commenced with the rule of law and the constitutional guarantees of judicial review of executive action established in *Kirk* (for the States).[44] He said:

> *It is unusual for an alleged breach of a duty imposed by State legislation upon an Executive body to be a matter that is wholly excluded from the adjudicative authority of the Supreme Court of that State.*[45]

Nonetheless, he accepted there are instances 'with powerful justifications and strong historical antecedents' where courts do not assert adjudicative authority, including exclusive cognisance of the Parliament as partly captured in Article 9 of the Bill of Rights.[46] Edelman J described the 'general constitutional principle' in Article 9 of the Bill of Rights, and a partly overlapping 'wider principle of exclusive cognisance'.[47]

For Edelman J, the ultimate question of justiciability was, in direct contrast to the joint judgment, 'not merely a matter of statutory interpretation'.[48] It was, rather, one of 'general constitutional principle'. He noted in this respect that in the United Kingdom and Canada there has been substantial inroads into the scope of *exclusive cognisance*,[49] with those jurisdictions relying on principled rule of law related reasons.

Edelman J posed three 'anterior' questions to determine whether the dispute concerning s 16(1) of the *Public Works Committee Act* falls within the exclusive cognisance of Parliament:

1. *Who owes the duty that is imposed by s 16(1) of the PWC Act? Is it the executive or all persons?*
2. *What is the content of the duty? To what extent does it concern questioning matters involving the internal proceedings of Parliament with the effect that judicial adjudication would infringe Article 9 of the Bill of Rights?*

[44] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[45] *Casimaty* [50]

[46] *Casimaty* [51]

[47] *Casimaty* [67].

[48] *Casimaty* [100].

[49] *Casimaty* [101], citing *R v Chaytor* [2011] 1 AC 684, 716; *R (Miller) v Prime Minister* [2020] AC 373, 411; *Canada (Attorney General) v Power* [2024] SCC 26.

3. *To whom is the duty owed? Is it to Parliament or the public generally?*[50]

Justice Edelman found that the duty is owed by the Executive Government (even though government sector bodies will usually contract out public works to private bodies). In relation to the content of the duty, he accepted that the 'conditions precedent' in section 16(1) do not provide *authority* to undertake the public work, and do not therefore go to power to undertake the actions. Rather, they refer to obligations that must be undertaken prior – but that do not *invalidate* the exercise of the power. This is, in many ways, similar to the conclusion of the majority, but it was not sufficient for Edelman J to resolve the question.

Justice Edelman then included an in-depth discussion of the scope of Article 9, and case law from Canada, New Zealand and the UK as to the meaning of the protections of Article 9. His Honour considered a number of ways of distinguishing between matters that *are* protected by Article 9, and those that are not, such as the distinction between relying on proceedings for the mere fact of their occurrence as against their truth. He looked at these distinctions and found them unhelpful. Rather, in his discussion, Edelman J preferred a *functional and pragmatic* approach to determining when Article 9 is breached, based on that which has been adopted in other jurisdictions:

> *… Article 9 may reflect the principle which determines the limit of common law powers of the Houses of Parliament, being those powers that 'are necessary to the existence of such as body, and the proper exercise of the functions which it is intended to executive.'*[51]

He noted, however, that it is not an absolute privilege, and it must be balanced against allowing some critical comment. Whether Article 9 is breached should be approached functionally and pragmatically:

> *The functional and pragmatic approach to balancing these competing considerations invites courts to ask whether consideration of, or admission of evidence of, parliamentary proceedings could give rise to a real or substantial prospect of a chilling effect upon the functioning of Parliament and its Members.*[52]

Applying this test to s 16(1) of the *Public Works Committee Act* and reflecting the inchoate nature of the proceedings in *Casimaty*, Edelman J noted it was not possible to determine conclusively whether judicial adjudication of section 16(1) questions would infringe Article 9.

[50] *Casimaty* [52].

[51] *Casimaty* [79].

[52] *Casimaty* [81] (emphasis added).

Much would turn on the nature of the breach of section 16(1) alleged, and the type of submissions that are made with respect to it.[53] This means, for instance if Mr Casimaty's case was just that there was a failure of strict correspondence between what the Committee considered and the works undertaken, judicial adjudication of this would not likely be a breach of Article 9. However, if Mr Casimaty's case was that there was not substantial consideration of the works and this rested on the intentions of the committee members, judicial adjudication may amount to a breach of Article 9.

Ultimately, for Edelman J, it was sufficient for the appeal that judicial adjudication of a breach of section 16(1) *could* engage Article 9.

In relation to his third question, Edelman J referred to the statutory history of the *Public Works Committee Act* that was so heavily relied on by the joint judgment. Drawing on this background, he said 'there are importance aspects of this statutory scheme that point strongly to the duty in section 16(1) being owed exclusively to Parliament.'[54] These included that the purpose of the scheme faces inwards – to ensure control by Parliament or the Committee of public works, and informing the Parliament; the obligation applies only to government sector bodies; the duty is closely related to the processes or Parliament; and there are no express sanctions for breach of section 16(1).[55]

Ultimately Edelman J accepted, given the answers to the three questions he posed, and in relation to a number of high principles – the interests of comity, mutual restraint, mutuality of respect and separation of powers – this case was one with the strongest justification for falling within exclusive cognisance, and therefore was non-justiciable.

FIRST OBSERVATION: JUDICIAL PRUDENCE OR JUDICIAL DEFERENCE?

One way to interpret the difference between the joint judgment and Edelman J is that the joint judgment's emphasis on statutory construction is based on an exercise of judicial prudence or avoidance, or perhaps even deference, in relation to the statutory codification of matters that might be seen as within parliamentary privilege and exclusive cognisance. Here, we break this observation into three parts.

The first is to consider whether the joint judgment is simply an example of judicial prudence/avoidance, or what has been called the *prudential approach,* where the Court avoids

[53] *Casimaty* [32].

[54] *Casimaty* [94]

[55] *Casimaty* [95].

questions of constitutional principle where the immediate case before it might be resolved through other methods, including statutory construction. The High Court's adoption of the prudential approach has recently attracted some commentary.[56] Tristan Taylor noted Justice Leeming's example in *Lazarus v ICAC*:

> *In a case such as this, the first step is to construe the statute: … If, putting to one side questions of validity, the [Act] would not apply…, then the analysis would cease, and the court would not reach the constitutional questions.*[57]

The Supreme Court of Canada's 2018 decision in *Changon v SFPQ*[58] provides further insight into when such an approach might be taken. That decision touched on privilege. In a concurrence, Rowe J articulated a concern that might plausibly explain the approach of the joint judgment in *Casimaty*. While the context and the provincial legislation was quite different, Rowe J said:

> *In my analysis, I look to [the provincial legislation] and find there the basis to resolve the appeal. I do not address the extent of parliamentary privilege; this is deliberate. In my view, one should have regard to constitutional questions only when necessary. Better to decide matters, where one properly can, by reference to 'the ordinary law'. Parliamentary privilege, derived from centuries of conflict and diverse experience, should be circumscribed with great caution and after careful reflection…*[59]

The joint judgment in *Casimaty* does not explicitly invoke the prudential approach, but its focus on statutory interpretation certainly resonates with it. One way to interpret the joint judgment, therefore, is as one of *unarticulated prudence*. Such an approach could be understood as institutionally neutral with respect to the Parliament.

[56] Tristan Taylor, 'The High Court's prudential approach to constitutional adjudication: when is it necessary to resolve a constitutional question?' *UNSWLJ 41(1).* (2024), pp. 211, 212; J Tjandra, 'The Prudential Approach to Constitutional Adjudication' *Public Law Review 35(1)* (2024). Available at: https://ssrn.com/abstract=4487533; Lael Weis, 'Constitutionally Conforming Interpretation in Australia' in Matthias Klatt (ed) *Constitutionally Conforming Interpretation: Comparative Perspectives* (Hart 2022, Vol 1.

[57] *Lazarus v ICAC* [2017] NSWCA 37.

[58] [2018] 2 SCR 687.

[59] [2018] 2 SCR 687, 725-726 (emphasis added).

The prudential approach has many resonances with, but different objectives, from a *deferential* approach.[60] Our second point then is to consider whether the inter-institutional dynamic at play in the joint judgment is understood as a *deferential* approach. This is again, unarticulated, which is perhaps unsurprising given the High Court's avowed rejection of the relevance of such an approach in Australia.[61] This approach is one that is respectful of Parliament's decision to codify one element of the practice of responsible government. Respecting Parliament's decision in this way means declining to understand the statute as an invitation to the courts to intervene, and declining to make the practice of responsible government judicially enforceable.

Casimaty certainly has an important inter-institutional dynamic.[62] It is illuminating and instructive for legislatures in terms of when the Court will involve itself in areas traditionally within the exclusive cognisance of the Parliament, even where they have been incorporated into a legislative scheme. Parliamentary reluctance to clarify matters that have traditionally been ones of practice and convention has sometimes been driven by fear that this might invite the courts into adjudication of what were previously intra-mural disputes. *Casimaty* demonstrates that, where carefully drafted and if the intention to reinforce and strengthen political accountability, there is not necessarily the danger of introducing judicial accountability. This is part of the inter-institutional impact of the High Court's jurisprudence, that is, the importance of understanding what the High Court says on how it impacts and shapes the actions of the other branches of government.

The third point we wish to make about approach – whether it is driven by prudence or deference – is to also note how comfortable the joint judges are in *discussing* ministerial responsibility and the parliamentary conventions and practice that relates to it, in the context where there is no judicial *enforceability.*[63] The joint judgment refers to and emphasises the nature of responsible government. They draw heavily on and quote lengthy passages from *Egan v Willis* including, for one abbreviated example:

> *A system of responsible government' 'has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'.'*[64]

[60] On deference in Australian constitutional law, see*: Murray Wesson, 'McCloy, Proportionality and the Question of Deference' , Blog Post, AUSPUBLAW (3 March 2016). Available at:* https://auspublaw.org/blog/2016/3/mccloy-proportionality-and-the-question-of-deference.

[61] See further discussion of the Australian position in ibid.

[62] Appleby, 'The 2018 Australian High Court Constitutional Term'..

[63] We are indebted to Lael Weis in relation to this distinction.

[64] The explanation in *Egan v Willis* relevantly continued: [39]

The joint judgment then quoted Isaacs J in *Horne v Barber*, decided in 1920, as stating that State MPs owe 'high public duties' including:

> *… watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure ... in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.*[65]

This approach, to provide extensive judicial explanation, indeed, constitutionally grounded reasoning, of the constitutional conventions around ministerial responsibility, might sit at odds with the joint judgment's earlier insistence that it was simply undertaking statutory construction. The joint judgment is engaging in this constitutional analysis for the purposes of *informing* the statutory construction. Judicial discussion of constitutional convention and ministerial accountability is not occurring in the context of any judicial *enforceability* of these conventions. Rather, they are judicial observations regarding the political operation of the conventions of ministerial accountability and responsible government; and judicial observations that are then used to inform an approach that limits judicial or legal enforceability.

POLITICAL AND LEGAL CONSTITUTIONALISM

The second observation we make in relation to the two approaches apparent in the judgments draws out their different emphases. The joint judgment focuses on accountability through ministerial responsibility, using this to support the statutory construction conclusion the judges draw.[66] In contrast, Edelman J starts his judgment with accountability through judicial review and his emphasis on the rule of law, although then accepts that there are exceptions to this, including in relation to parliamentary privilege, but sees these as necessarily narrowly drawn.[67]

'One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions.'

[65] [2024] HCA 31, [36], citing *Horne v Barber* (1920) 27 CLR 494, 500.

[66] See eg [2024] HCA 31, [31]-[41].

[67] See eg[2024] HCA 31, [50], [67]-[83].

These two starting points reflect distinctly different visions of the Australian constitutional system, the balance between political and legal constitutionalism, and the role of the Court.

The joint judgment's position is illuminated when placed in the context of the constitutional thesis previously exposited by now Chief Justice Gageler. He has articulated elsewhere that the *Australian Constitution* predominantly operates through political accountability, although the courts will intervene through judicial review where political accountability is inherently weak. His Honour's thesis is best captured in his remarks from 2009:

> *You start with the notion that the Constitution sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system, not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.*[68]

There are resonances between these views, and those of John Hart Ely in the United States.[69] The joint judgment does not reference a vision of the Constitution that prioritises political accountability unless there is an inherent weakness in it (such as the regulation of democracy). But, as we have explained in our first observation, one reading of the judgment is that it defers to political accountability within the constitutional system. Justice Edelman's approach ultimately defers to political accountability in this instance, but at least in his opening comments he seems to lean towards a preference for judicial accountability, with a focus on the constitutional importance of judicial oversight to rule of law values.[70]

The joint judgment's approach is one that heavily emphasises the theory of political accountability and ministerial responsibility, and the references to how Parliament might seek

[68] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' *Bar News 36. (2009), pp.* 30, 37 (emphasis added).

[69] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review.* Harvard University Press: 1981.; In the Australian context, and specifically Gageler's extension of the thesis in Australia, see Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' ,*I-CON 91(2),* (2021) pp. 455-475.

[70] See e.g. [2024] HCA 31, [50].

to 'enforce' those obligations rely on a Parliament that is willing to exercise its muscles.[71] However, ministerial responsibility does not always function so well, and, in modern practice, many have observed that the effective oversight of ministerial actions by the Parliament is largely ineffective, and mired in partisan politics. In many ways, the application of Gageler J's theory of political accountability in this case represents a win for Parliament. Unless the Parliament exercises its powers in ways that facilitate accountability, it does not necessarily represent a win for the public.

For those observing Australia from a comparative perspective, this may also underline Australia's peculiar focus on and trust in the political branches. Even as the United Kingdom, with its quintessentially political constitution drifts towards legal constitutionalism,[72] Australia's codified and significantly entrenched constitutional arrangements remain infused with political constitutionalism, and legal and political debates dominated by associated ideas.

PROCEDURE: PARLIAMENTARY PRIVILEGE AND PARLIAMENT'S INTERESTS

Our third observation relates to the procedure by which this case was decided. As we explained, the Attorney-General for Tasmania was joined as a defendant and took over the defence of the case. In the High Court, Attorneys-General for the Commonwealth, South Australia and the ACT were granted leave to intervene. As a matter of procedure, it is not clear how these parties were alerted to the case and its arguments. There was, for example, no section 78B notice requirement (under s 78B of the *Judiciary Act 1903* (Cth)) as the litigation did not involve a matter arising under or involving the *Australian Constitution*. Presumably these parties were simply aware of the litigation by watching the matter progress through the courts, or through institutional avenues such as the meetings of the Special Committee of Solicitors-General, or informal means.

The first comment we make in relation to procedure, then, is the need for greater transparency and notification where there are matters of what might be termed 'small c' constitutional significance that arise before the High Court. Such matters would also benefit from the submissions of the governments across the federation; and certainly decisions in these matters have the capacity to affect those governments (and parliaments). This transparency and notification could be relatively easily facilitated by legislation, or by some form of agreement

[71] See e.g. [2024] HCA 31, [40]-[41]. .

[72] See e.g. *Miller II* [2019] UKSC 41, cited in *Casimaty* [2024] HCA 31, [101] (Edelman J).

or understanding between courts, governments and legislatures. This transparency and notification would be further enhanced by a publicly available listing of such notices.[73]

The second point we make in relation to the procedural questions was that at no stage in the litigation was there separate and independent representation for, and argument presented on behalf of, the Tasmanian Parliament (or any of the eight other Australian legislatures). Whose interests and views were the Attorneys-General, then, representing to the Court? Presumably they first and foremost represented the views of their Executive.[74] Indeed, it would be thought that the positions taken reflect the political interest in seeing these matters not judicially enforced. But to what extent did the submissions also incorporate or at least represent the views of the Parliaments? Are these views necessarily aligned? Do Parliaments necessarily have an interest in seeing these matters remain within the realm of parliamentary privilege and exclusive cognisance, or might some Parliaments see the desirability of judicial enforcement of such statutes where there is disregard for parliamentary process? There are certainly instances in which there would be conflicting views, the *Egan* litigation probably being the most famous, where the President of the New South Wales Council and the Usher of the Black Rod, an officer of the Council, were separately represented as respondents;[75] and recent instances in which legislatures have had separate and independent representation in such matters through their speakers. In *CCC v Carne*[76] for example, the Speaker of the Legislative Assembly of Queensland was granted leave to intervene before the High Court; in *Cover v ACT Integrity Commission*[77], Mossop J of the ACT Supreme Court granted leave to the Speaker of the ACT Legislative Assembly 'to be heard as amicus curiae in the proceedings for the purposes of making written and oral submissions on the issue of parliamentary privilege in accordance with the directions of the court'. [78] Mossop J held that it was 'clearly appropriate for the Speaker to be heard one way or another as to the proper scope of parliamentary privilege'.[79]

[73] For further development of the argument to publicly release notifications of constitutional matters issued under s 78B of the *Judiciary Act 1903* (Cth), see Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges (A Commentary on Dixon)'*Federal Law Review 43.* (2015) p. 493.

[74] See Gabrielle Appleby, *The Role of the Solicitor-General: Navigating Law, Politics and the Public Interest.* Hart Publishing: 2016, Ch 4.

[75] See eg *Egan v Willis* (1998) 195 CLR 424, 438; *Egan v Chadwick* (1999) 46 NSWLR 563, 580.

[76] [2023] HCA 28.

[77] [2025] ACTSC 71

[78] *CCC v Carne* [2023] HCATrans 74 (6 June 2023); *Cover v ACT Integrity Commission* [2025] ACTSC 71 (3 March 2025).

[79] *Cover v ACT Integrity Commission* [2025] ACTSC 71 (3 March 2025), [11].

While the absence of independent representation might not have given rise to any tension in the *Casimaty* case (although we are not to know based on the record), it does raise for future consideration whether parliaments might be separately notified and routinely represented in constitutional matters of this kind.[80]

These procedural considerations are not entirely divorced from those of constitutional principle we introduced above. Indeed, one factor that might have been at play in relation to the joint judgment's decision to adopt a confined and perhaps unarticulated prudential approach, might have been the lack of representation by parliaments before it. Perhaps a prudent court might wish to keep its powder dry, endeavouring to avoid answering constitutional questions without those issues being fully ventilated, while nonetheless taking the chance to emphasise constitutional fundamentals.

CONCLUDING REMARKS

Taken together with the High Court's 2023 decision in *CCC v Carne*,[81] *Casimaty* marks the second time in as many years that the Court has explicitly opted to avoid delving deeply into questions of parliamentary privilege and exclusive cognisance. This failure, to date, to grapple with the interaction between parliamentary privilege and judicial oversight in a modern parliament, leaves many questions unanswered.[82]

At the same time, recent years have seen major decisions on privilege and related issues in jurisdictions including the United Kingdom and Canada.[83] When the High Court does return to these questions more squarely in the Australian context, no doubt attention will be paid to what *Casimaty* says about responsible government, the role of courts, and the role of state legislatures – and perhaps to what it did not say.

[80] For further arguments as to why Parliaments should retain separate counsel, see Gabrielle Appleby and Anna Olijnyk 'Constitutional Dimensions of Law Reform' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge, and Margaret Thornton (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 387.

[81] See also N Laurie 'Removing the watchdog's bark: CCC v Carne', *AusPubLaw Blog*, 24 October 2023.

[82] Including, for instance, questions of workplace safety, see further *President of the Legislative Council (SA) v Kosmas* [2008] SAIRC 41 (25 June 2008) [40].

[83] As noted in [2024] HCA 31, [101] (Edelman J): *R v Chaytor* [2011] 1 AC 684, 716 [78]; *R (Miller) v Prime Minister* [2020] AC 373, 411 [66]; *Canada (Attorney General) v Power* [2024] SCC 26.

‘Informal Evidence’ in Committee Inquiries: A Case for its Wider Use*

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Abstract: This article explores the concept of 'informal evidence' in parliamentary committee inquiries, and the role it can play supporting more formal and established practices of evidence gathering. Formal evidence most commonly takes the form of sworn verbal testimony and written submission, gathered through the formal powers of a committee. However, committee inquiries are often supported or augmented by informal fact-finding and stakeholder engagement exercises like private briefings, roundtables and site visits. Committees and committee staff can be left with the challenge of finding a way to use valuable yet 'informal' evidence in a form that can support the findings and recommendations of committee reports. The article begins by outlining criteria through which formal and informal evidence could be demarcated, before exploring the benefits to using informal evidence and the role it may play in increasing public participation in committee inquiries, particularly for under-represented stakeholder groups.

INTRODUCTION

Parliamentary committee inquiries rely on formal evidence. Gathered using the prescribed powers of committees, the formality of such evidence is derived from established convention, statute and/or the standing orders of the House. In practice, formal inquiry evidence most commonly takes the form of sworn verbal testimony and written submissions.[2] However, committee inquiries are often supported or augmented by what could be termed ‘informal evidence’: fact-finding and stakeholder engagement exercises like private briefings,

[1] The author wishes to thank Sam Griffith (Clerk Assistant) and Jonathan Elliott (Clerk Assistant) from the NSW Legislative Assembly's Committees team for their feedback and encouragement during the preparation of this article.

[2] Erskine May, *Erskine May's Treatise on the Law, Privileges and Proceedings of Parliament* (25th ed), London: UK Parliament, 2019, pt 6, 38.31.

roundtables and site visits.[3] Committees and committee staff can be left with the challenge of finding a way to use valuable yet 'informal' evidence in a form that can support the findings and recommendations of committee reports.[4]

In this article, I explore the distinctions and indistinctions between formal and informal evidence, and draw on recent research in parliamentary studies that has explored how committees engage with stakeholders outside of conventional processes.[5] While the article focuses on the committee systems of Australian jurisdictions, it nonetheless joins the ongoing, international discussion that has explored the growing need for strong engagement between parliaments and publics.[6] I argue that greater use of informal evidence may increase public participation in committee inquiries, particularly for under-represented stakeholder groups such as culturally and linguistically diverse communities and Indigenous stakeholders. However, using informal evidence is not without practical and procedural challenges, including risk management considerations and the need to protect witnesses and members though parliamentary privilege. The article begins by outlining criteria through which formal and informal evidence could be demarcated, before exploring the benefits to using informal evidence and outlining some strategies for its wider use in committee inquiries.

HOW DO WE DEFINE FORMAL AND INFORMAL EVIDENCE?

The power to call for evidence is central to the functioning of most parliamentary committees. In the separation of powers between the legislature and executive, the evidence-gathering powers of committees play an important role in the scrutiny of government action and the refinement of legislation and policy.[7] The practice of evidence gathering serves as an important interface between legislatures and polities, offering a forum for debate and discussion in which

[3] David Elder and P.E. Fowler (eds), *House of Representatives Practice,* 7th edition, Canberra: Department of the House of Representatives, 2018, p. 691.

[4] Carolyn Hendriks, Sue Regan and Adrian Kay, 'Public knowledge in contemporary parliamentary committees: Expanded evidence, bounded legitimacy'. *3rd International Conference on Public Policy*, Singapore, 28-30 June 2017, p.15.

[5] See e.g. Marc Geddes, *Good Evidence: How do Select Committees Use Evidence to Support their Work*, Edinburgh: University of Edinburgh, January 2023, p.3; Danielle Beswick and Stephen Elstub, 'Between Diversity, Representation and 'Best Evidence': Rethinking Select Committee Evidence-Gathering Practice'. *Parliamentary Affairs* 72 2019, pp. 945-964, p. 947.

[6] See e.g. Inter-Parliamentary Union, *Global Parliamentary Report 2022: Public Engagement in the Work of Parliament,* Geneva: IPU and UNDP, pp. 31-36.

[7] Geddes, *Good Evidence,* p.35.

individuals, interest groups and experts are able to directly engage with their elected political representatives (and vice versa).[8] Claims of knowledge and truth are presented to committees in the form of evidence, and how committees use this evidence can impact the lives and livelihoods of citizens, communities and the wider electorate. For these reasons, the institutional, functional and epistemological characteristics of evidence used by committees should be interrogated, rather than taken as given.

A holistic approach to evidence would necessarily take us beyond the walls of the parliamentary setting. Understanding the nature of evidence, and parallel concepts of 'fact', 'truth' and 'knowledge', has of course been an enduring preoccupation of philosophy and the social and natural sciences. An effort to fully historicise 'evidence' would take us through rich debate and contested theory – from the role of sensory experience, human reasoning and social construction in the formation of fact and knowledge,[9] to methodological detours through the qualitative-quantitative divide and the increasing role that 'lived experience' can play in research and analysis – but is largely outside the scope of this article.[10] Yet, as Kelly notes, evidence is 'hardly a philosopher's term of art', and it plays a central role in professional settings ranging from the courtroom and police station to the newsroom and laboratory.[11] Evidence is central to the decision-making of the executive and legislature and, in recent decades, there has been increased interest from governments, elected members, public servants and non-government organisations in implementing 'evidence-based policy'.[12]

The concept of 'evidence' – in a parliamentary setting – invokes a unique legal-institutional context, and the notions of 'formal' and 'informal' evidence present an interesting line of inquiry. Scholarship in parliamentary studies has tended more towards analyses of who gives evidence to parliamentary committees, the type of committee they give evidence to, and the

[8] Elder and Fowler, *House of Representatives Practice,* p.641

[9] John Locke, *An Essay Concerning Human Understanding*, Project Gutenberg [1690]; René Descartes, *Meditations on First Philosophy: With Selections from the Objections and Replies*, trans. M. Moriarty, New York: Oxford University Press, 2008 [1641]; Giambattista Vico, *The New Science,* trans. T.G. Bergin and M.H. Fisch, Ithaca, Cornell University Press, 1948 [1744]; Auguste Comte, *System of positive polity*, London: Longmans, Green and co., 1875; Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd ed), Chicago: University of Chicago Press, 1962.

[10] Barbara Hanson, 'Wither Qualitative/Quantitative?: Grounds for Methodological Convergence'. *Quality & Quantity* (42) 2008, pp. 97-111; Ian McIntosh and Sharon Wright, 'Exploring What the Notion of 'Lived Experience' Offers for Social Policy Analysis'. *Journal of Social Policy* 48(3) 2019, p. 449

[11] Thomas Kelly, 'Evidence'. *Stanford Encyclopedia of Philosophy* (Winter) 2016. Accessed at: https://plato.stanford.edu/archives/win2016/entries/evidence/.

[12] Peter Wells, 'New Labour and Evidence Based Policy Making: 1997-2007'. *People, Place and Policy* 1(1), pp. 22-29; The Pew Charitable Trusts, *How Nongovernmental Groups Can Support States in Evidence-Based Policymaking,* Philadelphia and Washington D.C.: Pew Charitable Trusts.

medium in which evidence is given.[13] The role that informal evidence can play in contributing to committee inquiries has been comparatively less explored. Nonetheless, several authors note a distinction between evidence that is formally submitted or given before a committee (written and oral evidence), and evidence that is gathered through less institutionalised fact-finding and engagement activities.[14]

This latter 'informal' category has conventionally included site visits and roundtables, though the literature notes recent interest in gathering evidence through 'social media, surveys and focus groups'.[15] Committees may also use seminars or workshops to support an inquiry. Activities such as these allow committees to gather background information prior to developing formal terms of reference or obtain community views through less public means.[16] Fact-finding exercises can precede a public hearing, and information gleaned informally may then support a line of questioning 'on the record'. Bochel and Berthier consider informal evidence within a broader category of 'informal dialogic systems' which also includes 'input through constituents, organised interests and others'.[17] However, my analysis here is limited to those activities that are more likely to involve a committee, as a collective body, rather than private interactions between individual members and external stakeholders that may be brought to bear on a committee's work.

How might we define informal evidence, as far as parliamentary committees are concerned? As Geddes has observed, parliamentary understandings of evidence tend towards the

[13] Hugh Bochel and Anouk Berthier, 'A Place at the Table? Parliamentary Committees, Witnesses and the Scrutiny of Government Actions and Legislation'. *Social Policy & Society* 19(1) 2020, p. 9; Laura Chaqués-Bonafont and Luz M. Muñoz Márquez, 'Explaining interest group access to parliamentary committees'. *West European Politics* 39(6) 2016, p. 1276; Ian Marsh and Darren Halpin, 'Parliamentary Committees and Inquiries', in Brian Head and Kate Crowley (eds), *Policy Analysis in Australia*, Bristol: Bristol University Press, Policy Press, 2015, pp. 137-150, pp. 144-147; Andrew Ray, Arabella Young and Will J. Grant, 'Analysing the types of evidence used by Australian federal parliamentary committees'. *Australian Journal of Public Administration* 81(1) 2022, pp. 279-302, p. 290.

[14] Geddes, *Good Evidence*, p.3; Beswick and Elstub, 'Between Diversity, Representation and 'Best Evidence'', p. 947; Hendriks, Regan and Adrian Kay, 'Public knowledge in contemporary parliamentary committees', pp.14-15.

[15] Geddes, *Good Evidence*, p.3.

[16] Elder and Fowler, *House of Representatives Practice,* p. 691; Department of the House of Representatives (Australia), 'Infosheet 4 – Committees'. Accessed at: https://www.aph.gov.au/about_parliament/house_of_representatives/powers_practice_and_procedure/00_-_infosheets/infosheet_4_-_committees.

[17] Bochel and Berthier, 'A Place at the Table?', pp. 6, 9.

legalistic.[18] In parliamentary settings, informal evidence can be described as that collected through less conventional and public-facing means, when compared with activities like public hearings or written submissions. Informal evidence may be perceived as lacking a degree of authority or clarity that is otherwise present in a legal formalist conception of evidence.[19] Formal evidence, meanwhile, could be defined as that which has been gathered using the formal powers of a committee, whether codified in statute or provided for in a legislature's standing orders.[20] Most Australian jurisdictions have a Parliamentary Committees Act, Privileges Act or other statute that gives committees the powers to send for persons (to give oral evidence), documents and other forms of evidence.[21] In New South Wales, the power to call for evidence is provided for in each House's standing orders or, in the case of statutory oversight committees, within the relevant statute.[22]

There is potential ambiguity in relying on this definition, as some legislatures explicitly provide for committees to conduct activities that may lead to the collection of informal evidence. For example, the NSW Legislative Council's Standing Order 214(d) empowers committees to conduct visits of inspection,[23] while provisions that give committees 'leave to make visits of inspection' are common within House resolutions that establish them.[24] This might suggest that informal evidence is nonetheless gathered through formal committee activity. Furthermore, while there are other rules and frameworks that shape the use of evidence – such as guidelines on procedural fairness for witnesses, penalties for refusing to appear before a committee, restrictions on what evidence can be published, and the protections of

[18] Marc Geddes, 'The Web of Belief Around 'Evidence' in Legislatures: The Case of Select Committees in the UK House of Commons'. *Public Administration* 99 2021, pp. 40-54, p.41.

[19] Geddes, *Good Evidence,* p.21; Elder and Fowler, *House of Representatives Practice,* p.692.

[20] See e.g. 'Chapter 26 – Committees', in Russell D Grove (ed), *New South Wales Legislative Assembly practice, procedure and privilege*, Parliament of New South Wales, 2007, p 7. Accessed at: https://www.parliament.nsw.gov.au/la/proceduralpublications/Documents/wppbook/Part%201%20Chapter%206%20Committees.pdf.

[21] See, for example: *Parliamentary Committees Act 2003* (Vic), s 28(1); *Parliament of Queensland Act 2001* (Qld) s 25.

[22] New South Wales Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, adopted 17 November 2022, approved by the Governor 20 February 2023, 80; See for example: *Independent Commission Against Corruption Act 1988* (NSW), s 69(1).

[23] New South Wales Legislative Council, *Standing Rules and Orders of the Legislative Council*, adopted 17 November 2022, approved by the Governor 20 February 2023, p.76.

[24] See e.g. Parliament of New South Wales, *Votes and Proceedings of the New South Wales Legislative Assembly*, 11 May 2023, pp.57-58.

parliamentary privilege attracted by formal committee proceedings[25] – these exist in varying degrees of codification and clarity across jurisdictions. Moreover, while most parliamentary committees do have formal powers to compel the production of evidence (such as by summoning witnesses), these are often used infrequently.[26] A reliance on evidence given voluntarily may lend a degree of informality to established, 'formal' practices of evidence gathering.

It is worth noting, however, that evidence in parliamentary proceedings lacks the explicit standards of proof or codified rules of admissibility that are present in other settings. Evidence in criminal trials must reach the standard of proving beyond reasonable doubt, while claims and findings in civil cases – and the work of some investigatory bodies, such as anticorruption agencies[27] - rest upon the balance of probabilities.[28] Although committee members and committee staff are likely to have practical understandings of what evidence is considered reliable, useful and relevant to an inquiry's terms of reference, there is no standard of proof that guides the use of evidence by parliamentary committees. This contrast can be attributed to the distinct outcomes of committee inquiries (findings and recommendations to support policy formation, for example) and judicial decisions (judgements and impositions of penalties relating to individual people).

In an example from 1990, advice provided by the Clerk of the (Australian) Senate to the Chair of the Committee of Privileges cautioned against 'too readily accepting that [the Committee] has to choose a particular judicially-expounded standard of proof.' Rather, the Committee should be transparent in the evidence it has chosen to use and be clear in its reasoning, 'while

[25] See e.g. New South Wales Legislative Council, *Procedural fairness resolution*, Parliament of New South Wales. Accessed at: https://www.parliament.nsw.gov.au/committees/Documents/Committeebrochures/Procedural%20fairness%20resolution.pdf; *Parliamentary Evidence Act 1901* (NSW), ss 7-9, s 12; *Independent Commission Against Corruption Act 1988* (NSW), s 70.

[26] *Erskine May*, pt 6, 38.31; 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.170-171; Jessica Strout, 'What's at stake when parliamentary committee inquiries rely on voluntary executive cooperation?', *Australasian Study of Parliament Group Annual Conference 2024*, Wellington, 4 October 2024, p. 4. Accessed at: https://www.aspg.org.au/wp-content/uploads/2024/10/Jessica-Strout_Whats-at-stake-when-parliamentary-committee-inquiries-rely-on-voluntary-executive-cooperation.pdf.

[27] See for example: *Kazal v Independent Commission Against Corruption* [2013] NSWSC 53 [32].

[28] Hock Lai Ho, 'The Legal Concept of Evidence'. *Stanford Encyclopedia of Philosophy,* (Winter) 2021. Accessed at: https://plato.stanford.edu/entries/evidence-legal/.

requiring more cogent evidence in proportion to the gravity of the matter in issue.'[29] This example relates to allegations of contempt, a type of committee inquiry where a committee may more be inclined to seek a formal standard of evidence to support findings or recommendations relating to the conduct of an individual. Nonetheless, it highlights how the type of evidence a committee uses to support its work often relies on the judgement and reasoning (of members and committee staff), rather than on any prescribed rules of evidence.

Returning to my initial question, the definition of formal and informal evidence is dependent on the functional characteristics of evidence gathering and the established conventions of how committees operate. This means that reliance on a purely legal formalist understanding would be misleading. Erskine May describes the common practice of select committees (or portfolio committees, in other jurisdictions), whereby committees 'rely very largely' on written and oral evidence that has been gathered through a process of seeking 'written evidence initially in particular from those whom the committee intends later to invite to give oral evidence, in addition to issuing a general invitation to submit written evidence'.[30]

Informal evidence could thus be described as evidence that has been gathered outside of these conventional practices, while also being comparatively lower in the hierarchy of legal formalism. Acknowledging that formal evidence may occasionally veer into uncodified convention, voluntary participation and individual judgement should not have the effect of invalidating these established practices of evidence gathering. Rather, if we acknowledge that the boundary between 'formality' and 'informality' can sometimes be indistinct or porous, it may open the door for greater innovation and flexibility in the types of evidence that can become part of a committee inquiry.

POTENTIAL BENEFITS FROM USING INFORMAL EVIDENCE MORE FREQUENTLY

This section explores potential benefits for committee inquiries if informal evidence were used more frequently or consistently. To begin with, informal evidence gathered through site visits, roundtables and private briefings may suit committee members' preferences. Members who represent an electorate often meet with constituents and interest groups outside of the

[29] Senate Standing Committee of Privileges, Parliament of Australia, 'Advice No. 5 - Standard of proof for a finding of contempt'. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Tabled_Documents_and_Advices/Advices/Advice-05.

[30] *Erskine May*, pt 6, 38.31.

parliamentary precinct and formal committee business.[31] Engaging with stakeholders in less public or more intimate fora may subsequently feel more authentic or genuine to them. In a qualitative study featuring senior ministers as research participants, researchers have identified a preference for informal consultation over more structured and public forms of engagement.[32]

Increasing stakeholder participation through new methods of collecting evidence

By broadening the collection of evidence beyond conventional practices, there may be opportunities to increase the participation of members of the public and stakeholder groups less commonly represented in committee proceedings. Internationally, there is a sense of momentum, where more parliaments are developing strategies to increase parliamentary engagement with the public and vice versa.[33] The Inter-Parliamentary Union has highlighted innovation, inclusivity, and parliamentary cultures that foster engagement as core elements for improving public participation in parliamentary processes.[34] By providing a forum for the evaluation and information exchange, parliamentary committees 'might be particularly well-placed to improve the relationship between parliament and the people', so long as sustained efforts are made to seek engagement from segments of the community that participate in inquiries less often.[35]

A number of Westminster parliaments have explored new formats for gathering evidence, in order to increase public participation in committee inquiries. The House of Commons' Liaison Committee heard that written submissions can create educational and technical barriers for lay publics seeking to contribute to committee inquiries, due to unequal levels of literacy or socioeconomic and technological disadvantages.[36] The Committee subsequently argued that its select committees should treat audio and video submissions as though they were 'formal

[31] David Wilson and Amy Brier, 'Engaging the public with Parliament in Aotearoa New Zealand'. *Australasian Parliamentary Review,* 37(2) 2022, pp.68-76, p.72.

[32] Carolyn Hendriks and Jennifer Lees-Marshment, 'Political Leaders and Public Engagement: The Hidden World of Informal Elite-Citizen Interaction'. *Political Studies* 67(3) 2019, pp.597-617, p. 609.

[33] IPU, *Global Parliamentary Report 2022*, pp. 31-36.

[34] IPU, *Global Parliamentary Report 2022*, p. 8.

[35] Sarah Moulds, 'Committees of influence: evaluating the role and impact of parliamentary committees'. *Senate Occasional Lecture Series*, Canberra, 30 April 2021, pp. 82-83.

[36] House of Commons Liaison Committee, Parliament of the United Kingdom, *The effectiveness and influence of the select committee system* (4th Report of Session 2017-19, 9 September 2019), p. 45.

evidence'.[37] The Scottish Parliament has expanded its parliamentary engagement strategies over the recent decade, and submissions to committee inquiries can now be made in audio or video formats, British Sign Language and, on a case-by-case basis, using languages other than English.[38]

Parliamentary committees in Australia have also begun using new methods to increase engagement with culturally and linguistically diverse (CALD) communities. In Victoria and New South Wales, for example, standing committees have translated terms of reference and inquiry promotion materials into languages other than English.[39] Ikeda has explored the use of 'Easy English' materials for committee engagement with stakeholders 'for whom plain language is too complex.'[40] Easy English material uses short sentences that focus on one idea, wording that reflects everyday experience and language usage, and clear formatting that is accompanied by images. Ikeda cites the use of Easy English by a Victorian inquiry into the early childhood engagement of CALD communities but notes its value for a broad range of stakeholders for whom visual or simplified communication may be beneficial (such as people with cognitive disabilities).[41]

These examples represent new ways of collecting evidence from the public that, ultimately, would likely be handled in the same way as formal evidence (e.g. video submissions that are transcribed and published as formal, text-based submissions; multilingual approaches to conventional inquiry promotion). There may be a tendency to utilise these methods for inquiries that are explicitly related to CALD communities, though such approaches could be extended to any committee inquiry that is seeking wider community input.

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[37] House of Commons Liaison Committee, *The effectiveness and influence of the select committee system*, p. 45.

[38] The Scottish Parliament, 'Format of Your Submission', *Committees: Submitting Your Views to a Committee*, (Web Page, 2024) <https://www.parliament.scot/about/information-rights/data-protection/privacy-notices/committees-submitting-your-views-to-a-committee>; The Scottish Parliament, *Public Engagement Strategy* (Report, 2021), 1.

[39] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, 'Inquiry into early childhood engagement of CALD communities'. Accessed at: https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-early-childhood-engagement-of-cald-communities; Legislative Assembly Committee on Community Services, Parliament of New South Wales, 'Improving crisis communications to culturally and linguistically diverse communities'. Accessed at: https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2870.

[40] Miona Ikeda, 'Inclusive not exclusive: parliamentary committees reaching out to CALD communities', *Australasian Study of Parliament Group Annual Conference 2024*, Wellington, 4 October 2024, p. 7. Accessed at: https://www.aspg.org.au/wp-content/uploads/2024/10/Miona-Ikeda-ASPG-Paper.docx.

[41] Ikeda, 'Inclusive not exclusive', pp. 7-8; Legislative Assembly Legal and Social Issues Committee, *Inquiry into early childhood engagement of CALD communities*, no. 167, Session 2018-20, Parliament of Victoria, pp. 355-377.

However, the prospect of broader multilingual inquiry engagement raises interesting practical challenges – some of which could be resolved through informal evidence gathering. If using translated and Easy English material increased awareness of committee inquiries in CALD communities, how would committee staff manage a high volume of submissions in a language other than English? Committee secretariats (or parliamentary departments as a whole) may lack the necessary expertise to translate submissions themselves, and paying for external translation services may prove too costly. Utilising 'informal' activities, such as surveys or focus groups, could be an opportunity to gain greater multi-lingual community participation with fewer resourcing requirements. For example, a committee could decide which questions to ask community representatives in a focus group or survey, and informal evidence could then gathered via an interpreter or a survey that is translated into multiple languages. If committees are prepared to consider new ways of collecting evidence – whether by rethinking conventional evidence gathering practices or by expanding the role of informal evidence – more members of the community could participate in committee inquiries.

First Nations stakeholders and culturally appropriate evidence gathering

Bridging the divide between formal and informal evidence is also an important consideration for Indigenous Australian stakeholders. Parliaments are the living embodiment of the colonial dismantling of Indigenous law and sovereignty, and the actions or inactions of legislatures have been responsible for a myriad of negative social, health and economic outcomes for First Nations peoples.[42] If practical reconciliation between First Nations people and Australia's constitutional institutions is to be achieved, active 'political listening' is required at the interface.[43] As Australia processes the aftermath of the Voice to Parliament referendum, innovation in parliamentary committee processes may make a comparatively modest contribution towards this goal.

The formalist traditions of Westminster parliaments may be alienating to First Nations Australians or at least culturally inappropriate, particularly where the legalistic conception of

[42] See, for example: Elizabeth Strakosch, 'The technical is political: settler colonialism and the Australian Indigenous policy system'. *Australian Journal of Political Science*, 54(1) 2019, pp. 114-130; Jeremy Walker, 'Silencing the Voice: the Fossil-fuelled Atlas Network's Campaign against Constitutional Recognition of Indigenous Australia'. *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, 15(2) 2023, pp. 105-125, p. 106.

[43] Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening'. *Federal Law Review* 48(4) 2020, pp.529-542, p. 529; Sarah Moulds, 'A Toolkit for Evaluating the Effectiveness of Parliamentary Public Engagement'. *University of South Australia Law Review* 5 2023, pp. 1-23, p. 10.

committee evidence may intersect with Indigenous experiences of the justice and carceral systems. While discussing evidence and Indigenous law from the perspective of criminal proceedings, Biber outlines several factors in the questioning of Indigenous witnesses that have relevance for committee inquiries. In Indigenous culture and custom, 'silence may be a meaningful response to a question' and 'what is deemed to be legally 'relevant' to the court may be deemed 'private' or 'secret' in Indigenous culture'.[44] The formal power of a committee to call for evidence, and related penalties for refusing to answer questions asked by a committee, could potentially conflict with a community elder's responsibilities to protect privileged or withheld knowledge. For Indigenous stakeholders to have greater input in committee proceedings, consideration of less formal means of evidence gathering would be advantageous – particularly for increasing the participation of lay citizens, rather than relying on organisations that do not necessarily represent the full range of diverse Indigenous community interests.

Requirements that witnesses swear an oath or make an affirmation before giving evidence may also be uncomfortable for Indigenous witnesses, given the apparent similarities between giving evidence in a court and doing so in front of a committee. In light of Indigenous over-representation in the justice system, inquiry witnesses may have had lived experience of court proceedings, such as being subject to cross-examination or other legal processes that may contribute to intergenerational trauma. It would also be valuable to consider how essential an oath or affirmation is for hearing formal evidence, in relation to other stakeholder groups who may be under-represented in committee proceedings. For example, children and young people who – depending on their age – may not reach the threshold for being able to consent to taking a formal oath, or who are not comfortable in doing so.

In a report exploring trust in and access to the South Australian justice system, Hora J (U.S., ret.) notes the work of Richard Balfour, who developed a more culturally appropriate oath for use by Aboriginal people who do not speak English.[45] Translated as, 'You will talk straight, and not say false things', Balfour's proposed oath aimed to assist Aboriginal witnesses in court.[46] A culturally relevant oath would not be out of place in a committee hearing, given the inclusion of affirmations as a secular alternative to the conventional oath to tell the truth 'so help me

[44] Katherine Biber, 'Fact-Finding, Proof and Indigenous Knowledge: Teaching Evidence in Australia'. *Alternative Law Journal* 35(4) 2010, p. 208.

[45] Judge Peggy Fulton Hora (Ret.), *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System,* Adelaide: Department of Premier and Cabinet (Government of South Australia), 2010, p. 19. Accessed at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1809719_code1398611.pdf?abstractid=1809719&mirid=1.

[46] Richard Balfour, cited in Hora, *Smart Justice,* p. 19.

God', and acknowledgements of country that have become common at the commencement of public hearings.

Australian jurisdictions vary as to whether a person appearing before committees needs to be sworn or affirmed before giving evidence. Some jurisdictions could be more flexible than others in relaxing these formalities for Indigenous witnesses and other groups less represented in committee inquiries. In Queensland, for example, a committee Chairperson is authorised to administer an oath or affirmation – and may require a person to answer questions under oath or affirmation – however, a person may be excused from doing so (though either excusing or requiring oaths and affirmation may be limited in practice).[47] In the NSW Legislative Assembly, meanwhile, Standing Order 291 requires that 'Witnesses shall be examined on oath or affirmation.'[48] The *Parliamentary Evidence Act 1901* (NSW) further states that every witness before a committee is sworn by the Chair, with protections of parliamentary privilege being afforded for doing so.[49] However, if witnesses did not swear an oath or make an affirmation (in jurisdictions with statutory provisions requiring them to) consideration could be given to protections against legal action provided for in other statutes, such as Defamation Acts.[50]

Outside this question of oaths and affirmations, rethinking evidence gathering may also present parliamentary committees with the opportunity to engage with First Nations witnesses in ways that draw on long-held Indigenous cultural practices. It is important to emphasise here that practices which might be termed 'informal' through a Western parliamentary lens are often anchored in formal Indigenous law and custom. Yarning, for example, involves a forum for truth-telling that is dialogic and collaborative, and is grounded in the Aboriginal relational systems: kinship, ancestry, story-telling and relationships with country.[51]

Yarning has not been widely used by parliamentary committees as a means of collecting evidence (formal or informal). In 2024, a NSW Legislative Assembly committee conducted site visits in outback NSW, and hosted a yarning circle involving community representatives and committee members.[52] In this example, the yarning circle was a private event that preceded a

[47] *Parliament of Queensland Act 2001* (QLD) s 31.

[48] New South Wales Legislative Assembly, *Consolidated Standing and Sessional Orders and Resolutions of the House*, adopted 17 November 2022, approved by the Governor 20 February 2023, 80.

[49] *Parliamentary Evidence Act 1901* (NSW) s 10(2), s 12.

[50] *Defamation Act 2005 (NSW)*, s 27.

[51] Stuart Barlo, 'Yarning as Protected Space: Relational Accountability in Research'. *AlterNative: An International Journal of Indigenous Peoples*, 17(1) 2021, pp. 40-48.

[52] Committee report likely to be tabled in 2025-26.

traditional public hearing the following day (rather than an activity that explicitly aimed to collect evidence for use in a report). However, it raises the question of whether yarning circles could become an effective method of engagement between parliamentary committees and Indigenous stakeholders. Yarning has been used as a research method in numerous policy studies, including research methods that have transcribed dialogue from a yarning circle.[53]

Recording, transcribing and publishing a yarn may have value in terms of inquiry evidence and stakeholder engagement. However, trust and reciprocity are fundamental elements in a yarning circle,[54] and establishing genuine, meaningful rapport between a parliamentary committee and an Indigenous community may be difficult in practice. For example, a committee may only visit a remote community for a limited amount of time, without returning to consult further. While yarning for evidence could become a valuable means of committee engagement, establishing sustained and authentic communication between members and community representatives would likely require significant time and resource commitments, for both members and committee staff.

Academic material as informal evidence

If 'informal evidence' is defined as evidence gathered outside of the formalised and entrenched practices of parliamentary committees, where does that leave academic knowledge? Several authors have examined the various channels through which academic and technical experts are able to inform policy deliberations by parliaments, with committee work being a prevalent avenue for doing so.[55] The ideal evidence base for an inquiry might include at least some written and oral evidence from researchers with expertise germane to the inquiry's terms of reference. Academic evidence can support or counter that provided by other inquiry participants, such as: those with lived or idiographic experience of a particular issue; witnesses that advocate on behalf of particular interest groups; and government witnesses with varying degrees of responsiveness and transparency in the face of committee questions.

[53] Michelle Kennedy, Raglan Maddox, Kade Booth, Siad Maidment, Catherine Chamberlain and Dawn Bessarab, 'Decolonising Qualitative Research with Respectful, Reciprocal, and Responsible Research Practice: A Narrative Review of the Application of Yarning Method in Qualitative Aboriginal and Torres Strait Islander Health Research'. *International Journal for Equity in Health* 21(134) 2022, pp.1-22, p. 6.

[54] Kennedy et. al, ''Decolonising qualitative research', p. 12.

[55] See, for example: Caroline Kenny, 'The impact of academia on Parliament: 45 percent of Parliament-focused impact case studies were from social sciences'. *London School of Economics Blog*, 19 October 2015. Accessed at: https://blogs.lse.ac.uk/impactofsocialsciences/2015/10/19/the-impact-of-uk-academia-on-parliament.

However, fulsome academic participation in committee inquiries cannot be presumed. As noted by Ray, Young and Grant in their study on committee evidence in Australian federal parliamentary committees, evidence from academic stakeholders is likely to be less commonly cited in committee reports than evidence from government and civil society groups. Where academic sources are used, there is a clear tendency towards written submissions or oral evidence, rather than the use of journal articles.[56] Committees may have powers or resources to commission research papers, yet this may be costly, time consuming and nonetheless external to the conventional evidence base of a committee inquiry.

In order to support committee findings and recommendations using academic evidence that – while also vulnerable to vested interest and personal, disciplinary or institutional biases – are at least grounded in research-based practices and subject to peer review and academic debate, committees could consider using academic material that has been sourced and collated outside of formal evidence gathering powers and practices. However, this is potentially difficult in practice. Committee reports focus on hearing transcripts and written submissions as source material, in large part, because these are evidence gathering activities in which the committee is directly engaged. Committee staff may be reluctant to undertake any 'independent' literature review to support an inquiry, as members themselves have not participated in gathering this material. As alluded to above, deciding on which kinds of academic evidence should support committee findings – whether longitudinal studies, statistical analyses, in-depth interview, narrative research or any other research methodology – could raise complex questions of epistemology and method that a committee may not wish to engage with.

USING INFORMAL EVIDENCE IN COMMITTEE PRACTICE: CHALLENGES AND CASE STUDIES

Further to the examples above, this section explores several strategies for how informal evidence could be used more frequently by committees. These include committee staff preparing guidance to members on whether informal evidence is protected by parliamentary privilege, in addition to minimising the risk of publishing informal evidence that presents risks to inquiry participants or to other parties referred to in evidence.

[56] Ray, Young and Grant, 'Analysing the types of evidence used by Australian federal parliamentary committees', pp. 289-290.

Informal evidence and parliamentary privilege

Whether published informal evidence is protected by parliamentary privilege is an important consideration, particularly if such evidence has been given by vulnerable stakeholders. While the account that follows is only a brief exploration of the complexities of parliamentary privilege, it is likely that informal evidence would be privileged in particular circumstances. Article 9 of the *Bill of Rights Act 1688* is in force in Australian jurisdictions and prevents 'Freedom of speech and debates or proceedings in Parliament' from being 'impeached or questioned in any court or place outside of Parliament'.[57] The Commonwealth *Parliamentary Privileges Act 1987* further clarifies proceedings of parliament as 'all words spoken and acts done in the course of, or for purposes incidental to, the transacting of the business of a House or of a committee',[58] including the giving of evidence before a committee. If a committee resolves to conduct site visits or private roundtables, evidence gathered during these activities may reasonably be considered a proceeding of parliament and thereby protected under parliamentary privilege.

If it is members' perception that informal evidence is not protected under privilege that is preventing its wider use,[59] briefing material could be provided to committee members to assuage this perception. There are some important caveats, however. Informal evidence would need to be gathered during valid proceedings of a committee, such as if the committee was acting within its terms of reference and if the committee was quorate when meeting.[60] In *House of Representatives Practice*, Elder notes that '[if] a quorum is present', activities such as visits of inspection become 'formal proceedings'.[61] However, much like other proceedings of parliament,[62] records of informal evidence could potentially be admissible in a court, and only privileged in particular circumstances.

If considering more prominent use of informal evidence in an inquiry, committees and secretariats should be mindful of any risks to inquiry participants or third parties. For example, if an inquiry engages with sensitive issues or there are safety considerations in making evidence public, there would likely be greater value in providing stakeholders with a private forum for

[57] *Bill of Rights 1688* s 9.

[58] *Parliamentary Privileges Act 1987* (Cth) s 16.

[59] See, for example: Geddes, 'Good Evidence', p. 8.

[60] Russell D Grove, Mark Swinson and Stephanie Hesford, '*Part 2 Chapter 3 – Such Privileges as were Imported by the Adoption of the Bill of Rights*', in Russell D Grove (ed) *NSW Legislative Assembly Practice, Procedure and Privilege*, Sydney: NSW Legislative Assembly, 2007, p.5.

[61] Elder and Fowler, *House of Representatives Practice,* p.733.

[62] See, for example: *Parliamentary Privileges Act 1987* (Cth) s 16(3).

sharing their views with the committee (in line with precautions taken with *in camera* evidence). Committees may also use a combination of public and private activities, depending on the nature of the discussions likely to take place.[63]

It is also worth emphasising that using informal evidence publicly (such as by citing it in a report) may defeat the purpose of conducting private activities in the first place. For example, committees may hold private briefings with departmental officials. Away from media or political scrutiny, these conversations between senior public servants and members can help to build rapport – which can be valuable when a government department is a lead stakeholder in an inquiry – and stand in contrast to guarded and indirect answers to members' questions that may be provided during a public hearing. There are likely to be numerous circumstances where publishing and using informal evidence would be counterproductive or inadequate in supporting inquiry participants.

Case study: broadcast of a community roundtable

Informal evidence gathering could be supported by guidance for members and participants on how to avoid testing the limits of parliamentary privilege. For example, a NSW Legislative Council inquiry into the commencement of the *Fisheries Management Act 2009* included a 'community roundtable' with local cultural fishers. As the roundtable began, the Acting Chair's opening statement included requests that participants 'avoid making adverse comments about others' and 'avoid using people's names and try to keep comments generalised'.[64]

As 'an alternative to a public hearing format',[65] the roundtable had a number of features that were intended to make proceedings less formal to support the participation of Indigenous community representatives.[66] This included seating members and participants around the

[63] Moulds describes the work of the Parliamentary Joint Committee on Human Rights (Commonwealth), which used frequent private meetings in order to create a 'politically safe forum' for negotiation, compromise and public input during a bill inquiry (Sarah Moulds, 'Committees of influence: Parliamentary committees with the capacity to change Australia's counter-terrorism laws'. *Australasian Parliamentary Review*, 31(2), pp.45-66, p.62).

[64] The Hon. Mick Veitch, Parliament of New South Wales, *Uncorrected Transcript,* Legislative Council Portfolio Committee No. 4 – Customer Service and Natural Resources, Narooma, 28 July 2022, p. 1.

[65] Legislative Council Portfolio Committee No. 4 – Customer Service and Natural Resources, Parliament of New South Wales, *Commencement of the Fisheries Management Act 2009*, (Report No. 55, November 2022), p. 62.

[66] Hendriks, Regan and Kay also describe the use of roundtables in committee proceedings, including the Senate Standing Committee on Community Affairs' use of transcribed and published 'community statement sessions' in 2015 (Hendriks, Regan and Kay, *Policy knowledge in contemporary parliamentary committees*, pp.11-12).

table in a 'mixed format' – as opposed to members seated to one side and witnesses sitting opposite – and not requiring that community representatives be required to take an oath or make an affirmation.[67] The Committee decided that the roundtable would be broadcast and transcribed, and the evidence was cited in the Committee's report.[68]

Case study: a published transcript from an expert briefing

The NSW Legislative Assembly's Committee on Law and Safety participated in an expert briefing that was transcribed and published, without a resolution to broadcast proceedings. The briefing was a backgrounding exercise intended to facilitate 'a greater understanding' of the complex, technical issues germane to an inquiry into embedded networks.[69] The Committee resolved to conduct the expert briefing 'prior to any public hearings and that Hansard transcribe the briefing with a view to it being made public and published on the inquiry webpage'.[70]

Similar to the above example, the extent to which the use of informal evidence can be successfully integrated into the legitimate functions of parliamentary committees is likely to depend upon planning and adequate discussions between committee members, secretariats and stakeholders. Consideration can be given to the degree of visibility or contemporaneousness of evidence given. While the utility of informal evidence is greater when it is transcribed and published, it may not need to be broadcast live (or at all). Using such an approach, committee staff can inform participants in advance that the briefing transcript is likely to be published, while also allowing the committee to decide not to publish it until after the transcript has been reviewed for adverse mention or other items that may require redaction.

Other avenues for using informal evidence

Other strategies could be deployed to ensure greater use of informal evidence, and to mitigate real or perceived risks of informal evidence not attracting parliamentary privilege. For example, Geddes argues that, in order to enhance evidence use by committees more broadly, informal

[67] Legislative Council Portfolio Committee No. 4, *Commencement of the Fisheries Management Act 2009,* p. 62.

[68] See, for example: Legislative Council Portfolio Committee No. 4, *Commencement of the Fisheries Management Act 2009*, pp. 19-20, 25, 62.

[69] Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Embedded Networks in New South Wales* (Report 3/57, November 2022), p. 76.

[70] Legislative Assembly Committee on Law and Safety, *Embedded Networks*, p. 82.

evidence gathering activities should be formally institutionalised as 'an accepted and valid form of evidence'.[71] Geddes offers a cautious approach to using evidence from site visits, roundtables, focus groups and surveys, whereby 'only an anonymised summary of the activity/information would be published as a formal record/proceeding …'.[72]

Regarding greater use of academic material, such as journal articles or external research reports, this may simply be a case of clarifying (through dialogue with committee members and staff) the circumstances in which using these types of sources within a committee report would be appropriate and beneficial. Guidelines for using evidence outside of core committee activities (public hearings, published submissions, site visits and other less formal activities) could be established, such as criteria for determining 'reliable' academic material in supporting or contesting oral evidence, or limiting its use to 'filling gaps' in an inquiry's evidence base, once public hearings and responses to questions on notice have concluded.

CONCLUSION

Greater use of informal evidence in committee inquiries may have the benefit of increasing stakeholder participation, reducing cultural barriers to Indigenous stakeholders' participation, and strengthening an inquiry's evidence based through the use of external academic material. Further research could also explore stakeholder preferences for giving evidence through formal or informal means. While barriers of perception, practicality and resourcing are not insurmountable, adequate planning and dialogue between committees and committee staff is critical – particularly in the case of providing guidance on the protections of parliamentary privilege. As part of wider efforts to modernise parliaments and increase public participation in democratic processes, parliamentary staff could give more explicit consideration to 'formalising the informal' and working with members and stakeholders on ways to broaden inquiry evidence beyond established conventions.

[71] Geddes, *Good Evidence,* p. 40.

[72] Geddes, *Good Evidence,* p. 40.

What Parliament *Didn't* Say: The Effect of Silence during Legislative Scrutiny on Statutory Interpretation*

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Abstract: When interpreting legislation, it has become routine for courts and other readers to refer to related Hansard and other parliamentary materials to help determine what the legislation means. Most of the time that parliamentary record is used for what it says about the proposed legislation. However, it is also possible to use Hansard for what it *doesn't* say. In American statutory interpretation law, this is called the 'dog that did not bark' canon, named after a Sherlock Holmes story, where a watchdog that failed to bark was a critical clue. In Australia, there is no statutory interpretation canon or presumption with this colourful moniker. But there is evidence from Australian case law that interpreters of legislation can use silence in parliamentary deliberations on proposed legislation to infer something about the meaning of that legislation. This article demonstrates how silence in legislative scrutiny deliberations can influence statutory meaning in Australia and identifies some implications of that use for both law makers and interpreters.

INTRODUCTION

In 1982, Harvard Law School Professor Lawrence H. Tribe wrote a paper about construing 'the sounds of Congressional and Constitutional silence'.[2] In that paper, he wrote that the 'arts of silence and inaction are no strangers to lawmakers'.[3] To support this statement, he quoted a tale about an American state politician, Reid Lefevre, apparently a giant of the Vermont legislature of the 1960s. Professor Tribe wrote that at one point this giant of a politician, apparently nicknamed King Reid, was arguing against a proposal to dock state legislators' pay for the days when they were away from parliament. 'As I look around this chamber,' so-called

[1] This article has its origins in a presentation given at the Australia-New Zealand Scrutiny of Legislation Conference, Parliament House, Melbourne, 4 December 2024.

[2] Laurence H. Tribe, 'Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence'. *Indiana Law Journal* 57(4) 1982, 515-535.

[3] Tribe, 'Toward a Syntax of the Unsaid', p. 516.

King Reid purportedly said, 'it occurs to me that many of our members make their greatest contribution to the legislative process on days when they *aren't* here.'[4]

What the story repeated by Professor Tribe speaks to is the power of silence. More specifically, the power of silence in materials that form part of the legislative record produced during the passage of a Bill through parliament (like second reading speeches, explanatory memoranda, committee reports and other Hansard records) when it comes to the next stage of life of that statute: its interpretation.

Parliamentary materials are often used to assist in statutory interpretation. But they are typically used for what they *do* say. For example, a second reading speech might explain the policy behind a statute, an explanatory memorandum might give an example of a provision's operation, or a committee report might indicate the defect intended to be fixed by the statute.[5] But Australian courts can also place value on what has *not* been said in the parliamentary record.

This article demonstrates how a court might use silence in legislative scrutiny deliberations for statutory interpretation. It then addresses how the use of that silence might be rationalised in statutory interpretation law. It does so by drawing on the well-established 'text, context, purpose' framework of the current law, and then focussing on the relevance of the notion of 'context' and its relationship to language conventions. The article then highlights some implications for both law makers and interpreters.

TYPE OF SILENCE

The notion of silence as a relevant evidentiary factor in the law is not novel.[6] Nor is its use novel in statutory interpretation law. For example, an inference might be drawn by a court about the meaning of a statutory provision where the statute itself is silent on a particular matter.[7]

[4] Tribe, 'Toward a Syntax of the Unsaid', p. 516 (emphasis added).

[5] For example, in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818; [2020] HCA 29, 827-28 [31]-[32] Kiefel CJ, Nettle and Gordon J relied on examples of the intended operation of a provision given in the Explanatory Memorandum.

[6] See, e.g. Peter Tiersma, 'The Language of Silence'. *Rutgers Law Review* 48(1) 1995, pp. 1-100 which addresses some legal contexts where a person's failure to speak may be significant.

[7] See, e.g. discussion in *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, [2013] HCA 50, 302 [19], 318 [47], 319 [49] (French CJ); 343 [138] (Hayne J). See also Harry Sanderson, 'Sounding Out a Presumption

The focus of this article is on silence in the legislative record of parliamentary proceedings. When there is no comment by participants in the legislative process about a particular matter when parliament is considering a Bill, an inference may be drawn about the intent behind that proposed law from that silence.

In the United States, the principle that permits probative value to be given to silence in the Congressional record is referred to as the 'dog that didn't bark' canon[8] or, perhaps less colourfully, the 'canon of canine silence'.[9] This moniker is derived from the 'curious incident of the dog in the night-time' in Sir Arthur Conan Doyle's Sherlock Holmes short story *Silver Blaze,* about the theft of a racehorse.[10] The 'curious incident' identified by detective Holmes was that the dog did not bark. The silence of the dog provided a critical clue as to the identity of the thief, in that it revealed that the thief must have been known to the dog.[11] The rationale in the United States for the principle is that if the Bill had been intended to significantly change the state of the law, then it would be expected that some sort of comment would have been made in parliament during its legislative scrutiny.[12]

In Australia, there is no distinct label for use of this kind of silence in statutory interpretation. Yet despite this lack of express recognition, there is evidence in Australian case law that courts may use silence in parliamentary materials to infer something about statutory meaning. For the purposes of this article, I draw on High Court of Australia decisions as examples.

USES OF SILENCE IN PARLIAMENTARY MATERIALS

In the Sherlock Holmes story, detective Holmes refers to the silence of the dog as having 'one true inference.'[13] However, unlike with the dog's silence, different inferences can be drawn from silence in parliamentary materials in different contexts. This is not to suggest that silence

from Silence'. *Australian Law Journal* 98(11) 2024, pp.939-949 which discusses inferences arising from parliamentary inaction (i.e. no amendment) following a judicial decision.

[8] Valerie C Brannon, *Statutory Interpretation: Theories, Tools, and Trends.* USA: Congressional Research Service, No R45153, version 2, 5 April 2018, p. 60.

[9] Brannon, *Statutory Interpretation*, p. 60, fn 612.

[10] See, eg, *Church of Scientology of California v Internal Revenue Service* (1987) 484 U.S. 9, pp.17-18.

[11] Sir Arthur Conan Doyle, 'Silver Blaze' in *Sherlock Holmes: The Complete Novels and Stories (Volume 1).* New York: Bantam Classics, 2003, pp. 521-546, p. 540, which in turn led to discovery about a murder. The relevance of the dog's silence is at p. 544.

[12] Anita S. Krishnakumar, 'The Sherlock Holmes Canon'. *The George Washington Law Review* 84(1) 2016, pp.1 – 54, pp. 2-3.

[13] Arthur Conan Doyle, 'Silver Blaze', p. 544.

on its own will be the 'magic bullet' for determining statutory meaning or even that it is a dominant factor. Statutory interpretation is a 'multi-factorial assessment' that involves evaluation of all relevant principles and criteria to come to a view, after balancing those considerations, about construction.[14] Silence in parliamentary materials might be one of those factors to consider.

The following categories are employed as tools to reveal the different ways courts engage with the concept of parliamentary silence. Arguably, there may be some overlap between them.

Silence is Telling

The first situation is where the lack of any mention in the legislative record is pointed out as being significant and relevant to the outcome for the interpretative issue. That significance varies from case to case. It may be noteworthy that the legislative record shows nothing inconsistent with, or conversely supports, the construction suggested by other interpretative factors (such as purpose or natural meaning), or the silence is used to positively support a conclusion that one of the choices of construction could not have been intended. For these cases I adopt, though use slightly differently, the description used by an American scholar that the 'silence is telling'.[15]

One example is *Van Beelen v The Queen.*[16] In that case, the appellant had been convicted of murder. A subsequent appeal had been unsuccessful. Nearly two decades later, the appellant sought a second appeal under section 353A of the *Criminal Law Consolidation Act 1935* (SA). One of the bases of this further appeal was that developments in the field of forensic pathology since his conviction about determining the time of death were 'fresh and compelling evidence' that allowed an appellate court to hear a second appeal.[17] Section 353A(6)(b) of the SA Act provided that fresh evidence is 'compelling' if 'reliable' 'substantial' and 'highly probative in the context of the issues in dispute at the trial.' In analysing the scope of section 353A, the Court stated that:

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[14] See Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice.* Cambridge: Cambridge University Press, 2023, pp. 118-120, 130-135, 140-144.

[15] Krishnakumar, 'The Sherlock Holmes Canon', pp. 9-14 uses this label in a more specific manner, dividing cases between 'no mention' cases and 'silence is telling' cases, but such a distinction was difficult to identify for the examples of Australian High Court decisions chosen for this article.

[16] *Van Beelen v The Queen* (2017) 91 ALJR 1244; [2017] HCA 48.

[17] *Van Beelen v The Queen*, 1247-1248 [14]-[16] (the Court).

> *Nothing in the scheme of the CLCA or the extrinsic material [citing South Australia, Legislative Council Hansard] provides support for a construction of the words 'reliable', 'substantial' and 'highly probative' in other than their ordinary meaning. Understood in this way, each of the three limbs of subs 6(b) has work to do…*[18]

Silence in parliamentary materials was used in a similar manner in *Bell Lawyers Pty Ltd v Pentelow*.[19] In deciding whether section 98(1) of the *Civil Procedure Act 2005* (NSW) about 'costs' that could be recovered by lawyers was qualified by a common law principle relating to lawyers acting on their own behalf, then Gageler J noted that the legislative history 'contains nothing to suggest legislative endorsement' of the common law exception.[20] Similarly, in another High Court decision it was noted that there was 'nothing in any of the extrinsic materials, or in the long policy debates' to suggest any rationale for the construction argued by one party about an extension of time provision in the *Patents Act 1990* (Cth).[21]

The more recent criminal case of *Director of Public Prosecutions (Vic) v Smith*[22] expresses the relevance of silence even more clearly. The High Court was construing the *Criminal Procedure Act 2009* (Vic). One of the issues was the scope of section 389E(1) which provided that the court may make or vary any direction 'for the fair and efficient conduct' of a ground rules hearing. The respondent had been charged with sexual offences. In accordance with a direction purportedly made under section 389E(1), the judge met with the complainant on the day before the hearing to introduce herself. The meeting was attended by the judge, the complainant, and defence and prosecution counsel, but not the accused.[23] One of the issues before the High Court was whether the meeting was authorised by section 389E.

Justice Edelman (in dissent as to whether section 389E authorised the meeting, but not as to outcome) considered the second reading speech, which included a statement of compatibility, given when the Bill to introduce section 389E(1) was before the Victorian Parliament. The Attorney-General gave the required statement of compatibility about whether the Bill was compatible with the *Charter for Human Rights and Responsibilities Act 2006* (Vic). His Honour noted that the Attorney-General gave some examples of the impact of the *Charter*, but 'made no mention of the possibility of a private meeting prior to trial from which an accused person

[18] *Van Beelen v The Queen*, 1250 [28] (the Court).

[19] *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29.

[20] *Bell Lawyers Pty Ltd v Pentelow*, 357 [67].

[21] *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 274; [2014] HCA 42, [71] (Crennan, Bell and Gageler JJ).

[22] (2024) 98 ALJR 1163; [2024] HCA 32.

[23] *Director of Public Prosecutions (Vic) v Smith,* 1169 [4]-[5], 1176 [51][57], 1185 [103].

was excluded…without even access by audiovisual link.'[24] That omission, His Honour said, 'is telling.'[25] The omission comprised one of the matters that led to his Honour's view that section 389E(1) could not empower such a meeting as such a direction would have the effect of unfairness or inefficiency in the conduct of the proceeding.[26]

Silence in the parliamentary materials was similarly relied on in *Coverdale v West Coast Council*.[27] The decision concerned the meaning of 'Crown lands' in section 11 of the *Valuation of Land Act 2001* (Tas). The issue was whether the phrase had the meaning given to that term in the *Crown Lands Act 1976* (Tas), which defined it to include land covered by the sea and other waters. The issue would determine whether farming leases over parts of the seabed and harbour waters were liable to be valued and rated by the Council under the *Valuation of Land Act 2001* (Tas). One of the arguments of the Valuer-General, which had declined to value the leases, was that that an amendment to the *Valuation of Land Act 2001* in 2007 made drafting changes to section 11 that revealed that 'Crown lands' was to be understood as excluding Crown land under the sea.[28] The Court, in a unanimous decision, rejected that submission, stating that there was no suggestion in the amending legislation 'or in any relevant extrinsic materials' (citing the Tasmania House of Assembly Hansard and the Bill's Clause Notes[29]) of a purpose of confining the meaning of 'Crown land' in that way.[30]

Opportunity Silence

The probative value of absence of comment in parliamentary materials might be strengthened when the legislative history of a statute reveals a particular state of the law that has been long accepted, such as long standing legal principles or a pattern of legislation. In those instances, the 'silence' may be more compelling as an interpretative factor because of that historical

[24] *Director of Public Prosecutions (Vic) v Smith*, 1197 [161].

[25] *Director of Public Prosecutions (Vic) v Smith,* 1197 [161].

[26] *Director of Public Prosecutions (Vic) v Smith,* 1197 [162]. Despite this view on s 389E Justice Edelman went on to hold that while the direction was irregular, it was not a fundamental irregularity at common law that might taint the evidence of the complainant.

[27] (2016) 259 CLR 164; [2016] HCA 15.

[28] *Coverdale v West Coast Council,* 176 [39].

[29] Similar to an explanatory memorandum.

[30] *Coverdale v West Coast Council*, 177 [40].

context. This is because Parliament can be seen as being squarely presented with an opportunity to alter the previous state of affairs but is silent during legislative scrutiny.

An example is *Frugtniet v Australian Securities and Investments Commission*.[31] The Australian Securities and Investments Commission ('ASIC') had made an order banning Mr Frugtniet from engaging in credit activities pursuant to section 80(1)(f) of the *National Consumer Credit Protection Act 2009* (Cth). For the purposes of the banning order, ASIC was required under section 80(2) to have regard to criminal convictions but, under the *Crimes Act 1914* (Cth), was not permitted to have regard to any spent convictions. The *Crimes Act 1914* (Cth) further provided that the exception for spent convictions did not apply to a court or tribunal.[32] Mr Frugtniet applied to the Administrative Appeals Tribunal for review of ASIC's decision. In affirming ASIC's decision, the Tribunal took into account the spent convictions.

The Court noted the long-standing principle underpinning merits review that the jurisdiction of the reviewing body, here the Tribunal, was to 'stand in the shoes of the decision-maker'[33], in this case ASIC, and so exercised the same powers as that decision maker. In their joint judgment, Kiefel CJ, Keane and Nettle JJ observed that the construction of section 80(2) to incorporate the exception in the *Crimes Act* for courts and tribunals 'needs to be assessed against the background of the long-standing principles concerning the function of an administrative review tribunal in the conduct of merits review of administrative decisions, to which reference has been made'.[34]

Not only, said that joint judgment, was such an 'obscure implication' improbable against that background, but more:

> *A fortiori where, as in the case of s 80(2), there is not a word to suggest in any of the extrinsic materials, including the Explanatory Memorandum and Second Reading Speech, a parliamentary intent to the effect that the AAT was to exercise a function other than the function exercised by ASIC. In light of such a tenuous implication, it is more probable that Parliament did not have an intention of changing the nature of administrative merits review of ASIC's decisions in the way contended for by the respondent.*[35]

[31] (2019) 266 CLR 250; [2019] HCA 16.

[32] *Frugtniet v Australian Securities and Investments Commission,* 254-5 [1]-[10].

[33] *Frugtniet v Australian Securities and Investments Commission,* 271 [51] (Bell, Gageler, Gordon and Edelman JJ). See also 257 [14] (Kiefel CJ, Keane and Nettle JJ).

[34] *Frugtniet v Australian Securities and Investments Commission,* 259 [21].

[35] *Frugtniet v Australian Securities and Investments Commission,* 259 [21].

In concluding, they observed that the better view was that such a profound change to the nature of merits review was not intended by parliament.[36]

Similarly, in *Flaherty v Girgis*,[37] the High Court referred to the long-established case law that gave relevant provisions of the *Service of Execution of Process Act 1901* (Cth) a construction that meant those provisions were supplemental to, rather than supplanting of, State laws. One of the arguments was that the statute was silent on the relationship between Commonwealth and State laws. The joint judgment of Mason ACJ, Wilson and Dawson JJ stated:

> *Reference to the Parliamentary Debates of the time… does not lead to any contrary conclusion. … One would expect that if State laws relating to service out of the jurisdiction were to be cut down in important respects, there would be some reference to the fact.*[38]

Another type of squarely presented 'opportunity' is where there is a new version of an Act before parliament against a background of legislative antecedents, previous amendments, or predecessor Acts, which seem to have maintained or accepted a particular construction of a provision. An amendment Act provides parliament with the opportunity to change that construction, so silence gives rise to the inference that no change was intended.

One example is *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*.[39] One of the issues that the High Court was required to determine was whether section 545(1) of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') permitted a Court to impose penal orders.[40] The Federal Court, as a consequence of a contravention by a union and one of its officials, had imposed a penal order that the trade union must not indemnify its officials. Section 545(1) of the *Fair Work Act* had an extensive legislative evolution, including

[36] *Frugtniet v Australian Securities and Investments Commission* 266 [32]. The joint judgment of Bell, Gageler, Gordon and Edelman JJ came to the same view on construction, but without relying on a similar use of parliamentary materials.

[37] (1987) 162 CLR 574.

[38] *Flaherty v Girgis,* 591. The joint judgment went on to note that the second reading speech, in particular, was equivocal: at p. 592.

[39] (2018) 262 CLR 157; [2018] HCA 3.

[40] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union,* 177 [60]. There was a separate statutory interpretation issue about whether there was an implied power in separate s 546: 177 [61].

predecessor Acts and previous versions of section 545.[41] The joint judgment of Keane, Nettle and Gordon JJ noted that section 545 had been re-drafted since those legislative antecedents, but agreed with comments of Jessup J in the appellate court (from which the appeal arose) that 'since the change in form had not been the subject of commentary in the parliamentary materials, it was inescapable that the change was one only of drafting and not reflective of a legislative intent to alter the substance of the pre-existing law.'[42]

A different kind of 'opportunity silence' can arise where parliamentary amendments are made. In *Harvey v Minister for Primary Industry and Resources*[43] one of the interpretative issues before the Court was the construction of the definition of 'infrastructure facility' in the *Native Title Act 1993* (Cth). The Full Court had determined that the definition was exhaustive and so confined to the types of facility listed in the definition.

The High Court rejected this construction, holding that the definition was non-exhaustive and so 'infrastructure facility' was not confined by reference to the list but also bore its ordinary meaning. One of the reasons for coming to this view was the contents of parliamentary material. The Court considered the Explanatory Memorandum (the '1997 Memorandum') that accompanied the originally introduced Native Title Amendment Bill 1997 and noted that the 1997 Memorandum expressly addressed the term 'infrastructure facility' and stated that it was to bear its ordinary meaning.[44]

That Bill was the subject of substantial amendments following its introduction into parliament. Consequently, a Supplementary Memorandum was produced. One of the amendments related to the definition of 'infrastructure facility'. The joint judgment observed:

> *It is true that after [the Explanatory Memorandum] was written in 1997 a great many more amendments were made to what was then the Native Title Amendment Bill 1997 (Cth) (which subsequently became the Native Title Amendment Act 1998 (Cth)). …However, nothing is said in the Supplementary EM that followed which contradicts what was said in the 1997 Explanatory Memorandum. If Parliament had*

[41] See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2016) 247 FCR 339, 347-349 [37]-[45] (Jessup J).

[42] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union,* 187 [91] (Keane, Nettle and Gordon JJ) referring to Jessup J's observations in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* CFMEU (2016) 247 FCR 339, which the joint judgment expressly agrees with at: 192 [107].

[43] (2024) 98 ALJR 168; [2024] HCA 1.

[44] *Harvey v Minister for Primary Industry and Resources,* 177 [32] (Gageler CJ, Gordon, Steward and Gleeson JJ), 191 [103] (Edelman J).

> *wanted to reverse its earlier explanation of the meaning of the term 'infrastructure facility' it could easily have done so.*[45]

Justice Edelman in a separate judgment (agreeing as to outcome on this point) similarly noted that 'the Supplementary Explanatory Memorandum that was produced after this amendment [to the application of the definition] did not suggest that there had been any intention to change the meaning of 'infrastructure facility''.[46]

Re-enactment Silence

Building on the above scenarios, silence in parliamentary materials is a relevant indicator for the so-called re-enactment presumption in statutory interpretation. This is a common law presumption that assumes that where Parliament repeats words in a statute that have been judicially construed, 'it can be taken to have intended the words to bear the meaning already judicially attributed to them'.[47] In other words, if the words of a statute have been given a meaning by a superior court and that attribution forms part of the reasoning of the court regarding the final outcome, then if a parliament (the same or another parliament) re-enacts those words given judicial meaning in another statute, that parliament might be taken to have 'approved' the meaning given to those words in the prior decision, and therefore it is presumed that they bear that judicial meaning.

The presumption has been described as 'artificial', and certainly its weight in the contemporary Australian legal system (where parliaments routinely amend statutes and so the possibility of re-enacting the same words is high) is questionable.[48] However, the application of this presumption has, it has been judicially noted, become 'more discerning' as parliamentary processes have become more available for courts to examine.[49] That is, since the legislative and common law developments of the 1980s and 1990s (more on this shortly) that led to relaxations in access to, and broadening of the range of, parliamentary materials for

[45] *Harvey v Minister for Primary Industry and Resources,* 186 [75] (Gageler CJ, Gordon, Steward and Gleeson JJ).

[46] *Harvey v Minister for Primary Industry and Resources*, 191 [104].

[47] *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 754; [2021] HCA 26, [51] (Gageler, Gordon and Steward JJ). See also 746 [10] (Kiefel CJ, Keane and Gleeson JJ, dissenting but not as to this principle). Both judgments cite *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

[48] *R v Reynhoudt* (1962) 107 CLR 381, 388 (Dixon CJ) .

[49] *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 754; [2021] HCA 26, [51] (Gageler, Gordon and Steward JJ) citing *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310, 329.

interpretation, parliamentary evidence can be more readily used to assess whether an inference that parliament 'approved' a judicially attributed meaning of statutory text can be plausibly drawn.

The presumption may be 'strengthened by the legislative history of the statute'[50], including parliamentary materials, if the material contains evidence that indicate parliament can be inferred to be 'aware' of a prior judicial interpretation. For example, in *Vella v Commissioner of Police (NSW)*, Kiefel CJ noted that it was evident from the second reading debates for a Bill that parliament was aware of a particular decision on a statute on which the Bill was modelled.[51] The joint judgment similarly noted that it was evident from the parliamentary debates that the New South Wales Parliament could be taken to have been aware of the prior judicial interpretation.[52]

Conversely, the *absence* of evidence in parliamentary materials may mean it is easier to rebut the re-enactment presumption. In a 2024 High Court case, Edelman J explained, agreeing with the majority judgment, that the 'force of this re-enactment or amendment principle of interpretation depends wholly upon context' and that will 'depend upon a number of factors including … the extent to which extrinsic materials to the re-enactment or amendment make express or implied reference to the decision.'[53] In relation to the matter before the Court, his Honour went on to say that the presumption 'has no force when the decision said to have been entrenched by the amendments is the obiter dicta, *unmentioned in any extrinsic materials*, of a single judge who was addressing a different point in an unreported decision … nearly two decades before the first amendment.'[54] In other words, the absence in the parliamentary materials of evidence of parliamentary approval of the prior decision is a factor that is relevant to the weight of the presumption.[55] Or, as the majority judgment in the decision pithily explained: '[o]ne judicial swallow does not make a legislative summer.'[56]

[50] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 233-4; [2019] HCA 38, [19] (Kiefel CJ).

[51] *Vella v Commissioner of Police (NSW),* 233 [19].

[52] *Vella v Commissioner of Police (NSW)* [52] (Bell, Keane, Nettle and Edelman JJ).

[53] *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2024) 98 ALJR 828, 856; [2024] HCA 21, [148].

[54] *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* 856 [149] (emphasis added).

[55] See also *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* 835-6 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

[56] *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd,* 836 [38].

RATIONALE FOR USE OF SILENCE IN PARLIAMENTARY MATERIALS

The examples above demonstrate that a court can use absence of comment in the record of legislative scrutiny as a factor to determine the meaning of words in a statute. Given this, the next question is how to understand this practice in the context of the current law.

In Australia, as noted earlier, it is well established that the framework for statutory interpretation is to consider the text, in its context, and having regard to its purpose.[57] The interpretation Acts of each Australian jurisdiction contain a provision requiring consideration of the purpose of a statute. For example, section 15AA of the *Acts Interpretation Act 1901* (Cth) ('AIA') requires an interpretation that would 'best achieve' the purpose of an Act. These statutory instructions reflect the common law.[58]

Recourse to extrinsic materials, including parliamentary materials, is also governed by both statutory and common law in Australia, but in somewhat different ways. The interpretation Acts of each Australian jurisdiction contain a provision, of varying restrictions, permitting access to materials outside the statutory text for the interpretative task.[59] The Commonwealth led this legislative development with the enactment of section 15AB in the AIA in 1984, a seismic shift in statutory interpretation law at the time.

Section 15AB was, at least in part, a reaction to the state of the common law that governed recourse to extrinsic materials, regarded as 'neither clear nor convincing.'[60] Within the next decade, all States and Territories, except South Australia (which relied entirely on the common law until 2021), enacted a provision on recourse to extrinsic materials in their respective

[57] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368; [2017] HCA 34 [14] (Kiefel CJ, Nettle and Gordon JJ). In New Zealand, this tripartite approach is embodied in legislation: *Legislation Act 2019* (NZ) s 10.

[58] *Thiess v Collector of Customs* (2014) 250 CLR 664, 672; [2014] HCA 12, [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

[59] *Acts Interpretation Act 1901* (Cth) s 15AB; *Legislation Act 2001* (ACT) s 141; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Legislation Interpretation Act 2021* (SA) s 16; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19.

[60] Symposium, *Symposium on Statutory Interpretation.* Canberra: Attorney-General's Department, 5 February 1983, p. 81 (Sir Anthony Mason).

interpretation Acts. Most jurisdictions, except Victoria, enacted a provision that mirrored, or was substantially similar to, section 15AB of the AIA.[61]

Soon after section 15AB was enacted it was judicially acknowledged that the section 'has its limits'.[62] The section provides that it is discretionary for interpreters to refer to extrinsic sources, but only permits them to do so if at least one of three circumstances is satisfied: to 'confirm that the meaning of the provision is the ordinary meaning' (s 15AB(1)(a)), or to 'determine the meaning' of a provision when 'the provision is ambiguous or obscure' (s 15AB(1)(b)(i)), or to 'determine' meaning when the 'ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable' (s 15AB(1)(b)(ii)).

While it might have been thought that a legislative statement on the circumstances in which interpreters, including judges, could use parliamentary materials would have been the final word on the matter, the common law continued to develop. In 1997, the 'modern approach' to statutory interpretation was formulated.[63] The following statement from the 2017 High Court decision of *SZTAL v Minister for Immigration and Border Protection*[64] is often cited to summarise this 'modern' approach'.

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.*[65]

The 'widest sense' includes the statute's legislative history of which parliamentary material is one component.[66] No ambiguity in the provision being construed is required before an interpreter can consider the wider context, including parliamentary materials. Indeed, regard to the wider context is considered an inherent part of the interpretative task. This common law approach is now well established, and its development has meant that, to a large extent, it,

[61] For key historical developments regarding extrinsic materials, see Barnes, Dharmananda and Moran, *Modern Statutory Interpretation,* pp. 17-35.

[62] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J).

[63] *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

[64] (2017) 262 CLR 362, 368; [2017] HCA 34.

[65] *SZTAL v Minister for Immigration and Border Protection,* 368, [14] (Kiefel CJ, Nettle and Gordon JJ) (citations omitted). See also 374-5 [36]-[37] (Gageler J, dissenting but not as to this principle).

[66] *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71; [2021] HCA 39, [87] (the Court).

rather than the interpretation Act provisions, have come to dominate the law about access to, and use of, extrinsic materials.[67]

But while it is well accepted that the common law 'text, context, purpose' framework is the lynchpin behind current statutory interpretation, the rationale behind that framework is less clear. On this point, the High Court has been less forthcoming. But, to the extent a rationale has been clearly articulated, it seems to be based in a linguistic rationale. That is, given that a statute is a written document and a tool of communication, its meaning is governed by the conventions of language. In linguistic terms, the statute might be called a 'speech act' or 'language act' - an utterance for the purpose of communication – a concept central to a philosophy of language theory developed by American philosopher John Searle[68] (who drew on the work of philosopher John Austin). As Edelman J has said, the common law 'modern approach' of text, context and purpose 'generally aligns the techniques for interpretation of statutes with the techniques for interpretation of ordinary speech.'[69]

Using this paradigm, the Parliament is the 'speaker' and the 'speech act' is the statute. As with ordinary speech, the meaning of 'utterances' are inevitably affected by their context, including 'the general fabric of basic knowledge and assumptions, express or tacit, that are shared by the users of the language'.[70] This linguistic model in the context of lawmaking bodies is explained by linguistic philosophers such as Scott Soames as follows:

> *What [lawmakers] assert is what a reasonable, informed audience that understands the text's linguistic meaning (including special legal meanings if any), the relevant publicly available facts and aspects of the lawmaking history, and the area of existing law into which the new law is expected to fit would rationally take the lawmakers to intend to assert or stipulate.*[71]

For statutes, those 'relevant publicly available facts and aspects of the lawmaking history' include parliamentary materials. As, again, Edelman J has explained:

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[67] See Jacinta Dharmananda, 'Sliding Doors: Harvey and the Dual Legal Gateways to Extrinsic Materials.' *Public Law Review* 35(2) 2024, pp.105-111.

[68] John Searle, 'What Is a Speech Act' in Max Black (ed), *Philosophy in America.* New York: Routledge, 2013, p. 221, pp.221-222.

[69] *Harvey v Minister for Primary Industry and Resources* (2024) 98 ALJR 168, 193; [2024] HCA 1, [111].

[70] Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context'. *Case Western Reserve Law Review* 23 1972, pp. 353-373, p. 356 (emphasis omitted).

[71] Scott Soames, 'Meanings, Speech Acts, and Legal Contents Produced by Plural Lawmaking Bodies'. *The Journal of Contemporary Legal Issues* 24(1) 2024, pp. 203-231, p.210 (emphasis omitted).

> *The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context.*[72]

If we accept this linguistic basis for the common law 'text, context, purpose' approach, which requires consideration of relevant parliamentary materials as part of 'context', then the next question is how silence in those materials is justified as an interpretative factor by that linguistic framework. It is one thing to use a communication paradigm when the evidence includes *positive* statements that form the background to the enacted law. But it is another to understand how that linguistic prism explains use of the *absence of a statement* (as part of the extrinsic context of the speech act) to indicate something about what was *said* (the statute).

Even without being conversant in the 'highly developed, complex and sophisticated body of linguistic knowledge' comprising speech act theory,[73] we can appreciate that silence can be meaningful. It is easy to imagine a scenario where silence during ordinary communication means something. Take this simple example which I have adapted from one example given by a linguistic scholar[74]:

> *A brother comes home, and his sister is sitting at the kitchen table. The brother looks in the cupboard, and then asks his sister 'Who ate all the chocolate biscuits?'*
>
> *His sister is silent.*
>
> *The brother says, 'I knew you did!'*

Even just a brief perusal of the literature related to the philosophy of language, including speech act theory, reveals that silence has been studied extensively in linguistic analysis and communication. Briefly, what that literature indicates is that, in communication, uses of silence are 'well-nigh inexhaustible.'[75] Indeed, silence has been described as 'a highly ambiguous form

[72] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838; [2020] HCA 29, [95].

[73] Haig Khatchadourian, *How To Do Things with Silence (Philosophical Analysis Series, Vol 63).* Germany: Walter de Gruyter GmbH, 2015, p.12.

[74] A Jaworski, 'Silence' in Keith Brown (ed), *Encyclopedia of Language & Linguistics.* Amsterdam: Elsevier Ltd, 2nd ed, 2006, p.377, p.378.

[75] Khatchadourian, *How To Do Things with Silence*, p. 8.

of communication.'[76] Most importantly, the inference about the communication that can be drawn from silence is 'fundamentally and inescapably contextual.'[77]

If we accept that the meaning given to silence in linguistic theory is highly dependent on context, that seems to accord with the common law interpretation framework for statutory interpretation. The silence in the parliamentary record forms part of the wider context of the speech act: the statute. The relevance of the silence will be highly dependent not only on the speech act (the statute), but on other contextual factors such as historical background, legislative antecedents, and previous common law decisions. Context also includes other parliamentary material. For example, the content of a parliamentary committee report, a Minister's speech in reply or a statement of compatibility with respect to human rights may help contextualise silence in, say, a second reading speech.[78]

IMPLICATIONS FOR LEGISLATIVE SCRUTINY

The use and potential relevance of silence in the legislative record for helping to determine statutory text meaning has some important implications, both practically and theoretically. I highlight three key points.

First, there are practical implications for law makers. Parliamentary materials consist of materials written by ministers, members of parliament, departments, parliamentary staff and minister's staff.[79] In light of the potential for inferences to be made from silences during legislative scrutiny, as reflected in those materials, for statutory interpretation, it would be wise for those participants to be aware, when preparing the materials, of that potential use.[80]

Second, there are practical ramifications for interpreters. If silence can be relevant to the communicative content of a statute, as the cases reveal, and that relevance is heavily context dependent, then it is incumbent upon interpreters, courts and lawyers, to understand that

[76] A Jaworski, *The Power of Silence: Social and Pragmatic Perspectives*. USA: SAGE Publications, Incorporated, 1992, p. 85.

[77] Khatchadourian, *How To Do Things with Silence,* p.9. See also p.15.

[78] Thank you to the anonymous reviewer for suggesting that the relationship between different parliamentary materials be highlighted.

[79] *Acts Interpretation Act 1901* (Cth) s 15AB(2) identifies some types of parliamentary materials that may be used in statutory interpretation but s 15AB(2) is not exhaustive.

[80] Krishnakumar, 'The Sherlock Holmes Canon', pp. 22-28 identifies 'legislative process problems' in the American context with the canon.

context. The notion of 'context' is a broad umbrella when it comes to grappling with a complex process like the parliamentary process. As others have pointed out, the fundamental principles of 'text, context and purpose' are expressed at a 'high level of generality' and so do not offer universal or even clear guidance in relation to legislative scrutiny.[81] Context might rationalise how the courts can consider parliamentary materials, including any lack of comment within them, but it provides little guidance when it comes to the assessment and weighing of the probative value of contextual material. Evaluation of the weight and relevance of what is not said (or said) requires something different – an understanding of the legislative process, something which the context principle does little to guide.

I have argued elsewhere, more generally, about the merit of understanding the parliamentary process for statutory interpretation, particularly when it comes to the evaluation of parliamentary materials.[82] That merit is magnified when it comes to assessing what parliamentary materials don't say for statutory interpretation. To take a simple example, understanding procedural rules may be relevant. In Federal Parliament, like other Australian parliaments, the standing orders in the House of Representatives and Senate are drafted so that a Bill will be considered over several days, at the minimum. But a variety of procedures may be used to suspend or overcome those requirements to expedite the passage of a Bill. To curtail debate on a Bill, measures that may be used include motions of 'closure' of the member (a motion that a member who is speaking no longer be heard),[83] a 'gag' motion (that the question in issue, such as a second reading motion, be put without further debate)[84] a 'guillotine' motion (a motion that the Bill be considered urgent which imposes limits on debate for all stages of the Bill)[85] or a contingent notice.[86] In the Senate, there is also the procedural mechanism of progressing a Bill 'without formalities', suspending the requirement for debate

[81] Justice John Basten, 'Statutory Interpretation: Choosing Principles of Interpretation'. *Australian Law Journal* 91 2017, pp. 881-885, p.881.

[82] Jacinta Dharmananda, 'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process'. *University of New South Wales Law Journal* 41(1) 2018, pp 4-39.

[83] House of Representatives, *House of Representatives Standing Orders.* Canberra: Department of the House of Representatives, 7th ed, 2018 ('*House SO*'), O 80. There is no equivalent 'closure' motion in the Senate.

[84] *House SO*, O 81; Senate, *Standing Orders and Other Orders of the Senate*. Canberra: Department of the Senate, October 2022 ('*Senate SO*') O 199.

[85] *House SO*, OO 82–5; *Senate SO*, O 142.

[86] A notice stating that, if a certain event happens, then a motion will be moved to suspend certain standing orders.

to be undertaken over certain days.[87] Any of these procedures can limit what is said in the parliamentary record and therefore provide another reason for lack of comment.

The third point is about perspective. The perspective of the current law emphasises the statute as a single point in time instrument of communication. But once we go outside the statute for interpretation, we are looking at a diversity of non-legislative types of parliamentary materials, with different authors and purposes and subject to different procedures and timing. In other words, once an interpreter engages with parliamentary materials, they are, arguably, no longer looking at the statute as a single point in time instrument of communication, but as a policy tool that forms one piece of the complex, pluralist, political process of which it is a part. In other words, we are looking at it as part of an institutional process. This institutional perspective, I suggest, offers a more enlightening and systematic approach to evaluating parliamentary (and other) materials, including silence in those materials, than the broad concept of 'context'.

CONCLUSION

While not wishing to overstate its significance, absence of comment in parliamentary materials can be a relevant interpretative factor. This has implications for lawmakers and interpreters. Participants in law making should be aware of this potential when preparing parliamentary materials. Interpreters should pay attention to the legislative process to meaningfully assess those materials. Finally, this discussion invites courts and other interpreters to think more carefully about what lawmakers already well understand – the institutional, rather than purely communicative, role of a statute because of the implications of what may even be unsaid.

[87] *Senate SO*, O 113(2)(a).

Follow the (Meta-) Experts: Helping Parliamentarians to Understand Complex Research*

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Abstract: Parliamentarians are increasingly required to respond to complex matters in areas where they have limited or no technical understanding. As such, parliaments are becoming more and more reliant on the advice of experts and the institution of expertise. This comes at a time when expertise is increasingly subjected to public questioning and criticism. Experts frequently disagree and sometimes make mistakes. These issues were highlighted during the 'perfect epistemic storm' of the COVID-19 pandemic but are also central to parliamentary consideration of countless other complex issues, including climate change, energy, artificial intelligence, military technologies, global finance and the prevention of future public health crises. Given the daunting gap between expert and non-expert understandings of technical issues, the question is, how can parliamentarians decide who are the relevant experts and which experts they should be listening to? This article outlines some conceptual strategies parliamentarians and parliamentary advisers can use to identify relevant experts and engage with their claims. In particular, the article highlights the role of 'meta-expertise' used by parliamentary research services and similar intermediary institutions in helping parliamentarians understand complex research.

INTRODUCTION

Parliamentarians are increasingly required to respond to complex matters in areas where they have limited or no technical understanding.[1] As such, they are becoming ever more reliant on the advice of experts.

Recent years have seen a growing number of studies in the field of expert advice and policy advisory systems for governments. These have included discussion of the impact of technological change, shifting conceptions of expertise, public sector capacity and questions of

[1] Similarly, political staff and parliamentary officers typically do not have expertise in technical matters. While we primarily refer to parliamentarians in this paper, this should be understood to include their staff.

technocracy, democratic control and participation.[2] However, there has been far less consideration of the challenges of complex policy matters and the role of expert advice for parliaments.

Parliamentarians are not only expected to develop, evaluate, and vote on legislation covering a wide range of issues but also to hold governments to account and represent constituents.[3] The performance of these roles requires timely access to authoritative and reliable information.[4] And, unlike members of the executive branch, other parliamentarians do not have the public service and other expert government bodies at their disposal.

In addition to generally not being experts on the full range of matters upon which they are called on to deliberate or investigate and having to assess a large volume of legislation, parliamentarians are time poor and operate in a highly political environment, balancing competing demands from a variety of actors seeking their support—including constituents, interest groups, colleagues and parties.

The challenge of needing to understand highly technical matters comes at a time when expertise has never been more heavily subject to public questioning and criticism. This is partly due to an increasingly educated public with independent access to vast amounts of information feeling more and more capable of challenging expertise. It is also a result of the public becoming more aware that experts frequently disagree and sometimes make mistakes. The situation is further exacerbated by the proliferation of misinformation and disinformation and what is sometimes called a 'crisis of expertise', 'the death of expertise' or a 'war on expertise'.[5] These issues were highlighted during 'the perfect epistemic storm' of the COVID-19 pandemic but are also central to parliamentary consideration of many other complex policy problems

[2] Jonathan Craft, Brian Head and Michael Howlett, 'Expertise, policy advice, and policy advisory systems in an open, participatory, and populist era: New challenges to research and practice', *Australian Journal of Public Administration* 82(2) 2024, pp. 143-55; Brian Head, 'Reconsidering expertise for public policymaking: the challenges of contestability', *Australian Journal of Public Administration* 82(2) 2024, pp. 156-72.

[3] Mathieu Ouimet, Morgaine Beaumier, Adrien Cloutier, Alexandre Cote, Eric Montigny, Francois Gelineau, Steve Jacob and Stephane Ratte, 'Use of research evidence in legislatures: a systematic review', *Evidence & Policy*, 20(2) 2024, p. 227.

[4] Inter-Parliamentary Union (IPU) and International Federation of Library Associations and Institutions (IFLA), *Guidelines for Parliamentary Research Services*, IPU and IFLA, 2015, p. 6. Accessed at: https://www.ipu.org/resources/publications/reference/2016-07/guidelines-parliamentary-research-services.

[5] Brian Head, 'Reconsidering expertise for public policymaking', p. 157; Roger Koppl, *Expert Failure*. Cambridge UK: Cambridge University Press, 2018; Thomas Nichols, *The death of expertise: the campaign against established knowledge and why it matters*. New York, NY: Oxford University Press, 2017; Gil Eyal, *The Crisis of Expertise*. Cambridge, UK: Polity Press, 2019.

such as climate change, energy transition, artificial intelligence, military technologies, global finance and the prevention of future public health crises.[6]

Given the daunting epistemic gap between experts and non-experts—that is, the inability of non-experts to understand or fully understand specialist technical expertise—how can parliamentarians decide who the relevant experts are and which experts they should be listening to? While policy makers and parliamentarians are often implored to 'just follow the science' or 'just follow the experts', it is rarely that simple.

In this article, we present a brief summary of a classification of expertise that can provide some guidance, and highlight the important role played by 'meta-expertise' in helping to address the problem and meet the needs of parliamentarians.

WHAT IS EXPERTISE?

At its most basic level, expertise is the ability to understand and do things that most other people cannot do.[7] A wide range of sub-definitions are based on expertise in specific domains (such as STEM, music, sport, aviation, the military and weather forecasting) and there is variation in the degree of emphasis on performance or knowledge.[8]

Performance-based definitions emphasise reliably superior performance on given tasks; these relate mostly to skills-based activities such as musicianship and are not easily applied to cognitive work in complex domains where it is not possible to easily measure or simulate performance or reduce it to simple tasks.[9] This describes the context of expertise in policy areas where the environment is highly uncertain, the problem or goals are ill-defined, where there are high stakes, and there are no right or wrong answers (in short, wicked problems). Other

[6] These are sometimes called 'wicked problems', which cannot be 'definitively described, have 'no 'solutions' in the sense of definitive and objective answers' (Horst Rittel and Melvin Webber, 'Dilemmas in a general theory of planning', *Policy Sciences* 4, 1973, p. 155), and for which 'facts are uncertain, values in dispute, stakes high and decisions urgent' (Maru Mormina, 'Knowledge, expertise and science advice during COVID-19: in search of epistemic justice for the 'wicked' problems of post-normal times', *Social Epistemology* 36(6) 2022, p. 672).

[7] Alvin Goldman, 'Expertise', *Topoi* 37 2018, p. 3.

[8] Paul Ward, Jan Schraagen, Julie Gore and Emilie Roth (eds), *The Oxford handbook of expertise*. Oxford: Oxford University Press, 2020.

[9] Ward, Schraagen, Gorre and Roth, *The Oxford handbook of expertise*, p. 12.

definitions stress the possession of knowledge and/or skills that enable more effective behaviours than novices', such as developing new, superior knowledge.[10]

Expertise can also be understood as either relational or realist. Relational accounts view expertise as largely a social construct. Here, expertise is a reputational matter, with an expert simply being somebody who is socially recognised and accredited as such. For instance, Koppl describes an expert as 'anyone paid for their opinion … 'expert' is a contractual role rather than a subset of persons'.[11]

By contrast, a realist approach treats expertise as an objective and tangible phenomenon. While expertise is gained through a social process (people are socialised in a particular domain of study) and is comparative, it is nevertheless something that individuals possess independently of whether other people think they do. A person may not advertise themselves as an expert but so long as they have the requisite knowledge or skills, they are to all intents and purposes an expert.[12] Expertise is also objective in that it enables people to understand and do things that they could not do before and that people without expertise in the relevant domain cannot do.

We argue after sociologists Harry Collins and Robert Evans (among others) that it is necessary to treat expertise as something that is both socially constructed and also demonstrably real.[13] This is essential if we are to be able to decide who knows what they are talking about and should participate in decision making on technical issues, and thereby deal with what has been described as 'the political problem of expertise'.

The political problem of expertise involves a tension between expertise as a form of authority that stands in contrast to liberal democratic values and the ideal that people should participate in debates over issues that have impact on their lives. The political problem is often represented in its most extreme form as the choice between technocracy, in which powerful expert bodies impose scientistic modes of thinking on public issues, and technological populism, in which the boundary between the knowledge of the expert and non-expert is dissolved: the radical democratisation of expertise.

[10] Michel Croce, 'On what it takes to be an expert', *The Philosophical Quarterly* 69 (274) 2019.

[11] Roger Koppl, *Expert Failure*. There is a large body of work in the social studies of science that subscribes to this relational, or constructivist, view of expertise.

[12] Goldman, 'Expertise', p. 4.

[13] Matthew Thomas and Luke Buckmaster, *Expertise and public policy: a conceptual guide*, Parliamentary Library, Canberra, 2013. See also Goldman, 'Expertise', p. 4.

Non-experts are free to engage in debates over matters of public policy that concern them. Indeed, it is important that they do so, given that these matters are not solely technical, but also involve values and interests. Moreover, if policy is to prove effective it needs to account for the lived experience of non-experts, as, to put it colloquially, 'only the wearer knows where the shoe pinches'.[14] However, where it comes to the technical aspects, they are typically not able to understand what is being said and who is saying it. In the absence of the ability to evaluate expert knowledge non-experts are reliant on experts and obliged to choose whom to believe. This may be described as the epistemic problem of expertise.

WHO ARE THE RELEVANT EXPERTS?

All this indicates the need for a guide to help legislators easily identify and assess expertise:

> *The roles of policy officials and ministers are made more difficult because to benefit from expertise, someone has to be the arbiter of who the expert is … in the absence of a recognised method for scrutinising expertise the process is far more subjective and can involve the judgements of third parties (who are no more or less expert that the policy professionals or ministers).*[15]

The most prominent attempt to create a classification of expertise that can help to deal with the political problem of expertise and the epistemic gap is that of Collins and Evans.[16]

The classification ranks expertise from lower to higher levels and distinguishes between two main types of expertise, namely, specialist expertise and meta-expertise. As their names imply, specialist expertise relates to technical expertise in specific domains while meta-expertise refers to forms of expertise that are used to judge other expertise.[17]

Specialist technical expertise ranges from what Collins and Evans describe as beer-mat knowledge (the sort of knowledge that would allow someone to answer a trivia question on a

[14] On the importance of accounting for lived experience see David Rose, Caroline Kenny, Abbi Hobbs and Chris Tyler, 'Improving the use of evidence in legislatures: the case of the UK Parliament', *Evidence and Policy* 16(4) 2020, pp. 619-638; Alex Hickman 'Facilitating evidence by vulnerable witnesses to parliamentary committees – recent Western Australian experiences', *Australasian Parliamentary Review* 39(1), pp. 20-35; Hannah Johnson, 'Who is in the room? Representing diversity in parliamentary committee evidence in the UK', *European Journal of Politics and Gender* 6(3) 2023, pp. 452-455.

[15] Gareth Conway and Julie Gore, 'Framing and translating expertise for government' in Ward et al, *The Oxford handbook of expertise*, p. 1143.

[16] Harry Collins and Robert Evans, *Rethinking expertise*. Chicago: University of Chicago Press, 2007.

[17] Collins and Evans, *Rethinking expertise*, p. 69.

technical subject) up to contributory expertise (the ability to contribute to a domain of expertise like immunology or computational physics).

At lower levels, specialist expertise involves the learning of facts or fact-like relationships from books or published papers, independent of research conducted in a domain.[18] This is propositional knowledge—knowledge 'that'—rather than procedural knowledge—knowledge 'how'. As such, at lower levels, specialist expertise might better be described as levels of knowledge or information. It is limited and does not enable its holders to understand or contribute to the technical part of debates. For this, either contributory expertise or interactional expertise—mastery of the language of a specialist domain but not practical competence—is required.[19]

Collins and Evans' classification has been criticised by some science researchers. This has been on two main grounds: firstly, that the classification does not sufficiently account for the exercise of power in determining who gets to be recognised as an expert, and, secondly, that it does not adequately deal with the messy and political nature of policy making, and the fact that politics inevitably intervenes in the process of developing technical knowledge. We argue that while it is indeed important to be aware of these issues, and to acknowledge that expertise is never entirely politically neutral, it is nevertheless essential to attempt to draw boundaries if we are to deal with the political problem of expertise.[20]

Using Collins and Evans' classification it is possible to draw a general boundary between lower and higher-level expertise, and to grasp just how few people can understand or participate in decision making on technical issues. In such a situation we have argued that meta-expertise comes into its own as a form of expertise that can enable its practitioners to make more-or-less reasoned judgements about the credibility and relevance of experts as well as assessing the reliability of evidence.[21] Using criteria such as credentials, track record and experience,

[18] Collins and Evans, *Rethinking expertise*, pp. 18-23.

[19] Collins and Evans, *Rethinking expertise*, pp. 24-35.

[20] See Sheila Jasanoff, 'Breaking the waves in science studies: comment on H. M. Collins and Robert Evans, 'The third wave of science studies', *Social Studies of Science* 33(3), 2003.

[21] Thomas and Buckmaster, *Expertise and public policy: a conceptual guide*, pp. 15–16. In this paper we identified and developed a form of expertise—social expertise—that can be used by non-experts to make judgements about which experts to believe when they are not in a position to judge what to believe. Such judgements may be made using criteria such as who has the numbers on their side; are there any relevant interests or biases; and what are the experts' track records. While social expertise is a valuable resource it is of limited use in the context of wicked problems, such as the COVID-19 pandemic, where expert consensus is often absent, there is conflicting testimony from genuine experts, facts take some time to develop, and there is more competition for the role of expert. These factors make it difficult if not impossible to make judgements using the criteria outlined. Thomas and Buckmaster, *Expertise and public policy: a conceptual guide*, pp. 21–38.

meta experts can determine whether people qualify as expert in a given area, and judge between experts.[22]

DESCRIBING META-EXPERTISE

While the term meta-expertise has come into wider scholarly usage only relatively recently, similar concepts have been used in earlier discussions about the role of experts in the social distribution of knowledge. For example, social philosopher Alfred Schutz saw the 'reasonably founded opinions' of the 'well-informed citizen' as having an important social role in bridging the gap between expert knowledge and that of the person on the street.[23] Sociologists Berger and Luckmann also highlighted the need for meta-expertise ('experts on experts') in a society increasingly characterised by the gap in understanding between experts and non-experts:

> *The social distribution of knowledge of certain elements of everyday reality can become highly complex and even confusing to the outsider. I not only do not possess the knowledge supposedly required to cure me of a physical ailment, I may even lack the knowledge of which one of a bewildering variety of medical specialists claims jurisdiction over what ails me. In such cases, I require not only the advice of experts, but the prior advice of experts on experts. The social distribution of knowledge thus begins with the simple fact that I do not know everything known to my fellowmen, and vice versa, and culminates in exceedingly complex and esoteric systems of expertise. Knowledge of how the socially available stock of knowledge is distributed, at least in outline, is an important element of that same stock of knowledge.*[24]

Drawing on philosopher, Michel Croce, the 'better understanding' possessed by a meta-expert refers to having a 'broader, deeper and more significant grip on the relationship between true bodies of information constituting [a subject area] than most people do'.[25] However, they are

[22] Collins and Evans argue that experience is the most useful criteria in setting a boundary between the knowledge of non-experts and experts: 'without experience within a technical domain, or experience at judging the products of a technical domain, there is no specialist expertise'. And, without specialist expertise, 'the minimal standards for making judgements in [technical] areas have not been met'. Collins and Evans, *Rethinking expertise*, p. 68.

[23] Alfred Schutz, 'The Well-informed Citizen: an essay on the social distribution of knowledge', *Social Research* 13(4) 1946, pp. 463-78.

[24] Peter Berger and Thomas Luckmann, *The Social Construction of Reality*, Harmondsworth: Penguin, 1972, pp. 60-61.

[25] Croce, 'On what it takes to be an expert', p. 19. See also Catherine Elgin, 'Understanding and the Facts', *Philosophical Studies* 132(1) 2007, pp. 33-42.

not expected to understand specific aspects of a subject area in the same depth as a higher-level expert. This point was well captured by a former head of the Australian Parliamentary Library, who explained that 'It is more useful to us to have specialists who can cover an acre or two at a depth of 100 feet rather than a square foot to a depth of 5,000 feet'.[26] Or, in the words of a UK Member of Parliament:

> *Academic research feeds in a very limited capacity because it's probably too specialised. What [I] need to know, in practical terms, is 80% of the high-level subject and I don't need to know, or haven't got the time to know, the other 20%.*[27]

We define meta-expertise as having two main attributes: (i) advanced understanding (mastery) of a particular subject area and (ii) the ability to assist others in their understanding of that subject area. These should be seen as 'ideal types'; attributes a meta-expert should be aiming for. A given meta-expert may be stronger in one of these attributes than the other (e.g. they may know a lot about a subject area but not be as proficient in communicating with non-experts) but both aspects are necessary to the provision of meta-expertise. Further, we suggest that meta-expertise should not be seen as necessarily limited to a particular 'class' of meta-experts but rather a role that could also be performed by 'higher level' (contributory, interactional) experts who possess the attributes of subject area mastery *and* ability to improve non-expert understanding.

Mastery of a Subject Area

This aspect of meta-expertise can be understood as the capacity to make reasoned judgements about the credibility and relevance of experts in a particular subject area.[28] Meta-experts have an informed understanding of a subject area developed through experience.

The aim here is more than merely the possession of a larger number of facts (true beliefs) in a subject area. Rather, meta-expertise should be measured in terms of a person's understanding of such questions as:

- what are the background assumptions of a subject area?

[26] Allan Fleming, cited in Dorothy Bennett, 'A History of the Parliamentary Research Service' in *The PRS 25 Years On: The Executive and the Legislature, the Interplay in Australia's Westminster System. Papers to Mark the 25th Anniversary of the Parliamentary Research Service*, Department of the Parliamentary Library, Canberra, Australian Government Publishing Service, 1995, p. 13.

[27] David Christian Rose, Caroline Kenny, Abbi Hobbs, and Chris Tyler, 'Improving the use of evidence in legislatures: the case of the UK Parliament', *Evidence & Policy* 16(4) 2020, p. 632.

[28] Collins and Evans, *Rethinking expertise*, p. 69.

- what are the key questions arising within it?
- what are the key methodologies used within it?
- what are the areas of contention/consensus?
- who are the most relevant and credible experts/sources on the subject?
- where do various experts and their views 'fit in' to the field?

Improving the understanding of non-experts

Our understanding of meta-expertise extends the concept beyond the usual association of it only with subject area mastery, to include capacities necessary to help non-experts improve their understanding. Meta-experts have an intermediary function, the point of which is not simply to develop advanced understanding of a subject but to pass that understanding onto others. Croce describes a non-exhaustive set of 'novice-oriented abilities'; dispositions or virtues that might enable a person to help others improve their understanding of a subject area.[29] These include 'sensitivity to the novice's needs, intellectual generosity, intellectual empathy, sensitivity to the novice's epistemic resources, and maieutic ability'.[30]

Examples of such abilities in practice include asking empathetic, well-pitched questions to determine precisely what help a non-expert might need (e.g. what do you already know about the subject area? What are you hoping to do with the information?). It would also include the ability to tailor responses to the specific needs of an individual or audience. For example, translating complex material into plain language; understanding how much detail is required and how much can be left out.

META-EXPERTISE AND PARLIAMENTS

Unless they happen to be specialists in a particular area that is the subject of parliamentary attention, parliamentarians are just as likely to be limited in their understanding of complex technical matters as any other non-expert. As a UK Member of Parliament has put it:

[29] Croce, 'On what it takes to be an expert', p. 13.

[30] Croce, 'On what it takes to be an expert', p. 13. Philosopher, Jean Goodwin, worries that 'from the citizens' point of view, the friendly meta-expert is yet another apparent egghead demanding their regard'. Jean Goodwin, 'Accounting for the appeal to the authority of experts', *Argumentation* 25(3) 2011, p. 290. 'Novice-oriented abilities' are essentially about avoiding the 'apparent egghead' trap.

> *By definition, most politicians are not experts on most subjects; on the one hand, we have to be generalists, on the other you are expected to be expert, and there is a massive tension between those two that you would hope academic research could arbitrate.*[31]

Meta-expertise therefore has a crucial role to play in helping parliamentarians to understand and make decisions about complex technical matters.

The main way in which parliaments have attempted to deal with the epistemic gap is through the establishment of intermediary bodies in which the exercise of meta-expertise takes place. Institutional meta-expertise can be found in various forms in parliaments, including parliamentary information and research services (including parliamentary libraries), parliamentary technology assessment bodies and parliamentary committees. A recent project sponsored by the UK Parliamentary Office of Science and Technology (POST), found that most parliaments have an established service for accessing and connecting with research, and identified 73 across the world as providing analysis or synthesis of research and/or direct links to academic scholarship.[32]

Parliamentary research services

Parliamentary research services (PRS) play a key role in helping parliamentarians to perform their legislative, deliberative, scrutiny and representational duties. They emerged as a complement to parliamentary libraries, to meet the growing demand for objective, and authoritative research and analysis. In many cases they operate separately from parliamentary libraries and can be divided into three broad models: internal, external or mixed.[33] An early example of PRS is the US Congressional Research Service, which was established (under the name, Legislative Reference Service) in 1914 to assist with the information needs of Congress, and in 1970 was given a greater role in research and analysis.[34]

The Inter-Parliamentary Union and International Federation of Library Associations and Institutions research services guidelines provide a good explanation of the role of PRS:

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[31] Rose et al, 'Improving the use of evidence in legislatures: the case of the UK Parliament', p. 632.

[32] Vicky Ward and Mark Monaghan, 'Mapping and connecting Parliamentary Research Services around the world', Commonwealth Parliamentary Association blog, [2024]. Accessed at: https://www.cpahq.org/knowledge-centre/blogs/parliamentary-research/.

[33] D Jágr, 'Parliamentary research services as expert resource of lawmakers. The Czech way', *The Journal of Legislative Studies* 28(1) 2022, p. 97.

[34] Congressional Research Service (CRS), *The Congressional Research Service and the American Legislative Process*, CRS Report, 12 April 2011, p. 1.

> *… as they prepare themselves for their parliamentary activities, parliamentarians have the daunting task of having to secure access to authoritative and concise material that presents synthesis and analysis of the relevant facts necessary for them to intervene effectively (often on short notice) on public policy issues addressed by a parliament ... A parliamentary research service can assist by preparing synthesis and analysis of proposed legislation, policies or programmes considered by a parliament. Activities can include the preparation of factual assessments, the provision of second opinions on information provided by the government or even assessments of whether the government has implemented the actions it committed to take.*
>
> *The role of the research service will be to provide analysis covering the spectrum of perspectives through products and services that do not attempt to lobby, are non-partisan and are offered to governing and opposition parties alike. Analytical work will focus on synthesizing facts and presenting information in a balanced manner both in political terms and in the approaches adopted to conduct analysis.*[35]

For PRS, effective performance of this function requires meta-expertise. There must be subject specialists available who possess the necessary attributes for helping parliamentarians to better understand legislative and public policy matters. For example, specialist staff in the Australian Parliamentary Library's research service provide written and verbal briefings to members of parliament, their staff and parliamentary committees, research publications on current issues and legislative analysis. Parliamentary researchers need to know what they are talking about (subject area mastery) and be capable of presenting it in a way that meets the specific requirements of their parliamentary audience (timely, impartial, clear, concise).[36]

Parliamentary technology assessment

In response to increased awareness from the 1960s and 1970s about the specific challenges and uncertainties posed by scientific and technical change, many countries have established dedicated parliamentary technology assessment (PTA) bodies tasked with providing impartial

[35] IPU and IFLA, *Guidelines for Parliamentary Research Services*, p. 6.

[36] These requirements may be captured in legislation and/or governance arrangements. For example, under the Australian *Parliamentary Service Act 1999* (s38B), the functions of the Parliamentary Librarian (the statutory officer responsible for information and research services in the Australian Parliament), are to 'provide high quality information, analysis and advice' to the Parliament 'in a timely, impartial and confidential manner', 'maintaining the highest standards of scholarship and integrity', 'on the basis of equal access' and 'having regard to the independence of Parliament from the Executive Government of the Commonwealth'.

advice to assist with decision-making. As Csaki (et al) explain, '[PTA] may focus on diverse themes such as energy, health and ageing. PTA may involve experts, stakeholders and possibly citizens, but with the primary purpose of informing decision-makers within the parliament.'[37] Following the establishment of the Office of Technology Assessment at the US Congress in 1972, PTA bodies have taken a variety of forms across different parliaments, including within parliamentary committees, as independent offices or units within the parliament or as independent institutions (operating separately but with parliament as their main client).[38]

The Office of Technology Assessment at the German Bundestag (TAB) is an example of the latter. It is operated by a body within the Karlsruhe Institute for Technology and governed by a parliamentary steering committee. According to Kehl (et al):

> *TAB's work is mainly based on gathering expert scientific opinions. Its task is to integrate relevant knowledge in a comprehensive manner, to weigh up the available information, to disclose different positions and their normative premises, and to identify new options for (political) action in order to support the democratic decision-making processes.*[39]

By contrast, while originally an external body when established in 1989, the UK's POST now operates within the UK parliament, governed by a board comprising parliamentarians, parliamentary officials and experts drawn from the UK's learned academies.[40] POST describes itself as:

> *… a research and knowledge exchange service based in the UK Parliament. It works to ensure that the best available research evidence and information is brought to bear on the legislative process and scrutiny of Government. It primarily supports the select committees of both Houses.*[41]

[37] Csaba Csaki, Ciara Fitzgerald, Paidi O'Raghallaigh and Fredric Adam, 'Towards the Institutionalisation of Technology Assessment: the case for Ireland', *Transforming Government: People, Process and Policy* 8(3) 2014, p. 318.

[38] Csaki et al, 'Towards the Institutionalisation of Technology Assessment', p. 319.

[39] Christoph Kehl, Steffen Albrecht, Pauline Riousset and Arnold Sauter, 'Goodbye Expert-Based Policy Advice? Challenges in Advising Governmental Institutions in Times of Transformation', *Sustainability* 13, 2021, p. 2.

[40] European Parliamentary Technology Assessment (EPTA), 'United Kingdom – The Parliamentary Office of Science and Technology, EPTA. Accessed at: https://eptanetwork.org/static-html/comparative-table/countryreport/united_kingdom.html.; POST, 'POST board'. Accessed at: https://post.parliament.uk/about-us/post-board/.

[41] POST, 'About us'. Accessed at: https://post.parliament.uk/about-us/

Its work includes publishing peer-reviewed research, helping Parliament to access experts and evidence, identifying emerging areas of interest and supporting the exchange of expertise between researchers and the Parliament through fellowships and other activities.[42]

The core tasks undertaken by bodies like TAB and POST require both advanced understanding of science and technology matters and highly developed novice-oriented abilities and as such should be considered a form of meta-expertise.

In an Australian context, a 2021 report by the Australian Senate Legal and Constitutional Affairs References Committee recommended the establishment of 'a Parliamentary Office of Science, modelled on the United Kingdom Parliamentary Office of Science and Technology, to provide independent, impartial scientific advice, evidence and data to the parliament, and all Members and Senators'.[43] This was supported by the Australian Academy of Science, which highlighted the challenges for 'non-experts to determine the authority and accuracy of information provided, particularly when committees can receive flatly contradictory advice'.[44] In arguing for the establishment of a Parliamentary Science Office, the Academy maintained that 'Committees are not well set up to identify poor quality information and are therefore vulnerable to erroneous data and deliberate misinformation'.[45]

Further, the NSW Parliamentary Research Service recently established a service for sourcing independent, objective analysis and advice from external experts on complex and technical matters, a resource that is available to committees as needed.[46] This followed a 2019 examination of how committees could benefit from the assistance of experts external to the Parliament, conducted by the NSW Legislative Council's Procedure Committee.[47]

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[42] POST, 'About us'.

[43] Senate Legal and Constitutional Affairs References Committee, *Nationhood, national identity and democracy*, Parliament of Australia, 2021, p. 174.

[44] Australian Academy of Science (AAS), 'How should the Australian Parliament get its science advice?', AAS. Accessed at: https://www.science.org.au/curious/policy-features/how-should-australian-parliament-get-its-science-advice#:~:text=A%20Parliamentary%20Science%20Office%20should,and%20evidence%20to%20all%20parliamentarians.

[45] Ibid.

[46] Anita Knudsen, 'Collaborating with External Experts', Association of Australasian Parliamentary Libraries Conference 2025. Accessed at: https://www.apla.asn.au/2025-conference/.

[47] Legislative Council of NSW Procedure Committee, Consultation on highly contentious bills and committee access to external experts, Report No.12, September 2020; NSW Parliamentary Library submission to NSW Legislative Council, Inquiry into Consultation of Highly Contentious Bills, Submission No. 9, November 2019. Accessed at:

In their role of investigating issues and legislation, the work of parliamentary committees includes finding out the facts of an issue, examining witnesses, reviewing evidence and drawing reasoned conclusions.[48] While committee work involves the use of meta-expertise—for example, in advising committee members about the selection of expert witnesses to invite to committee hearings—committees are not a focus of this paper.

DISCUSSION: IMPLICATIONS AND FUTURE RESEARCH

The purpose of the above has not been to suggest that meta-expertise is something new but rather to clarify its role as a discrete and necessary feature of the social distribution of knowledge and to highlight its value to the work of parliaments. Greater and greater volumes of information, specialisation, complexity and uncertainty mean that the daunting epistemic gap between high level expertise and non-experts is only likely to become more and more daunting. Parliaments will increasingly require highly capable intermediate experts to assist with (quickly) understanding complex research, making and scrutinising decisions and representing citizens.

By identifying meta-expertise as specific form of expertise within parliaments, our intention is not just to highlight its current role but also suggest it as something that can be improved on. This means asking questions about the strengths and limitations of the current institutional forms of meta-expertise in parliaments (as well as policy advisory systems outside of parliaments) and what might be the optimal arrangements under which they perform their roles.

One set of questions is about ensuring research is of the highest quality; that is, accurate, based on a sound understanding of the subject area, oriented towards the needs of parliament. For example:

- Is this primarily a matter of recruitment, development and retention practices?
- What is the appropriate balance between specialisation and general research skills?

https://www.parliament.nsw.gov.au/lcdocs/submissions/66449/009%20Department%20of%20Parliamentary%20Services,%20NSW%20Parliament%20ORIGINAL.pdf

[48] House of Representatives, Parliament of Australia, 'House of Representatives Practice (7th Edition), Chapter 18 – Parliamentary committees'. Accessed at: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter18/Parliamentary_committees.

- What service models and quality control practices are best?
- Is greater contestability of expert views within the institutions a viable option? (or how might meta-experts within the institutions make greater use of contestability among external experts?)[49]
- How might the various strands of expertise within a parliament (expert bodies and committees) operate more effectively together in pursuit of quality?

Further, parliamentary research institutions must balance independence and autonomy with the need to ensure they are directly focused on the needs of parliaments. As Miller et al note:

> *To perform their task adequately, parliamentary institutes need to be operationally autonomous. They need to be free of government control, of partisan influence and also of the influence of other institutional figures such as the Speaker of the House. Should parliamentary institutes be influenced by the Speaker, by one of the parliamentary parties or by the government, they would not be able to gather and provide free and reliable information …* [50]

Similarly, they must avoid being overly associated with particular experts or expert viewpoints. In the words of the IPU and IFLA guidelines, 'a parliamentary research service will need to balance the value of the expertise found in academia and think-tanks against the risk of being associated with partisan endeavours'.[51] Indeed, Fitsilis and Koutsogiannis have argued for PRS to adopt strategies to 'stand out' in the informal competition with more partisan external think tanks and research centres.[52]

On the other hand, according to Miller et al:

> *… in spite of their operational autonomy, parliamentary institutes need to be sufficiently attached to the parliamentary system. This second necessity is due to*

[49] Roger Koppl, *Expert Failure*. See also: Roger Koppl, 'Public health and expert failure', *Public Choice* 195(1-2) 2023, pp. 101-124; Brian Head, 'Reconsidering expertise for public policymaking: the challenges of contestability'.

[50] Robert Miller, Riccardo Pelizzo and Rick Stapenhurst, *Parliamentary Libraries, Institutes and Offices: The Sources of Parliamentary Information*, Washington DC, World Bank Institute, 2004, p. 9.

[51] IPU and IFLA, *Guidelines for Parliamentary Research Services*, p. 38. See also Christoph Kehl et al, 'Goodbye Expert-Based Policy Advice?

[52] Fotios Fitsilis and Alexandros Koutsogiannis, 'Strengthening the Capacity of Parliaments through Development of Parliamentary Research Services', *13th Workshop of Parliamentary Scholars and Parliamentarians, 29-30 July 2017, Wroxton College, Oxfordshire, UK*. Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216371.

> *two different but related needs. The first is that parliamentary institutes need to be credible partners in the eyes of the individual parliamentarians and of the parliamentary administration. The second is that if parliamentary institutes are not sufficiently attached to the parliament, they might not be sufficiently sensitive to the needs arising from the parliamentary functioning and, thus, they might fail to provide appropriate and timely information, training or both.*[53]

What then is the optimal approach to balancing autonomy and appropriate attachment to parliaments, and impartiality with the kinds of connections with external experts necessary to develop subject area mastery?

Further, how might parliamentary researchers establish whether they are effective in their roles? The case for institutional expertise within parliaments is well-recognised but the usage and impact of these institutions has been less explored. What value do they add in terms of the quality of legislation, debate or scrutiny? What measures of impact and influence might be possible? [54]

Finally, there are questions about the capacity of parliamentary research institutions to face current and future challenges such as greater complexity of issues, pressures for more rapid responses, contestation of expert knowledge, political change, and the emergence of advanced technological applications such as artificial intelligence. To what extent will these require the development of new competencies, processes, service types, and organisational forms?

CONCLUSION

There has been relatively little study of expertise in a parliamentary context. In this article we have suggested that the work of Harry Collins and Robert Evans provides a useful starting point, in that it identifies various forms and levels of expertise, and, importantly, provides a basis for determining who should and should not participate in decision making in technical areas.

We have also drawn attention to meta-expertise as a specific form that is essential to narrowing the epistemic gap and meeting the immediate needs of parliamentarians. If parliaments are to be best equipped to deal with complex matters of public policy in a changing world, then we maintain this will require an increased focus on expertise in general, but especially on meta-expertise and how it can be optimised. While 'following the science' and

[53] Miller et al, *Parliamentary Libraries, Institutes and Offices*, p. 8.

[54] Tarek Al Baghal, 'Usage and impact metrics for parliamentary libraries', *IFLA Journal*, 45(2) 2019, pp. 104-13; Roswitha Poll and Philip Payne, 'Impact measures for libraries and information services', *Library Hi-tech* 24(4) 2006. Robert Miller et al, *Parliamentary Libraries, Institutes and Offices*, p. 14.

other forms of complex expertise will increasingly be a challenge, meta-expertise provides a crucial support for parliaments in performing their roles.

What's at Stake When Parliamentary Committee Inquiries Rely on Voluntary Executive Cooperation?

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Abstract: Parliamentary committees undertake inquiries into matters of public interest and are a key mechanism to holding the executive to account. These committees have broad information-gathering powers, which raises public expectations that they will use them to gather and scrutinise relevant information. However, various factors, including political considerations, may influence how committees exercise these powers during inquiries—and in practice, most of the time, committees rely on voluntary executive cooperation to obtain relevant information. While there are justifiable reasons, including legal ones, for the executive not to contribute to a committee inquiry, there is rarely a public record of what is going on 'behind the scenes'. This makes it difficult, and sometimes impossible, to assess whether committees are fulfilling their promise to hold the executive accountable and deliver optimal policy and legislative outcomes. To manage expectations of what parliamentary committees can deliver, there is a pressing need for the apparent practice of relying on executive cooperation in inquiries to be reviewed.

INTRODUCTION

Parliamentary committees are a key mechanism to hold the executive to account, with most having broad inquiry powers to call members of the executive to answer questions or produce documents.[1] Governance arrangements and parliamentary committee practice reveal that it is predominantly a Minister—not a committee—who ultimately exercises discretion to determine what government-held information will or will not be provided to a parliamentary committee inquiry. This includes exercising effective control over which government officials will or will not attend to provide evidence at a public hearing held as part of a parliamentary committee inquiry.

Parliamentary committees need access to relevant information if they are to deliver on their accountability 'promise' to hold the executive to account for their actions and to deliver optimal policy and legislative outcomes as part of their inquiries. When this information is held

[1] Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *UNSW Law Journal* 40.

by members of the executive, such as public servants or government departments, this means parliamentary committees become reliant on voluntary executive cooperation in order to obtain relevant information. Government guidelines that limit the circumstances for executive participation in parliamentary committee inquiries also play an influential role in this context.

This article considers how the reluctance of parliamentary committees to use or test their compulsive powers to obtain relevant government-held evidence during an inquiry into matters of public interest, restricts their ability to hold the executive to account, scrutinise government action and deliver outcomes. It argues that the parliamentary committee practice of relying largely on good faith and voluntary cooperation from the executive limits the ability for committees to fulfil their roles when conducting inquiries, suggesting that this limitation is exacerbated by current government guidelines and the difficulty for inquiry topics to 'fit neatly into the jurisdiction of one particular department, or of the Commonwealth [federal] or the state governments'.[2] The article reveals the limits of parliamentary committee inquiries to deliver on their 'promise' to hold the executive to account and identifies a need to recalibrate expectations on what parliamentary committee inquiries can deliver.

Scope and key terms

At the outset it is important to acknowledge that parliamentary committees have a range of powers to compel witnesses from all walks of life to provide evidence or produce documents.[3] The full scope of these powers will not be examined in detail in this article [4] because ithas a specific focus on the ways in which *the executive* interacts with parliamentary committees when considering whether to voluntarily comply with requests for information.

[2] Gabrielle Appleby, Alexander Reilly and Laura Grenfell (3rd ed), *Australian Public Law.* Australia and New Zealand: Oxford University Press, 22 October 2018, p. 297.

[3] See, for example, 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* (2023) 38(2) (Spring/Summer).

[4] See, for example, Geoffery Lyndell, 'Parliamentary Inquiries and Government Witnesses'. Melbourne University Law Review (1995-1996) 20, p. 383-422; Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?'. *Australasian Parliamentary Review* (2002) 17(2) (Spring), pp. 131-139; Patrick Dupont, 'The uncooperative witness: the punitive powers of parliamentary committees'. *Australasian Parliamentary Review* (2011) 26(2) (Spring), pp. 114-123.

For the purposes of this article, the executive is defined as ministers, 'all the personnel in the department: the public service and other public officers'[5] and the 'myriad offices and bodies that assist the executive to fulfil its duties, but fall outside the formal department system'.[6] The term 'government officials' is used to refer to members of the public service.[7]

PARLIAMENTARY COMMITTEES AND THE PROMISE OF EXECUTIVE ACCOUNTABILITY

The Australian Constitution creates a system of separated powers, dividing power between the legislative (parliaments), executive (ministers) and judicial (courts) branches of government.[8] This provides important checks and balances against the use of arbitrary power by any single branch of government and is a fundamental principle of Australia's democracy.[9] This principle co-exists with and is reinforced by the principle of responsible government, which demands that the members of the executive government are held responsible for their decisions through questioning and debate in the Parliament, and ultimately through the ballot box at regular elections.[10]

> *Governments are supposed to be accountable to parliament, and through parliament to the electorate; that is, governments are supposed to give account of their conduct of public administration so that the electorate can pass judgement on*

[5] Appleby, Reilly and Grenfell, *Australian Public Law,* p. 255.

[6] Appleby, Reilly and Grenfell, *Australian Public Law*, p. 256.

[7] It is acknowledged that: a government official is held accountable through their relevant Minister, who is responsible for the actions of their relevant department; and individual ministerial responsibility is important so that government officials feel comfortable providing 'frank and fearless' advice and service to the government, while also ensuring accountability: Appleby, Reilly and Grenfell, *Australian Public Law*, p. 296. It is also acknowledged that while the public service is 'required to provide frank, impartial and timely advice to the Government of the day (often referred to as 'frank and fearless' advice). Ministers are not obligated to accept and act on this advice': Written correspondence to Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, 17 October 2023, pp. 1-2 (Brigid Monagle, Victorian Public Sector Commissioner).

[8] Peta Stephenson, Rebecca Ananian-Welsh, Andrew Lynch, George Williams, Sean Brennan (8th ed), *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials*. Alexandria, NSW: The Federation Press, 2024, Part 1, Section 5

[9] David Clark (5th ed), *Introduction to Australian Public Law.* Chatswood, NSW: LexisNexis, 2016, pp. 79-80.

[10] *Australian Constitution* chs I-III, ss 44, 61, 64, 71.

> *their performance … [The parliament] often through committees, regularly compels government to account for its activities when it would not otherwise do so.*[11]

A number of accountability measures have been developed to deliver on this 'promise',[12] such as the broad powers of the Parliament to conduct inquiries into matters of public interest including the actions of the executive government.[13] One of the key ways parliament's seek to deliver on this function is through the use of parliamentary committees, or groups of elected members, who are entrusted with powers to inquire into particular matters or proposed legislation, or authorised to question ministers on behalf of their appointing house.[14]

PARLIAMENTARY COMMITTEE INQUIRY POWERS

Parliamentary committees are made up of a group of members of parliament appointed by their respective houses.[15] They generally have considerable powers to undertake inquiries on behalf of the Parliament, including into government policies, administration and performance—providing important 'checks and balances' on the activities of government.[16] Committee inquiries can: 'create a transparent arena for interaction between interests and the

[11] Harry Evans, 'The Role of the Senate'. Department of the Senate, *Papers on Parliament no. 25*, December 2009, p. 97.

[12] For example, independent bodies such as Ombudsman and Anti-Corruption Commissions are designed to investigate corruption, misconduct and maladministration in the public sector. Chris Field 'The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability', (2013) 72 *AIAL Forum,* pp. 24-33.

[13] Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?'. *Australasian Parliamentary Review* (2002) 17(2) (Spring), p. 131.

[14] Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?'. *Australasian Parliamentary Review* (2002) 17(2) (Spring), p. 131; Lynn Lovelock and John Evans (1st ed), *New South Wales Legislative Council Practice*. Sydney: The Federation Press, 2008, pp. 487-488.

[15] See, for example, Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 205; Legislative Council, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, 2022, O 23.05; Parliament of Australia, *Standing Orders and other orders of the Senate*, October 2022, O 27; House of Representatives, Parliament of Australia, *Standing Orders*, 2 August 2022, O 229.

[16] Austin Asche, 'Parliamentary Democracy: Checks and Balances'. *Australasian Parliamentary Review* (2004) 19(1), pp. 139-143.

state in key policy domains'; provide 'a platform through which emerging issues and grievances can be constructively aired'; and make positive contributions to legislative amendments.[17]

On paper, most parliamentary committees have powers to summons witnesses to provide evidence or require the production of documents, but these are very rarely used in contemporary Australian practice.[18] Federally, these powers come from the Constitution[19] or the legislation that established a committee,[20] and the associated Standing Orders and resolutions of the Houses.[21] This is similar at a state level, where legislation[22] and Standing Orders generally provide these powers to committees.[23]

Parliamentary privilege is a legal protection that extends to all evidence given or received by a parliamentary committee, ensuring that the information shared during committee proceedings remains protected.[24] This includes evidence given in response to a formal summons issued by

[17] Ian March and Darren Halpin, 'Parliamentary Committees and Inquiries' in Brian Head and Kate Crowley (1st ed), *Policy Analysis in Australia*. Bristol: The Policy Press, 2015, pp. 137-138.

[18] 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* (2023) 38(2) (Spring/Summer), p.75.

[19] *Australian Constitution* s 49.

[20] See, for example, *Public Accounts and Audit Committee Act 1951* (Cth) s 13; *Parliamentary Committees Act 2003* (Vic) s 38.

[21] Senate, Parliament of Australia, *Standing Orders and other orders of the Senate*, October 2022, O 34; and Senate, Parliament of Australia, *Standing Orders and other orders of the Senate*, October 2022, pp. 109-118 (Parliamentary privilege: Resolutions agreed to by the Senate on 25 February 1988); House of Representatives, Parliament of Australia, *Standing Orders*, 2 August 2022, O 236.

[22] See, for example, *Parliamentary Committees Act 1991* (SA) s 28; *Parliament of Queensland Act 2001* (Qld) ch 3 pt 1; *Parliamentary Privileges Act 1858* (Tas) ss 1-3.

[23] See, for example, Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 192; Legislative Assembly, Parliament of Queensland*, Standing Rules and Orders of the Legislative Assembly*, Effective 31 August 2001 (Includes amendments effective 16 June 2023), O 205.

[24] J. R. Odgers (14th re ed), *Odgers' Australian Senate practice.* Canberra: Commonwealth of Australia, 2016, pp 45-47; Bill of Rights Act 1689 (UK), art XI; *Australian Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth); *Constitution Act 1975* (Vic) s 19, *Defamation Act 2005* (Vic) s 37, *Constitution of Queensland 2001* (Qld) s 9, *Parliament of Queensland Act 2001* (Qld) ss 8, 9, 36; *Defamation Act 2005* (Qld) s 27. It is noted that the law of parliamentary privilege in New South Wales is different to other Australian jurisdictions and 'relies on the common law, without recourse to statutory expression or to the historical privileges of the Houses of Parliament in the United Kingdom': Stephen Frappell, 'Parliamentary privilege in New South Wales'. *38th Annual Course of the International Association of Law Libraries,* Sydney, 28 October 2019, pp. 2-4.

a committee.[25] The purpose of this privilege is to create a safe environment where information can be shared freely without fear that it will be used in subsequent legal proceedings.[26] This privilege is crucial to ensure parliamentary committees can conduct their inquiries without obstruction and with access to all the necessary information. A person who fails to comply with a parliamentary committee summons can be punished for contempt.[27] Such a charge is considered a serious offence, reinforcing the authority of parliamentary committees and ensuring that their work is respected and upheld.

Parliamentary committees can be established for a variety of purposes many of which are articulated through their establishing Standing Orders, legislative provisions or resolutions of appointment. However, in practice, any individual committee or committee member could see their primary role or purpose in a range of contested ways. For example, government members of a committee may see their purpose as advancing and protecting the government's policy agenda, whereas the public may see the committee's role as being a forum for them to have their say about issues relevant to their lives. As a result, it can be challenging for some parliamentary committees to identify a shared primary purpose in practice. For instance, committees that are composed of government majorities are likely to be more inclined to protect and support the interests of the government, often providing a safeguard for its actions and decisions.[28] In contrast, committees with non-government majorities are likely to be more focused on scrutinising or criticising government policies and actions.[29] These varying dynamics

[25] Odgers, *Australian Senate Practice,* pp. 45-47; Bill of Rights Act 1689 (UK), art XI; *Australian Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth); *Constitution Act 1975* (Vic) s 19, *Defamation Act 2005* (Vic) s 37, *Constitution of Queensland 2001* (Qld) s 9, *Parliament of Queensland Act 2001* (Qld) ss 8, 9, 36; *Defamation Act 2005* (Qld) s 27; Frappell, 'Parliamentary privilege in New South Wales', p. 2-4.

[26] Odgers, *Australian Senate Practice,* pp. 45-47; Bill of Rights Act 1689 (UK), art XI; *Australian Constitution* s 49; *Parliamentary Privileges Act 1987* (Cth); *Constitution Act 1975* (Vic) s 19, *Defamation Act 2005* (Vic) s 37, *Constitution of Queensland 2001* (Qld) s 9, *Parliament of Queensland Act 2001* (Qld) ss 8, 9, 36; *Defamation Act 2005* (Qld) s 27; Frappell, 'Parliamentary privilege in New South Wales', p. 2-4.

[27] Patrick Dupont, 'The uncooperative witness: the punitive powers of parliamentary committees'. *Australasian Parliamentary Review* (2011) 26(2) (Spring), pp. 114-115.

[28] See for example, The Senate Environment and Communications Legislation Committee, *Inquiry into National Broadband Network (Commitment to Public Ownership Bill) 2024 [Provisions]*, February 2025. This Committee has a government majority and government Chair, and its report recommends that the Bill be passed. However, the Coalition senators' dissenting report states that the 'bill is unnecessary' (p.16) and the Greens additional commented recommends, among other thing, that 'the bill be amended' (pp. 19-20).

[29] See for example, The Legislative Council Environment and Planning Committee, Parliament of Victoria, *Inquiry into the 2022 flood event in Victora: Final Report*, July 2024. This Committee is government chaired but the government does not have a majority, and its report comprehensively scrutinises the government and its

highlight the different roles each type of committee fulfils in the legislative and policy-making process, along with their role in holding the executive accountable for their actions.

Parliaments give certain parliamentary committees broad inquiry and information-gathering powers, which raises public expectations that they will use these powers to gather and scrutinise relevant information. However, in practice, various factors, including political considerations, may influence the extent to which committees actually exercise these powers during their inquiries. This creates a tension between the public's expectation of accountability and the political reality, where there are strong incentives to maintain positive relationships with the executive and avoid political embarrassment. As a result, parliamentary committees can fall short of meeting their accountability objectives and the promise of delivering optimal policy and legislative outcomes, as they may be lacking the crucial information necessary to do so.

POSITIVE IMPACTS OF VOLUNTARY EXECUTIVE COOPERATION

When members of the executive, such as ministers, voluntarily cooperate with parliamentary committees' requests for information, the accountability and information gathering functions of parliamentary committees can be realised. Many examples of such practice exist at the state and federal level.[30] In 2023 the Victorian Legislative Assembly's Standing Committee on Legal and Social Issues commenced its inquiry into increasing the number of registered organ and tissue donors.[31] As part of this inquiry, the Committee received evidence from federal, Victorian and South Australian government officials which enabled scrutiny of past government actions and informed evidence gathering aimed at delivering better policy and legislative outcomes in the donation sector.

The independent federal statutory authority that leads the national approach to improve donation rates provided a written submission, and federal government officials from the

agencies. For example, it includes a finding that 'Vendor disclosure statements under the *Sale of Land Act 1962* (Vic) do not adequately disclose flood risk to purchasers of lands' and recommends legislative amendments to rectify this (p. 100).

[30] See, for example, Legislative Council Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into the Victorian Government's COVID-19 contact tracing system and testing regime*, December 2020. Evidence was received from the Australian Chief Scientist and the Commonwealth Department of Health. See also House of Representatives Standing Committee on Employment, Education and Training, Parliament of Australia, Canberra, *Inquiry into the use of generative artificial intelligence in the Australian education system*, August 2024. Evidence has been received from the South Australian and Tasmanian Departments of Education.

[31] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors*, March 2024.

authority appeared at a public hearing. This submission included information about the complex funding and service provision landscape for organ and tissue donation in Victoria and Australia.[32] Understanding these governance arrangements allowed the Committee to direct questions to the right decision-makers throughout the inquiry.[33]

The Australian Department of Health and Aged Care, that collaborates with Services Australia to administer the Australian Organ Donor Register (AODR), did not appear at a public hearing but instead provided responses to the Committee's written questions on notice.[34] The details provided about complications in the transfer of state-based Victorian driver licence donor registration records to the AODR was critical to the inquiry. The granular data that was provided about Victorian donor registrations by local government area (LGA) also allowed the Committee to conduct analysis to inform suggestions for targeted awareness campaigns. This included comparing registration rates by LGA against cultural and language diversity and estimated population growth.[35] The following Figure was used by the Committee in its final report to demonstrate these findings.[36]

[32] Organ and Tissue Authority, Submission No 31 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 2023; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 23 June 2023 (Lucinda Barry, Helen Opdam, Mark McDonald and Brianna Elms, Organ and Tissue Authority).

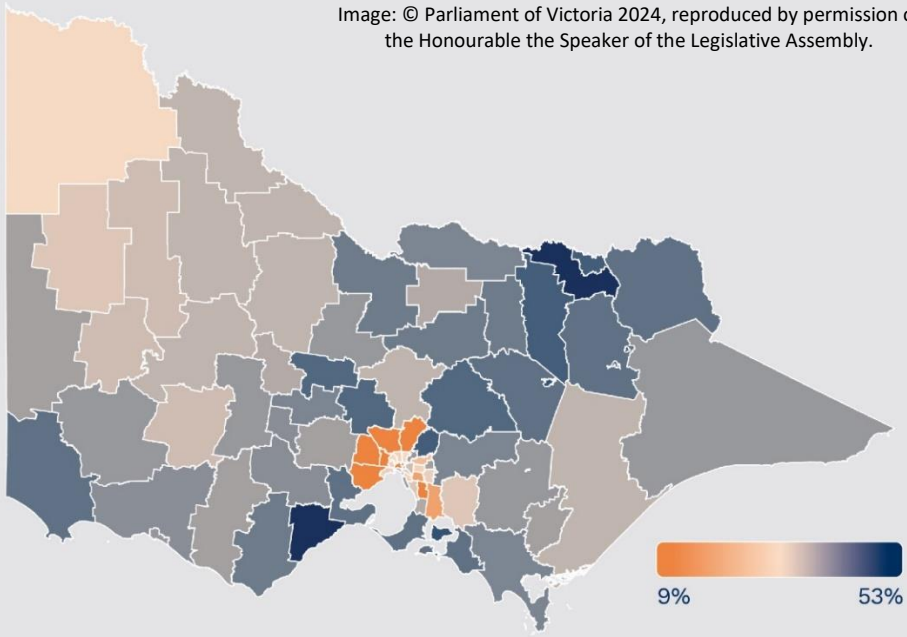
[33] Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 31 July 2023, p. 15 (Louise McKinlay, Victorian Department of Health).

[34] Commonwealth Department of Health and Aged Care, Responses to written questions on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 15 August 2023.

[35] Commonwealth Department of Health and Aged Care, Follow up to responses to written questions on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 13 September 2023, pp. 5-7.

[36] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 117. Image © Parliament of Victoria 2024, reproduced by permission of the Honourable the Speaker of the Legislative Assembly.

Percentage of Victorians registered on the Australian Organ Donor Register (AODR) by local government area (LGA), 2022



Ten Victorian LGAs with the lowest percentage of people registered on the AODR in 2022, population increase from 2021 to 2036 and number of language communities with low English proficiency in 2022

LGA	Percentage of people registered on AODR, 2022	Percentage increase in population, 2021 to 2036	Number of language communities with low English proficiency, 2022
Greater Dandenong	9%	19%	77
Brimbank	10%	13%	74
Wyndham	12%	59%	87
Hume	13%	44%	66
Melbourne	13%	58%	55
Melton	13%	93%	70
Whittlesea	13%	45%	62
Casey	16%	43%	86
Monash	16%	21%	59
Manningham	19%	15%	39
State average	23%	29%	50[a]

a. 50 is the metro average and the lowest throughout Victoria is 20 in Nillumbik and Warrnambool.

The Victorian Departments of Health, and Transport and Planning provided written submissions and state government officials appeared at public hearings. Both Departments provided detailed information about historic and current donor registration practices in Victoria and identified opportunities for improvement.[37] Evidence from the Victorian Department of Transport and Planning about the transfer of state-based Victorian driver licence donor registration records to the AODR was necessary to supplement the evidence received from the Australian Department of Health and Aged Care.[38] Collating this evidence put the Committee in the advantageous position to scrutinise past government action and shed light on the cause of Victoria's comparably low donor registration rate—the focus of the Committee's inquiry.

The Victorian Department of Government Services did not appear at a public hearing but provided responses to the Committee's written questions on notice about digital opportunities to increase donor registrations. This included useful information about best practice for web and app opportunities to increase donor registrations.[39]

The South Australian Department for Health and Wellbeing also did not appear at a public hearing but provided information to the Committee that could be published about their approach to donor registration through a state-based driver licence system.[40] This allowed the Committee to question government officials from Victoria about the feasibility of

[37] Victorian Department of Health, Submission No 42 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 2023; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 31 July 2023 (Louise McKinlay, Victorian Department of Health); Victorian Department of Transport and Planning, Submission No 42 to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 2023; Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 11 September 2023 (Jacqui Sampson and Tim Mitchell, Victorian Department of Transport and Planning).

[38] Victorian Department of Transport and Planning, Responses to questions taken on notice to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 28 September 2023, p. 1.

[39] Victorian Department of Government Services, Responses to written questions on notice to Legislative Assembly, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into increasing the number of registered organ and tissue donors*, 26 October 2023, p. 4.

[40] Written correspondence to Legislative Assembly, Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 19 July 2023, 1-2 (Fay Jenkins, Acting Chief Public Health Officer, South Australian Department for Health and Wellbeing).

implementing a driver licence model for registration similar to that which operates in South Australia.[41]

This voluntary cooperation by Australian, Victorian and South Australian government officials resulted in the Committee obtaining evidence directly relevant to the topic of their inquiry. Where this occurs, a parliamentary committee can determine where to concentrate attention and workshop legislative options in a politically safe environment because they are dealing with relevant information from government officials that is shared in a solutions-focused environment, rather than a defensive or blame-avoidant environment. Among other things, the Committee recommended that the Victorian Government scope the capability of the State's driver licence system to allow Victorians to register on the AODR when applying or renewing a driver licence.[42] The Victorian Government response to the Committee's report has not been tabled yet.[43]

MISSED OPPORTUNITIES WHERE THERE IS A LACK OF VOLUNTARY EXECUTIVE COOPERATION

Where government officials with knowledge relevant to a parliamentary committee inquiry refuse to voluntarily provide evidence, it can be challenging, and sometimes impossible, for parliamentary committees to undertake their accountability functions.

While committee reports are a public record of an inquiry, it is rare for these reports to include details about a lack of executive cooperation. However, the Australian Parliament's Joint Standing Committee on Public Works' 1953 inquiry into the proposed erection of the Commonwealth Administrative Centre in Melbourne provides an example.[44] The Centre at the heart of this inquiry was to provide office space for a growing number of Victorian staff working for Australian Government departments in Melbourne, with the full project to allow for future

[41] Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 11 September 2023, 6-9 (Jacqui Sampson and Tim Mitchell, Victorian Department of Transport and Planning).

Victorian Department of Transport and Planning, public hearing, 11 September 2023.

[42] Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, *Inquiry into increasing the number of registered organ and tissue donors: Register and talk about it*, March 2024, p. 70.

[43] Department of the Legislative Assembly, Parliament of Victoria, 'Legislative Assembly Legal and Social Issues Committee: Inquiry into increasing the number of registered organ and tissue donors'. Accessed at: https://www.parliament.vic.gov.au/organtissuedonor-reports.

[44] Joint Standing Committee on Public Works, Parliament of Australia, Canberra, *Inquiry into the Erection of a Commonwealth Administration Centre (First stage) at Melbourne*, *Victoria*, 2 December 1953.

expansion at scale. The inquiry considered present office accommodation, the plan for the Centre and various other sites.[45]

Several Victorian government officials gave evidence to the Committee, including from the then-Victorian Departments of Postmaster-Generals and Public Works.[46] Evidence from Victorian government officials from the then-Postmaster-Generals' Department revealed that the planned Centre would not accommodate the department's employees, who were to remain in their present office but would likely require a new site in 8 to 10 years.[47] This information was supplemented by evidence from Victorian government officials from the then-Public Works Department who 'submitted sketch plans and models' of a possible development that could provide such facilities in the future, if required.[48] But the Committee's final report records:

> *Considerable disappointment is expressed by the Committee at the action taken at the highest governmental level to prevent a Victorian State Government official from giving evidence before the Committee. In an endeavour to co-operate with the State and to ensure that the Commonwealth proposals were in every way desirable, and also in order to secure technical advice from a State expert, an opportunity was presented to a State official to give evidence. It is regretted that, although the official concerned was willing to appear, his superiors were of opinion that it was not necessary for him to appear, and refused permission for him to do so. This is surprising as it has been the custom of the State Public Works Committee to call Commonwealth officials in its inquiries. The Committee considered it undesirable to magnify the incident into a matter of major importance, and decided not to use the legal authority in its Act, but it feels that the State has lost an opportunity of assisting in a scheme which is of the greatest importance to its citizens future.*[49]

In this instance the Australian Solicitor-General advised the Committee 'against making a test case by summoning a State official' because their power to do so was 'so doubtful'.[50]

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[45] Joint Standing Committee on Public Works, 1953, pp. 8-10.

[46] Joint Standing Committee on Public Works, 1953, pp. 5-6, 9; V H Arnold, *Victorian Year-Book 1952-53 and 1953-54* (No 73). Melbourne: Commonwealth Bureau of Census and Statistics, Victoria Office, pp. 158, 491.

[47] Joint Standing Committee on Public Works, 1953, p. 7.

[48] Joint Standing Committee on Public Works, 1953, pp. 6-7.

[49] Joint Standing Committee on Public Works, 1953, p. 33.

[50] D R Elder and P E Fowler (7th ed), *House of Representatives Practice*. Canberra: Commonwealth of Australia, 2018, p. 701, quoting opinion by Solicitor-General, to the Secretary of the Parliamentary Standing Committee on Public Works, dated 16 September 1953. This applies equally to Australian government officials refusing to

Another more recent example of a parliamentary committee making a public comment about government officials not accepting an invitation to provide evidence to a parliamentary committee inquiry comes from the current Victorian Select Committee into the 2026 Commonwealth Games Bid. This Committee was set up by the Legislative Council to inquire into the governance, probity and procurement processes followed by the Victorian Government in bidding for the 2026 Commonwealth Games and the impacts of the subsequent termination of the contract to host the Games.[51] While several ministers from the Victorian Legislative Council as well as Victorian government officials from various state authorities and departments provided evidence to the inquiry, many declined the Committee's requests to contribute.[52]

After the requests were declined, the Committee published a statement listing current and former Victorian ministers who had refused the invitation to attend a public hearing each who had considerable experience and held senior government roles directly relevant to the Committee's inquiry.[53] In this context, it is noted that '[t]he power to send for persons, documents and other things is subject to an exception for members, documents and other things belonging to other Houses of Parliament… including members who are also Ministers'.[54] This means that the process a Committee follows to request a Minister provide evidence to an Inquiry depends on the House of Parliament the member belongs to.

For current members of the Victorian Parliament these processes are clear. Committees can request a member of their own House to provide evidence. If the member refuses, this gets

provide evidence to state committees. However, as mentioned above, the scope of the powers of parliamentary committees to call for and compel witnesses and documents outside their jurisdiction is not explored in this article.

[51] Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, *Inquiry into the 2026 Commonwealth Games Bid*, 2023 (ongoing).

[52] Evidence to Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, 26 October 2023 (Hon Shaun Leane MLC, Hon Harriet Shing MLV); Parliament of Victoria, 'News: Government MPs quizzed about Games cancellation'. Accessed at: https://www.parliament.vic.gov.au/news/economy/commgameshearings.

[53] Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, 'Inquiry into the 2026 Commonwealth Games Bid: Statement by the Committee on Invitations sent to Hon Jacinta Allan MP, Hon Daniel Andrews and Hon. Martin Pakula' Accessed at: https://www.parliament.vic.gov.au/48e9d0/contentassets/8a1a842a93aa4ce088e66978eb22f160/sccgb---statment-26-october-2023.pdf.

[54] Greg Taylor, *The Constitution of Victoria.* Sydney: The Federation Press, 2006, p. 276. As noted in the 'Scope and key terms' part of this article, the scope of the power of parliamentary committees to compel witnesses and documents in the course of an inquiry, including those specific to the Select Committee on the 2026 Commonwealth Games Bid, will not be discussed in this article.

reported to the House.[55] To request a member from the other House, a motion needs to be first passed in one House to send a message to the other House, granting leave for the member to attend and provide evidence.[56] In this case, the Legislative Council agreed to send the message but the Legislative Assembly denied leave for the member to attend and provide evidence.[57] For former members of the Victorian Parliament the process is murky. In this case, the former members of the Legislative Assembly argued that since the Committee was requesting that they attend to provide evidence in their capacity as former ministers and former members of the Legislative Assembly, they had the same protections as if they were current members of the Legislative Assembly.[58]

The Committee also sought written information from the Victorian Government in relation to the Commonwealth Games bid, including responses to questions on notice, document requests and a summons for papers and documents.[59] The Victorian Government has claimed executive privilege in relation to a significant proportion of the information requested[60]—meaning the information requested could not be provided because the Victorian Government's assessment of the documents considered them broadly prejudicial to the public interest.[61] The Committee

[55] Legislative Council, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, 2022, O 17.02; Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 187

[56] Legislative Council, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, 2022, O 17.02; Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 187.

[57] Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report,* April 2024, p. 6.

[58] Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, 'Inquiry into the 2026 Commonwealth Games Bid: Other documents (Correspondence from Hon. Daniel Andrews Response to Hearing Request). Accessed at: https://www.parliament.vic.gov.au/4a6874/contentassets/5fdfbf66ffb44e44b69c7def90904618/20231016-andrews-response-to-hearing-request_redacted.pdf; Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, 'Inquiry into the 2026 Commonwealth Games Bid: Other documents (Correspondence from Hon. Martin Pakula Response to Hearing Request). Accessed at: https://www.parliament.vic.gov.au/4a6875/contentassets/0d720e9f7e8b427093c738f136aaaf79/20231016-pakula-response-to-hearing-request_redacted.pdf.

[59] Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report,* April 2024, p. 11.

[60] Greg Taylor, 'Parliament's Power to Require the Production of Documents—a Recent Victorian Case'. Deakin Law Review (2008) Vol. 13 No. 2.

[61] Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Interim report,* April 2024, p. 11.

is using its website to publish information requests and summons for documents, and the status of the Victorian Government's answers to them.[62]

The Committee has also published two interim reports. The first includes a chapter on the 'significant barriers' faced by the Committee 'in accessing key information about the 2026 Commonwealth Games from the Victorian Government and key individuals with knowledge of the Games'.[63] Among other things, the interim report finds:

> *The Committee has exhausted most avenues open to it in obtaining certain documents from the Victorian Government relevant to its Inquiry, for which the Government has made a claim of executive privilege. For the matter to be progressed further a production of documents motion would need to be agreed upon by the House. A motion at least in line with the Committee's summons for all documents held by the Department of Jobs, Skills, Industry and Regions, the Department of Premier and Cabinet and the Department of Treasury and Finance, or their predecessors, that relate to briefings provided by the Departments to a Minister or Ministers, would assist the Committee in this regard.*[64]

Following this, the Committee Chair moved a production of documents motion in the Legislative Council, seeking Victorian Government documents that had been the subject of claims of executive privilege.[65] This motion was agreed to, but the Victorian Government has failed to provide the requested documents or follow the process required to claim executive privilege on the requested documents.[66] Instead, the Victorian Government provided a schedule identifying the documents over which executive privilege is claimed.[67] The Committee's second interim report titled 'Failure to provide documents under Legislative Council Standing Orders' notes this non-compliance and states:

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[62] Parliament of Victoria, Select Committee on the 2026 Commonwealth Games Bid, 'Inquiry into the 2026 Commonwealth Games Bid: Other documents (Information requests and summons for documents). Accessed at: https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-the-2026-commonwealth-games-bid/other-documents.

[63] Select Committee on the 2026 Commonwealth Games Bid, 2024, pp. 1, 5.

[64] Select Committee on the 2026 Commonwealth Games Bid, 2024, p. 17.

[65] David Limbrick MLC, Parliament of Victoria, *Hansard*, Legislative Council, 1 May 2024, pp. 1301-1303. Accessed at: https://www.parliament.vic.gov.au/4af983/globalassets/hansard-daily-pdfs/hansard-974425065-26304/hansard-974425065-26304.pdf.

[66] Select Committee on the 2026 Commonwealth Games Bid, 2024, pp. 1-4.

[67] Tabled documents, Parliament of Victoria, *Production of documents: 2026 Commonwealth Games bid (Schedule of documents)*, tabled in the Legislative Council 18 June 2024, released on a non-siting day 31 May 2024. Accessed at: https://www.parliament.vic.gov.au/parliamentary-activity/tabled-documents-database/tabled-document-details/8245.

> *These documents are relevant to the Committee's Inquiry and the Government's failure to engage with the process for claiming executive privilege, including the process for disputing the validity of a claim of executive privilege, may impede the Committee's ability to properly carry out its functions as set out in its Terms of Reference.*[68]

The report goes on to emphasise the ways in which 'the Government's own self-assessment of Executive privilege without independent review is [among other things]… a direct impediment on the Committee's ability to conduct a thorough and transparent inquiry'.[69] Subsequent to this report tabling, a motion requiring the documents listed in the schedule to be lodged with the Clerk to permit an independent examination over the claims of executive privilege was agreed to.[70] In support of the motion the Chair of the Committee explained:

> *… it is the role of this committee to firstly get to the bottom of what has happened with the decision-making processes, and a lot of that involves looking at documents by government and also through public hearings, submissions and this sort of thing. But I also share the view, and I hope all the other committee members share the view, that we can ultimately form recommendations in the final report that will prevent this sort of thing happening again. I hope that the government and the opposition agree with that. We have wasted a vast amount of taxpayers money here on what has happened, and there has clearly been a failure. It is my sincere view that if this committee can provide useful and actionable recommendations that the government could follow which would help prevent something like this ever happening again in the future, then I think the committee will have done some good work. That is exactly what I intend to do. But in order to do that good work, we need to see some of these documents.*[71]

The timeframe for the Government to respond to the motion to produce documents passed without response. While the matter of non-compliance could be raised as a possible

[68] Select Committee on the 2026 Commonwealth Games Bid, 2024, p. 1.

[69] Select Committee on the 2026 Commonwealth Games Bid, Parliament of Victoria, Melbourne, *The 2026 Commonwealth Games bid: Failure to provide documents under Legislative Council Standing Orders (Second interim report),* September 2024, p. 2.

[70] David Davis MLC, Parliament of Victoria, *Proof* Hansard, Legislative Council, 11 September 2024. Accessed at: https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-974425065-28109#12.

[71] David Limbrick MLC, Hansard, 11 September 2024.

contempt,[72] the Committee did not pursue this course of action.[73] Instead, the Chair of the Committee drew attention to the Government's non-compliance in the Legislative Council chamber, as follows:

> *… the non-production of these documents I believe is hindering the work of the committee to carry out its important role in looking at the decisions around both taking on and then abandoning the Commonwealth Games and also the regional infrastructure rollout, which is another part of the committee's work. Clearly this is hindering that work. The vast majority of these documents have not been handed over, and I can only conclude that the government is not keen for the committee to do a thorough job of what this house has resolved to be their work.*[74]

Regardless of the level of executive cooperation, the Committee remains responsible for scrutinising the conduct and performance of the executive and any decisions they may have made in a ministerial capacity in relation to the Victorian Government's handling of the 2026 Commonwealth Games bid. This case study suggests that the Committee may be limited in its capacity to hold the executive to account if it is not able to obtain the evidence required to scrutinise past government actions in relation to the Commonwealth Games bid.

These examples demonstrate the ways in which executive cooperation in a parliamentary committee impacts the ability of the committee to undertake its accountability function.[75] The two case studies also highlight the important need to consider the political context of an inquiry when evaluating the impact of varying levels of executive cooperation in response to requests for information from parliamentary committees. The first example relates to organ donation – an issue that is about 'how can we make a system better for people'. The second example relates to a complex and expensive bid to host the Commonwealth Games that centred on the question of who to 'blame for things going wrong'. In these two different contexts we see how a parliamentary committee may be left with no choice but to rely upon the executive as the

[72] Legislative Council, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, 2022, O 17.06; Legislative Assembly, Parliament of Victoria, *Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria*, January 2024, O 193.

[73] David Limbrick MLC, Parliament of Victoria, *Proof Hansard*, Legislative Council, 16 October 2024. Accessed at: https://www.parliament.vic.gov.au/parliamentary-activity/hansard/hansard-details/HANSARD-974425065-28395#1755.

[74] David Limbrick MLC, Hansard, 16 October 2024.

[75] It is noted that individual members of committees occasionally use public hearings as an opportunity to put on the public record instances where witnesses, including government officials, have been reluctant to accept an invitation to provide evidence. See for example, Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 20 July 2021 (David Southwick MP, Lisa Lynch, Royal Women's Hospital (Melbourne)), p. 4.

only body who has access to the relevant information. However, the need for access to government officials and information is critical in both cases.

ADDITIONAL CHALLENGES ARISING FROM THE FEDERAL DIVISION OF LEGISLATIVE POWER AND POLICY RESPONSIBLITY

The Australian Constitution delineates the responsibilities of Commonwealth and state parliaments and anticipates a dual functionality in some areas (for example, health and education), noting that where a Commonwealth and state law conflict, the Commonwealth law will prevail.[76] At federation the text of the Constitution set out the division of law-making powers[77] but in modern Australia it is becoming increasingly challenging to identify Commonwealth and state responsibilities for the delivery of government services—for example, those delivered in response to the COVID-19 pandemic such as economic supports, vaccine rollout and hotel quarantine arrangements.[78]

This complexity of accountability in modern governance arrangements presents a challenge for parliamentary committee inquiries that traverse subject matter that involve shared responsibilities and powers—where they are relying on voluntary executive cooperation. This problem is compounded for parliamentary committees by government guidelines that have been issued for government officials that set out a process that is to be followed for determining executive involvement in parliamentary committee inquiries.

The Australian Department of Prime Minister and Cabinet has issued guidelines which apply to the making of submissions or appearing as a witness before a parliamentary committee.[79] These guidelines make specific provision for requests to Commonwealth [federal government]

[76] *Australian Constitution* ss 51, 52, 109, ch V.

[77] Appleby, Reilly and Grenfell, *Australian Public Law*, p. 134.

[78] See, for example, Anne Twomey, 'Multi-Level Government and COVID-19: Australia as a case study'. *The University of Melbourne Forum on Constitution Building in the Asia and Pacific,* 17 September 2020; Alan Fenna 'Pandemic Policy-Making in Australia's Federal System'. *Australia and New Zealand School of Government John L. Alford Case Library: Canberra*, 2020; Select Committee on COVID-19, Commonwealth of Australia, The Senate, *Final report,* 2022.

[79] Australian Department of the Prime Minister and Cabinet, 'Government guidelines for official witnesses before parliamentary committees and related matters (February 2015)'. Accessed at: https://www.pmc.gov.au/sites/default/files/resource/download/Gov_Guidelines_for_Official_WIitnesses_Feb_2015.pdf.

officials to appear before or make a submission to a state parliamentary inquiry. The guidelines state:

> *[O]fficials should be aware that it would be rare for Commonwealth officials to participate in such [state] inquiries … However, there may be cases where, after consulting the minister about the request, it is considered to be in the Commonwealth's interests to participate. Officials should not participate in any state or territory parliamentary inquiry without consulting the minister.*[80]

This means the ability of federal government officials to participate in state parliamentary committee inquiries appears to be limited to circumstances that are 'in the Commonwealth's interests'.

Like the Commonwealth, the states also have guidelines.[81] For example, the Victorian Government has issued guidelines to assist public officials involved in parliamentary committee inquiries. Of relevance in Victoria's guidelines for submissions and responses to inquiries, is that after obtaining ministerial endorsement, a government body must write to the Secretary of the Department of Premier and Cabinet seeking further approval to make a submission and advise, among other things:

> *… the issues of substantial importance that the inquiry will canvass, and the reasons why making a submission or response would be of strategic value to the Victorian Government; ...[and] the sensitivity of the topic to be discussed and any risks posed by the submission or response, particularly with respect to likely stakeholder or community reactions …*[82]

It therefore appears that a Victorian government official's ability to voluntarily participate in a parliamentary committee inquiry is limited to circumstances that 'would be of strategic value to the Victorian Government'. Such officials must also carefully consider 'any risks' their active

[80] Australian Department of the Prime Minister and Cabinet, 'Government guidelines for official witnesses before parliamentary committees and related matters (February 2015)'. Accessed at: https://www.pmc.gov.au/sites/default/files/resource/download/Gov_Guidelines_for_Official_WIitnesses_Feb_2015.pdf, p. 25.

[81] See, for example, New South Wales Department of Premier and Cabinet, 'C2011-27 Guidelines for Appearing Before Parliamentary Committees (October 2011)'. Accessed at: https://arp.nsw.gov.au/c2011-27-guidelines-appearing-parliamentary-committees/; Government of Western Australia, Public Service Commission, 'Public sector officers providing evidence to parliamentary committees: Guidance–Information for public sector officers providing evidence to parliamentary committees either through written submissions or by appearing as witnesses at committee hearings (10 May 2023)'. Accessed at: <https://www.wa.gov.au/government/publications/public-sector-officers-providing-evidence-parliamentary-committees>.

[82] Victorian Department of Premier and Cabinet, 'Guidelines for Victorian Government Submissions and Responses to Inquiries (May 2016)', pp 5-6. Accessed at: https://content.vic.gov.au/sites/default/files/2018-09/Guidelines-for-Victorian-Government-Submissions-and-Responses-to-Inquiries.pdf.

participation in an inquiry might pose. The Victorian guidelines do not provide examples to assist in understanding how 'strategic value' or 'risks' are to be interpreted.

The complexities of federalism often make it difficult for the public to clearly understand which government (federal or state) is responsible for specific decisions, policies, or services. Parliamentary committees also face challenges navigating the legal aspects of the federal division of powers—that are exacerbated when committees cannot access the necessary information from the executive. This situation in turn becomes more complicated when state and federal governments have different guidelines about the participation of officials in committee inquiries. As a result, the public may be dissatisfied with the performance of committees and their ability to deliver important outcomes and to hold the government to account for their actions.

WHAT'S AT STAKE?

Parliamentary committees have been established to undertake inquiries into matters of public interest and are a key mechanism to holding the executive to account. To perform their role, parliamentary committees have powers to compel evidence during an inquiry. While the conduct of parliamentary committee inquiries varies between different jurisdictions, in most instances, and especially in inquiries that traverse subject matters where the federal and state governments share service delivery responsibility, reliance on voluntary executive cooperation appears to be an accepted practice.

There are justifiable reasons, including legal ones, that must be taken into account when considering the reasonableness of a decision for the executive not to contribute to a particular parliamentary committee inquiry. But without a public record of what is going on 'behind the scenes' in an inquiry, it is impossible to assess whether parliamentary committees are keeping their 'promise' to hold the executive to account and putting themselves in the best position possible to deliver optimal policy and legislative outcomes.

While publishing parliamentary committee statements and reports where the executive refuse to provide evidence or decline an invitation to appear at a public hearing as part of an inquiry assists with transparency and accountability, it does not acquit the 'promise' of holding the executive accountable. The importance of executive cooperation to parliamentary committee inquiries cannot be underestimated. For this reason, to manage expectations of what parliamentary committees can deliver when it comes to executive accountability in the current landscape, there is a pressing need for the apparent parliamentary committee practice of relying on voluntary executive cooperation (and the government guidelines that restrict the circumstances for executive participation) in parliamentary committee inquiries to be reviewed.

Going Viral: Managing Inquiries with Thousands of Submissions and Substantial Public Interest

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Abstract: This article investigates the challenges faced by New South Wales Legislative Council committees undertaking inquiries with significant public interest. The article examines the logistical hurdles associated with receiving, reviewing and considering thousands of submissions, managing heightened public and media expectations, and the strain placed on small secretariat teams with limited resources. To illustrate these challenges, the article reviews three case studies: the inquiries into the provisions of the Reproductive Health Care Reform Bill 2019, the Voluntary Assisted Dying Bill 2021, and the inquiry into birth trauma. The article also outlines resource constraints, strategies for enhancing efficiency and some potential solutions, along with recommendations for process improvements to handle high interest inquiries more effectively.

INTRODUCTION

Legislative Council committees play a critical role in the democratic process in New South Wales. Committee inquiries foster public participation and enable debates of policy and legislation. However, high-profile inquiries, marked by a large influx of submissions and intense media scrutiny, present unique challenges. Committee secretariats, typically consisting of three or four staff, must work under intense pressure, often with limited resources, to facilitate committee inquiries. The secretariat teams process and review submissions, respond to media inquiries, conduct hearings, and prepare reports, all while managing committee demands and navigating public expectations. This article presents three case studies which demonstrate

[1] With thanks to staff of the Legislative Council: Shaza Barbar, Madeleine Dowd, Stephen Frappell, Tina Mrozowska, Sharon Ohnesorge and Steven Reynolds for taking the time to share their reflections as members of the secretariat teams for the inquiry into the provisions of the Reproductive Health Care Reform Bill 2019, the inquiry into the provisions of the Voluntary Assisted Dying Bill 2021, and the inquiry into birth trauma. Interviews were conducted with these staff in August 2024. Thank you to Robin Howlett for assisting with statistics and charts. Thank you also to Steven Reynolds, Deputy Clerk of Parliaments for his assistance in workshopping and developing this article, and staff of the Legislative Council more broadly for sharing their experiences working on high interest inquiries. With further thanks to David Blunt, Clerk of Parliaments for review and advice, and Beverly Duffy, Clerk Assistant Committees and Sharon Ohnesorge Acting Clerk Assistant Committees for supporting us to develop this article.

these challenges and assesses the effectiveness of the strategies used to manage them. These include methods for prioritising and processing submissions, use of online questionnaires, and clear communication of expectations. It concludes with recommendations to improve efficiency for future inquiries.

COMMITTEE INQUIRIES

The Legislative Council has a long history of committees dating back to 1825.[2] Since then, committees have become an important function of the Upper House. Upper House committees have delivered strong outcomes, including significant legislative and policy changes.[3] These committees have been instrumental in holding the government to account and improving public policy for the benefit of people in New South Wales.

Role and function within the Legislative Council

Legislative Council committees, constituted by members from across the political spectrum, are appointed to conduct inquiries into policy issues, proposed legislation or executive activity.[4] The Legislative Council has several committees that inquire into a range of issues. The Council currently has 20 committees, including 17 standing committees and three select committees. Legislative Council members also participate in six joint committees.[5]

Committees play a vital role in raising public awareness and facilitating public participation in policy discussions through their inquiry work. In the course of a typical inquiry, a committee will receive or adopt a terms of reference, gather evidence through submissions and public hearings, and prepare a final report.[6]

[2] Stephen Frappell, David Blunt (editors), *New South Wales Legislative Council Practice Second Edition*. Sydney: The Federation Press, 2021, p. 726.

[3] See for example, reforms to the governance of state transport assets and insurance schemes which followed the Public Accountability Committee's inquiry into the Transport Asset Holding Entity (2022) and the Standing Committee on Law and Justice's Review of the Workers Compensation Scheme (2023).

[4] Frappell & Blunt *New South Wales Legislative Council Practice,* pp. 726 and 727.

[5] As of 5 September 2024. Up to date information on the committees of the current parliament can be accessed at https://www.parliament.nsw.gov.au/committees/listofcommittees/pages/committees.aspx

[6] See Frappell & Blunt *New South Wales Legislative Council Practice,* pp. 758-776.

Standard procedures for inquiries

In the Legislative Council, the Committee Office operates a single secretariat, allocating staff to inquiries as they commence, rather than staff being designated for a particular committee. The Committee Office currently maintains a pool of approximately 30-40 staff available to work on committee inquiries, including Directors, Principal Council Officers, Senior Council Officers and Administration Officers. These officers facilitate the effective operation of a committee. Generally, this involves:

- providing procedural advice to the Chair and other committee members
- organising committee meetings and hearings
- preparing meeting agendas and minutes
- reviewing evidence (submissions, correspondence, answers to questions on notice and supplementary questions and hearing transcripts) and providing material required by the committee
- maintaining committee records and ensuring their security
- responding to committee correspondence and enquiries from the public
- preparing draft reports.[7]

A typical secretariat for an inquiry is comprised of three or four staff with complimentary skills and experience. Typically, the secretariat team is comprised of a Director, Principal Council Officer, and Administration Officer. A Senior Council Officer is also allocated for more complex inquiries. At any one time, the above staff will support multiple inquiries. Directors work closely with the Clerk Assistant – Committees to allocate inquiries so the busiest parts of each inquiry do not coincide. However, when inquiry timelines change, this cannot be avoided. On rare occasions, additional temporary staff will be recruited, or staff from other inquiries will be asked to volunteer on particularly busy inquiries.

A committee typically begins an inquiry by publicising its terms of reference through media releases, on social media, and by calling for submissions. Committees also directly contact key stakeholders who have an interest in the inquiry's subject matter and encourage them to provide their input. A deadline is set for submissions, although extensions can be granted.[8]

[7] Frappell & Blunt *New South Wales Legislative Council Practice*, pp. 794-795.

[8] Frappell & Blunt *New South Wales Legislative Council Practice*, p. 760.

Submissions are one of the principal means by which committee members are informed about issues and viewpoints. Submissions can take various forms, including letters, research articles, multimedia recordings or presentations. Submissions can be provided by direct upload to the inquiry webpage, via e-mail or post to the committee secretariat team. An administration officer then processes the submissions.

Administration officers process submissions by:

- accessing the submission through the Parliament Information Management System (PIMS)
- downloading the submission
- redacting names, contact details and signatures
- creating a cover page
- saving the submission to the inquiry folder
- entering submission details into the submission spreadsheet
- sending an acknowledgement email to the submission author asking them to confirm the requested publication status – either public, name suppressed, partially confidential or confidential.[9]

Administrative officers have noted this process is time consuming as it involves significant manual management of submissions.[10]

After a submission is processed, it will be reviewed and published by the committee. The authority of committees to publish submissions is an important part of the inquiry process, as it facilitates transparency and enables public discussion and engagement with an inquiry.[11] Once published by a committee, authors of submissions benefit from absolute privilege in relation to defamation, and immunity from civil and criminal proceedings, in relation to the evidence provided.[12]

[9] Conversation with Tina Mrozowska, Council Officer, Legislative Council Committees, 2 September 2024.

[10] Tina Mrozowska, 2 September 2024.

[11] Susan Want & Jenelle Moore, Edited by David Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*. Sydney: The Federation Press, 2018, pp. 728-729.

[12] Want & Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, p. 728.

Resolutions appointing most committees will require that, unless the committee decides otherwise, the Committee Clerk check for confidentiality and adverse mention. Should the Committee Clerk identify these issues, the publication of the document will be specifically considered by the committee.[13] In practice, the secretariat reads each submission carefully and highlights any adverse mention or confidential information for the committee to consider redacting.

Submissions are then provided to the committee members for consideration. The committee will then resolve to publish a submission publicly, keep the submission confidential, or make it partially confidential (by redacting certain information). Once the committee has agreed to this, the secretariat will publish the submission on the inquiry webpage.[14]

Following the receipt of submissions, committees typically hold public hearings, where witnesses are invited to appear and give evidence. Hearings are an opportunity for committee members to directly question witnesses about matters relevant to an inquiry and to clarify or test issues raised in submissions. Primarily, witnesses are identified through submissions received by the committee.[15]

During hearings, a witness may take questions 'on notice', to provide a written answer later. According to resolutions establishing the committees, all answers to questions on notice are published, subject to the committee secretariat checking for adverse mention and confidentiality.[16]

Following a hearing, committee members may provide supplementary questions to witnesses and witnesses usually have 21 calendar days to provide answers. All answers to supplementary questions are published by the same process as answers to questions on notice.[17]

[13] Want & Moore, *Annotated Standing Orders of the New South Wales Legislative Council,* p. 728; See for example, resolutions establishing the Subject Standing Committees, Public Accountability and Works Committee, Modern Slavery Committee, Regulation Committee, Privileges Committee and Portfolio Committees, *Minutes*, NSW Legislative Council, 10 May 2023, pp. 31-40; pp. 65-67.

[14] Want & Moore, *Annotated Standing Orders of the New South Wales Legislative Council*, p. 728.

[15] Frappell & Blunt *New South Wales Legislative Council Practice*, pp. 763-764.

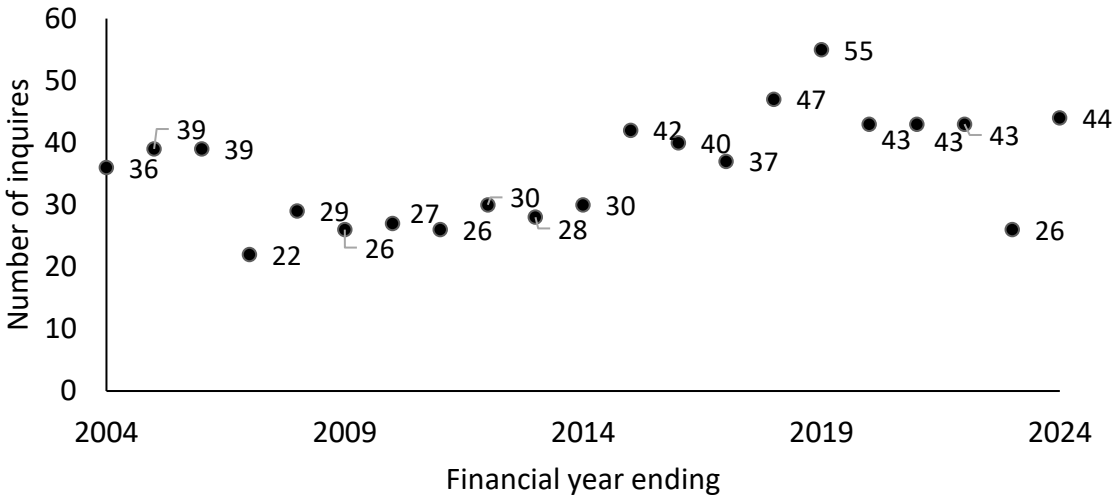
[16] Frappell & Blunt *New South Wales Legislative Council Practice*, p. 766.

[17] Frappell & Blunt *New South Wales Legislative Council Practice*, p. 766.

Trends – more inquiries, more submissions

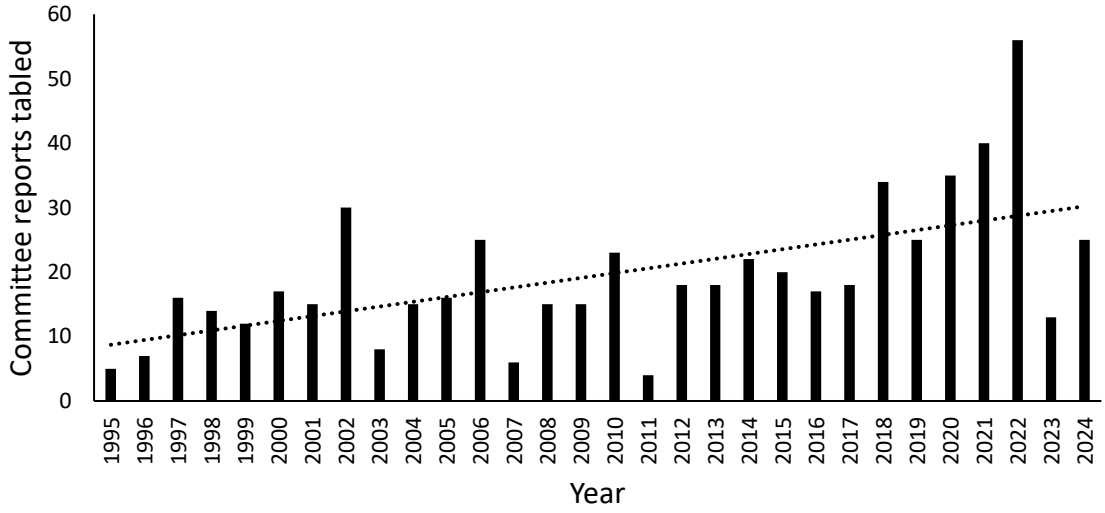
Over the last two decades, there has been a trend towards a higher volume of concurrent inquiries in the Legislative Council (Figure 1). Between 2004-14, the average number of active annual inquiries was 30. Between 2014-24, this average increased to 42.

Figure 1. Number of active inquiries in the Legislative Council each year over the last two decades.



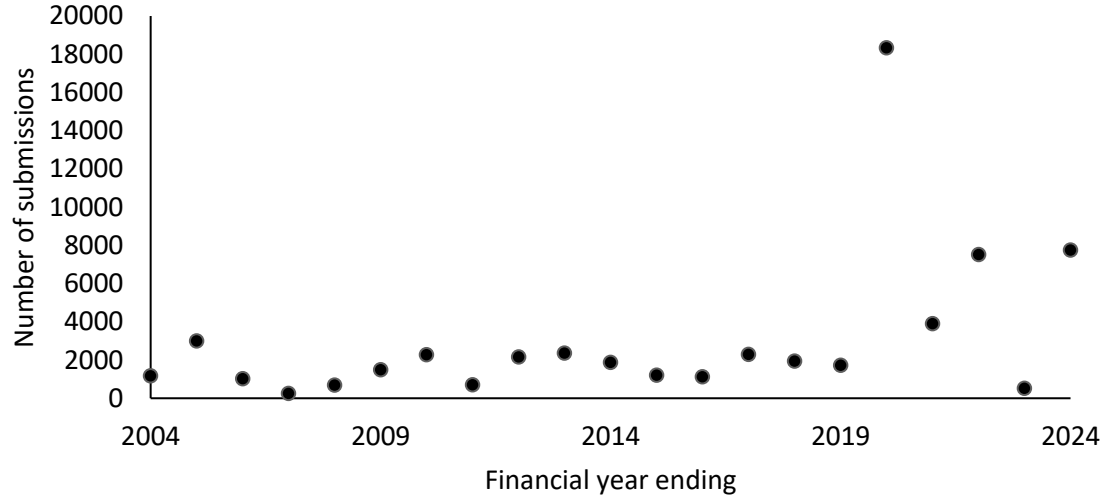
There has been an increase in the average number of reports published by inquiries of the Legislative Council over the last three decades (Figure 2). Notably, in the decade from 1995-2004, an average of 14 reports were published each year, in contrast with the most recent decade from 2015-2024, when an average of 28 reports were published per year.

Figure 2. Number of reports published each year by committee inquiries of the Legislative Council since 1955.



In the last five-year period, the Legislative Council has experienced a marked increase in the number of submissions received by committees each year (Figure 2).

Figure 3. Submissions received by inquiries of the Legislative Council each year since 2004, as recorded in annual reports.



Since 2019 an average of 7,605 submissions were received and processed each year.

This was an over fourfold increase on the relatively stable preceding 15-year period, when an average of 1606 submissions were received each year (from 2004-2019).

Given this dramatic recent increase in the volume of submissions, the Legislative Council has been testing new approaches to processing, reviewing and publishing submissions and the resourcing of inquiries.

INQUIRIES WITH SUBSTANTIAL PUBLIC INTEREST

Characteristics of inquiries with substantial public interest

Politically charged inquiries that deal with social policy issues, questions of morality or personal issues often attract significant public and media attention. The inquiries into the provisions of the Reproductive Health Care Reform Bill 2019 and the Voluntary Assisted Dying Bill 2021 touched on deontological ethics, personal freedoms and rights, and involved contentious moral, ethical and legal considerations. These inquiries attracted a broad audience, ranging from individuals with direct experiences, to advocacy groups and religious organisations.

These inquiries preceded the extensive debates of these bills in the houses. Given members were permitted a conscience vote, the inquiries became critical to both supporters and proponents of the bill, as they gave a final opportunity for members to garner support for their cause. This is evidenced by members' use of the evidence from the inquiries during the debates.[18]

The inquiry into birth trauma also drew significant attention due to its focus on critical aspects of healthcare and its impacts on reproductive health and families.

Inquiries with substantial public interest are often subject to considerable media coverage and social media campaigns. Influential media personalities and social media accounts can have a dramatic impact on the volume of submissions an inquiry receives by encouraging followers to participate. For example, the inquiry into birth trauma received over 4,000 submissions, which may have been driven by coordinated online campaigns. Such campaigns can lead to 'submission bombing' where inquiry portals are flooded with brief, homogenous submissions. While this can demonstrate the strength of public sentiment, it can also obscure meaningful contributions and place a heavy administrative burden on committees.

[18] See for example: Fred Nile, New South Wales, *Hansard*, Legislative Council, 24 September 2019, p. 85; Shayne Mallard, New South Wales *Hansard*, Legislative Council, 25 September 2019, p. 125.

Case study – Inquiry into the provisions of the Reproductive Health Care Reform Bill 2019

The Reproductive Health Care Reform Bill 2019 (NSW) was introduced into the Legislative Assembly on Thursday 1 August 2019 as a Private Member's Bill by Mr Alex Greenwich MP, Member for Sydney.[19] The bill was subsequently debated in the Legislative Assembly over three days from 6 to 8 August 2019 and forwarded to the Legislative Council on Friday 9 August 2019.[20]

In summary, the key aspects of the bill sought to:

- enable termination of pregnancy up to 22 weeks, and in some circumstances after 22 weeks
- remove criminal offences relating to termination of pregnancy from the Crimes Act 1900 (NSW)
- require a health practitioner who has a conscientious objection to performing a termination to disclose the objection and refer the person to another health practitioner
- create an offence for a person who is not a medical practitioner or otherwise authorised to terminate a pregnancy.[21]

The inquiry into the bill began with a referral to the Standing Committee on Social Issues from the Selection of Bills Committee on 6 August 2019.[22] The house resolved that committee was to report by 20 August 2019, allowing 14 days for the inquiry.[23] Upon referral, the committee resolved to begin the inquiry by advertising submissions from 9 August 2019 (or sooner depending on the passage of the bill through the Legislative Assembly).[24]

[19] New South Wales, *Votes of Proceedings*, Legislative Assembly, 1 August 2019, p. 228.

[20] New South Wales, *Votes of Proceedings*, Legislative Assembly, 6 August 2019, pp. 249-250; New South Wales, *Votes of Proceedings*, Legislative Assembly, 7 August 2019, pp. 255-256; New South Wales, *Votes of Proceedings*, Legislative Assembly, 8 August 2019, pp. 261-287; Standing Committee on Social Issues, NSW Legislative Council, *Reproductive Health Care Reform Bill 2019 [Provisions]* (2019), p. 3.

[21] Explanatory note, Reproductive Health Care Reform Bill 2019 (NSW), p. 1.

[22] New South Wales, *Minutes*, Legislative Council, 6 August 2019, pp. 292-293.

[23] New South Wales, *Minutes*, Legislative Council, 6 August 2019, pp. 292-293.

[24] Standing Committee on Social Issues, NSW Legislative Council, *Reproductive Health Care Reform Bill 2019 [Provisions]* (2019), p. 62.

The committee initially planned a 'short-format' inquiry which would involve one hearing day, a brief report including an explanation of the bill and a transcript from the hearing.[25] However, the significant public interest in the bill led the committee to undertake a full inquiry, including a substantial report, albeit within an exceptionally brief timeframe.[26]

To conduct this inquiry the committee:

- invited submissions from 9 August to 13 August 2019 (extended to 15 August following technical issues with the submissions portal)[27]
- held three days of public hearings on 14, 15 and 16 August 2019, comprising of: 15 hours of hearings, 15 panels of witnesses, 44 witnesses, approximately 300 questions, and 174 pages of Hansard transcript[28]
- held a report deliberative on 19 August 2019[29]
- reported to the House on 20 August 2019.[30]

The inquiry received over 13,000 submissions, with 10,000 received through the website portal and 3,000 via email.[31] On the afternoon of the closing date, due to the volume of submissions received, the website portal experienced downtime (i.e. a 'crash').

The committee heard evidence from a total of 44 witnesses, including 15 panels of witnesses.[32] Panels of witnesses represented a broad spectrum of viewpoints on the issue, and included ethicists, religious leaders, academics, women's organisations, legal and medical professionals, and advocates from both the right to choose and right to life perspectives.[33]

[25] Interview with Mr Steven Reynolds, Legislative Council Deputy Clerk and Mr Stephen Frappell, Clerk Assistant-Procedure, 23 August 2024.

[26] Interview with Mr Steven Reynolds and Mr Stephen Frappell, 23 August 2024.

[27] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. 3.

[28] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, pp. vii and 4.

[29] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, pp. 71-77.

[30] New South Wales, *Minutes*, Legislative Council, 20 August 2019, pp. 355-356.

[31] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. 3.

[32] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. vii.

[33] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. vii

The secretariat anticipated a large volume of submissions for this inquiry and employed additional temporary staff to assist with processing submissions.[34] After a day or so of submissions being received and processed, the secretariat determined they would be unable to process all the submissions despite the additional staff, within the fixed timeframe available for the committee to deliver its final report.[35]

The secretariat made considerable effort to identify all submissions from witnesses giving evidence, and more generally from key agencies and organisations with an opinion on the bill. In most cases, with few exceptions, these submissions were identified, processed and published by the committee.[36]

In relation to submissions received from the public via the online portal, the committee adopted a random sampling approach to ensure that the views of inquiry participants were represented in a manner that was achievable within the time limitations. For submissions received through the website portal, the secretariat processed every 50th submission, and once this was completed, returned for a second pass to process every 25th submission.[37] A sample of 100 of these submissions was de-identified and published.[38] Of this sample, 96 were opposed to the bill, three did not express a position on the bill, and one suggested amendments.[39]

A similar approach was taken to submissions received over e-mail, where a sample of 40 submissions were processed and published.[40] Of this sample, 36 were opposed to the bill and 4 supported the bill.[41]

To complete this inquiry within the 14-day period, the committee resolved to adjust some standard inquiry timeframes.

In a typical Legislative Council inquiry, witnesses are afforded the opportunity to take questions on notice during a hearing, and members are also given an opportunity to ask supplementary

[34] Interview with Mr Steven Reynolds, 23 August 2024.

[35] Interview with Mr Steven Reynolds, 23 August 2024.

[36] Interview with Mr Steven Reynolds, 23 August 2024.

[37] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. 4.

[38] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019,* p. 4.

[39] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, p. 4.

[40] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019,* p. 4.

[41] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019,* p. 4.

questions following a hearing.[42] Witnesses are typically given 21 days to respond to questions taken on notice and supplementary questions.[43] For this inquiry, the committee resolved that witnesses would be directed not to take questions on notice at the hearings, and no supplementary questions would be asked by members.[44]

The committee adopted the following timeline in relation to the finalisation of the report for the inquiry in August 2019:

- Friday 16 August: final hearing for the inquiry
- Monday 19 August (early morning): Chair's draft report to be circulated to the committee
- Monday 19 August (5.00 pm): report deliberative
- Tuesday 20 August: report tabled in the Legislative Council.[45]

Circulation of a Chair's draft report within one working day of a final hearing, and one day prior to tabling, is highly unusual for a substantial report of this nature.

At the time of this inquiry, there was no specified timeframe for providing a Chair's draft report to members prior to tabling. However, the Standing Orders were amended in November 2019 to provide that, unless a committee decides otherwise, a Chair's draft report is to be circulated at least seven days prior to the report deliberative.[46]

To assist the Chair with preparing the report within this timeframe, the Clerk Assistant – Committees became heavily involved in drafting over the weekend of 17-18 August 2019, which again is not typical of Legislative Council inquiries, where usually less senior clerks assist the Chair with drafting.[47]

[42] See for example, resolution establishing the portfolio committees, *Minutes*, NSW Legislative Council, 10 May 2023, pp. 65-67.

[43] See for example, New South Wales, *Minutes*, Legislative Council, 10 May 2023, pp. 65-67.

[44] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019,* pp. 62, 63, 66 and 69.

[45] Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019,* p. 62.

[46] New South Wales, *Minutes*, Legislative Council, 20 November 2019, p. 729.

[47] Interview with Mr Steven Reynolds, 23 August 2024.

The volume of submissions reflected the considerable public interest in this inquiry. However public engagement with the inquiry outside of the submission process, including phone calls from the public to the secretariat, was reasonably limited.[48]

Media interest was generally directed towards the houses as the bill progressed, rather than the inquiry itself.[49]

As members were permitted a conscience vote on the bill, the media focused on voting divisions rather than the activities of the inquiry itself.[50] However, the inquiry was regularly referred to during the debates, primarily through use of the transcripts to quote various witnesses to support the arguments members were making. Although it is unlikely members would have changed their position as a result of the inquiry, it did provide useful material for opponents and proponents of the bill.[51]

Case study – Inquiry into the provisions of the Voluntary Assisted Dying Bill 2021

The inquiry by the Standing Committee on Law and Justice in the Legislative Council into the provisions of the Voluntary Assisted Dying Bill 2021 was conducted from October 2021 to February 2022.

The Voluntary Assisted Dying Bill 2021 ('the VAD bill') was introduced in the Legislative Assembly on 14 October 2021, as a Private Member's Bill by Mr Alex Greenwich MP, Member for Sydney,[52] and was co-sponsored by 28 members across both houses of parliament.[53]

In summary, the key aspects of the bill sought to:

- enable eligible persons with a terminal illness to access voluntary assisted dying
- establish a procedure for, and regulate access to, voluntary assisted dying

[48] Interview with Mr Steven Reynolds, 23 August 2024.

[49] Interview with Mr Steven Reynolds , 23 August 2024.

[50] Michael McGowan, 'MPs' threat over abortion bill could push NSW Liberals into minority government'. *The Guardian*, 3 September 2019. Accessed at: https://www.theguardian.com/australia-news/2019/sep/03/nsw-liberal-mps-threaten-to-move-to-crossbench-over-abortion-bill

[51] Interview with Mr Steven Reynolds, 23 August 2024.

[52] New South Wales, *Votes of Proceedings,* Legislative Assembly, 14 October 2021, p. 1310.

[53] Standing Committee on Law and Justice, NSW Legislative Council, *Voluntary Assisted Dying Bill 2021 [Provisions]* (2022), *p.* 1.

- establish the Voluntary Assisted Dying Board and provide for the appointment of members and functions of the Board.[54]

On 19 October 2021 the Legislative Council resolved that the VAD bill should be referred to the Standing Committee on Law and Justice for inquiry and report, upon receipt of the message on the bill from the Legislative Assembly. The resolution from the house stipulated that the committee should report by the first sitting day in 2022.[55] As such, the final report of the inquiry was tabled on 22 February 2022. [56]

On 21 October 2021 the committee considered the referral from the house, and resolved to:

- invite submissions and responses to an online questionnaire until 22 November 2021
- hold a series of three hearings on 8, 10 and 13 December 2021
- to advertise the inquiry via Twitter, Facebook, media release and direct e-mail to key stakeholders.[57]

Over the subsequent 53 days, the committee:

- received 3,073 submissions, of which 107 were published[58]
- received over 39,000 responses to the online questionnaire[59]
- heard testimony from 78 witnesses over the three days of hearings.[60]

This legislation was controversial, with substantial engagement from peak bodies and religious groups, and like the Reproductive Health Care Bill, was being considered at the culmination of a long, emotionally charged, public debate. Unlike the Reproductive Health Care Bill, the VAD bill inquiry had a longer period of consideration and enquiry which was a lesson clearly learned from the prior example.

[54] Explanatory note, Voluntary Assisted Dying Bill 2021 (NSW), p. 1.

[55] New South Wales, *Minutes*, Legislative Assembly, 19 October 2021, pp. 2511-2512.

[56] New South Wales, *Minutes,* Legislative Assembly, 22 February 2022, p. 2927.

[57] Standing Committee on Law and Justice, *Voluntary Assisted Dying Bill 2021*, p. 72.

[58] Standing Committee on Law and Justice, *Voluntary Assisted Dying Bill 2021*, p. ix.

[59] Standing Committee on Law and Justice, *Voluntary Assisted Dying Bill 2021*, p. 2.

[60] Standing Committee on Law and Justice, *Voluntary Assisted Dying Bill 2021*, pp. 65-70.

It was anticipated that there would be a substantial public interest and a considerable submission load. To manage the submission load, the committee and secretariat:

- established an online questionnaire
- publicly promoted the online questionnaire, rather than the submission portal
- invited submissions from peak bodies and advocacy groups
- sent a standard e-mail acknowledgement to contributors
- procured a 'data dump' of all submissions that could be circulated to members without requiring individual processing by the secretariat.[61]

Despite the management plan put in place, the volume of submissions and the timeframe for production of the committee report created challenges for the inquiry.[62]

While submissions were open from 21 October to 22 November 2021, with less than two weeks between the closing date and the first hearing, it was not possible for the committee to review over 3000 submissions received in time to identify witnesses to give evidence at the hearings.

The committee agreed to a course of three hearing days, with one to hear from witnesses in support of the bill, one to hear from witnesses opposed to the bill, and one to finalise proceedings and hear from witnesses who had been unable to attend prior days.[63] Committee members in support of the bill and opposed to the bill were respectively given broad latitude to nominate witnesses.[64] This approach resulted in quite fulsome schedules for each hearing day, with 22, 37, and 20 witnesses appearing on 8, 10 and 13 December 2021 respectively.

In recent years, committee inquiries in the NSW Legislative Council had begun using online questionnaires across a wide range of inquiries, such as those investigating road tolling, flooding, and museums.

A typical online questionnaire conducted by a committee of the period would receive a few hundred responses, for example:

[61] Interview with Ms Sharon Ohnesorge, Acting Clerk Assistant – Committees, NSW Legislative Council and Ms Madeleine Dowd, Director, Regulation Committee, NSW Legislative Council, 23 August 2024.

[62] Interview with Ms Sharon Ohnesorge, 23 August 2024.

[63] Standing Committee on Law and Justice, *Voluntary Assisted Dying Bill 2021,* pp. 75.

[64] Interview with Ms Sharon Ohnesorge, 23 August 2024.

- 119 responses were received by the inquiry into the Response to Major Flooding across New South Wales in 2022[65]
- 301 responses were received by the inquiry into the government's management of the Powerhouse Museum and other museums and cultural projects in New South Wales[66]
- 503 responses were received by the inquiry into road tolling regimes.[67]

Although it was anticipated the inquiry into provisions of the VAD bill would generate a significant level of public interest and questionnaire responses, the engagement with the questionnaire far exceeded expectations.

At its closing date the questionnaire had received 39,915 responses from New South Wales Residents. At this point in time, this was a record amount of public engagement with an online questionnaire circulated by a Legislative Council inquiry.

Offering an online questionnaire to the public as a method for engaging with an inquiry can provide several benefits to a committee.

- Online questionnaires can provide a quick way for a member of the public to share their sentiments with a committee without the need to write a fulsome submission.
- In contrast with open submissions, online questionnaires can give the committee rapid insight into the sentiments towards a given question or topic, which can be particularly useful for inquiries into bills.
- The volume of responses to a questionnaire indicates how engaged the public is with a particular issue under scrutiny or debate.

[65] Select Committee on the Response to Major Flooding across New South Wales in 2022, NSW Legislative Council, *Online questionnaire report: Inquiry into the Response to Major Flooding across New South Wales in 2022*, August 2022, p. 2.

[66] Select Committee on the Government's management of the Powerhouse Museum and other museums and cultural projects in New South Wales, NSW Legislative Council, *Online questionnaire report: Inquiry into the government's management of the Powerhouse Museum and other museums and cultural projects in New South Wales*, June 2020, p. 2.

[67] Portfolio Committee No. 6 - Transport and the Arts, NSW Legislative Council, *Online questionnaire report: Inquiry into road tolling regimes*, September 2021, p. 2.

- Online questionnaires potentially reduce the number of 'pro-forma' or duplicate submissions, which in and of themselves are of limited value as evidence but consume Legislative Council resources in processing.
- Prior to the establishment of 'official' online questionnaires, stakeholders would create their own online questionnaires and seek to provide the output to the committee. Administratively receipt of such third-party questionnaires by committees was not straight-forward, as it was not possible for the committee to verify whether questions or answers had been manipulated or know whether respondents knew that their data would be provided to the committee.

Online questionnaires do have limitations.

- Online questionnaires are by their nature not representative of the opinion of the electorate as a whole. Responses to online questionnaires only represent the views of those persons who have self-selected to respond to the questionnaire.
- When you have the volume of responses to an online questionnaire as was received with the inquiry into provisions of the VAD Bill, it is not possible for the secretariat or the committee to review or read the responses to the 'free text' parts of 39,000 responses. For the purposes of the report on the online questionnaire, a representative sub-sample of 'free text' responses from different viewpoints was provided in the report.
- For the inquiry into the VAD Bill, certain members expressed the views that the summary of those in support of or opposed to the bill, did not reflect the true sentiments of the community.

As with the inquiry into the provisions of the Reproductive Health Care Reform Bill 2019, evidence arising from this VAD bill inquiry was referenced heavily in the house debate on the bill. The bill was debated at length in the house, late into the evening on 18 May and through the morning of 19 May 2022, with members referring to evidence from the bill inquiry during debate.[68] It is likely that, having worked through the bill in detail in preparation for, and during, the inquiry, members were well provisioned to debate matters of policy in detail via the process of amendment making.

Indeed, one member of the committee made specific mention of the inquiry and the value it provided:

[68] See for example: Greg Donnelly, New South Wales, *Hansard*, Legislative Council, 18 May 2022, pp. 6532-6563; Scott Farlow, New South Wales, *Hansard,* NSW Legislative Council, 18 May 2022, p. 6537.

> *Do members know what the big difference is between November last year and May this year? Certainly you would know, Chair: a most extremely well conducted inquiry—although over a short timetable, which I was complaining about, but nevertheless—into the provisions of this bill by the Standing Committee on Law and Justice… Simply put, it is one of the most important committees of the Legislative Council—I know all committees are important—in terms of looking at laws and trying to make assessments about whether these are good laws or not good laws, or laws that perhaps should be amended.*[69]

Case study – Inquiry into birth trauma

The Select Committee into Birth Trauma was established on 21 June 2023.[70] The House established the Select Committee to inquire into and report on birth related trauma for women in New South Wales, including:

- the potential causes and contributing factors to birth trauma
- the impact of birth trauma
- the barriers to providing and receiving continuity of care
- methods of delivery and access of educational information on maternity care
- what steps could be taken, if any, to improve the maternity health care system within New South Wales to help reduce the prevalence of birth trauma[71]

As the first parliamentary committee examining this issue, the inquiry attracted significant public interest both within New South Wales, and across Australia and internationally. Unlike the Bills inquiries discussed above, the Select Committee into Birth Trauma had a unique opportunity to investigate and gather evidence on the issue of birth trauma for the first time. However, the complexity of the inquiry was heightened by public engagement and media interest.[72]

[69] Greg Donnelly, New South Wales, *Hansard*, Legislative Council, 18 May 2022, p. 6544.

[70] New South Wales, *Minutes*, Legislative Council, 21 June 2023, pp. 208-211; Emma Hurst, New South Wales, *Hansard*, Legislative Council, 21 June 2023, p. 7900.

[71] New South Wales, *Minutes*, Legislative Council, 21 June 2023, p. 211.

[72] Interview with Ms Shaza Barbar, Director of Inquiry into Birth Trauma, 16 August 2024.

After an 11-month inquiry, the committee tabled its report on 29 May 2024. The report was based on extensive evidence gathered, including over 4,000 submissions and evidence from 104 witnesses appearing at six public hearings.[73]

The inquiry coincided with significant media attention on the issue, including coverage by the Australian Broadcasting Corporation (ABC)[74] and The Project.[75] The secretariat team speculated that media interest helped bring the issue to the forefront, leading to widespread awareness of the inquiry.[76] In addition, there was considerable interest online through social media and podcasts. Several influential accounts run by midwives, doulas and women's health advocates, actively promoted the inquiry and encouraged their followers to share their personal experiences. [77] The secretariat team believe that this encouragement likely contributed to the large influx of submissions.[78]

The secretariat noted that while these types of coordinated campaigns can demonstrate public sentiment, they can also provide a significant burden for the committees to review thousands of submissions, with limited value as evidence.[79]

The inquiry received a significant volume of evidence, including submissions and witness testimony. Many of these stories included deeply personal and traumatic accounts of pregnancy and childbirth, which required careful handling.

The online portal for submissions was open from 3 July 2023 to 15 August 2023. By the time the portal closed the committee had received over 4,000 submissions, many detailing deeply personal and traumatic birth stories. The large volume of submissions and sensitive content posed a significant logistical challenge, requiring meticulous reviewing and processing.[80]

[73] Select Committee on Birth Trauma, NSW Legislative Council, *Birth Trauma* (2024), p. xxi.

[74] Kathleen Calderwood, 'Investigation underway after 30 women complain about maternity experience at NSW hospital', (7 June 2023), *ABC News*, 7 June 2023. Accessed at: https://www.abc.net.au/news/2023-06-07/wagga-wagga-basehospital-hccc-investigation/102444994

[75] 'Wagga Wagga Base Hospital Investigated Over Incompetence', *The Project*, Network 10, 18 July 2023.

[76] Interview with Ms Shaza Barbar, 16 August 2024.

[77] See for example, Dr Melanie Jackson, 'The Great Birth Rebellion, Episode 45 – How to change the system'. Accessed at: https://www.melaniethemidwife.com/podcasts/the-great-birth-rebellion; Better Births Illawarra [@betterbirthsillawarra], 'Submissions close at 11.59pm today', 15 August 2023. Accessed at: https://www.instagram.com/reel/Cv8fCCORHpx/

[78] Interview with Ms Shaza Barbar, 16 August 2024.

[79] Interview with Ms Shaza Barbar, 16 August 2024.

[80] Interview with Ms Shaza Barbar, 16 August 2024.

To safeguard privacy, the committee resolved to redact sensitive and identifying information, including details that could indirectly reveal identities, including the names of medical professionals, children, hospitals and locations.[81]

To manage this, the committee took several approaches to submissions.

1. Data extraction: Most submissions were received through the online portal over a six-week period. As the number of submissions grew, the secretariat had Novaworks, a software data company, extract the data on the total number of submissions, the length of each submission and the location of the submission authors. This information helped the committee to prioritise which submissions to process first. The secretariat managed stakeholder expectations by emailing submission authors to inform them of delays due to the high volume of submissions received.[82]

2. Prioritisation: Submissions from organisations were prioritised. Subsequently, submissions from individuals residing within New South Wales were processed and published, while the committee resolved to have all submissions from individuals residing outside New South Wales kept confidential. This helped manage the workload and ensured that the most relevant evidence was made public and available for the report.[83]

3. Publishing substantial submissions: The committee decided to prioritise processing longer submissions (those over 500 words). Shorter submissions from within New South Wales were published next, and short name supressed submissions were 'bulk-processed' into one single, comprehensive document. This approach helped streamline the review process while ensuring that all voices were considered.[84]

4. Identifying and removing duplicate submissions: The secretariat identified and filtered out duplicate submissions, a resource intensive process.[85]

[81] Interview with Ms Shaza Barbar, 16 August 2024.

[82] Interview with Ms Shaza Barbar, 16 August 2024.

[83] Select Committee on Birth Trauma, NSW Legislative Council, *Birth Trauma* (2024), p. 183.

[84] Select Committee on Birth Trauma, *Birth Trauma*, pp. 183 and 212.

[85] Interview with Ms Shaza Barbar, 16 August 2024.

5. Redaction guidelines: Given the inquiry's sensitive nature, the committee resolved to remove specific details, such as children's names, names of medical professionals and hospital names or locations. The secretariat created an inquiry-specific guide to ensure all staff followed a consistent approach to redactions.[86]

Despite the small size of the secretariat team, every effort was made to process all public and name suppressed submissions from within New South Wales. This effort required the involvement of nearly every staff member of the Committee Office to help meet the deadlines of the inquiry.[87]

Given the sensitive nature of birth trauma, the committee made several adjustments to standard practices, including making welfare calls to vulnerable stakeholders, utilising mental health providers to support witnesses with lived experience, and providing a list of support services on the inquiry webpage.

During the early months of the inquiry, the secretariat endeavoured to phone each submission author to ensure they were safe and supported, and to thank them for their contribution. As the number of submissions grew this became increasingly difficult, in the end only submission authors who directly referenced ongoing mental health issues or self-harm were called.[88]

The volume of requests from submission authors who changed their mind about publishing their submissions was another challenge for the secretariat team. The Legislative Council submission management system notifies submission authors via email once their submission is processed. This email asks authors to confirm the publication status of their submission (either public, name suppressed or confidential). A significant number of authors no longer wanted to be identified in their submission and asked to change their publication status to name suppressed. This required the team to manually locate the original submission and redact names and personal information, adding to the workload.[89]

Identifying specific relevant individuals amongst the thousands of submission authors to invite to give evidence at public hearings was another unexpected challenge. To help with this task, the secretariat team approached advocacy groups to help identify individuals who would be interested and had the confidence and capacity to give evidence before the committee. This allowed the committee to easily shortlist potential witnesses, while also ensuring that

[86] Select Committee on Birth Trauma, *Birth Trauma*, p. 182.

[87] Interview with Ms Shaza Barbar, 16 August 2024.

[88] Interview with Ms Shaza Barbar, 16 August 2024.

[89] Interview with Ms Shaza Barbar, 16 August 2024.

witnesses were supported.[90] The committee also arranged for mental health clinicians from the Gidget Foundation to attend public hearings to provide emotional support and counselling to witnesses who shared their stories.[91]

After completing the inquiry, the secretariat team identified some insights for future inquiries. These include earlier stakeholder engagement, improving communication with the public, improving the submission management system, and prioritising staff wellbeing.

The secretariat recognised that engaging with key stakeholders earlier in the inquiry process could have helped manage public expectations. Clearer communication on the inquiry webpage could have also helped submission authors better understand the inquiry process and how their submission would be handled. In addition, outsourcing some aspects of the submission review process earlier could have also alleviated some of the burden on the secretariat team.[92]

The inquiry also revealed the emotional impact on staff who review potentially traumatic content. The Legislative Council recognise how important it is to provide mental health support to staff, emphasising the need to prioritise wellbeing in the future.[93]

Finally, the inquiry demonstrated the need for improved systems to effectively manage large volumes of submissions. The experience highlighted the importance of balancing the practicalities of processing and publishing submissions alongside the committee's efforts towards transparency.[94] The inquiry not only addressed birth trauma, but also set a precedent for managing similar inquiries in the future.[95]

CURRENT APPROACHES AND FUTURE OPPORTUNITIES

Managing high interest inquiries requires a tailored approach dependent on the inquiry and the public engagement expected. The three inquiries examined in this article each used

[90] Interview with Ms Shaza Barbar, 16 August 2024.

[91] Select Committee on Birth Trauma, p. xxi.

[92] Interview with Ms Shaza Barbar, 16 August 2024.

[93] Interview with Ms Shaza Barbar, 16 August 2024.

[94] Interview with Ms Shaza Barbar, 16 August 2024.

[95] Interview with Ms Shaza Barbar, 16 August 2024.

different strategies to manage the volume of submissions alongside public and media expectations.

Current approaches to managing inquiries with substantial public interest

Inquiries with significant public interest can create tension within committees as they strive to balance transparency with the logistical challenges of reviewing high volumes of submissions within short timeframes. Media coverage and social media campaigns can also often increase public participation, leading to 'submission bombing', where coordinated campaigns resulted in an overwhelming number of submissions.

To manage the volume of submissions, various approaches have been employed.

- Random sampling: To address the large number of submissions received, the Reproductive Health Care Reform Bill inquiry adopted a random sampling approach. This method allowed a representative sample of public submissions to be processed and published by the committee in the timeframe permitted for the examination of the bill.[96]
- Online questionnaires: An online questionnaire was used in the Voluntary Assisted Dying Bill inquiry to capture public opinion in a structured way, reducing the burden of processing individual submissions and allowing the committee to focus on more detailed submissions from key stakeholders.[97]
- Bulk processing: Given the highly personal and sensitive nature of the submissions received to the inquiry into birth trauma, the committee resolved to process every submission from individuals residing in New South Wales. This created a significant administrative workload for the secretariat. To manage this, bulk processing of short submissions, particularly those from name suppressed authors, was authorised by the committee. This approach streamlined the administrative process while ensuring all voices were heard.[98]

When inquiries receive large volumes of submissions, committees can employ a range of strategies to manage the expectations of inquiry participants. These include:

[96] Interview with Mr Steven Reynolds, 23 August 2024.

[97] Interview with Ms Sharon Ohnesorge, 23 August 2024.

[98] Interview with Ms Shaza Barbar, 16 August 2024.

- using the inquiry webpage to notify submission authors of delays in processing and publishing submissions
- providing proactive, regular updates on the progress of the inquiry on the webpage, particularly where there are changes to the standard processes or timelines
- if significant public participation is anticipated, the committee may extend the inquiry to allow adequate time for processing and reviewing submissions[99]

These strategies emphasize the importance of flexible approaches to handling large volume inquiries while managing stakeholder expectations and maintaining fairness and transparency.

Opportunities for process changes to support parliamentary committees

In addition to existing approaches, other new and innovative approaches could be made to better manage inquires with significant public interest.

The current Parliament Information Management System (PIMS) could be significantly improved to better support the management of high-volume inquiries. Suggestions from secretariat teams include:

- automating the identification of duplicate submissions
- tracking submissions received from outside New South Wales
- implementing tools to manage short submissions and instead direct authors to an online questionnaire
- streamlining processes for obtaining author approval for submission publication status (public, name suppressed or confidential)
- revising the acknowledgement email to reduce the likelihood of authors changing their preferred publication status.[100]

[99] Interview with Mr Steven Reynolds, 23 August 2024; Interview with Ms Sharon Ohnesorge, and Ms Madeleine Dowd, 23 August 2024; Interview with Ms Shaza Barbar, 16 August 2024.

[100] Interview with Mr Steven Reynolds, and Mr Stephen Frappell, 23 August 2024; Interview with Ms Sharon Ohnesorge, and Ms Madeleine Dowd, 23 August 2024; Interview with Ms Shaza Barbar, 16 August 2024.

Larger secretariat teams can significantly enhance the management of inquires with high volumes of submissions by providing the necessary capacity to handle the increased administrative burden. With more team members, tasks such as processing and reviewing submissions can be distributed, reducing the strain on individual staff members. This is particularly important in inquiries where sensitive content requires careful handling.[101] Expanding the secretariat teams also allows for more specialised roles such as those focused on stakeholder management, which is crucial in high interest inquiries. Overall, a larger team provides the flexibility and resources needed to adapt to the unique challenges of each inquiry, ensuring all voices are heard and the integrity of the inquiry is maintained. The ability to re-allocate staff from other, less controversial inquiries, is one of the strengths of the Legislative Council's single committee secretariat model.[102]

Generative artificial intelligence (AI) and large-language models (LLMS), at first glance, appear to have the potential to save time and resources in processing, grouping or summarising large amounts of text such as those in submissions to parliamentary inquiries. Unfortunately, evidence shows that current AI models are likely to fabricate evidence[103] and references[104] creating additional fact-checking work, rather than saving time. A recent study commissioned by the Australian Securities and Investments Commission (ASIC) asked a LLM to summarise submissions, and had the output compared with work done by ASIC staff, in a blind comparison. On review, ASIC concluded:

- introducing AI into workflows created more work, due to the need for additional fact checking, or because the submissions themselves presented the information in a clearer way

[101] Interview with Mr Steven Reynolds and Mr Stephen Frappell, 23 August 2024; Interview with Ms Sharon Ohnesorge, and Ms Madeleine Dowd, 23 August 2024; Interview with Ms Shaza Barbar, 16 August 2024.

[102] Interview with Mr Steven Reynolds, and Mr Stephen Frappell, 23 August 2024; Interview with Ms Sharon Ohnesorge, and Ms Madeleine Dowd, 23 August 2024; Interview with Ms Shaza Barbar, 16 August 2024.

[103] In one early example, in 2023 the Senate Finance and Public Administration References Committee inquiry into management and assurance of integrity by consulting services received a submission prepared by Emeritus Professor James Guthrie AM, which included entirely fabricated allegations of wrongdoing by consulting firms. Professor Guthrie later provided a revised submission to the inquiry and a letter of apology. See Henry Belot, 'Australian academics apologise for false AI-generated allegations against big four consultancy firms'. *The Guardian*, 3 November 2023. Accessed at: https://www.theguardian.com/business/2023/nov/02/australian-academics-apologise-for-false-ai-generated-allegations-against-big-four-consultancy-firms

[104] In artificial intelligence research these fabrications are known as 'hallucinations'. See for example: Michele Salvagno, Fabio Silvio Taccone & Alberto Giovanni Gerli, 'Artificial intelligence hallucinations'. *Critical Care* 27(180) 2023.

- the AI models were not able to pick up 'nuance or context' required to analyse submissions.[105]

AI could play some small role in helping to sort or triage submissions, as a tool used by secretariat to assist their work, but care should be taken to isolate AI models from any actual drafting, to avoid creation of additional fact-checking work.

CONCLUSION

The experience of the inquiries into the provisions of the Reproductive Health Care Reform Bill and the Voluntary Assisted Dying Bill, and the inquiry into birth trauma demonstrate a range of options for managing high interest inquiries. Online questionnaires, random sampling and bulk processing have all been used by committees to manage large volumes of submissions and public interest. Anticipating which inquiries will have strong community interest, and adopting appropriate, proactive strategies is key to managing the high volumes of submissions and ensuring effective public engagement.

Post script

As part of the presentation of this article at the Australasian Study of Parliament Group 2024, delegates engaged in discussion about the management of inquiries that attract substantial public interest. Some of the current practices in other jurisdictions include:

- only accepting submissions via portal and not email
- removing manual processing of submissions, replacing with automated workflows
- treating submissions as public unless requested otherwise
- sending submissions to the committee without proposing redactions.

We thank the conference delegates for sharing their perspectives and practices.

[105] Australian Senate, Select Committee on Adopting Artificial Intelligence (AI), Australian Securities and Investments Commission, *Generative Artificial Intelligence (AI) Document Summarisation Proof of concept, Final report,* Document tabled in response to question no. 001, 21 May 2024.

Protecting Parliamentary Procedure: Bridging the Gap in Institutional Memory with Artificial Intelligence

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Abstract: The intricate processes of law-making, government scrutiny and constituent representation in parliaments is anchored in a dual framework of written rules and institutional memory, often embedded by precedents. The retention of this institutional memory is crucial for maintaining parliamentary effectiveness amidst dynamic political environments. This paper explores the potential of Artificial Intelligence (AI) in preserving parliamentary procedural knowledge and addressing the challenge of 'institutional amnesia'. AI can enhance knowledge management systems by contextualising both explicit and implicit sources of information, ensuring the history and precedents of parliaments are retained and accessible. This paper considers the complexities of recording parliamentary procedures, emphasising the importance of institutional memory, which is often uncodified and held by long-serving members and staff. The frequent turnover in parliamentary personnel poses a significant risk to the continuity of institutional memory. AI, with its capabilities in data storage and analysis, offers a promising solution to this problem. The paper examines existing applications of AI in global parliaments, highlighting its potential to improve the accessibility and application of procedural knowledge. By integrating AI, parliaments can build intelligent repositories that support decision-making, member training, and the seamless transfer of procedural knowledge. However, the adoption of AI must be carefully managed to uphold democratic principles, ensuring transparency, accountability, and human oversight. Further, parliaments must carefully mitigate the cyber-security risks associated with AI, especially given the often sensitive nature of documents and records kept. This paper proposes a balanced approach, leveraging AI to preserve parliamentary precedents while maintaining the integrity and trust of the institution. Through this exploration, the paper aims to contribute to the evolving discourse on AI's role in enhancing parliamentary resilience and procedural continuity.

INTRODUCTION

The intricate process of law-making in parliaments involves a complex interplay between written rules and more implicit understandings of parliamentary procedure. Parliaments globally operate within this dual framework to ensure their effectiveness amidst political dynamics. The foundation of parliamentary procedure is anchored in legal frameworks prescribing the operational rules and protocols of the institution. These rules, often enshrined in constitutions and bills of rights, ensure that parliaments function within a defined legal

structure, safeguarding democratic principles, rights, and the separation of powers. While these elements are often documented, their application necessitates an interpretation infused with tacit knowledge—a deep, unwritten understanding of parliamentary norms and practices based on experience and internalised beliefs.

The importance of tacit knowledge poses an ongoing challenge for parliaments: how to retain it and ensure knowledge remains intact. This paper sets the foundation for a theoretical exploration of how AI can support the retention and application of parliamentary procedural memory. As parliaments face the challenge of maintaining institutional knowledge amidst frequent turnover of members and staff, AI presents a new frontier for preserving both codified and tacit knowledge. While AI's potential to enhance knowledge management has been widely discussed in other sectors, its application to the specific needs of parliamentary institutions remains underexplored. This paper delves into AI's capacity to support decision making, improve access to procedural knowledge, and enhance the education of new members, particularly in understanding the complex interplay between written and uncodified rules and norms that guide parliamentary procedure.

Rather than proposing specific AI solutions, this paper takes a broader theoretical approach to outline the possibilities and challenges of integrating AI into parliamentary systems. It considers how AI tools could be used to bridge gaps in institutional memory, but it also examines the limitations and risks of relying on such technology in a democratic setting. By focusing on AI's potential to preserve procedural memory, this paper aims to contribute to the ongoing discourse on parliamentary resilience, highlighting both the opportunities and the need for careful governance in adopting AI. The analysis will provide insights into how parliaments can leverage AI without compromising democratic principles such as transparency, accountability, and human oversight.

SOURCES OF PARLIAMENTARY PROCEDURE AND PRECEDENT

The work of parliaments to develop laws is complex requiring an ecosystem of written rules and procedures as well as precedents and other implicit practices. To ensure parliaments remain effective in a political environment, these institutions rely on a multitude of legal documents such as constitutions, legislation, standing or sessional orders and resolutions of a house. Parliamentary procedure is legal in nature governing the rules of the house(s);[1] in essence it sets out the rules of engagement within the parliament and how it should conduct business (such as questions, passage of legislation and rules of debate).

[1] John Waldeck, 'Legal Nature of Parliamentary Procedure'. *Cleveland State Law Review* 21(1) 1972, p. 87.

In Westminster-style (such as Australia or the United Kingdom) or similar legislatures (such as the United States), procedure is made up from a complex mix of written rules and unwritten conventions and precedents. This mix poses significant challenges for retaining and understanding parliamentary knowledge. Reliance on precedent to contextualise prescriptive rules adds a layer of complexity which can render parliamentary process opaque and inaccessible, even for those with experience of the system.

The UK Parliament identifies four key components of parliamentary procedure:

- Practice which is the general understanding established over the centuries and does not need to be formally written down.
- The Standing Orders which are the rules under which Parliament conducts its business and regulates the way members behave, and debates are organised.
- In the House of Commons Rulings from the Chair relate to decisions on procedure which have been referred to the Speaker for clarification. In the House of Lords, procedure is developed by the House itself through the Procedure Committee which considers any proposals for changes to Standing Orders.
- Other proceedings are controlled by Acts of Parliament which cover such things as taking the Oath or presenting Bills to Parliament.[2]

Documents explicitly outlining parliamentary procedure are often not prescriptive and require interpretation and the acceptance of tacit knowledge about the rules and practices of parliament. Parliamentary rules are designed to be enabling, facilitating the effective functioning of the house and its members, rather than restrictive, making it essential for them to remain flexible rather than rigid. It is the responsibility of parliamentary actors (e.g. members, presiding officers, clerks or other parliamentary officers) to interpret the intent of parliamentary procedure. This interpretation often relies on tacit knowledge.

'Tacit knowledge' refers to 'personal knowledge embedded in individual experience and involving intangibles such as personal belief, perspectives and values'.[3] Howells expanded on the definition of tacit knowledge contending it is 'non-codified, disembodied know-how that is

[2] UK Parliament. 'Parliamentary Procedure'. Accessed at: https://www.parliament.uk/site-information/glossary/parliamentary-procedure/.

[3] Femi Olan et al, 'Artificial Intelligence and Knowledge Sharing: Contributing Factors to Organizational Performance'. *Journal of Business Research* 145 2020, p. 607; Ikujirō Nonaka and Hirotaka Takeuchi, *The Knowledge-Creating Company: How Japanese Companies Create the Dynamics of Innovation*. United Kingdom: Oxford University Press, 1995, p. 89.

acquired via the informal take-up of learned behaviour and procedures'.[4] In the parliamentary context, tacit knowledge is the uncodified understanding of the practices and procedures of the parliament drawn from interpretation of codified rules or norms. A parliamentary actor's interpretation of the standing orders given in advice to a presiding officer or member is an example of tacit knowledge in action.

Parliaments rely on precedent to contextualise the rules of their work where codified procedure is not prescriptive. These precedents keep order in the chambers, assist with managing the practices of the institution and ensure that members are efficient in meeting their various obligations to the public. Precedent refers to past decisions, practices, and actions which guide or create a rule for how similar instances are to be addressed in the future. Generally, precedents contextualise written rules in legislation or standing/sessional orders however it can also be used to create common practices on which these documents are silent. For example, from 2016 to 2022 the President of the Legislative Council at the Parliament of Victoria (Australia) would give an Acknowledgement of Country following the Lord's Prayer at the commencement of a sitting day.[5] Under the House's Standing Orders, only the Lord's Prayer was required.[6] The consistent practice of delivering Acknowledgement of Country became a precedent for the House until it was formally adopted as s substantive rule in the Standing Orders from 2022.[7]

Precedents encompass not only formal decisions but also the nuances of debate, the subtleties of procedure, and the intricacies of committee work. This complexity is compounded by the fact that precedents can evolve, with new interpretations and applications arising as parliamentary contexts change.[8] Whilst some precedents are codified into secondary documents such as procedure manuals or *Rulings from the Chair* books, not all are. Despite not being codified in writing, parliaments are still expected to respect their application and use them to provide a framework for operation. By relying on historical precedent, parliaments can ensure continuity and stability. However, appropriately interpreting and applying these precedents requires a deep understanding of parliamentary processes. This knowledge is essential to strike a balance between maintaining institutional continuity and adapting to modern expectations of parliaments and their members. Without this expertise, there is a risk

[4] Jeremy Howells, 'Tacit Knowledge, Innovation and Technology Transfer'. *Technology Analysis & Strategic Management* 8(2) 1996, p. 92.

[5] Victoria, *Parliamentary Debates*, Legislative Council, 9 February 2016, p. 1.

[6] Legislative Council of Victoria, Standing Orders (2021) SO 4.02, p. 8.

[7] Legislative Council of Victoria, Standing Orders (2022) SO 4.02, p. 11.

[8] UK Parliament, *Erskine May*. Accessed at: https://erskinemay.parliament.uk/information/preface.

that precedents may be misapplied or become disconnected from contemporary legislative and procedural needs.

Reliance on precedent to guide contemporary practices is valuable to parliaments for several reasons. In parliaments, precedents:

- provide a sense of continuity and stability, ensuring that the current parliament avoids arbitrary decisions by carefully considering well-established historical and procedural contexts
- maintain the integrity and predictability of parliament's operations ensuring it is not subject to changing political climates
- guide parliamentarians, clerks and staff in situations where prescriptive rules are ambiguous or silent on the specific matters before the house
- promote fairness and equity in parliamentary proceedings ensuring decisions are not ad hoc or controlled by the governing party and instead are rooted in a consistent application of rules and norms. This role is particularly important for parliaments within democratic systems.[9]

It is clear that precedent is a central source of knowledge that helps parliament contextualise its rules and procedures, and it is most effective when properly documented. Tacit knowledge can become institutional memory when it is documented, even if it does not evolve into formal precedent. The act of writing down advice, interpretations, or informal practices allows this otherwise personal and experiential knowledge to be shared and preserved within the institution.[10] While such documentation may not always result in a formal precedent, it still contributes to the broader institutional memory of parliament. Written records, including procedural notes, clerk advice, or interpretations of standing orders, ensure that valuable insights and understandings are accessible to future parliamentary actors. This process enables the continuity of knowledge that might otherwise be lost through turnover of staff and members, helping to maintain the stability and functioning of the parliament, even if those written insights do not carry the weight of an established precedent.

By recording these interpretations and informal practices, the parliament ensures that future decision-makers have a reservoir of institutional knowledge to draw upon, bridging the gap

[9] Michael Kirby. 'Precedent Law, Practice and Trends in Australia', p. 12. Accessed at: https://www.michaelkirby.com.au/images/stories/speeches/2000s/vol60/2006/2150-Precedent_Law.pdf.

[10] Sima Siami-Namini, 'Knowledge Management Challenges in Public Sectors'. *Research Journal of Economics* 2 2018, p. 1.

between individual experience and collective understanding.[11] Institutional knowledge is much more than a simple collection of facts. It serves as an active guide that shapes how procedures and practices are implemented. This deeply embedded understanding ensures that rules and processes are followed with a clear grasp of their historical significance and practical applications, thereby improving the process of lawmaking.

RETAINING PARLIAMENT'S INSTITUTIONAL MEMORY

The dispersion of parliamentary knowledge across formal and informal sources creates the collective knowledge of a parliament. This collective knowledge is vital to sustaining the practices of parliament but can make it challenging to locate and synthesise precedents to understand their application to current situations.

In parliaments, tacit knowledge—those informal understandings, norms, and practices that guide decision-making—can be recorded, but this is done inconsistently. Moreover, it is often documented for personal use only or easily lost, meaning much of this knowledge remains tacit and held by knowledgeable actors who will eventually leave or retire. While some tacit knowledge transitions into precedent, formalising it into the institution's collective memory, a significant portion remains tied to the expertise of individuals, making it vulnerable to loss.[12]

By establishing and documenting knowledge, parliaments build 'institutional memory.' This memory acts as a bridge, connecting the tacit, experiential knowledge held by parliamentary actors with the formal, codified rules of procedure. For instance, advice provided by clerks or parliamentary officers may offer interpretations of standing orders that clarify ambiguities or establish new norms. Even if this advice is not formally adopted or written into the rules, it may still influence future decisions and become an informal part of parliamentary practice. As such, institutional memory plays a vital role in preserving continuity and guiding the application of procedure, ensuring that the parliament operates with consistency while also adapting to new contexts and challenges. However, without proper storage or sharing of this knowledge, it does not embed itself in the deeper memory of the institution, risking loss of valuable insights.[13] As such, institutional memory plays a vital role in preserving continuity and guiding the application

[11] Siami-Namini, 'Knowledge Management Challenges in Public Sectors'.

[12] Ellen C Martins and Nico Martins, 'The role of organisational factors in combating tacit knowledge loss in organisations'. *Southern African Business Review* 15 2011, p. 53.

[13] Karl G Siewert and Pamela Louderback, 'The 'Bus Proof' Library: Technical succession planning, knowledge transfer, and institutional memory'. *Journal of Library Administration* 59 2019, p. 469.

of procedure, ensuring that the parliament operates with consistency while also adapting to new contexts and challenges.[14]

Without an accessible knowledge repository, the retention of parliamentary knowledge heavily relies on the tacit knowledge of long-serving members and parliamentary staff. This reliance makes parliaments vulnerable to the risk of 'institutional amnesia'[15] where the context and applicability of important precedents are lost. Turnover in parliamentarians and parliamentary officers—in particular clerks—creates gaps in institutional memory. Parliaments are particularly exposed to this risk among members during an election period which can see long-serving members retire or lose their seats, potentially leaving large procedural gaps in a new parliament.

The Parliament of Victoria's 2022 election highlights the risk of losing institutional knowledge, even when examining just one of its houses, the Legislative Council. Before the election, the Clerk of the Legislative Council and several long-serving members announced their retirement.[16] Together, they represented over 100 years of accumulated expertise. This created a substantial gap in institutional knowledge, affecting not only the Legislative Council but the entire Parliament. These individuals held a deep procedural understanding and historical knowledge of the parliamentary system, which is difficult to replace. Furthermore, the election brought about a shift in the House's composition, with 20 new members elected to the Legislative Council.[17] This transition underscores concerns about maintaining parliamentary traditions and preserving critical institutional memory.

The loss of institutional memory is not unique to parliaments. It is a risk for all organisations and is often studied in the context of the broader public sector. Tingle discussed the loss of institutional memory in Australia's public service (which she described as 'political amnesia') and the consequences for policymaking in the country. Whilst the essay focuses on the memory of public servants and advisers, its contentions are relevant to the dilemma faced by parliaments: how to retain institutional memory. Tingle described the risks poor institutional memory can have in a democratic context:

> *Without memory, there is no context or continuity for the making of new decisions. We have little choice but to take these decisions at face value, as the inevitable outcome of current circumstance. The perils of this are manifest. Decisions are taken that are not informed by knowledge of what has worked, or not worked, in*

[14] Laura Tingle, 'Political Amnesia: How We Forgot to Govern'. *Quarterly Essay* 60 2015, p. 4.

[15] Christopher Pollitt, 'Institutional Amnesia: A Paradox of the 'Information Age'?'. *Prometheus* 18(1) 2000, pp. 5–16.

[16] Victoria, *Parliamentary Debates*, Legislative Council, 21 September 2022.

[17] Department of the Legislative Council, *Annual Report 2022-23*. Victoria: Parliament of Victoria, 2023, p. 1.

> *the past, or even by a conscious analysis of what might have changed since the issue was last considered.*[18]

Interestingly, Tingle contested that technology is 'acting against institutional memory' by depleting the need for individuals to build their own knowledge which contributes to an institution's memories.[19] However, developments in AI and other forms of emerging technologies show possibilities for preserving institutional memory in a way which can catalogue information and educate newer actors (such as first term members) on how to apply this knowledge to contemporary situations.[20]

For parliaments, retaining precedents and other forms of procedural knowledge is essential. Embedding new technological systems for preserving institutional memory can assist with several challenges currently experienced by parliaments, especially educating and training new members. Member education is a crucial component of the role of many parliamentary officers, particularly clerks. Procedure is an essential part of members' education because of its importance to the core functions of parliament. In 2012, Ken Coghill (a former Speaker of the Victorian Legislative Assembly) found that 78.5% of training content received by parliamentarians focused on parliamentary procedure.[21] The challenges associated with retaining and understanding parliamentary knowledge can extend to the functioning of parliamentary democracy. For new members, the steep learning curve associated with building a repository of precedents (or even the skills to find relevant precedents) can be a barrier to effective participation. This barrier can limit the capacity of members to conduct their business and represent constituents, potentially eroding the diversity of voices and perspectives in parliamentary debate and decision-making.[22]

Retaining parliamentary memory is a multifaceted issue requiring a multi-pronged approach. Parliaments must ensure there are appropriate documentation processes for precedents and other forms of institutional memory which provide context to its written materials. These documents must also be accessible and digestible; without accessibility it is unlikely members or staff will engage with these documents, further risking institutional amnesia. By exploring

[18] Tingle, 'Political Amnesia', p. 5.

[19] Tingle, 'Political Amnesia', p. 82.

[20] Andrea Bencsik, 'The sixth generation of knowledge management – the headway of artificial intelligence'. *Journal of International Studies* 14 2024, p. 91.

[21] Ken Coghill, 'How Should Elected Members Learn Parliamentary Skills', in *Senate Occasional Lecture*. Victoria: Monash University, 23 November 2012, p. 14.

[22] Cristina Neesham et al, 'Educating and Training Parliamentarians'. *Australian Parliamentary Review* 25(1) 2010, pp. 46–47.

technological solutions to storing informal knowledge, parliaments can ensure there are sources to assist with the further functioning of parliament whilst also providing more tools for education. Emerging technology can provide a unique opportunity to improve knowledge management in parliaments by building intelligent repositories for information which can support members and staff to apply relevant knowledge to current situations.

DEFINING ARTIFICIAL INTELLIGENCE (AI)

Artificial Intelligence, a form of 'emerging technology', is not a new phenomenon despite its recent mainstream attention with the advent of programs such as ChatGPT making the technology accessible to a global audience. Whilst AI is only one form of emerging technology, it is the focus of this paper because of its potential applicability in solving the knowledge retention problem faced by parliaments. AI is a type of disruptive technology which has the capability to significantly transform organisational processes and practices. 'Disruptive technology' refers to a 'set of emerging technologies that drastically transform the processes and operations' of an organisation.[23] Other examples of disruptive technologies are the Internet of Things and recommender systems.

Despite its emergence as early as 1956,[24] there is no universally accepted definition of AI. Tobin described AI broadly as:

> *… the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.*[25]

A common feature of definitions of AI is the assertion that its intelligence can make sense of information collected from previous experience whilst managing uncertainty in future actions,[26] and that it can emulate human-esque cognitive tasks.[27]

[23] Dimitris Koryzis et al, 'Disruptive Technologies for Parliaments: A Literature Review'. *Future Internet* 15 2023, p. 2.

[24] In 1956, Darthmouth College researchers examined how to make machines use language and solve problems like humans. Science, Innovation and Technology Committee, *The Governance of Artificial Intelligence: Interim Report*. United Kingdom: House of Commons, 2023, p. 6.

[25] James Tobin, *Artificial Intelligence: Development, Risks and Regulation*. United Kingdom: House of Lords Library, 2023, p. 2.

[26] Pär J. Ågerfalk, 'Artificial Intelligence as Digital Agency'. *European Journal of Information Systems* 29(1) 2020, p. 5.

[27] Hind Benbya, Stella Pachidi and Sirkka Jarvenpaa, 'Special Issue Editorial: Artificial Intelligence in Organizations: Implications for Information Systems Research'. *Journal of the Association for Information Systems* 22(2) 2021, p. 281.

Relevant to knowledge management, AI technology has three key features which can be used to preserve and elevate the use of institutional memory in parliaments:

- storage to collect information from multiple users in a variety of formats
- analysis features to process information and compare it to varying datasets/information to extract more valuable insights based on human prompts
- recommendation features to list the most important information to assist with decision-making.[28]

It is important to emphasise that the success of AI in retaining and sharing institutional knowledge is still contingent on human oversight. For parliaments, this means that a relevant actor—such as a clerk, presiding officer, member or other person—is still responsible for contextualising the relevancy of the information. However, the interplay between AI and human agency has the capability to elevate the use of institutional memory by parliaments through establishing a repository of shared knowledge that can be applied to specific situations.

APPLICABILITY OF AI TO RETAIN PARLIAMENTATY PROCEDURAL MEMORY

For parliaments, the integrity and efficiency of its procedures are paramount because of their relationship to safeguarding important parliamentary principles such as democracy, transparency and accessibility. AI and other emerging technologies can assist with the work of parliaments to retain this knowledge. To ensure that the democratic principles of parliaments are maintained and to retain public trust, it is important that the use of AI (in any capacity) 'aids, rather than overshadows, the critical human analysis that underpins parliamentary scrutiny'.[29]

Whilst still a fledgling development in the global parliamentary network, there are some examples of legislatures using AI to elevate their work.[30] In 2020, the Inter-Parliamentary Union noted several uses, or investigations, of AI by parliaments in its *Innovation Tracker*:

[28] Cristina Trocin et al, 'How Artificial Intelligence Affords Digital Innovation: A Cross-Case Analysis of Scandinavian Companies'. *Technological Forecasting and Social Change* 173 2021, p. 9.

[29] Bussola Tech, 'The Future of Parliamentary Processes: Embracing AI in the UK's House of Commons'. Accessed at: https://library.bussola-tech.co/p/the-future-of-parliamentary-processes.

[30] Bussola Tech, 'The Evolution of Parliamentary Systems in the Age of Artificial Intelligence and Technology'. Accessed at: https://library.bussola-tech.co/p/the-evolution-of-parliamentary-systems.

- **South Africa:** exploring using a chatbot to assist members find information and perform tasks.
- **United States, House of Representatives:** used to analyse and summarise legislative documents, assisting with decision-making.
- **Japan:** using speech recognition technology to make videos searchable, improving public access to parliamentary proceedings.
- **Netherlands:** a speech recognition system to make reporting more accurate and streamline generating proceeding documentation.[31]

Integrating AI into parliamentary systems is not without challenges. The future of AI requires a careful balance between technological advancement and maintaining the institution's democratic functions.[32] Consequently, embedding AI into parliaments is not just a technological prospect but a cultural one.[33] Parliaments must develop user frameworks for AI which have regard to transparency, accountability and privacy.[34]

For AI to be successful in parliament, it is important that it remains human centric with oversight and accountability mechanisms.[35] When used appropriately, AI can promote transparency and efficiency in legislative operations by simplifying administrative tasks, facilitating digital public engagement,[36] and encouraging interparliamentary collaboration through improved information exchange.[37]

Despite clear interest, one of the most underexplored applications of AI in parliaments is retaining and managing procedural knowledge. Parliamentary procedure is complex and can

[31] Inter-Parliamentary Union, 'Artificial Intelligence: Innovation in Parliaments'. *Innovation Tracker* 4 2020. Accessed at: https://www.ipu.org/innovation-tracker/story/artificial-intelligence-innovation-in-parliaments.

[32] Bussola Tech, 'Harmonizing Artificial Intelligence with Traditional Parliamentary Processes'. Accessed at: https://library.bussola-tech.co/p/harmonizing-artificial-intelligence.

[33] Bussola Tech, 'Harmonizing Artificial Intelligence with Traditional Parliamentary Processes'.

[34] European Parliament, 'Artificial Intelligence: Threats and Opportunities'. Accessed at: https://www.europarl.europa.eu/news/en/headlines/society/20200918STO87404/artificial-intelligence-threats-and-opportunities.

[35] Bussola Tech, 'Harmonizing Technological Advancement with Legislative Tradition: The Role of AI in Parliamentary Decision-Making'. Accessed at: https://library.bussola-tech.co/p/harmonizing-technological-advancement.

[36] Emma Armstrong, 'Digital Innovation and Public Engagement at the Scottish Parliament'. *Australasian Parliamentary Review* 37(2) 2022, p. 57.

[37] Fotios Fitsilis and Jörn von Lucke, 'Re-shaping Interparliamentary Cooperation through Advanced Information Sharing'. *Australasian Parliamentary Review* 38(1) 2023, p. 79.

require years to master (leaving the institution at risk of procedural amnesia). AI can address parliament's knowledge gap by:

- employing knowledge management systems to catalogue procedural rules, debates, decisions and advice, including cataloguing and updating old databases in outdated forms
- using decision support systems to assist parliamentarians to understand precedent and identify appropriate courses of action during proceedings (by analysing historical data)
- enhance member training and education on parliamentary procedure, AI tools can be used for interactive, adaptive and continuous learning on complex procedural matters.

A variety of sectors both within the public and private spheres are adopting the use of AI to transform their knowledge management. The concept of 'AI affordances' provides an appropriate framework for understanding the potential applicability of AI in retaining parliamentary knowledge. The affordance framework—first developed by James Gibson in 1979 in the field of ecological psychology[38]—has since been applied to understand the potential of technology to assist with human goals (referred to as 'technology affordance').[39] AI affordance specifically considers the suitability of AI-offerings for specific goals.

Trocin, et al examined AI affordances for digital innovation noting its applicability to improving organisational performance across a variety of areas including decision-making, communication, recruitment and others.[40] For knowledge management, AI has the capacity to 'overcome human information processing constraints' such as speed or condensing multiple types of information.[41] In the parliamentary context, AI used for knowledge management could be used to store, process and analyse multiple types of information (such as standing orders or notes from a clerk on advice to a member or presiding officer). Further, precedents can be built

[38] James J Gibson, 'The Theory of Affordances'. *The Ecological Approach to Visual Perception*. E-book: Psychology Press, 2014.

[39] Giulia Maragno et al, 'Exploring the Factors, Affordances and Constraints Outlining the Implementation of Artificial Intelligence in Public Sector Organizations'. *International Journal of Information Management* 73 2023, p. 3.

[40] Trocin et al, 'How Artificial Intelligence Affords Digital Innovation', p. 8.

[41] Trocin et al, 'How Artificial Intelligence Affords Digital Innovation', p. 1.

into an AI's repository allowing it to intelligently assess the rules and procedures of parliament and apply them to modern situations with the right parameters.

Mansoori, et al explained that knowledge management is 'all about managing the flow of information' ensuring that the 'right people get the right information at the right time'.[42] It achieves this through establishing processes used to identify, gather, and reinforce knowledge within organisations. The authors identified three critical elements of knowledge management: people, technology, and process; with people being the core component, accounting for 70% of its success.[43]

Technology is an enabling component of knowledge management by facilitating processes and making knowledge accessible.[44] In particular, AI can elevate knowledge management by providing rapid access to targeted information and enhancing real-time decision-making. There are several forms of AI technology which could be employed by parliaments to strengthen its knowledge management. The below table outlines some of the potential applications of AI technology to create an intelligent knowledge management system in parliaments.

[42] Saeed Al Mansoori, Said A Salloum and Khaled Shaalan, 'The Impact of Artificial Intelligence and Information Technologies on the Efficiency of Knowledge Management at Modern Organizations: A Systematic Review' in M Al-Emran et al (eds), *Recent Advances in Intelligent Systems and Smart Applications*. E-book: Springer Nature, 2021, p. 164.

[43] Mansoori, Salloum and Shaalan, 'The Impact of Artificial Intelligence and Information Technologies on the Efficiency of Knowledge Management', p. 164.

[44] Mansoori, Salloum and Shaalan, 'The Impact of Artificial Intelligence and Information Technologies on the Efficiency of Knowledge Management', p. 168.

Figure 1. Potential application of AI technology for retaining parliamentary procedural knowledge.[45]

AI technology	Description	Applicability to parliaments
Natural Language Processing	A system to understand, interpret and generate human language.	Apply precedents to interpret sources of procedure such as standing or sessional orders.
Machine Learning and Deep Learning	A system to learn from data, identify patterns and make decisions with limited human intervention.	Using procedural sources and precedents, offer advice on dealing with a current situation in the House.
Semantic technology	Assists with understanding meaning and context of words within documents.	Apply precedents to derive meaning to procedural sources such as standing or sessional orders.
Expert systems	Uses rule-based algorithms to emulate decision-making.	Apply precedents or clerk advice to assist with procedural matters in the House.

Creating an intelligent knowledge management system for parliament's procedural knowledge can enhance the accessibility, organisation and analysis of this information. AI has the capacity to assist with efficiency in the application of parliamentary procedure by making precedents more accessible and contextual to the contemporary work of the institution. It can also assist with the education and training of new members addressing the challenges parliaments continually face when institutional memory disappears because of long-serving staff and member turnover.[46]

RISKS TO PARLIAMENTS

The use of AI in parliaments requires careful consideration. Whilst there are not many examples of AI being used in this paper's proposed manner, there is a plethora of scholarship signalling the importance of parliaments retaining democratic and institutional principles when

[45] LeewayHertz, 'AI in Knowledge Management: Paving the Way for Transformative Insights'. Accessed at: https://www.leewayhertz.com/ai-in-knowledge-management/.

[46] Tingle, 'Political Amnesia: How We Forgot to Govern', p. 12.

using emerging technology in any capacity.[47] Although AI offers promising tools to preserve institutional memory and enhance knowledge management, its implementation in parliamentary systems is not without risks. These risks can be categorised into several key areas: over-reliance on technology, erosion of tacit knowledge, security vulnerabilities, ethical concerns, and reduced human oversight. While AI can process vast and varying datasets, the human capacity for nuanced interpretation of parliamentary proceedings remains irreplaceable.[48] This highlights the importance of balancing AI's efficiency with the critical role of human oversight to ensure legislative processes retain their integrity.[49]

The adoption of AI in parliaments potentially poses significant challenges to fairness, transparency, explainability and accountability especially where automated decision-making systems are deployed.[50] Lord Sales (UK Supreme Court) noted these concerns:

> *Through lack of understanding and access to relevant information, the power of the public to criticise and control the systems ... is eroded. Democratic control of law and the public sphere is being lost.*[51]

A significant risk is over-reliance on AI to the detriment of human expertise. While AI can efficiently store, analyse, and retrieve precedents, 'it is imperative to approach this with caution, ensuring that AI aids, rather than overshadows, the critical human analysis that underpins parliamentary scrutiny'.[52] Human judgment remains essential in interpreting parliamentary procedures, which often involve unwritten conventions, precedents, and context-specific decisions. Over-reliance on AI may lead to a shallower application of procedural rules, neglecting their political or historical significance.

AI, when used for decision-making, runs the risk of diminishing human oversight in parliamentary processes. The efficiency of AI tools in providing procedural advice or summarising debates may lead to a temptation to bypass human judgment or reduce the level

[47] Mehmet B Unver, 'AI governance: Compromising democracy or democratising AI?'. Accessed at: https://www.research.herts.ac.uk/ws/portalfiles/portal/62206776/Paper_Democratic_AI_governance_Unver_final_1_August_2024.pdf.

[48] Bussola Tech, 'The Role of Artificial Intelligence in Transforming Parliamentary Operations' Accessed at: https://library.bussola-tech.co/p/the-role-of-artificial-intelligence-d2a.

[49] Unver, 'AI governance: Compromising democracy or democratising AI?', p. 2.

[50] Daniel Montoya and Alice Rummery, 'The Use of Artificial Intelligence by Government: Parliamentary and Legal Issues'. New South Wales: NSW Parliamentary Research Service, 2020, p. 6.

[51] Lord Sales, *Algorithms, Artificial Intelligence and the Law*. Online: The Sir Henry Brooke Lecture for BAILII, 2019, p. 6.

[52] Bussola Tech, 'The Future of Parliamentary Processes: Embracing AI in the UK's House of Commons'. Accessed at: https://library.bussola-tech.co/p/the-future-of-parliamentary-processes.

of scrutiny applied to parliamentary decisions.[53] This can pose a threat to democratic processes, where human deliberation, debate, and accountability are foundational principles. Therefore, it is crucial that parliaments maintain a clear distinction between AI as a tool for support and the final authority of human actors in interpreting and applying procedural rules. AI should 'augment human capabilities rather than replace them...to ensure AI outputs are accurate and contextually appropriate'.[54]

Ensuring human oversight of AI systems is even more crucial because, at present, it is not feasible to teach a system the values and principles that underpin parliaments, such as democracy, transparency, and accountability. While there have been recent initiatives in places like the European Union to guide AI technologies with values such as fairness and transparency, these efforts largely rely on the intervention of 'human agents'.[55] These agents are responsible not only for designing AI systems in alignment with these principles but also for continually updating them to ensure that the systems reflect evolving values over time. Where value-based principles are embedded within AI systems, human oversight becomes essential not just for reviewing outputs but also for continuous monitoring and redesign to maintain these principles.[56] For parliaments, this means that human involvement is critical at every stage—from the initial design of AI systems to their ongoing governance. Continuous evaluation and adaptation would be necessary to align AI systems with the complex and evolving nature of parliamentary work, ensuring that these tools enhance, rather than undermine, the integrity of the institution.

Poorly implemented AI knowledge management systems can run counter-intuitive to their aim in preserving institutional memory. AI systems are designed to codify and store knowledge, but they may inadvertently contribute to the erosion of tacit knowledge, which is inherently difficult to capture.[57] Tacit knowledge in parliamentary systems encompasses the unwritten rules, norms, and cultural practices that guide decision-making. While AI can store explicit knowledge in the form of documented rules or precedents, the subtleties of human interaction

[53] Philip Meissner and Christoph Keding, *The Human Factor in AI-based decision-making*. E-Book: O'Reilly, 2021.

[54] Bussola Tech, 'Using Artificial Intelligence in Legislative Services – Considerations from Society of the Clerks of the Table Africa Region Panel in Arusha/Tanzania'. Accessed at: https://library.bussola-tech.co/p/artificial-intelligence-parliaments-socatt.

[55] Ibo van de Poel, 'Embedding Values in Artificial Intelligence (AI) Systems'. *Minds and Machines* 30 2020, p. 397.

[56] Poel, 'Embedding Values in Artificial Intelligence', p. 397.

[57] Paul M Leonardi and Jeffrey W Treem, 'Knowledge management technology as a stage for strategic self-presentation: Implications for knowledge sharing in organizations'. *Information and Organization* 22 2011, p. 57.

and the interpretation of these rules may be lost over time.[58] As AI systems are increasingly relied upon, the depth and richness of institutional memory could diminish, leading to a more mechanistic and less flexible approach to procedure.

AI systems that manage sensitive parliamentary information are vulnerable to cyber-attacks, hacking, and data breaches. Parliamentary records, particularly those related to procedural advice, debates, and confidential deliberations, are often sensitive and politically charged. An AI system that holds such data could be an attractive target for malicious actors seeking to disrupt parliamentary processes or exploit confidential information. It is vital that parliaments implement robust security measures to 'ensure the authenticity of legislative data and its protection from cyber threats'.[59] The handling of sensitive information requires stringent data privacy laws and security protocols to mitigate these risks.

AI systems can be prone to biases based on the data they are trained on,[60] leading to unintended consequences in parliamentary decision-making. If AI tools are trained on incomplete or biased historical data, they may perpetuate and amplify existing biases in parliamentary procedure.[61] For example, precedents that were historically shaped by unequal power dynamics or that favoured certain political interests could be reinforced by AI algorithms without proper scrutiny. This risks reinforcing any existing inequalities in the parliamentary system and undermining the fairness and impartiality expected in democratic institutions. Parliaments must therefore ensure that AI systems are transparent, regularly audited for bias, and subject to ethical guidelines that prioritise fairness and equality.[62]

Along with biases, AI 'hallucinations', wherein AI systems generate incorrect or false information, can present a significant risk for procedural accuracy, particularly where inadequate systems or processes are adopted.[63] The risk of AI producing erroneous content necessitates caution against over-relying on these systems without human validation. The potential for AI to misinterpret or invent procedural precedents or information raises concerns

[58] Anna Trunk, Hendrik Birkel and Evi Hartmann, 'On the current state of combining human and artificial intelligence for strategic organizational decision making'. *Business Research* 13 2020, p. 896.

[59] Bussola Tech, 'Using Artificial Intelligence in Legislative Service'.

[60] IBM, 'Shedding light on AI bias with real world examples'. Accessed at: https://www.ibm.com/think/topics/shedding-light-on-ai-bias-with-real-world-examples#:~:text=AI%20bias%2C%20also%20referred%20to,historical%20and%20current%20social%20inequality.

[61] Jake Silberg and James Manyika, 'Notes from the AI frontier: Tackling bias in AI (and in humans)'. *McKinsey Global Institute* 2019, p. 3.

[62] Bussola Tech, 'Implementing Artificial Intelligence in the Legislative Process: Procedural and Administrative Challenges'. Accessed at: https://library.bussola-tech.co/p/implementing-artificial-intelligence-parliaments.

[63] Michele Salvagno, Fabio Silvio Taccone and Alberto Giovanni Gerli, 'Artificial Intelligence hallucinations'. *Critical Care* 27 2023, p. 1.

about the reliability of AI-assisted decision-making. However, the extent of 'hallucinations' can depend on the specific application in use. If designed with narrow, rule-based constraints, AI hallucinations can be reduced by strictly adhering to codified parliamentary procedures. Conversely, if the adopted model is employed for broader interpretative tasks (i.e., generative AI models), the risk of misleading outputs increases.[64] Non-expert users may struggle to discern AI-generated errors, necessitating safeguards such as expert oversight or verification mechanisms, like processes in place for managing AI biases.[65] Addressing this issue explicitly would be valuable for AI adoption in legislative environments. Failing to acknowledge AI's limitations could lead to misplaced trust in its outputs or create a culture of distrust resulting the failed uptake of systems, reinforcing the need for critical evaluation in its deployment.[66]

Given these risks, it may be more desirable for parliaments to invest in the development of purpose-built AI systems specifically designed to uphold the unique requirements. Purpose-built AI systems can better address the nuanced demands of parliamentary procedures and mitigate concerns such as bias, security vulnerabilities, and the potential erosion of tacit knowledge.[67] However, such an endeavour poses significant resourcing and funding challenges; an area where many legislatures are already constrained. The investment required to develop purpose-built AI solutions is substantial, with a variety of sources reporting that custom AI solutions can cost anywhere between US$5,000 to US$500,000.[68] Moreover, the complexity of designing AI systems that integrate seamlessly with existing parliamentary frameworks while maintaining flexibility and human oversight adds to the difficulty. Consequently, while the creation of customised AI systems may offer the most viable solution to ensuring that the use of emerging technology in parliaments remains aligned with democratic principles, the practical barriers to achieving this must be carefully considered.

[64] Select Committee on Adopting Artificial Intelligence (AI), *Final Report on Adopting Artificial Intelligence (AI)*. Canberra: Parliament of Australia Senate, 26 November 2024, p. 43.

[65] Bingcheng Wang, Pei-Luen Patrick Rau and Tianyi Yuan, 'Measuring user competence in using artificial intelligence: validity and reliability of artificial intelligence literacy scale'. *Behaviour & Information Technology* 42 2023, p. 1327.

[66] Michele Salvagno, Fabio Silvio Taccone and Alberto Giovanni Gerli, 'Artificial Intelligence hallucinations', p. 1.

[67] MIT Technology Review, 'Purpose-built AI builds better customer experiences'. Accessed at: https://www.technologyreview.com/2024/04/02/1090164/purpose-built-ai-builds-better-customer-experiences/.

[68] For example: NextGen Invent Corp, 'Artificial Intelligence Cost Estimation: How much does it cost to build an AI-powered app?'. *Medium, 2023*. Accessed at: https://nextgeninvent.medium.com/artificial-intelligence-cost-estimation-how-much-does-it-cost-to-build-an-ai-powered-app-d937442ca995.

CONCLUSION

The integration of AI into parliamentary systems represents a pivotal opportunity to address one of the most pressing challenges modern legislatures face: the preservation of institutional memory. AI's potential to support parliaments in maintaining their institutional memory, particularly in the context of frequent personnel turnover, offers a significant advance in ensuring continuity, stability, and procedural integrity. By creating intelligent repositories and decision-support systems, AI can bridge the gap between codified rules and the informal understandings that shape parliamentary practice, helping parliaments navigate complex procedural environments with greater efficiency and clarity.

AI's ability to store, analyse, and recommend information offers a promising avenue for addressing the challenges of knowledge retention in parliamentary systems. By building intelligent knowledge management systems, AI could assist in bridging gaps caused by turnover, ensuring that precedents and procedural knowledge remain accessible and applicable. However, because of the risks associated with the integration of AI into these sensitive political environments—such as over-reliance on AI systems, the potential erosion of tacit knowledge, and heightened concerns over transparency and accountability—parliaments should prioritise the development of purpose-built AI systems. These systems should be designed specifically for the legislative context, with security, ethical considerations, and parliamentary oversight built in from the outset.

Developing AI solutions tailored for parliamentary use ensures that the specific needs of democratic institutions are addressed while mitigating potential risks. Purpose-built AI systems can enhance parliamentary decision-making by providing timely access to data, offering predictive insights for future legislative issues, and preserving procedural knowledge. Additionally, these systems must be adaptable and resilient to the dynamic nature of parliamentary work, offering flexibility while safeguarding institutional knowledge.

As AI increasingly becomes integrated into legislative workflows, the importance of human oversight cannot be overstated. Parliamentarians and clerks must remain engaged with these systems, ensuring that human judgment, experience, and intuition are not sidelined. By embedding AI into purpose-built systems, parliaments can strike a balance between innovation and tradition, ensuring that the adoption of AI complements—rather than threatens—the human elements that define parliamentary democracy.

Ultimately, AI's role in parliaments must be seen as a complement to the rich tradition of human expertise and judgment that has guided these institutions for centuries. When implemented thoughtfully and through carefully designed, purpose-built systems, AI can enhance the efficiency, accessibility, and continuity of parliamentary procedures, safeguarding institutional memory for future generations. However, it is only through careful governance, rigorous ethical standards, and an unwavering commitment to democratic principles that parliaments can fully harness the potential of AI while preserving the integrity and trust of their institutions. This intentional, cautious approach ensures that AI serves to strengthen, rather than undermine, the democratic processes that parliaments were created to uphold.

Beyond the Pandemic: To What Extent Should Parliament Embrace Remote Participation in the Digital Age?

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Abstract: While technological breakthroughs have long enabled virtual business meetings worldwide, Parliaments only recently grappled with the necessity of remote participation prompted by the COVID-19 pandemic. In response to lockdown requirements, Parliaments worldwide adopted remote participation from 2020 to early 2022. Remote participation undeniably facilitated the functioning of Parliaments through unprecedented challenges. However, variations in procedures, the ratio of allowed remote participation, and the scope of members' actions when participating remotely notably varied across jurisdictions. This variation implies significant considerations regarding the tension between maintaining parliamentary functionality and adhering to procedural formality, which are significant to ensure Parliament's constitutionality, integrity, and dignity. This article investigates the approaches to remote participation in Victoria and selected Westminster jurisdictions, examining their implications for parliamentary procedures and formality. By exploring how remote participation aligns with parliamentary principles of constitutionality, integrity, and dignity, it aims to offer insights into the relationship between remote participation and parliamentary procedure, providing clarity on its potential applications and limitations in future events. In doing so, it also contributes to the discussion on the balance between adaptability and tradition in modern parliaments.

INTRODUCTION

Parliaments have long utilised remote participation in committees, evolving from teleconferences (audio) to more sophisticated audiovisual platforms overtime.[2] However, it wasn't until the COVID-19 pandemic that the need for remote participation in plenary sessions

[1] Hong Thi Quang Tran, Parliamentary Officer, Parliament of Victoria. I would like to thank Bevan Rogers (New Zealand Parliament), Kate Murray and Chris Prasad (Victorian Parliament) and Niamh McEvoy (UK Parliament) on sharing their insights on this topic. Their contributions form a significant part of my argument and were instrumental in the completion of this article.

[2] Inter-Parliamentary Union, World e-Parliament Report 2018, p. 50.

gained critical importance. In response to lockdown requirements, parliaments worldwide adopted remote participation in their sittings.[3]

Westminster Parliaments similarly embraced teleconferencing but initially confined its use to committee meetings. In Australia, the Senate amended its standing orders in early 1997 to allow remote participation in Senate Committees, with the House of Representatives following suit in late 2000.[4] In New Zealand, select committees had accepted submissions via video conferencingfor several years.[5] The UK Parliament experimented with and eventually institutionalised virtual committee meetings in the early stages of the pandemic.[6] These virtual committee sessions provided an important test for virtual parliaments in technical terms.

Virtual parliamentary sittings, however, encountered more significant constitutional, procedural, and technical challenges compared to committee meetings. Committees were able to adapt more easily as their procedural arrangements are based on the constitutional authority of the Houses to regulate their own proceedings.[7] In contrast, parliamentary sittings are constitutionally constrained by provisions such as the location of sittings and the requirement for members to be 'present', which traditionally implies physical presence.[8] Additionally, parliamentary sittings follow highly formalised and structured practices designed

[3] Inter-Parliamentary Union, Country compilation of parliamentary responses to the pandemic. Accessed at https://www.ipu.org/country-compilation-parliamentary-responses-pandemic#N

[4] Stephanie Gill, 'Can you hear me? Remote participation in the Commonwealth Parliament', Flagpost, Australian Parliament. Accessed at https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/8723082/upload_binary/8723082.pdf;fileType=application%2Fpdf#search=%22library/prspub/8723082%22.

[5] Phil Smith, 'Submission rising: Parliament's feedback flood. *Radio New Zealand*, 17 October 2021. Accessed at https://www.rnz.co.nz/national/programmes/the-house/audio/2018815908/submission-rising-parliament-s-feedback-flood.

[6] The UK House of Commons allowed Virtual Select Committee Meetings on 24 March 2020. See Lindsay Hoyle, UK Parliament, *Delegated Legislation,* House of Commons, 24 March 2020. Accessed at https://hansard.parliament.uk/Commons/2020-03-24/debates/A7CE205E-D980-48A1-8255-B5B6594000A7/DelegatedLegislation#contribution-D59E4D20-55CF-424C-87C7-DC743AA383B4.

[7] See, for example, *Australian Constitution,* s50

[8] For example, *Australian Constitution* s 125 states that: The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney. Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor. The Parliament shall sit at Melbourne until it meet at the seat of Government.

to uphold Parliaments' order, democratic nature, and also symbolic value— many of which are difficult to fully observe when members are not physically in the Chamber.

Technical challenges also arose, including concerns about potential disruptions caused by system failure, as well as the significant costs associated with installing and maintaining technology on a larger scale. Despite these obstacles, parliaments within the Westminster system, to varying degrees, adopted remote participation as a response to the pandemic. This experience offers a valuable opportunity to explore the potential of virtual sittings in the digital age.

This paper investigates the implementation of remote participation in the UK, the Commonwealth of Australia, the State of Victoria, and New Zealand from 2020 to 2022. It first examines how remote participation was deployed in these jurisdictions during the pandemic and identifies the principles that guided this deployment. In doing so, the paper aims to provide insights into the relationship between remote participation and parliamentary proceedings, clarifying its applicability and limitations for future events. Ultimately, it contributes to the discussion on balancing adaptability and tradition in modern parliaments.

THE EMERGENCE OF REMOTE PARTICIPATION DURING THE PANDEMIC

The UK

The UK Parliament led the way in adopting remote participation, applying it to varying degrees in the two Houses.

The House of Commons

After returning from Easter break on 21 April 2020, the House of Commons deployed a hybrid sitting system. This arrangement allowed up to 50 members to be physically present in the Chamber, while up to 120 members could attend remotely via screens placed around the Chamber.[9] Initially, hybrid sittings were allowed only for scrutiny proceedings (questions and statements), but on the following day, they were expanded to substantive proceedings, including debates and legislation. The Speaker published call lists to replace the traditional process of members seeking calls in the Chamber. To facilitate hybrid sitting, on 22 April, the

[9] UK Parliament, House of Commons takes historic first step towards virtual proceedings. Accessed at https://www.parliament.uk/business/news/2020/april1/hybrid-house-of-commons/.

House of Commons agreed to remote voting, with the first remote division being experimented on 12 May about a general debate on COVID-19.[10]

Considering these as temporary arrangements, the House of Commons agreed on 20 May 2020 that hybrid proceedings and remote voting would lapse.[11] After the Whitsun recess, on 2 June, the House passed a motion to return to physical proceedings with social distancing. However, on 4 June, it was agreed that members unable to attend in person could still participate in scrutiny proceedings remotely, resulting in a part-hybrid system. Participation in debates remained restricted to those physically present.[12] A new voting system was introduced, where members lined up in socially-distanced queues to declare their vote at the despatch boxes.[13] From November 2020, members within the Palace could apply for proxy votes to reduce pressure on the division lobbies.[14]

The temporary arrangements allowing members to participate virtually and vote via proxy were extended in March 2021 and again in June 2021 until 22 July 2021.[15] The orders expired on 22 July 2021 when the House rose for the summer recess. The recall of the House of Commons on 18 August 2021 to debate the situation in Afghanistan marked its return to full in-person sessions.[16]

The House of Lords

The UK House of Lords distinguished itself by adopting fully virtual sittings. After returning from the Easter break on 21 April 2020, the House met physically to agree on a motion allowing virtual proceedings. The first virtual proceedings followed on Oral Questions. Virtual sessions were held between physical sittings in the Chamber, where only a limited number of members could attend. On 23 April 2020, all proceedings were conducted virtually, including the first virtual debates.[17]

[10] S. Priddy, House of Commons Library, Coronavirus timeline: How the Commons virtually went virtual. Accessed at https://commonslibrary.parliament.uk/coronavirus-timeline-how-the-commons-went-virtual/.

[11] S. Priddy, Coronavirus timeline: How the Commons virtually went virtual.

[12] S. Priddy, Coronavirus timeline: End of hybrid proceedings in the House of Commons. Accessed at https://commonslibrary.parliament.uk/coronavirus-timeline-end-of-hybrid-proceedings-in-the-house-of-commons/.

[13] S. Priddy, Coronavirus timeline: How the Commons virtually went virtual.

[14] S. Priddy, Coronavirus timeline: End of hybrid proceedings in the House of Commons.

[15] S. Priddy, Coronavirus timeline: End of hybrid proceedings in the House of Commons.

[16] S. Priddy, Coronavirus timeline: End of hybrid proceedings in the House of Commons.

[17] E. Scott and N. Newson, House of Lords Library, House of Lords: timeline of response to Covid-19 pandemic. Accessed at https://lordslibrary.parliament.uk/house-of-lords-timeline-of-response-to-covid-19-pandemic/.

Initially, virtual proceedings covered oral questions, private notice questions, statements, urgent question repeats, and debates on statutory instruments.[18] The first virtual debate on a statutory instrument took place on 5 May 2020, although formal approval of the instrument still had to take place in the chamber.[19] On 6 May 2020, the House of Lords passed a motion permitting the committee stage of public bills to be held virtually,[20] with Virtual Committees replacing Grand Committee for bills at this stage. However, divisions were not allowed, and decisions to alter the bill could only be made by unanimity.[21]

The House of Lords transitioned to hybrid sittings on 8 June 2020,[22] with a maximum of 30 members permitted to participate from the Chamber at any given time to maintain social distancing. The House ruled that 'Sittings of the hybrid House have the same status as normal sittings of the House. The Mace will be on the Woolsack, and there will need to be a physical presence in the Chamber of at least three members, the quorum required in the physical House.'[23] Hybrid sitting could take all the decisions typically taken by the House, with remote participants counted towards quorum for divisions on bills and subordinate legislation.[24] Remote voting was introduced for hybrid sittings, with the first remote voting taking place on 15 June 2020.[25]

On 12 July 2021, the House of Lords approved amended procedures for resuming physical sittings after the summer recess. Despite this shift, the House retained hybrid sittings by changing its Standing Orders to allow members who are unable to attend physically due to

[18] Lord Speaker's statement on UK Parliament's response to the spread of COVID-19, UK Parliament. Accessed at https://www.parliament.uk/business/news/2020/march/lord-speaker-statement-on-covid-19/.

[19] E. Scott and N. Newson, House of Lords: timeline of response to Covid-19 pandemic.

[20] UK Parliament, Hansard, Business of the House (Virtual Proceedings relating to the Committee stage of public bills and to Messages and First Readings), Volume 803: debated on Wednesday 6 May 2020. Accessed at https://hansard.parliament.uk/Lords/2020-05-06/debates/A5A7F911-4863-4C96-AAD5-C47F183AF425/BusinessOfTheHouse(VirtualProceedingsRelatingToTheCommitteeStageOfPublicBillsAndToMessagesAndFirstReadings).

[21] Procedural Committee, Guidance on Virtual Proceedings, Issue 2, 30 April 2020.

[22] UK Parliament, Hansard, Business of the House Volume 803: debated on Thursday 4 June 2020. Accessed at https://hansard.parliament.uk/Lords/2020-06-04/debates/6C8AFF53-FAC1-4193-860C-CA0EF977E8D3/BusinessOfTheHouse.

[23] Procedure and Privileges Committee, Guidance on Hybrid House, Issue 1, 5 June 2020.

[24] Procedure and Privileges Committee, Guidance on Hybrid House, Issue 1, 5 June 2020.

[25] E. Scott and N. Newson, House of Lords: timeline of response to Covid-19 pandemic.

long-term disability to participate remotely.[26] On 22 February 2022, the House agreed to enable members to participate virtually in oral statements and repeated urgent questions.[27]

Australian Federal Parliament

Parliaments in Australia took a more cautious approach to remote participation. To comply with public health advice, alternative solutions were favoured, such as pairing members,[28] reallocating seats to maintain sufficient space between members, cancelling scheduled sittings,[29] and temporarily shutting down.[30] The Senate, on 8 April 2020, established a COVID-19 Select Committee to scrutinise the government's response to the pandemic, in the absence of the parliament.[31]

Remote participation in the Commonwealth Parliament took place for the first time on 24 August 2020. According to a resolution passed by the House on the same day, members could participate remotely if the Speaker was satisfied that the member was unable to physically attend Parliament due to COVID-19-related reasons. Remote participation required the use of the official parliamentary video facility, and members had to be present either at an Electorate Office or a Commonwealth Parliament Office.[32] The scope of remote participation was limited, allowing members to contribute to debates and ask or answer questions at Question Time. Remote participants were recorded in the attendance register, and their contributions would be treated as made in the Chamber.[33]

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[26] See Standing Order 24A, Standing Orders of the House of Lords.

[27] E. Scott and N. Newson, House of Lords: timeline of response to Covid-19 pandemic.

[28] Pairing is an unofficial arrangement under which, when a member on one side of the House is absent for any votes when a member from the other side is to be absent at the same time. This arrangement maintains the relative voting strengths of the parties. See Parliament of Australia, The House must go on. Accessed at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Freportrep%2F024511%2F0007;query=AlternateId_Phrase%3A%22committees%2Freportrep%2F024511%2F75076%22;rec=0.

[29] Dianne Heriot, Australian Parliament, Australia's Parliament House in 2020: a Chronology of Events. Accessed at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Chronologies/APH2020-Chronology.

[30] Anne Twomey, A vitual Australian parliament is possible – and may be needed – during the coronavirus pandemic, *The Conservation*, 25 March 2020. Accessed at https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540.

[31] Dianne Heriot, Australia's Parliament House in 2020: a Chronology of Events.

[32] Votes and Proceedings, No 63, Monday 24 August 2020, p. 1027. The requirement to be attending the Electorate Office or a Commonwealth Parliament Office can be waived for COVID-related reasons. See the Appendix A of the Report 1 of 2021.

[33] Votes and Proceedings, No 63, Monday 24 August 2020, p. 1027.

A similar arrangement was made in the Senate. According to the Senate resolution, the decision to allow a member to participate remotely was to be made jointly by the President and Deputy President. Senators participating remotely were restricted from moving motions or amendments, proposing or being counted in support of a proposal to discuss a Matter of Public Importance or urgency motion, being counted for quorum formation, raising a point of order, or calling or participating in a division.[34]

Both Houses allowed remote participation on a fortnightly sitting basis, including 24 August to 3 September; 6 to 8 October;[35] 9 to 12 November;[36] and 30 November to 10 December in 2020.[37] Changes to ACT Government restrictions enabled greater attendance by parliamentarians during the 9 to 12 November sittings. Records show that over 130 members and 68 senators attended in person over the sitting fortnight.[38]

Remote participation continued in the Australian Parliament in 2021 and 2022. On 15 February 2021, when Victoria was in lockdown, both Houses allowed members from Victoria to participate and contribute remotely. On 3 August 2021, the House and the Senate revised rules to expand remote participation, leading to 41 members and 25 Senators participating via video link. Remote participation was reinstated from 22 November to 2 December. In 2022, at the surge of the Omicron variant, the two Houses resumed remote participation on 8 February.[39]

Victorian Parliament

Like the Commonwealth Parliament, the Legislative Assembly and Legislative Council of Victoria initially responded to the pandemic by reducing their sittings and enforcing physical distancing in the Chambers. Other measures included shortening sitting hours,[40] allowing

[34] Journal of the Senate No 59—24 August 2020, p. 2065.

[35] Journal of the Senate N. 67—6 October 2020, p. 2328.

[36] Journal of the Senate No 70–9 November 2020, p. 2446.

[37] Journal of the Senate No 74–30 November 2020, p. 2593.

[38] Diane Heriot and Anna Hough, Parliament of Australia, Australia's Parliament House in 2020: a Chronology of Events. Accessed at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Chronologies/APH2020-Chronology#_ftn260.

[39] Diane Heriot, Stephanie Gill and Pauline Downing, Parliament of Australia, Australia's Parliament House in 2022: a Chronology of Parliament, accessed at https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2223/Chronologies/Parliamentin2022.

[40] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 317, Victorian Legislative Council's Minutes of the Proceedings 2018-22, p. 490;

written submissions for statements, adjournment matters[41] and speeches on bills,[42] immediate moving of second reading,[43] implementing pairing arrangements,[44] and using public galleries as extensions of the Chambers to maintain physical distancing.[45]

The Legislative Assembly was the first to allow remote participation. On 23 April 2020, the House laid the groundwork by resolving that 'so much of standing and sessional orders be suspended to allow […] the House […] to meet in a manner and form not otherwise provided for in the standing and sessional orders'.[46] Remote participation was formally introduced on 3 September 2020. However, the House did not employ remote participation during the March and May sittings of 2021. It resumed on 8 June 2021 and continued for several consecutive sitting weeks until 7 October 2021. The House ceased remote participation from the sitting week beginning 26 October 2021.[47]

The House's resolutions[48] outlined the conditions for members to attend sittings remotely and the scope of their participation. Remote participation required the Chair's approval and was permitted only when the member's inability to attend was beyond their control, provided they had reliable audio or audio/visual links for identity verification and participation. Members participating remotely could debate motions, bills, grievances, and Matter of Public Importance. They were also permitted to ask questions at Question Time, raise adjournment matters, and provide personal explanations. However, they were not counted for quorum purposes and could not vote.

The Victorian Legislative Council started to consider remote participation on 18 August 2020, but the question was adjourned indefinitely.[49] On 7 September 2021, the House resolved to request the President to present a report about the feasibility of remote participation.[50] The

[41] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 317, Victorian Legislative Council's Minutes of the Proceedings 2018-22, p. 490;

[42] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 329; Victorian Legislative Council's Minutes of the Proceedings 2018-22, p. 490;

[43] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 329.

[44] Victorian Legislative Council's Minutes of the Proceedings 2018-22, p. 489;

[45] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 329; Victorian Legislative Council's Minutes of the Proceedings 2018-22, p. 421;

[46] Victorian Legislative Assembly's Votes and Proceedings 2018-22, p. 329-30.

[47] Victorian Legislative Assembly Votes and Proceedings 2018–22, p. 725.

[48] Victorian Legislative Assembly Votes and Proceedings 2018–22 pp. 368, 402, 420, 442, 460, 477, 520, 598, 616, 634.

[49] Victorian Legislative Council Minute of Proceedings 2018-22, p. 503.

[50] Council Minute of Proceedings No. 117 Tuesday 7 September 2021, p. 849.

President submitted his report two days later, confirming that there were no legal or technical barriers to holding hybrid sittings where some members participate remotely. However, the report raised uncertainty regarding members being counted for the quorum and voting. Based on these concerns, the President suggested some limitations on members participating remotely, such as not chairing the debate or drawing the Chair's attention to the state of the House.[51] As a result, on 15 September 2021, the Council passed a resolution allowing hybrid sittings. The resolution allowed members to participate in debate remotely using an audio-visual link but excluded them from being counted for quorum or voting. Additionally, there were restrictions on their roles, such as not being allowed to chair debate, refuse leave or raise or speak on a point of order. The resolution was applicable until 31 December 2021.[52]

New Zealand Parliament

New Zealand was the last Parliament among those studied to adopt remote participation. Despite the later start, New Zealand implemented broad remote participation, resulting in a relatively high rate of member involvement.

At the onset of the pandemic, New Zealand's initial response included a month-long parliamentary shutdown, aligning with the first national lockdown from 25 March 2020 to 28 April 2020. During this period, the Epidemic Response Committee was established, chaired by the Leader of the Opposition and comprised of representatives from all parties, to scrutinize the government's pandemic management.[53] When transmission rates significantly dropped, the House resumed on 28 April with reduced attendance.[54] Initial reluctance to adopt remote participation was partly due to technical barriers and costs.[55]

The arrival of the Omicron variant in late 2021, which led to high transmission rates, highlighted the need for a sustainable solution. This coincided with efforts to develop a cost-effective model for remote participation.[56] On 17 February 2022, the House passed a sessional order allowing members to participate in proceedings digitally, without needing to be physically present in the Chamber. Under this order, remote participation was considered part of the

[51] The President's Report to the Legislative Council, September 2021.

[52] Legislative Council Minutes of the Proceedings 2018-22, pp. 874-76.

[53] Journal of the House for the week beginning Wednesday, 25 March 2020.

[54] Interview with a New Zealand parliamentary officer.

[55]Interview with a New Zealand parliamentary officer.

[56] Interview with a New Zealand parliamentary officer; also see New Zealand Parliament Hansard of 17 February 2022.

House's proceedings, and members participating remotely were treated as present within the Chamber. They could submit documents electronically through the Clerk, and proxies were permitted without limits. Additionally, parties with five or fewer members could have votes cast on their behalf even if no members were physically present in the parliamentary precincts.[57]

Remote participation was permitted in New Zealand from 1 March to 31 August 2022. Statistics show that remote attendance peaked early but steadily declined from April onwards, as more Members returned to in-person sessions.

VARIATIONS IN REMOTE PARTICIPATION IN UK, AUSTRALIA, VICTORIA AND NEW ZEALAND

The table below highlights the key differences in the application of remote participation across these four jurisdictions:

Houses	Start/end	Form	Scope of participation	Voting	Cap
UK House of Commons	21 April 2020 to 22 July 2021	Hybrid	Questions and statements, debates on legislation, then later limited to questions and statements.	Remote voting then proxy voting	120
UK House of Lords	21 April 2020 - Ongoing	Fully virtual in between physical, hybrid from 8 June	Virtual proceedings: Oral questions, private notice questions, statements, urgent question repeats and debates, then expanded to legislation, including the committee stage of debate on bills. Later confined to statements and urgent questions. Hybrid proceedings: No limits Part hybrid: only on scrutiny proceedings.	Remote voting then proxy voting, members counted for quorum	50
Australian	24 August		Contributing to debate,	Not allowed to	No cap but

[57] New Zealand Parliament sessional orders (53rd Parliament) as at 6 April 2022.

House of Representatives	2020 to 2 February 2022	Hybrid	asking/answering questions at Question Time	vote or counted for quorum	presiding officers would determine on a case-by-case basis
Australian Senate			Limitations were similar to the House of Representatives, except for moving amendments and requests to legislation in committee of the whole.		
Victorian Assembly	3 September 2020 to 26 October 2021	Hybrid	Can participate in debate but cannot move a motion, amendment or vote	Not allowed to vote or counted for quorum	No cap but presiding officers would determine on a case-by-case basis
Victorian Council	15 September 2021 to 31 December 2021	Hybrid			
New Zealand	17 February 2022 to 31 August 2022	Hybrid	No limits	Proxy voting; Being counted for quorum	No cap but quorum must be maintained in the Chamber

KEY CONSIDERATIONS UNDERLYING REMOTE PARTICIPATION

Despite the differences in implementation, the application of remote participation in the UK, Australia, and New Zealand was driven by similar key considerations. These can be summarised into four main themes: functionality, constitutionality, procedure and formality, and practicality.

Functionality

The adoption of remote participation across the UK, Australia, and New Zealand was driven by the need to maintain key parliamentary functions - scrutinising the government, authorising spending, and making laws - while adhering to public health measures to hinder virus transmission.[58] This imperative was emphasised in numerous resolutions allowing remote participation, in members' speeches, and in media discussions. For instance, the House of Commons stated it was acting 'to keep democracy going during the coronavirus crisis'.[59] Similarly, the House of Lords Select Committee on the Constitution confirmed that hybrid proceedings were 'a necessary solution to maintaining business continuity while a significant number of members are unable to attend […] in person'.[60]

In many cases, remote participation was introduced when other avenues, such as long adjournment, temporary shutdown, and reduced physical attendance, proved insufficient. As mentioned above, physical distancing and other measures could not fully address the need for parliamentary oversight and legislative duties. The Leader of the House in New Zealand noted that 'some […] senior members of Parliament [were] unable to attend and participate in parliamentary proceedings unless we find an alternative way for them to do so'.[61]

The timing of remote participation also corresponded to the COVID stages in each country. Australia and New Zealand, having lower transmission rates, delayed its introduction until later

[58] Jacob Rees-Mogg, the Leader of the UK House of Commons, as cited by Rajeev Syal, UK to set up virtual parliament during coronavirus shutdown, the Guardian, 2 April 2020. Accessed at https://www.theguardian.com/politics/2020/apr/01/uk-set-up-virtual-parliament-during-coronavirus-shutdown.

[59] UK Parliament, House of Commons takes historic first step towards virtual proceedings.

[60] House of Lords, Select Committee on the Constitution, Covid-19 and Parliament, 1st Report of Session 2021–22, p. 24.

[61] Trevor Mallard, New Zealand, *Sessional Order—Remote Participation,* House of Representatives, 17 February 2022. Accessed at https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20220217_20220217_20.

stages. New Zealand only adopted remote participation in 2022 when the Omicron variant rendered previous containment efforts insufficient.[62]

Ultimately, remote participation was seen as a temporary, necessary measure that would end once the public health crisis abated.

Constitutionality

Constitutionality refers to the significant concern to ensure that the adoption of remote participation aligned with each country's constitutional framework. This concern greatly influenced the implementation of remote participation across the examined jurisdictions, as all parliaments carefully navigated constitutional rules to avoid questioning the validity of their proceedings and decisions.

In Australia, authorisation of remote participation was grounded in Section 50 of the Constitution, which gives the House the power to make and change its standing orders. To facilitate the effective application of this section, on 23 March 2020, the House amended Order 47(c) (ii) to change the requirement of an absolute majority of the House to a simple majority of members voting when suspending standing orders without notice. This amendment paved the way for the House to permit remote participation without necessitating the large physical presence of members in the Chamber.[63] The requirement for agreement of both the Leader of the House and the Manager of Opposition Business in this aspect underscored their efforts to pre-empt any challenges to the validity of their decisions.

All Parliaments were cautious in interpretating the constitutional stipulations regarding the location of parliamentary proceedings. Consequently, none opted for fully virtual sessions, and the scope of actions available to members participating remotely was limited, except in New Zealand. Maintaining a quorum in the parliamentary precincts was deemed essential for safeguarding the legitimacy of parliamentary proceedings and the validity of the decisions made.

[62] See, for example, House of Lords: Remote Participation and Hybrid Sittings, Volume 812: debated on Thursday 20 May 2021, https://hansard.parliament.uk/lords/2021-05-20/debates/1A303224-207C-4131-96B2-4A07DE9CF3D8/HouseOfLordsRemoteParticipationAndHybridSittings. Also see House of Lords, Select Committee on the Constitution, COVID-19 and Parliament, published on 13 May 2021.

[63] New Zealand Parliament, Votes and Proceedings No. 51, 835 (23 March 2020).

For instance, in New Zealand, after considering the *Constitution Act 1986* (NZ) regarding the meeting place, the Parliament chose hybrid sittings with a quorum on-site.[64] This allowed the Parliament to assert that it continued to meet in the parliamentary precincts in Wellington, while enabling most members to participate remotely.[65] Similarly, the then Leader of the Opposition in the Australian Parliament noted, 'The parliament is meeting and it is meeting here. [W]hen members want to make a contribution to a debate or discussion in different ways, they're able to do so via video link. But for all other purposes you have to be here'.[66]

In Victoria, the Clerks of the Assembly and Council jointly sought legal advice on remote participation. They were advised that '*The Council and the Assembly may adopt orders or rules that permit Members to participate in proceedings remotely by means of audio-visual communication technology. In my view, such orders or rules may permit such Members to vote and to be counted in a quorum*.'[67] However, uncertainty persisted regarding the interpretation of the term 'present' in the *Constitution Act 1975*, particularly in relation to quorum and voting.[68] This ambiguity raised concerns that 'this may not be a universally held view', 'could be contradicted by a court', and 'may be in the context of invalidating a law'. To mitigate these potential risks, both Houses opted for hybrid sittings, with members participating remotely were not allowed to vote or counted for quorum.[69]

Despite the absence of a written constitution, the UK Parliament also approached constitutional principles with caution. According to guidance from the Procedure Committee, 'A Virtual Proceeding is not a sitting of the House. There is no Mace present and the Virtual Proceeding will not be empowered to make decisions', clarifying that 'when a decision is needed that must be taken by the House'.[70]

[64] In New Zealand, the quorum requires a presiding officer, Minister, and Clerk at the Table. During hybrid sitting, three of them must be physically present at all times to ensure that the House met in the Chamber. See Parliamentary Practice in New Zealand, 5th Ed., p. 128.

[65] New Zealand Parliament, Hansard, 17 February 2022.

[66] T Burke, 'Statements on Indulgence: COVID-10: Parliamentary Procedure', House of Representatives, *Debates,* 24 August 2020, p. 5039.

[67] Chris Horan QC, Memorandum of Advice in the matter of the Legislative Assembly and Legislative Council of the Parliament of Victoria: Voting by remote means, 11 September 2020.

[68] Sections 32 and 40 of the *Constitution Act 1975*

[69] Legislative Council, President's Report, September 2021.

[70] Guidance on Virtual Proceedings from the Procedure Committee. Issue 1, 16 April 2020.

Procedure and Formality

This aspect refers to Parliaments' emphasis on adhering to established parliamentary practices when enabling remote participation.

Westminster Parliaments follow a broad set of rules regulating their proceedings. These rules establish the procedure and formality designed to ensure the effective operation of parliaments while safeguarding the parliamentary principles of democracy and transparency. By adhering to these procedures, parliaments also secure the legitimacy and dignity of the parliament and the merit of the outcomes of their debate.

To maintain adherence to parliamentary practice, all parliaments issued remote participation guidance, ensuring virtual proceedings mirrored in-person procedures as closely as possible. For instance, the House of Lords Procedure Committee stated, 'The procedure in Virtual Proceedings shall follow, so far as practical, procedure in the House', adding that 'Virtual Proceedings, and the members taking part, will attract all the usual protections of parliamentary privilege.[71] Similarly, guidance across parliaments included rules for maintaining order during hybrid sittings.

In the House of Commons, members participating remotely were explicitly instructed not to display or reference objects to illustrate their contributions.[72] The Australian Senate required that 'the standing orders and other orders of the Senate, including the standing orders relating to the conduct of senators and rules of debate, otherwise apply to senators participating remotely, to the extent they are capable of applying'.[73] In Victoria, the Speaker's guidelines stipulated that 'Members participating remotely must participate with the same formality as though they were in the Chamber, and should wear normal business attire.'[74] In the Commonwealth Parliament, members were required to join remote participation from their electorate offices or a Commonwealth parliamentary office.

Practicality

Practicality acknowledges the fact that the implementation of remote participation was unavoidably constrained by the accommodability of technology and the associated costs. It

[71] The House of Lords Procedure Committee, Guidance on virtual proceedings.

[72] UK Parliament, House of Commons takes historic first step towards virtual proceedings.

[73] Australian Parliament, Senate Journal No. 59—24 August 2020, pp. 2064-5

[74] Victorian Legislative Assembly, Speaker's guidelines about remote participation.

explains several steps taken towards remote participation[75] and the limitations inherent in its application.

The practice of remote participation exhibited certain drawbacks of Parliaments' virtual and hybrid sittings. Some well-recognized issues include the inability to interject and raise points of order,[76] diminished in-person interaction, and loss of spontaneity during debates, all of which hampered the effectiveness of parliamentary scrutiny.[77] Additionally, the number of members participating remotely was often limited. In the UK House of Lords, members were onboarded individually by specially trained staff who needed to be on-site in a broadcasting hub. This process was time-consuming, capping the number of members participating remotely at 50.[78] However, if technical issues arose on the members' end, it would be nearly impossible to provide support from within the parliament precinct.[79]

Technical errors further compounded the challenges associated with remote participation. Members could be disconnected during their speech, disrupting the order of business in the House.[80] For example, in the UK, Member Kevin Brennan began his question but was cut off, while David Mundell missed his question entirely.[81] In the House of Lords, the online voting system malfunctioned twice, necessitating the rescheduling of divisions, slowing down the House's decision-making process.[82]

The above discussion points out that during the pandemic, parliaments adopted remote participation strictly on a necessary basis, ensuring compliance with constitutional requirements, adhering to parliamentary procedures and formalities, and operating within the constraints of their technical infrastructure and budgets. The following section will use these elements to test the case for continuing with remote participation in the future.

[75] See the above section on The Emergence of Remote Participation which detailed the steps by the two Houses towards remote participation.

[76] UK Parliament, House of Commons takes historic first step towards virtual proceedings.

[77] House of Lords, Select Committee on the Constitution, Covid-19 and Parliament, 1st Report of Session 2021–22

[78] Guidance on Virtual Proceedings from the Procedure Committee: Issue 3, 11 MAY 2020

[79] Interview an IT staff member from the Parliament of Victoria.

[80] The UK House of Commons, Votes and Proceedings, No 63, Monday 24 August 2020, p. 1027.

[81] S. Priddy, Coronavirus timeline: How the Commons virtually went virtual.

[82] E. Scott and N. Newson, House of Lords: timeline of response to Covid-19 pandemic.

LOOKING FORWARD: TESTING THE KEY ELEMENTS OF REMOTE PARTICIPATION IN FUTURE CIRCUMSTANCES

This section evaluates the key elements underlying the application of remote participation during the pandemic against future circumstances to bolster the case for its continuation.

Functionality

The application of remote participation in parliamentary sittings suggests its potential for use in future emergencies. Circumstances such as floods, fires, or civil unrest could similarly hinder members from attending the parliamentary precincts. In such cases, the appropriate solution would be to enable remote participation. Additionally, the desire for a modern parliament points to remote participation as a vehicle to accommodate members with babies or care giving responsibilities, disabilities, or those residing far from the parliamentary precinct. This capability has been recognised by parliaments; for example, the Select Committee on the Constitution of the UK said, 'We welcome the benefits remote proceedings have brought for members with disabilities, health concerns or caring responsibilities, or who are geographically distant.'[83] As stated by a staff member at the Victorian Parliament, remote participation facilitates a more accommodating parliament, which 'encourages greater nominations, leading to more competitive elections and providing the electorate more opportunities to select their preferred representatives.'[84] In this context, remote participation supports the development of a more adaptive and inclusive parliament.

While the case for remote participation can be substantiated, the question arises: why shouldn't it be allowed more broadly, enabling members to save time by not traveling to the physical chamber, thus balancing their presence between the legislature and their local communities? [85] In answering this, aside from the drawbacks of remote participation already mentioned, it is important to highlight the significance of the parliamentary workplace for both parliamentarians and staff, as well as the role of the physical environment in embodying the constitutional tradition.[86] Much is at stake if parliaments were to conduct their business virtually under normal circumstances.

[83] The UK House of Lords, Select Committee on the Constitution, Covid-19 and Parliament, 1st Report of Session 2021–22, p. 24.

[84] Interview with a staff member in the Legislative Assembly Department of Victorian Parliament.

[85] P. Evans, P. Silk and H. White, Parliaments and the Pandemic, p. 206.

[86] P. Evans, P. Silk and H. White, Parliaments and the Pandemic, p. 206.

Thus, it is essential to maintain the principle that members should attend sittings in person, with remote participation available only as a last resort. The Standing Orders Committee of the New Zealand Parliament stated: 'We do not endorse remote participation being always available. Members should attend in person. Having all members present in Wellington facilitates cooperation and development for all members.' It also suggests that 'The Business Committee apply a reasonably high threshold to its decisions about the use of remote participation.'[87]

Constitutionality

To support the case for continuing remote participation, it is necessary to strengthen its constitutional basis. As previously noted, the adoption of remote participation was partly limited by uncertainties regarding its compliance with constitutional provisions. To facilitate more effective remote participation in the future, it is advisable to clarify and solidify the constitutional framework that underpins it.

Procedure And Formality

The arrangements for remote participation during the pandemic posed challenges to parliamentary procedures and formality. To facilitate smooth running in future circumstances necessitating remote participation, parliaments need to address various aspects of their practices, such as member conduct and interaction, available solutions for the Chair, parliamentary privileges for those participating remotely, dress codes, and the proper setup of their screens to uphold parliamentary standards in a virtual environment. It is advisable to develop comprehensive sets of rules for remote participation in parallel with those for physical sittings.

Practicality

As we consider the why and how of holding remote participation in future parliamentary sittings, we must account for technical issues and costs. Given that parliaments already possess the necessary infrastructure from their pandemic experiences, technical barriers to remote participation are significantly diminished. Furthermore, rapid advancement in technology promises more effective and cost-efficient solutions to apply for virtual meetings in parliaments. Technical teams can monitor these developments and suggest appropriate enhancements.

[87] Report of the Standing Orders Committee, August 2023 (I.18A), p. 15.

However, the use of video conferencing platforms is not without its challenges. No current application can replicate the full experience of chamber proceedings. For instance, how can a platform simulate a speaker 'being on their feet'? There are certain issues to be considered in practical terms, such as:

- Selecting appropriate technical infrastructure and solutions, which would often need to be on standby.
- Training requirements for staff to support members, the Chair, and the Clerk in facilitating remote participation, including tasks such as logging members in, receiving registrations, managing calls and documents, monitoring the screen, highlighting speakers, and taking appropriate actions in case of incidents.

CONCLUSION

The pandemic accelerated the adoption of remote participation in parliamentary sittings, offering a valuable opportunity to assess its applicability for future events. This research seizes this opportunity by examining how remote participation was implemented during the pandemic by Westminster parliaments in the UK, Australia, New Zealand and Victoria.

Using the four criteria of functionality, constitutionality, procedure and formality, and practicability, this study evaluates how remote participation aligns with parliamentary values of constitutionality, integrity and dignity, while also enhancing adaptability in a modern context.

The research finds that remote participation enables members to contribute meaningfully to parliamentary sittings, even when circumstances prevent their physical presence in the chamber. With careful customisation of procedural rules, remote participation can be extended to members in need without undermining the prestige or dignity of parliaments. Moreover, when technical settings are aligned with procedural frameworks, the constitutional principles of parliaments remain firmly upheld.

Having examined all the above elements, it is clear that remote participation should be integrated into parliamentary practice. With careful design, remote participation can help build a more accommodating, adaptive, inclusive, and technologically advanced parliament that upholds both constitutional and traditional principles.

Psychological Well-being of Parliament staff: What Do We Know and What Can Parliaments Do?

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Abstract: Workplace culture has been widely discussed in the reviews of Australian and New Zealand Parliaments. One of the main highlights of the reviews is to prioritise policies that improve workplace culture, including the psychological well-being of staff. Using the job demands-resources (JD-R) model, this article discusses how the annual employee engagement survey in the New Zealand Parliament provides insights into factors affecting employees' psychological well-being. Future initiatives by the New Zealand Parliament, along with insights from the New South Wales Parliament, offer an understanding of well-being initiatives in different Parliaments and highlight gaps in knowledge that future research can address.

INTRODUCTION

Parliaments across Australia and New Zealand have conducted reviews in recent years about parliamentary workplace culture. The reviews in the Australian Commonwealth Parliament by Jenkins[1], New South Wales Parliament by Broderick[2] and New Zealand Parliament by Francis[3] centred around workplace issues such as bullying and harassment. These reviews have emphasised prioritising policies to improve workplace culture, including policies to address bullying and harassment, and to promote the psychological wellbeing of staff in Parliament.

To understand factors associated with employees' psychological wellbeing, it is important to be guided by established research. In this paper, I will discuss employee wellbeing from the job demand-resources model (JD-R), which has been well-researched over the past 20 years.[4] The

[1] Kate Jenkins, *Independent Review into Commonwealth Parliamentary Workplaces.* Sydney: Australian Human Rights Commission, 2021.

[2] Elizabeth Broderick, *Independent Review into bullying, harassment and sexual misconduct at the Parliament of NSW*. Sydney: NSW Parliament, 2022.

[3] Debbie Francis, *External Independent Review Bullying and Harassment in the New Zealand Parliamentary Workplace*. Wellington: NZ Parliament, 2019.

[4] Wilmar B. Schaufeli, and Arnold B. Bakker. 'Job demands, job resources, and their relationship with burnout and engagement: A multi-sample study'. *Journal of Organizational Behavior: The International Journal of Industrial, Occupational and Organizational Psychology and Behavior* 25(3) 2004, pp. 293-315; Tino Lesener, Burkhard Gusy, and Christine Wolter, 'The job demands-resources model: A meta-analytic review of longitudinal studies.'. *Work &*

JD-R model posits that job demands can lead to psychological strain, while job resources mitigate psychological strain.[5]

The JD-R suggests that job demands such as bullying and harassment can lead to poor wellbeing.[6] Other job demands that can contribute to poor psychological wellbeing at work include role ambiguity, role conflict, stressful events, workload and pressure.[7] Conversely, autonomy, manager and co-worker support, feedback, and task significance are job resources that facilitate the path to wellbeing at work. Although studies on the factors related to wellbeing have been conducted across different types of workplaces, there are few studies on the factors affecting the wellbeing of MPs,[8] and much less is known about factors that affect the wellbeing of staff working in Parliament.

The main aim of this paper is to discuss how employees' perceptions of job demands and resources can be tracked through the annual employee engagement survey administered by the New Zealand Parliament. This paper will also describe future initiatives by the New Zealand Parliament to measure engagement, along with insights on wellbeing initiatives undertaken by the New South Wales (NSW) Parliament.

THE NEW ZEALAND PARLIAMENT

To understand the factors that may contribute to or hinder the psychological wellbeing of staff in the New Zealand Parliament, it is important to view wellbeing in the context of Parliament as a workplace. Staff employed within Parliamentary agencies in New Zealand are part of the legislative branch of government.[9] While funding for the Parliamentary agencies in New Zealand comes from the government, they are independent agencies. The Parliamentary

Stress, 33(1) 2019, pp. 76-103; Arnold B Bakker, Evangelia Demerouti, and Ana Sanz-Vergel, 'Job Demands–Resources Theory: Ten Years Later'. Annual Review of Organizational Psychology and Organizational Behavior 10(1) 2023, pp. 25–53.

[5] Arnold B Bakker, and Evangelia Demerouti, 'The Job Demands-resources Model: State of the Art'. *Journal of Managerial Psychology* 22(3) 2007, pp. 309–328.

[6] Samuel Farley, Daniella Mokhtar, Kara Ng, and Karen Niven, 'What influences the relationship between workplace bullying and employee well-being? A systematic review of moderators'. *Work & Stress* 37(3) 2023, pp. 345-372.

[7] Bakker, Demerouti, and Sanz-Vergel, 'Job Demands–Resources Theory', pp. 25–53.

[8] Matthew Flinders and others, 'Governing under Pressure? The Mental Wellbeing of Politicians'. *Parliamentary Affairs* 73(2) 2020, pp. 253–273.

[9] David Wilson, *Parliamentary Practice in New Zealand*. Wellington: New Zealand, 2023.

agencies are accountable to the Speaker of the House for the purposes of the Public Finance Act 1989.

The day-to-day operation of the New Zealand Parliament is mainly supported by the Office of the Clerk and Parliamentary Service. The Office of the Clerk offers procedural advice and supports the House and its committees. Parliamentary Service provides services to members (based both within and outside the parliamentary precinct).

Within the Parliamentary Service, corporate and member support staff employment terms are different from each other. Member support staff are employed on fixed-term event-based employment agreements where the terms of their agreements are closely connected to a specific member of Parliament (MP). They are employed under triangular employment agreements, with the Parliamentary Service as their legal employer and the MP as their day-to-day manager. This contrasts with corporate staff who are more likely to be on permanent employment agreements and the MP is not involved as their day-to-day manager.

In line with Fletcher et. al.'s[10] view to contextualise the demands and resources, understanding the work context of Parliament and the different employment terms within Parliament can help to identify which risk and protective factors are more related to psychological wellbeing for Parliament staff. Risk factors those that can lead to psychological strain while protective factors can mitigate psychological strain.

VIEWING WELLBEING THROUGH THE EMPLOYEE ENGAGEMENT SURVEY

In the New Zealand Parliament, the Human Resources team administers the annual employee engagement survey. The Health and Safety team leads the work in identifying and managing psychosocial risks. The responses to the annual employee engagement survey provide some insights into staff wellbeing. The survey has 13 categories and 61 questions, covering topics such as leadership, the organisation's process, people's experience, and psychological safety.

While all questions have their purpose, the engagement survey is not designed to measure employees' wellbeing. The survey questions are not necessarily organised into categories that reflects job demands and resources. Therefore, I will reorganise the engagement survey questions, and some questions may be omitted as they are less related to factors that may contribute to or deplete wellbeing such as organisational value-based questions (e.g., 'We keep up to date with best practice relevant to our organisation').

[10] Luke Fletcher, Catherine Bailey, Kerstin Alfes, and Adrian Madden, 'Mind the context gap: A critical review of engagement within the public sector and an agenda for future research'. *The International Journal of Human Resource Management* 31(1) 2020, pp. 6-46.

Each question in the engagement survey was considered and organised into categories that reflect job resources, job demands, or the underlying mechanisms of job resources/demands. Underlying mechanisms explain how job demands/resources are connected to wellbeing.

Some value-based questions that do not clearly present as job demands, resources, or underlying mechanisms, were not included in this exercise. Once the questions were broadly organised into three categories, the questions were classified into factors. See Appendix 1 for the full list arranged by factor. The following section highlights some of these outcomes.

WHAT CAN THE EMPLOYEE ENGAGEMENT SURVEY TELL US ABOUT WELLBEING?

The engagement survey includes job resources questions related to leadership behaviour, opportunities for development, role clarity, social support, autonomy, participation in decision making, authenticity at work, reward, feedback, and physical work environment setup. Among these factors, leadership behaviour has eight questions, while the rest of the factors have one to three related questions. This suggests an underlying assumption that leadership is the main job resource that can contribute to employees' wellbeing. However, this focus overlooks other important job resources that also impact wellbeing. Additionally, it does not fully consider the context and complexity of leadership behaviours and their effects on wellbeing.[11]

In terms of underlying mechanisms, the survey contains questions related to the psychological safety of the team and individual, authenticity at work, meaningful work, and work-life balance. Psychological safety has the most related questions (eight). Supportive leadership behaviours, supportive organisational practices, and the quality of relationships at work are some of the factors that may contribute to individual and team psychological safety, which in turn leads to positive outcomes such as greater engagement.[12] Without further analysis, it is unclear which job resources are associated to underlying mechanisms, particularly psychological safety, in the New Zealand Parliament.

Finally, there was no question identified in the engagement survey that is related to job demands or wellbeing outcomes. As this is preliminary work to identify questions in the engagement survey that can contribute to employees' wellbeing, a factor analysis or structural equation modelling should be conducted to confirm if the questions are as categorised in

[11] Marc Van Veldhoven and others, 'Challenging the Universality of Job Resources: Why, When, and for Whom Are They Beneficial?'. *Applied Psychology* 69(1) 2020, pp. 5–29.

[12] Alexander Newman, Ross Donohue, and Nathan Eva, 'Psychological Safety: A Systematic Review of the Literature'. *Human Resource Management Review* 27(3) 2017, pp. 521–35.

Appendix 1. Further analysis can also provide understanding on how job resources are associated to psychological safety. The implications of this exercise will be discussed in the section below.

IMPLICATIONS

The annual engagement survey consists of questions that will elicit information on employees' well-being. As the engagement survey is collected and discussed annually, this provides an opportunity for each team to discuss the results of the survey with a focus on changes over time and the resources that can contribute to their wellbeing.

While the survey has provided some information on job resources that can contribute to employee wellbeing, it is notable that job demands and questions that measure wellbeing are not found in the engagement survey. Job demands such as workload, time pressure, interpersonal contact/conflict, physical work environment demands (such as noise), and shift work for some business units, can contribute to psychological strain[13]. Wellbeing outcomes such as job satisfaction and general wellbeing are also not part of the survey questions.

The Human Resources team is in the process of planning a quarterly survey with a goal of being able to respond sooner to issues and check their progress. The Health and Safety team is contributing to this process by identifying risk factors that can be included in the survey. This may be an opportunity to consider including job demands and wellbeing questions that can provide more relevant information about wellbeing.

The NSW Parliament's '*Public Sector People Matter Employee Survey (PMES)*' could be a useful reference when designing questions about wellbeing and job demands. Similar to the New Zealand Parliament, the NSW Parliament tracks wellbeing through the PMES and some teams regularly respond to surveys to keep track of workload and general wellbeing.[14] The PMES includes questions about wellbeing (e.g. In general, my sense of wellbeing is…) and a range of job demands such as physical harm, discrimination and harassments.

Tracking employee wellbeing can also be a way to identify if wellbeing initiatives achieve their aims. One notable practice of the NSW Parliament is the establishment of the Executive Sponsor of Mental Health and Wellbeing role. The aim of the role is to create a culture in the NSW Parliament that supports good mental health and wellbeing among staff. One of the initiatives overseen by the Executive Sponsor of Mental Health and Wellbeing is the *'Mental Health First Aid Network'*. This initiative has seen 16 people being trained as Mental Health

[13] Bakker and Demerouti, 'The Job Demands-resources Model: State of the Art', pp. 309–28.

[14] Matthew Dobson, Executive Sponsor of Mental Health and Wellbeing, 'Personal Communication', 6 September 2024.

First Aid Officers (MHFAOs) to recognise signs of mental ill health and provide first aid in the NSW Parliament.

As parliaments across Australia and New Zealand implement wellbeing initiatives, it is imperative to know how wellbeing initiatives affect employee wellbeing. A regular survey with a focus on wellbeing may be able to track the progress of wellbeing initiatives over time; essentially answering the question, 'do the initiatives improve wellbeing?'. Furthermore, research to assess other contextual factors that can influence wellbeing outcomes of Parliament staff in different departments can provide information on how to improve the wellbeing initiatives.[15]

CONCLUSION

As Parliament remains a complex workplace, psychological wellbeing should continue to be a priority. To better understand how the engagement survey is related to wellbeing, some of the questions in the engagement survey have been reorganised based on the JD-R model. Leaders can approach the engagement survey's discussion from a wellbeing perspective, helping their team to increase their perceived resources. Increasing resources and reducing demands can contribute to psychological wellbeing. Further research can also provide information on how to improve wellbeing initiatives for different departments in the Parliament.

[15] Caroline Biron and Maria Karanika-Murray, 'Process Evaluation for Organizational Stress and Well-Being Interventions: Implications for Theory, Method, and Practice'. *International Journal of Stress Management* 21(1) 2014, p. 85-111.

APPENDIX 1

Table 1. Categorising employee engagement survey based on the JD-R model

Original category	Question	Factors
Job resource		
Operational Processes	I have the autonomy to make decisions about matters I am responsible for	Autonomy
Performance Development	Parliamentary Service has a culture of empowerment that enables me to work to my potential	Autonomy
Performance Development	I have regular and effective feedback, performance and development conversations with my direct manager/people leader	Feedback
Diversity and Inclusion	Our senior leaders are committed to building an inclusive culture founded on respect, fairness and equity	Leadership behaviour
Internal Communication	My direct manager/people leader shares information with me that enables me to do my job effectively	Leadership behaviour
Leadership	The actions of my direct manager/people leader are consistent with our Parliamentary Service values	Leadership behaviour
Leadership	My direct manager/people leader treats team members fairly and with respect	Leadership behaviour
Leadership	My direct manager/people leader handles stressful or challenging situations well	Leadership behaviour
Leadership	My direct manager/people leader's decisions are fair and communicated effectively	Leadership behaviour
Leadership	The Executive Leadership Team (ELT) communicates effectively	Leadership behaviour
Leadership	Our leaders explain why workplace changes are made	Leadership behaviour
Performance Development	My direct manager/people leader actively encourages my career development	Opportunities for development
Performance Development	Parliamentary Service provides valuable learning and development opportunities for me	Opportunities for development
Strategy	Parliamentary Service is good at looking at future demands and opportunities	Opportunities for development
Internal Communication	There is effective communication and consultation before changes are made that affect me	Participation in decision

Organisation Performance	I am regularly asked for feedback on how to improve the way we work at Parliamentary Service	Participation in decision
Operational Processes	We have the right technology to support the needs of Parliamentary Service	Physical work environment
Organisation Culture	My team has a culture of celebrating success	Rewards
Customer Focus	I am clear about my role in delivering great services	Role clarity
Organisation Specific	I have a deep understanding of the Parliamentary environment	Role clarity
Performance Development	My annual goals and objectives are aligned with the priorities of Parliamentary Service	Role clarity
Operational Processes	I feel well supported by other teams I work with	Social support
People Experience	I feel included and supported by the people I work with	Social support
Job resource/underlying mechanism		
Diversity and Inclusion	I am encouraged to be myself at work	Authenticity at work
Diversity and Inclusion	My personal values and cultural beliefs are respected at Parliamentary Service	Authenticity at work
Underlying mechanism		
Customer Focus	I see how my work contributes to positive outcomes for customers or people I provide services to	Meaningful work
Customer Focus	Parliamentary Service has a positive impact on those we work with	Meaningful work
Performance Development	I feel the work I do is valued at Parliamentary Service	Meaningful work
Organisation Culture	I feel confident to speak up even when it may be unpopular	Psychological safety
Organisation Performance	My team adapts well to change	Psychological safety
People Experience	Parliamentary Service values the differing perspectives, skills and experiences of employees	Psychological safety
Psychological Safety	I know that if I make a mistake, it will be treated as a learning opportunity	Psychological safety
Psychological	I am encouraged to innovate and show initiative	Psychological safety

Safety		
Psychological Safety	I know that if I ask for help or feedback, I won't be judged negatively for it	Psychological safety
Operational Processes	My team regularly reviews processes to identify possible improvements	Team psychological safety
Operational Processes	My team looks for ways to increase efficiency and effectiveness where we can	Team psychological safety
People Experience	I feel I am able to balance my work and private life	Work-life balance

Threats From the Fringe: Understanding and Solving Fringe Social Media Sites' Threats and Incitements to Violence Against New Zealand's MPs

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Abstract: Online hate and harassment against MPs is rising, not just in New Zealand, but internationally. This article examines violence-speech and death threats publicly made against New Zealand MPs and political figures on the fringe social media site Gab, uncovering the ways New Zealand's legislation has thus far failed to address this dangerous behaviour, as well as offering thoughts on options for law reform in this area. An analysis of top posts in New Zealand messageboards on Gab is followed by a comparative examination of incitement to violence laws in Australia before considering reform options for New Zealand.

INTRODUCTION

Recent research has shown that hate against and harassment of Members of Parliament (MPs) in Aotearoa New Zealand is rising. Especially after COVID-19 lockdowns, the 2022 occupation of parliament, and the 2023 election, MPs are subject to higher levels of hate than ever before.[1] Unmoderated, fringe social media communities represent a significant site wherein violent sentiment against 'othered' individuals is facilitated and encouraged, causing both psychological and real-world harm against targeted groups.[2] The violence (and threats thereof) incurred by these communities against political officials also degrades the quality of democracy by discouraging people with marginalised identities from running for office.[3] Fearful journalists cannot effectively report on political news when they're subject to death threats for doing their

[1] Susanna Every-Palmer, Oliver Hansby, and Justin Barry-Walsh, 'Stalking, Harassment, Gendered Abuse, and Violence Towards Politicians in the COVID-19 Pandemic and Recovery Era'. *Front. Psychiatry* 15 (1) 2024, pp. 5, 8.

[2] Arne Dreißigacke, Philipp Müller, Anna Isenhardt, and Jonas Schemmel, 'Online Hate Speech Victimisation: Consequences for Victims' Feelings of Insecurity'. *Crime Science* 13 (4) 2024, p. 7; Human Rights Campaign, 'New Human Rights Campaign Foundation Report: Online Hate & Real World Violence Are Inextricably Linked'. *Human Rights Campaign,* 13 December 2022.

[3] Every-Palmer, Hansby, and Barry-Walsh, Stalking, Harassment, Gendered Abuse, and Violence, p, 8; Maya Oppenheim, 'General election: Women MPs Standing Down Hver 'Horrific Abuse', Campaigners Warn'. *The Independent,* 31 October 2019.

jobs,[4] and this threat too is becoming more pronounced in Aotearoa.[5] Not only is online hate and harassment against politicians rising, but new initiatives to regulate online and real-world political violence in Aotearoa have not been fully implemented, and proposed legislative reforms have stalled or been abandoned. For example, Aotearoa's project to establish an agency regulating social media platforms was disestablished in May 2024, and recommendations of the Royal Commission inquiry into the 2019 Christchurch terrorist attack were abandoned soon after.[6]

In this environment, there has been a rise of groups of individuals forming online communities on fringe social media platforms, where they regularly engage in violence-speech, inciting real-world violence, as well as other forms of harassment and harm. In some instances, these 'communities of hate' have targeted elected MPs, political staff, and others working in and around parliament.

Online violence facilitated in fringe social media communities and the real-world violence and harm resulting therefrom has ripple effects throughout the whole democratic structure when performed against and political officials in particular. In the interests of maintaining the health, diversity, and stability of our democratic structures, then, we cannot ignore violent fringe and extremist social media communities.

An egregious example of a community of this sort that has directly impacted MP and staff safety in Aotearoa is the 'Nuremberg 2.0' website that existed from October 2021 until April 2022.[7] Users posted which government officials, ministry workers, journalists, or activists they believed deserved to be charged in the 'Nuremberg 2.0' trials, what violent punishment they 'deserved', and for what reason. This sort of group communication- the publishing of public

[4] National Union of Journalists, 'Four in Five Journalists Have Experienced Threats and Violence at Work'. *National Union of Journalists*, 3 November 2021; Silvio Waistbord, 'Mob Censorship: Online Harassment of US Journalists in Times of Digital Hate and Populism'. *Digital Journalism* 8 (1) 2020, pp.2037-38.

[5] Susan Fountaine and Cathy Strong, 'An Intersectional Analysis of Aotearoa New Zealand Journalists' Online and Offline Experiences of Abuse, Threats and Violence'. *Journalism Studies* 25 (1) 2023, 168.

[6] Tom Pullar-Strecker, 'Internal Affairs Scraps Ambitious Plan to Clean up the Internet'. *The Post*, 10 May 2024; Tom Pullar-Strecker, 'Internal Affairs Sets Out Big Plans to Regulate Harmful Content on Social Media'. *Stuff*, 1 June 2023;

Radio New Zealand, 'Christchurch terror attacks: Government's binning of recommendations 'shameful', Muslim leader says'. *Radio New Zealand,* August 2 2024.

[7] Toby Manhire, 'Inaction on NZ 'Nuremberg' Site Sparks Calls for Overhaul of System 'Not Fit for Purpose''. *The Spinoff*, 4 April 2022.

'hit lists'- is a common, low-cost high-yield threat device employed by communities of hate.[8] Unsurprisingly, then, the public online community of 'Nuremberg 2.0' was full of vitriolic calls for the killing of political officials. Posts like 'All those involved and complicit need to be rounded up, tried for those crimes, and given no less than the death penalty' were prolific.[9]

Those subject to public death threats and public harassment struggle to stop this behaviour. One New Zealand academic who researches and publishes on the extreme-right has been subject to public threats calling for him to be hanged,[10] and these public threats have led to the harasser's social media community joining the harassment campaign against him.[11] A prolific science communicator, too, was named on the 'Nuremberg 2.0' site, where users publicly called for her to be killed.[12] Neither of these high-profile academics were able to seek justice for the public threats made against them, because laws are not fit for the contemporary hate and harassment landscape. The police, the chief censor, and the Domain Name Commission (who control the .nz domain the website used), all lamented that they were unable to take action to shut down the 'Nuremberg 2.0' website because the legislation did not exist to allow them to do so.[13] While threats do not always indicate that someone will commit violence, and people who commit violence do not always make threats beforehand, social media platforms hosting violent communities of hate like Nuemberg 2.0, Gab, 4chan, and 8chan radicalise their users, facilitate anger that motivates action, and create social endorsement of such action.[14] A thriving and unimpeded ecosystem of hateful social media communities nurtures these sentiments and intentions, and for that reason, we must pay close attention to them.

[8] Enrique Eguren, 'Understanding Death Threats Against Human Rights Defenders'. *Protection International,* 2021, pp. 2-3.

[9] Manhire, 'Inaction on NZ 'Nuremberg' Site'.

[10] Martyn Bradbury, 'Siouxsie Wiles Gets a Pittance and Byron Doesn't get Protection – All Public Academics and Researchers Will Suffer'. *The Daily Blog*, 13 July 2024;

Nadine Roberts, 'What it Took to Stop Harassment From a White Supremacist'. *Stuff*, September 29 2023.

[11] Roberts, 'What it Took to Stop Harassment'.

[12] Emma Stanford, ''Wrong on Many Levels': Disinformation Researcher Criticises University of Auckland's 'Silencing' of Siouxsie Wiles'. *Radio New Zealand,* 14 November 2023.

[13] Manhire, 'Inaction on NZ 'Nuremberg' Site'.

[14] Brian Ballsun-Stanton, Lise Waldek, Julian Droogan, Debra Smith, Muhammad Iqbal, and Mario Peucker, 'Mapping Networks and Narratives of Online Right-Wing Extremists in New South Wales: Final Report'. *Macquarie University, Department of Security Studies and Criminology* 2020, pp. 30, 32.

Fringe, violent social media communities and the threats of violence against political staff that result therefrom demands a response in order to protect the quality and diversity of our democracy. Giving groups power to take action on these issues, though, requires legislative change, which itself requires a thorough understanding of the exact shape of the problem. This article first locates the problem of online violence-speech within a broader international context and considers other relevant studies documenting hate speech directed at elected officials and politicians. The article then documents a specific study undertaking in New Zealand, analysing the nature of the communications threatening and inciting violence against MPs Zealand, before identifying some possible options to address the nature of communications within these violent fringe social media communities.

INTERNATIONAL INSIGHTS INTO ONLINE DEATH THREATS AGAINST PARLIAMENTARIANS

International studies into violence-speech and online death threats against politicians provide insights into the nature of this phenomenon and the range of legal and non-legal options that may provide effective responses. For example, in 2021, Peter Eisler, Jason Szep, Linda So, and Sam Hart conducted research for Reuters into the form of death threats against political officials and election workers following Donald Trump's 2020 election loss.[15] They collected 850 threatening messages through interviews, online post collection, and public records requests. Only 13% were 'prosecutable'. In the remaining 87% of threats, researchers say, the 'harassers call for violence without threatening to act themselves'.[16] Even utterances like 'You and your family will be killed very slowly' were 'unprosecutable'.[17] The researchers indicate that even though threats may be directed towards an individual, speakers often indicate no personal intent. The lack of personal intent does not, of course, reduce the psychological harm incurred by the victim. Their research focuses primarily on the legality of the threats made against officials- that being their 'true intent'. In the United States, a death threat is illegal when it constitutes a 'true threat', rather than 'political hyperbole' or 'emotionally charged rhetoric'.[18]

[15] Peter Eisler, Jason Szep, Linda So and Sam Hart, 'Anatomy of a Death Threat'. *Reuters* December 30, 2021.

[16] Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[17] Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[18] Constitution Annotated. 'Amdt 1.7.5.6 True Threats'. Accessed at: https://constitution.congress.gov/browse/essay/amdt1-7-5-6/ALDE_00013807/.

Reuters' legal scholars sorted Eisler et. al's data into likely legal or potentially illegal on that basis. In the former category were utterances like 'patriots are coming for you', 'This woman should be strung up in the goddamn state capitol', and 'if your children can't be tried for treason like you, then I pray that your children get cancer. And die a slow, miserable death. And you have to watch'. In the latter category were utterances such as 'let's burn her house down and kill her family', 'they will be hung for treason', and 'prepare for the gallows'.[19]

The lexical difference between many of these examples is slight. While 'this woman should be [hung] at the state capitol' is likely protected, 'they will be hung for treason' likely is not. Indeed, it seems that the former may be more indirect, using the indefinite modal verb 'should' being perhaps more permissible than the definite modal verb 'will'; one indicating a desire and another a sense of certainty and intent. This is mirrored in the 'potentially illegal' utterances 'let's burn her house down' and the imperative sentence 'prepare for the gallows'.[20]

In a 2022 study, Bjørgo et. al considered violent threats made against Norwegian politicians. Their study advances the thesis that when threats occur against a background of violent attacks on politicians, threats become acts of political violence in themselves.[21] Asking Norwegian politicians and party youth-wing members about their experiences of online and in-person harassment, the study's authors found that while online threats were less common than online harassment, indirect threats were received far more frequently than direct threats (the former being experienced by 40% of parliamentarians in 2021, and the latter by 28%).[22] In this study, threats were measured as threats to harm the individual or those close to them,[23] but the difference between direct and indirect threats was not specified.[24] If we take that 'direct' and 'indirect' track broadly onto the 'prosecutable' and 'not prosecutable' distinction outlined in Eisler et. al, we see again that indirect, non-prosecutable threats against politicians occur at a significantly higher rate than the 'prosecutable' direct threats. This disparity, of course, does

[19] Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[20] Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[21] Tore Bjørgo, Anders Ravik Jupskås, Gunnar Thomassen, and Jon Strype, 'Patterns and Consequences of Threats Towards Politicians: Results from Surveys of National and Local Politicians in Norway'. *Perspectives on Terrorism* 16 (6) 2022, p. 101.

[22] Bjørgo, Jupskås, Thomassen, and Strype, 'Patterns and Consequences of Threats,' pp. 105-06.

[23] Bjørgo, Jupskås, Thomassen, and Strype, 'Patterns and Consequences of Threats,' p. 103.

[24] Bjørgo, Jupskås, Thomassen, and Strype, 'Patterns and Consequences of Threats,' p. 105.

not mean the victims of such threats experience lower levels of psychological damage as a result.[25]

The 2022 Threats and Harassment Against Local Officials Dataset, created by a coalition of groups including Princeton's Bridging Divides Initiative and the Anti-Defamation League, analysed approximately 3,000 unique incidents of threats and harassment against United States local (not federal or state) officials.[26] In this study, the authors defined threats as utterances communicating an 'intention to inflict pain, injury, damage, or hostile action' on an individual because of their 'role as a public official', that would 'reasonably cause' the victim to fear for their or their family's safety.'[27] The dataset counts both legal and illegal threats. This approach can be contrasted with an approach that focuses on 'harassment', which intends to intimidate, threaten, or terrorise the victim.[28] The group utilised human coding, each incident being coded by two researchers after it was approved by two other researchers for eligibility.[29] While the researchers did not divide threats into legal and illegal threats, they did sort them by topic. Of the threats identified, 34% were threats of death or gun violence,[30] while 18% were threats to perform multiple acts of violence, and 14% were ambiguous about the nature of the violence. Other specified threats were in the minority.[31]

In the context of the NZ study introduced below, it is important to pay attention to death threats made within communities of hate, as well as threats made directly to victims, as research shows threats made within this context amplify the group members' desire and endorsement of violent acts. For example, research suggests group posts with motivational 'collective action' frames (that is, posts that call for or acknowledge a need for group action to address a grievance) prepare people for offline mobilisation. These kinds of posts promote political violence as in-group endorsed, morally justified, legitimate ways to pursue a 'common

[25] Bjørgo, Jupskås, Thomassen, and Strype, 'Patterns and Consequences of Threats,' p. 113.

[26] Joel Day, Aleena Khan, and Michael Loadenthal, 'Threats and Harassment Against Local Officials Dataset'. *Bridging Divides Initiative* 2022, p. 4.

[27] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 11.

[28] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 11.

[29] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 13.

[30] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 5.

[31] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 22.

cause'.[32] When members of the in-group repeatedly identify existential threats, members are more likely to endorse violence. Bailard et. al calls this phenomenon 'moral convergence'.[33]

In their study of over 500,000 posts on 'Proud Boys' Telegram channels, Bailard et. al found that increases in the number of posts with a motivational frame correlated with increased instances of Proud Boys' violence offline,[34] while posts with a prognostic frame- a frame specifying violent solutions to group problems- did not.[35] This sentiment is repeated in Jess Berentson-Shaw and Marianne Elliott's paper Online Hate and Offline Harm. These authors describe the phenomenon of the false consensus effect, where those with extreme views believe their views are more widely shared than the facts suggest.[36] This suggests that if an individual spends time in a violent social media community that openly discusses the desire or necessity for violence, that individual's belief that political violence is warranted, acceptable, or even necessary becomes falsely normalised. Above all, even when violence-speech and death threats are not received by victims themselves, these kinds of threats encourage, normalise, and legitimise the use of violence against officials. This has been acknowledged by counterterrorism scholarship, which points out that 'Lone Wolf' actors are never truly alone, as they often have online communities of hate that radicalised, educated, and incited them to commit their acts.[37]

In light of these considerations and past studies, it is possible to predict that a majority of posts endorsing or calling for violence against MPs made in violent fringe social media communities in jurisdictions like New Zealand and Australia are 'non-prosecutable'. At first glance, many seem to be. While the site is inaccessible now, journalist Toby Manhire archived some 'Nuremberg 2.0' posts in his article on the site: '[d]eserves the rope to be hung till death and nothing more or less will be sufficient' says one commenter. '[T]he Govt. members should face

[32] Catie Bailard, Rebekah Tromble, Wei Zhong, Frederico Bianchi, Pedram Hosseini, and David Broniatowski, ''Keep Your Heads Held High Boys!': Examining the Relationship between the Proud Boys' Online Discourse and Offline Activities'. *American Political Science Review* 2024, pp. 2, 14.

[33] Bailard, Tromble, Zhong, Bianchi, Hosseini, and Broniatowski, ''Keep Your Heads Held High Boys!,' p. 14.

[34] Bailard, Tromble, Zhong, Bianchi, Hosseini, and Broniatowski, ''Keep Your Heads Held High Boys!,' pp. 9, 12.

[35] Bailard, Tromble, Zhong, Bianchi, Hosseini, and Broniatowski, ''Keep Your Heads Held High Boys!,' p. 15.

[36] Jess Berentson-Shaw and Marianne Elliott, 'Online Hate and Offline Harm'. *The Workshop* 2019, pp. 14-15.

[37] Royal Commission of Inquiry into the Terrorist Attack On Christchurch Mosques on 15 March 2019, 'Part 2: Context'. *Royal Commission of Inquiry into the Terrorist Attack On Christchurch Mosques on 15 March 2019* 1 (1) 2020, p. 109.

the death penalty' says another.[38] The comment '[a]ll those involved and complicit need to be rounded up, tried for these crimes and given no less than the death penalty' mirrors Eisler et. al's observation that many 'non-prosecutable' threats involve calls for the use of legal means.[39] Just as the vast majority of threats examined by Eisler et. al and Day, Khan, and Loadenthal in the *Threats Against Local Officials Dataset* were non-prosecutable; so too was Nuremberg 2.0 and the threats posted thereupon immune to any legal recourse by Aotearoa's police, security, and cybersecurity officials.[40]

Drawing upon the outcomes of the studies surveyed above, I argue that it is possible to see two kinds of threats emerge in Aotearoa's violent fringe social media communities. First, there will be the 'direct' or 'prosecutable' threats: threats made against a distinct individual that indicate personal intent to commit the act. Second, we can expect to see 'indirect' or 'non prosecutable' threats: threats made to a vague class of individuals that endorse or incite some act of violence. These indicate four distinct states a threat can be in: it can be direct and personal- threatening an individual with language that demonstrates a personal intent to commit violence, or it can be direct and impersonal- threatening a particular individual by way of encouraging others to carry out the desired violence. Threats may also be impersonal and direct- made against a group of unspecified individuals with personal intent, or impersonal and indirect- made against a group of unspecified individuals with the intent of encouraging others to carry out the violence. As seen before, these distinctions can be understood through a lexical and semantic analysis of posts: a consideration of their modal verbs, singular or plural personal pronouns, and more.

Scholars have endorsed discourse analysis as an effective method for analysing language's justifying effect on violence. Through 'microdetails', people morally situate themselves in regards to the actions they endorse. They allow speakers and groups to claim or negate responsibility, establish collective responsibility, or implicate others in their described acts.[41] Finally, we can expect that the majority of these threats will be in the 'indirect' 'non prosecutable' category. That is, any threat that is not personal and direct. Should this be the case, which the case of the Nuremberg 2.0 website indicates it may be, it will demonstrate a significant need to tailor response strategies to communities that create violent threats in this

[38] Manhire, 'Inaction on NZ 'Nuremberg' Site'.

[39] Manhire, 'Inaction on NZ 'Nuremberg' Site'; Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[40] Manhire, 'Inaction on NZ 'Nuremberg' Site'.

[41] Robin Conley Riner, 'Language and Violence'. *Oxford Research Encyclopedia of Anthropology* 2023, p. 12.

form. With background and expectations established we may move onto the design of this study.

ANALYTIC FRAMEWORK

To understand the makeup of violence-speech and threats against New Zealand's politicians and political officials, an analysis was performed on public violence-threats made against these groups on extremist fringe social media site Gab. Gab was chosen for a number of reasons. First, because it hosts the most New Zealand extremist activity of any non-mainstream social media platform.[42] Second, because of its public accessibility; one does not need an account to see posts on Gab. Third, because of its relaxed speech rules. Gab is (in)famous for hosting and radicalising terrorists,[43] and their founder has forthrightly refused to implement speech restrictions on the platform.[44] Fourth, because Gab hosts topic-specific boards, which makes finding discourse related to a particular country very easy. 'Most popular' posts (sorted by highest number of comments and reactions) on 'New Zealand Politics' groups, or groups similar thereto, were analysed to capture sentiment towards Aotearoa's politicians specifically. Many studies of this type use large API 'scraping' or 'snowballing' models to acquire content for analysis and computer methods for coding,[45] but due to technological restrictions and the semantic specificity of violence-talk and threats,[46] manual data-gathering was performed. When threats of violence were noticed, they were captured, archived, and manually coded. Given the observational nature of this study, no independent variable is manipulated, but the dependent variable for quantitative measurement was the category into which each instance of violence-speech was coded: direct or indirect, and personal or impersonal.

In this study, any post endorsing violence against any current or past Member of Parliament, as well as parliamentary or electorate staff was included for analysis, whether or not that violence was indicated to be in pursuit of a political goal, and whether or not the speech would reasonably cause the victim to dear for their or their loved ones' safety. This includes both explicit 'death threats' and endorsements of violence that are usually protected. Terms like

[42] Milo Comerford, Jakob Guhl and Carl Miller, 'Understanding the New Zealand Online Extremist Ecosystem'. *Institute for Strategic Dialogue* 2021, p. 10.

[43] Rita Katz, 'Inside the Online Cesspool of Anti-Semitism That Housed Robert Bowers'. *Politico Magazine*, 29 October 2018.

[44] Christopher St.Aubin and Galen Stocking, 'Key Facts About Gab'. *Pew Research Center,* 24 January 2023.

[45] Ballsun-Stanton, Waldek, Droogan, Smith, Iqbal, and Peucker, 'Mapping Networks and Narratives,' pp. 11, 14.

[46] Riner, 'Language and Violence,' 9.

'violence-speech' 'death threat' and 'violent threat' are generally interchangeable in this very broad context, but they are united in their communication of intention, encouragement, or positive recognition of hostile action taken against some individual.[47] A definition of violence-speech for the purposes of this study must be broad by necessity so the broad milieu of violence-speech can be effectively understood with a coding framework that operationalises speech-features for regulation or response.

Criteria for each coding category are as follows: First, a personal threat indicates personal intention, whereas an impersonal threat indicates incitement, personal endorsement, or agreement with acts of violence. 'I will x' or 'I want to give her x' indicates personal intent primarily with the personal pronoun 'I'. Utterances like 'She deserves x', 'someone ought to x her' or utterances of approval to instances of violence-speech like 'true that!' are impersonal, as they do not indicate any intent by the speaker to act, but personal endorsement or acceptance of violence. The second measure employed is whether some threat is made directly or indirectly. A direct threat is made against a specified individual or a group of specified individuals. For example, 'she deserves x' is a direct threat as the singular pronoun 'she' indicates a specific individual, specified by the context of surrounding utterances. Direct threats also include utterances like 'John Doe deserves x', 'I will x John Doe', or 'every member of Party y must be x-ed'. Finally, an indirect threat captures threats made against an unspecified group or class of individuals. An indirect threat may look like 'people like that deserve x' or 'I will x any politician who denies our freedoms'. 4 possible coding options were available for threats encountered in this study, then: Impersonal Direct (ID) 'John Doe deserves to be hanged', Personal Direct (PD) 'I will hang John Doe', Impersonal Indirect (II) 'people who deny our rights deserve to get hanged', and Personal indirect (PI) 'I will hang anyone who denies us our rights'. After data collection, the prevalence of each kind of threat is used to generate options for online violence prevention strategies.

THE NATURE OF ONLINE DEATH THREATS: OUTCOME.

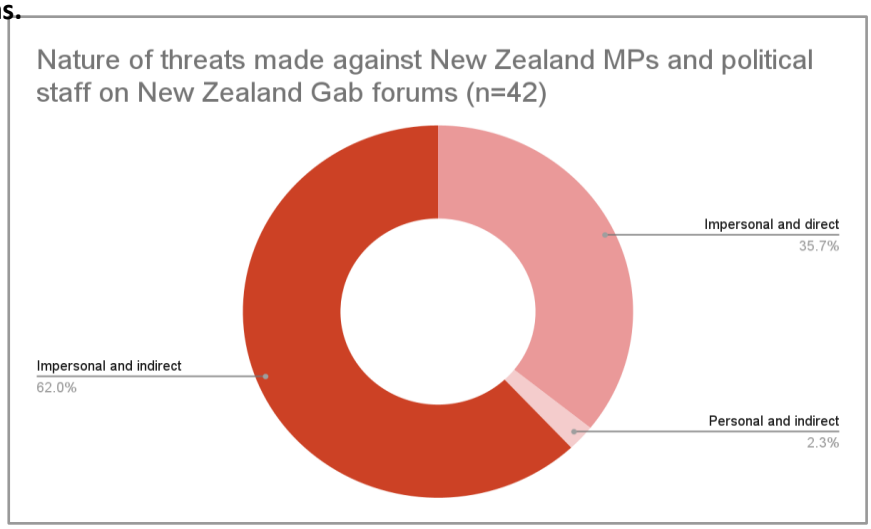
The Gab Boards New Zealand Politics (2,600 members) and New Zealand Gab (1,500 members) were observed. On these boards, the top 10 most popular posts (measured by number of reactions and comments) were selected for analysis. A total of 810 posts were analysed. This includes 20 'parent' posts and 790 comments. Of the posts, 5.1% (42), or every 1 in 20 posts, were identified as violent threats against New Zealand political figures. Zero personal and direct threats were detected, while 15 impersonal and direct threats were detected (35.7%), 1

[47] Day, Khan, and Loadenthal, 'Threats and Harassment Against Local Officials,' p. 11.

personal and indirect threat was detected (2.3%), and, reflecting the hypothesis, 26 (61.9%) of the analysed threats were impersonal and indirect (fig.1).

Of the Gab posts analysed, death threats occurred most often on posts discussing Aotearoa's COVID-19 pandemic response. Threats regarding this topic made up 80.9% of analysed threats (34 posts). The New Zealand Politics board attracted significantly more threats (76.2% of total threats made) than the board New Zealand Gab, particularly on posts about ex-prime minister Jacinda Ardern. Death threats and violence-speech under 'parent' posts concerning Ardern across both boards made up 71.4% of total threats, whereas threats made underneath posts regarding Ardern on the New Zealand Politics board alone represented 87.5% of that board's total threats (n=34). This major discrepancy in the subject of death threats and violence speech is to be expected, as surveys have shown female politicians are subject to a significantly higher amount of abuse than their male colleagues. Every-Palmer, Hansby, and Barry-Walsh found in their recent survey of MPs' experiences of abuse that female MPs reported higher levels of abuse than their male colleagues on nearly every measure, including 46.9% experiencing threats of physical violence and 34.4% reporting receiving death threats, compared to male MPs who reported these experiences at a rate of 30% and 15% respectively.[48]

Figure. 1 The distribution of threat-types against MPs and political staff on top New Zealand GAB forums.



[48] Every-Palmer, Hansby, and Barry-Walsh, *Stalking, Harassment, Gendered Abuse, and Violence*, p. 5.

Paradigmatic examples are provided in order to indicate the nature of threats within each category. No personal and direct threats were recorded, so no paradigmatic examples could be provided from the source. A personal and indirect threat would have used singular personal pronouns such as 'I', 'me', 'my', to indicate singular, personal intent. Group pronouns such as 'we' and 'our' were taken as impersonal, given that the person making the threat was typically making it on behalf of some unspecified group. A personal, indirect threat found in the sample was 'I will vaccinate lefties [sic] with [a handgun]'. Personal intent is communicated with the personal pronoun 'I' and reinforced with a definite modal verb 'will'. Given the unspecified target of the politically left-wing ('lefties'), the threat is categorised as being indirect; no specific target is indicated.

In the impersonal direct category, we see examples such as 'hang her!' and 'she and others behind the murderous tyranny will be tried, convicted and executed for treason'. In each case, the singular personal pronoun 'she' is used to specify the MP targeted by the threat, while each poster does not personally implicate themselves in the acts they describe. In the first sample, an imperative sentence is used. While this indicates personal endorsement and personal desire to see such an act, it does not explicitly implicate the speaker in the act. In the second example, there is little connection between the poster and the specified act. While his personal endorsement of the act is implicit rather than explicit (he says 'hanging will happen' rather than 'hang her!'), he contributes to the fantasy of violence against politicians with a positive, celebratory tone; he describes the goals of his group to see the death of a specific politician.

Finally, impersonal and indirect threats neither specify personal involvement in the violent act, nor indicate a specific target for the violence. This kind of threat merely expresses a desire or an approval for violence against some political enemy. Examples include: 'we must kill our criminal leaders' and 'they to [sic] will all be hanged for treason and crimes against humanity soon'. In the impersonal and indirect examples, we see a normative, encouraging valence that attempts to incite in the first sample with a collective pronoun and strong modal verb 'we must', while the poster in the second sample mirrors the impersonal direct sample in merely describing what 'will' happen. In each case, the speaker distances themselves from the acts described by either locating themselves as part of a group or removing themselves altogether, giving a prophetic, hopeful vision for the future. These samples also do not indicate any specified individual, rather presenting a broad class of individuals: 'our leaders' or 'they', which in the 'parent' post is specified as the 'ruling class'. Now that the nature of each category and the violent communications therein are specified, the implications of this study may be understood more thoroughly.

The hypothesis, we see, is strongly supported. The results indicated by this short study align with results found in other political environments, such as the United States,[49] indicating that indirect and impersonal death and violence-threats have a major role to play in communities of hate, creating an environment where violence is normalised, accepted, and endorsed as part of the social lexicon. [50] Further, the saturation of impersonal death threats in this community demonstrates that the majority of this problematic speech appears to be 'incitory in nature', that is attempting to incite violence. Impersonal threats do not communicate personal intent, instead functioning to encourage others to commit acts of violence. The tools parliament has at its disposal for addressing the harms caused by this kind of public speech- particularly as it pertains to the incitement of violence- are considered below.

LEGISLATIVE RESPONSES COMPARED ACROSS THE TASMAN

Individuals subject to these threats have emphasised that the current legislative landscape is unequipped to deal with the kind of death threats we most frequently see in online communities- threats that incite others to commit the violence. Remembering the sentiment expressed by the agencies unable to address the 'Nuremberg 2.0' website, here we investigate Aotearoa's online communication legislation, comparing it to equivalent legislation in Australia, to understand the potential and precedent for improvement.

New Zealand's *Harmful Digital Communications Act 2015* (NZ) (HDCA) is intended to 'deter, prevent, and mitigate harm caused to individuals by digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress'.[51] The HDCA contains 10 Communication Principles that must be observed by internet users. Users who breach these principles can be investigated and addressed by courts.[52] While the principles prohibit the incitement to online harassment and incitement to suicide, no such principle exists to prohibit the incitement to offline violence.[53] Further, individuals may not bring any person to court under the HDCA unless they have attempted mediation,[54] a process

[49] Eisler, Szep, So, and Hart, 'Anatomy of a Death Threat'.

[50] Bailard, Tromble, Zhong, Bianchi, Hosseini, and Broniatowski, ''Keep Your Heads Held High Boys!,' pp. 2, 14; Berentson-Shaw and Elliott, 'Online Hate and Offline Harm,' pp. 14-15.

[51] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 1 s 3.

[52] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 1 s 6 (1-2), pt 1 sub-pt 2 s 12 sub-s 12.2(a).

[53] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 1 s 6(1).

[54] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 2 s 12 (1), pt 1 sub-pt 2 s 13 sub-s2(a).

which one academic subject to public death threats has described as 'dangerous', since the process satisfies the harassers, showing that 'they are having an effect'.[55]

Under the HDCA, it is an offence to make a communication with the intention of causing harm against an individual,[56] but it is not an offence to make a communication with the intention (or effect) of bringing about offline harm against an individual. Criticism has been brought against the HDCA that is not fit for purpose in a landscape where death threats are made in public forums, rather than directly to individuals. As the same academic notes, the Act 'seems to have been written for teenagers experiencing cyberbullying'.[57] The 2020 Royal Commission Inquiry into the Christchurch Mosque attacks similarly criticised the Act's requirement for offending speech to specify a victim, noting that charges could not be brought against individuals who 'denigrate groups rather than particular individuals'.[58]

Results of this Gab study highlight the significance of this gap in the existing law. Most instances of incitement to violence (i.e. impersonal threats) were indirect; against unspecified groups like 'the elites' and 'our leaders'. However, death threats and incitement against the groups of interest to the Christchurch Royal Commission report (groups with a 'protected characteristic') were not measured in this study. Equivalent pieces of legislation in our pacific community might point to options for reform for Aotearoa, to protect both our MPs and our other vulnerable communities from the harm from public online death threats.

Australia's Basic Online Safety Expectations (BOSE) set out in the Australian *Online Safety Act 2021* (Cth) serve a similar function to Aotearoa's Communication Principles set out under the HDCA. However, the BOSE more thoroughly and specifically address online violence and abuse. For example, pursuant to sections 45 and 46 of the BOSE, social media service providers must minimise the amount of content that 'promotes', 'incites', or 'instructs in abhorrent violent conduct'.[59] Service providers also must have clear and accessible means by which users can report content that 'promotes', 'incites', or 'instructs in abhorrent violent conduct'.[60] Aotearoa's Communication Principles do not contain prohibitions of this type. While they recognise the harm that can be done by publicly disclosing sensitive personal facts or spreading

[55] Roberts, 'What it Took to Stop Harassment'.

[56] Harmful Digital Communications Act 2015 (NZ) pt 1 sub-pt 2 s 22 sub-pt 1(a).

[57] Roberts, 'What it Took to Stop Harassment'.

[58] Royal Commission of Inquiry into the Terrorist Attack On Christchurch Mosques on 15 March 2019, 'Part 9: Embracing Social Cohesion and Diversity'. *Royal Commission of Inquiry into the Terrorist Attack On Christchurch Mosques on 15 March 2019* 3 (1) 2020, p. 712.

[59] *Online Safety Act* 2021 (Cth) pt 4 sec 45 div 2 s 46 sub-s 1(c) v, vi, vii.

[60] *Online Safety Act* 2021 (Cth) pt 4 sec 45 div 2 s 46 sub-s 1(e) vi, vii, viii.

false allegations, they do not recognise the harm done to an individual through threats that incite others to commit violence against them- the kind so prevalent on New Zealand Gab forums.

A major difference between the *Online Safety Act 2021* and the HDCA is that the former only addresses what platforms can and cannot host, while the HDCA legislates against what individuals can post online. Laws regulating online platforms are valuable, but they cannot alone address the problem of online incitement turning into offline violence, or fear thereof. When people get censored on one platform, they simply move to another or create their own, creating a cat-and-mouse game of hateful platforms. Indeed, Gab was established as an alternative to X (formerly Twitter) for this very purpose.[61] A strength of the HDCA is that it focuses on holding individuals accountable for the violent and threatening communications they post or publish online. We see both a model and a precedent for improving personal accountability for violent online communications in the Australian legislation, too, which includes provisions directed at prohibiting certain online communications containing threats of violence directed at groups. Australia's Criminal Code Act 1995 prohibits individuals from urging (and intending their urging to cause) 'a group' to commit violence 'against a group' with a protected characteristic.[62] A similar law exists prohibiting someone from urging a group to commit violence against an individual by virtue of that individual's protected characteristic.[63]

These provisions remain imperfect, though. First, being a political official is not a protected class under the Australian law (and indeed it ought not be to protect genuine criticism and dissent), so these laws would not necessarily prevent communications that incite violence against MPs or political staff as a group. Second, these sections of the legislation do not specify their application to online communications. Nonetheless, these prohibitions in tandem with the BOSE create the possibility for agencies to take action against sites saturated with impersonal indirect, or impersonal direct threats of violence and murder against politicians with a specific ideological adherence, given the inclusion of 'political opinion' as a protected characteristic.[64]

Aotearoa's equivalent legislation, the *Crimes Act 1961* (NZ), does not seem as equipped to deal with situations where a group or the public is incited to commit an act of violence against a

[61] St.Aubin and Stocking, 'Key Facts About Gab'.

[62] *Criminal Code Act* 1995 (Cth) ch 5 p 5.1 div 80 sub-div C 80.2A sub-s 1(a-c).

[63] *Criminal Code Act* 1995 (Cth) ch 5 p 5.1 div 80 sub-div C 80.2B sub-s 1(a-d).

[64] *Criminal Code Act* 1995 (Cth) ch 5 p 5.1 div 80 sub-div C 80.2A sub-s 1(c), 80.2b sub-s 1(d).

group or an individual in circumstances where the incitement occurs through an online post, and it is not clear whether the violent act or acts may in fact be carried out. The Act renders someone party to, and therefore guilty of, [65] an offence they incited if the offender was likely to or actually did commit the offence.[66] The likelihood of the offence occurring likely rules out all online group communications, given that the inciter has no means for determining how likely or capable their audience is to commit that offence. The *Crimes Act* also contains a provision against inciting murder, but it pertains to individual-on-individual communication rather than impersonal acts of incitement to a group that were common in the above case study and are present on other social media platforms.[67]

The above study shows that the *Crimes Act* and the HDCA are ill-equipped to handle the phenomenon of public 'hit lists' like 'Nuremberg 2.0' and public online incitement to violence against political officials. Including provisions against the 'promotion', 'incitement' or 'instruction' to commit violent acts in the Communication Principles of the HDCA may open up avenues for individuals to seek justice when there has been a 'serious' or 'repeated breach' of the Communication Principles.[68] There is also a significant and precedented opportunity, when we compare the NZ *Crimes Act* to the Australian *Criminal Code Act 1995* (Cth), to include provisions against group or public 'promotion', 'incitement' or 'instruction' to commit violent acts against individuals or groups. However, using the HDCA's infrastructure to achieve this goal could result in accountability both for social media platforms and for the individuals who make 'serious' and 'repeated' incitement and death threats on unmoderated online platforms like Gab.[69]

CONCLUSION

Hate and violent threats against Members of Parliament and their staff is on the rise, and social media has a significant role to play in this phenomenon. It is not just the direct threats we ought to be concerned about, though; we must pay attention to the online communities that ferment and incite this hatred. Taking a focus on one of New Zealand's largest, publicly accessible extremist social platform Gab, it was shown that death threats against politicians make up over 5% of posts, with the majority inciting others to commit the desired violence. If this is the case

[65] *Crimes Act* 1961 (NZ) pt 4 sub-pt 66 sub-s 1(d).

[66] *Crimes Act* 1961 (NZ) pt 4 sub-pt 70(1).

[67] *Crimes Act* 1961 (NZ) pt 8 sub-pt 174.

[68] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 2 s 12 sub-s2(a).

[69] *Harmful Digital Communications Act* 2015 (NZ) pt 1 sub-pt 2 s 12 sub-s2(a).

across other online extremist communities, there is a clear need for legislative solutions. One legislative solution explored in this paper was an addition to the communication principles set out in the *Harmful Digital Communications Act 2015* (NZ) that prohibits communications inciting a group to violence, but more possibilities are open to lawmakers and policy makers in New Zealand, such as an extension of the definition of 'objectionable' content in the *Films, Videos, and Publications Classification Act 1993* (NZ), or a widening of the 'racial disharmony' clause in the *Human Rights Act 1993* (NZ) to include all protected groups.

This study was small, and there were several limitations. Primarily, replacing or supplementing the single junior researcher with a more experienced researcher would yield broader, higher-quality results. The small number of posts analysed (n=810) may not have produced a representative sample, and the qualitative nature of single-researcher coding may have produced biassed results. Solutions for this issue involve multi-researcher coding and establishing a broader scope for data gathering, particularly the inclusion of more fringe social media platforms such as Telegram.

Future research into the nature of violent fringe social media communities that produce and foment violence against political figures ought to be conducted with a wider scope, and on a wider array of platforms, especially Facebook and X (formerly Twitter) where a majority of New Zealand's extremists congregate.[70] Eisler et. al's data gathering method of collecting death threats made directly to the offices of politicians and political staff could be repeated here, too, and coded based on their personal/impersonal nature to reveal the amount of personal responsibility for violence people are willing to take when not in the comfort and anonymity of their extremist community. Linguistic, political, and cultural variations on the personal/impersonal direct/indirect death threat trend could also be investigated to uncover whether cultural differences change the nature of death threats. Such an approach might reveal extra-legislative possibilities for addressing the issue of incitement to violence, including for example, cultural initiatives, like expansions of the Department of Prime Minister and Cabinets' Preventing and Countering Violent Extremism Fund.[71]

[70] Comerford, Guhl, and Miller, 'Understanding the New Zealand Online Extremist Ecosystem'.

[71] Department of Prime Minister and Cabinet. 'Preventing and Countering Violent Extremism Fund'. Accessed at: https://www.dpmc.govt.nz/our-programmes/national-security/counter-terrorism/preventing-and-countering-violent-extremism-fund.

One Member Seizing an Opportunity! A Case Study in the Transformation of Parliamentary Practice[1]

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Abstract: The second of December 2024 marked the 30th anniversary of the last sitting day of the Legislative Assembly of New South Wales during the 50th Parliament (1991-1995). The general election held in May 1991 resulted in a hung Legislative Assembly. This provided the political circumstances for the negotiation of a Memorandum of Understanding for a Charter of Reform (the Charter) between the government and key independent members. The Charter aimed 'to provide stable Government in return for broader accountability reforms 'to enhance Parliamentary democracy'. Practice in the Legislative Assembly prior to 1991 gives the context that shaped the motivation for one member to seize an unexpected opportunity to consolidate and transform parliamentary practice through the Charter. The Charter frames this case study by analysing the accountability measures implemented through sessional orders, amendments to the standing orders and practice. The analysis in this article will show how the Charter curbed and reversed the tide of executive dominance in parliament, demonstrating why 'procedure matters'. Most of the transformed parliamentary practice from the 50th Parliament remains. The evidence shows that the changes have strengthened the parliamentary means available to members to both hold the executive to account as well as to directly raise issues in the House. Looking back over the 30 years, the Charter has had an ongoing positive impact on the procedural culture of the Legislative Assembly.

INTRODUCTION

The 1991 general election for the 50th Parliament of New South Wales resulted in a minority government. The government, seeking to remain in office, entered negotiations with the four independent members who held the balance of power in the Legislative Assembly. This gave

[1] This article expands on the post *'Parliamentary Procedure and Responsible Government'* contributed to the online book forum, Benjamin B. Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People*, Hart Publishing, 2023. Accessed at: https://www.auspublaw.org/blog/2024/6/parliamentary-procedure-and-responsible-government-responsible-government-and-the-australian-constitution-book-forum.

the independents a bargaining chip. In return for their support, the government agreed to a programme of reforms to both government administration and parliamentary procedure to enhance responsible government.

In the introduction to his book *Responsible Government and the Australian Constitution*[2] Benjamin B. Saunders distilled the essence of responsible government as:

> *the principle that the government is a creature of, and accountable to, Parliament, which is supposed to play a key role in scrutinising the actions of the executive and holding it to account.*[3]

The proposed programme of reforms to parliamentary practice and procedure aimed to redress the imbalance between the executive and parliament by targeting executive accountability measures and creating more opportunities for members in the parliament. The subject of executive accountability is a perennial theme for legislatures. Best parliamentary practice measures are transferrable, as those tried and tested in one jurisdiction are regularly adapted by other jurisdictions.

With the perspective of 30 years, this article highlights the Legislative Assembly of the 50th Parliament (1991-1995) with the central focus on the outcomes arising from the procedural reforms. The article will outline the source of the power inherent in parliamentary procedure, the context of the reform principles of the Charter of Reform, the specific reforms to the standing orders, their application and impact on procedure as sessional orders,[4] and their outcomes.

THE IMPORTANCE OF PARLIAMENTARY PRACTICE

In the article *Playing by the Rules*,[5] Philip Norton, the Director of the Centre for Legislative Studies, and a Member of the House of Lords, explores how parliamentary procedure has evolved and why the rules have endured,[6] and the 'institutional attributes which cannot be

[2] Benjamin B. Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People*, Hart Publishing, 2023.

[3] Saunders, *Responsible Government and the Australian Constitution A Government for a Sovereign People*, p. 2.

[4] Under Standing Order 364, approved February 2023 and previous standing orders, the Legislative Assembly may make sessional orders that override and amend existing standing orders or to provide for new practice and procedure. Sessional orders are temporary and only have force for the duration of the session in which they are adopted. They need to be re-adopted each new session.

[5] Philip Norton, 'Playing by the Rules: The Constraining Hand of Parliamentary Procedure'*, The Journal of Legislative Studies 7(3),* 2001, pp. 13-33. Accessed at: https://doi.org/10.1080/714003882.

[6] Norton, *Playing by the Rules*, pp. 21-24.

easily unpicked'.[7] He states that details in the rules are important and have consequences. He illustrates his argument with the examples of the Scotland and Wales Bill in 1977, the Wild Mammals (Hunting with Hounds) Bill in 1997 and the European Communities (Amendment) Bill (referred to as the Maastricht Bill) in 1992-93 as significant government legislation[8] that faced 'the constraining hand of parliamentary procedure'[9] in the House of Commons.

However, standing orders and practice are not set in stone. Norton adds that long established standing orders are adapted and amended over time. He concludes that while rules may not constrain government as some would like, nonetheless procedure is a constraint. Therefore, attention to detail is important as 'procedure matters'.[10]

The *Constitution Act 1902* (NSW) (the *Constitution*) provides the authority for the Legislative Assembly and the Legislative Council (the Assembly and Council respectively) to each 'prepare and adopt' rules and orders to 'regulate' the conduct and proceedings of the Houses.[11] The scope of the power is limited to matters internal to the Houses or matters permitted by other Acts to be regulated by the standing orders. However, it is with the stipulation that once adopted by the House, the standing rules and orders must be laid before the Governor for approval.

The *Constitution* does not dictate how the Houses are to conduct their functions. As one of the key functions of parliaments is to hold the executive to account it follows that the power to make standing rules and orders is a key element of the doctrine of responsible government. Rules and practice also evolve over time to redress any short comings, facilitate procedure to meet the challenges of new circumstances, adapt practices from other jurisdictions and to reflect the values, expectations, diversity and demographic changes in the membership of the House.

The last occasion a government had a majority in the Council was 1988. Since then, it has increasingly asserted itself against the executive through adopting new practice and standing orders. Likewise, the Assembly, arising from a hung House, had its own opportunity to

[7] Norton, *Playing by the Rules*, p. 21.

[8] Norton, *Playing by the Rules*, pp. 22-24. The Scotland and Wales Bill was not defeated but did not proceed when the vote on a timetabling motion for its passage was lost. The Wild Mammals (Hunting with Hounds) Bill was subject to procedural hurdles, as was the 'Maastricht Bil' before that bill's eventual passage. In more recent times the Brexit related legislation had a long and tortured passage as the politics played out within many procedural permutations.

[9] The subtitle of Norton's article.

[10] Norton, *Playing by the Rules*, p. 30.

[11] *Constitution Act (No. 32) 1902* (NSW) s 15.

transform parliamentary practice to strengthen the ability of members to make the executive more responsible to parliament.

JOHN HATTON

John Hatton was the independent member for South Coast in the Legislative Assembly from 1973 until 1995. Prior to entering parliament, he was engaged in community activism and joined the South Coast Villages Progress Association, before being elected to Shoalhaven Shire Council, and later becoming the Shire President.[12]

Frustrated at ministers not taking notice of representations made by the council Hatton decided to contest the 1968 general election for the seat of South Coast. Running against the sitting member, who was the Minister for Conservation, Hatton reduced the minister's majority. At the third attempt in 1973 Hatton won the seat when the incumbent minister chose not to seek re-election and, the opposition strategically did not contest the seat.

The obstacles, difficulties, and technicalities Hatton faced when running for election and then as a member strengthened his resolve to:

> *follow small procedural details of the political process, knowing that to ignore them would restrict his freedom to act or even silence him.*[13]

In Hatton's first term, on a crossbench of three independents, he was an outsider who took the opportunity to observe proceedings and gain an understanding of procedure, as:

> *Increased knowledge on parliamentary procedures allowed him greater influence in Parliament.*[14]

This knowledge and experience were to serve Hatton well. In those years the atmosphere of the Assembly was combative with 'no quarter asked, none given'. For instance, in the year of Hatton's election, the opposition dubbed the Leader of the House 'Stainless Steel'[15] for his proclivity to apply the guillotine[16] on the consideration of government legislation. Living up to the Assembly's sobriquet of the 'Bear Pit'.

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[12] Ruth Richmond, *The Little Bloke: an authorised biography of John Hatton, OA*, Master of Arts research thesis, School of History and Politics, University of Wollongong, 2007. See chapter 2: 'Making the Politician'. Accessed at: http://ro.uow.edu.au/theses/666.

[13] Richmond, *The Little Bloke*, p. 63.

[14] Richmond, *The Little Bloke*, p. 63.

[15] Frank Walker, *NSW Parliamentary Debates*, Legislative Assembly, 23 November 1973, p. 328.

[16] The guillotine is effected when a closure motion is carried at or after the time nominated in a notice given in the House by the executive to put the question on the nominated stages of legislation without any further debate.

Hatton was shaped by his near 20 years' experience in a House dominated by Liberal-Country, Labor and Liberal-National governments to build a reputation for integrity and probity. Noting the limited opportunities, he questioned how the House worked and how it might be improved. To him:

> *it seemed that parliamentary procedures were aimed directly at silencing those in opposition to government and particularly those outside the party structure*.[17]

Prime examples being non-answers in question time, questions on notice left unanswered, the use of the gag[18] and the guillotine and the lack of opportunities for backbenchers in the House.

Presciently, ten days before the 1991 election, Hatton was asked what he would do in the case of a hung House.[19] His answer was an outline of the principles that would go on to form the basis of the Charter.

THE HUNG HOUSE AND THE CHARTER OF REFORM

The election did result in a hung Assembly. The Greiner Liberal-National Party Government had won the most seats but lost its absolute majority. This prompted the government to explore assorted options to continue in office, including negotiating with the independent members: John Hatton,[20] Peter Macdonald,[21] Clover Moore[22] and Tony Windsor.[23]

[17] Richmond, *The Little Bloke*, p. 65.

[18] The carrying of the closure motion, 'That the question be now put' closes debate on the question then before the House, is known as the gag.

[19] Richmond, *The Little Bloke*, pp. 85-86.

[20] John Hatton, Member for South Coast, 1973 to 1995. Parliamentary service and other details accessed from https://www.parliament.nsw.gov.au/members/formermembers/.

[21] Peter Macdonald, Member for Manly, 1991 to 1995. Parliamentary service and other details accessed from https://www.parliament.nsw.gov.au/members/formermembers/.

[22] Clover Moore, Member for Bligh, 1988 to 2007 and Member for Sydney, 2007 to 2012. Parliamentary service and other details accessed from https://www.parliament.nsw.gov.au/members/formermembers/.

[23] Tony Windsor, Member for Tamworth, 1991 to 2001. Parliamentary service and other details accessed from https://www.parliament.nsw.gov.au/members/formermembers/. Windsor resigned from the Assembly to contest and win the seat of New England in the House of Representatives. Following the 2010 general election which resulted in a hung House he was at the centre of negotiations, along with two other rural independents, that led to support for the ALP to continue in government.

Windsor concluded his own agreement to support the government 'in return for a series of concessions to his electorate'.[24] While the other three, dubbed the 'unaligned' independents, took longer to negotiate the basis for their support to the government.

John Hatton is elevated as the 'one member' referred to in the title of this article because he was into his seventh and last term, Moore only her second term and Macdonald his first. This is not to dismiss the role of Moore and Macdonald. For without them Hatton would have had a diminished influence in the negotiations.

When negotiating with the government the three independents did not miss their opportunity! In return for voting with the government on appropriation, supply and no confidence motions (not involving corruption or gross maladministration), there was agreement on a *Memorandum of Understanding for a Charter of Reform* (the Charter).[25]

The preamble stated the aim of the Charter was 'to enhance Parliamentary democracy and open and accountable Government in New South Wales'.[26] To achieve this, the Charter proposed major accountability reforms, including:

- Constitutional reform and protection of the independence of the Parliament
- Reform of the Procedures of the Parliament
- Reform of the Legislative Process
- Scrutiny of the Election Process Guaranteeing Open and Accountable Government through strengthening the Freedom of Information Act and greater scrutiny of statutory authorities and Rights of Citizens through whistleblower protection, defamation law reform, scrutiny of the legal profession, strengthening the roles of the Ombudsman and the Auditor-General and third party rights.

The Charter also expressed concerns that:

> *the Legislature and the procedures of the Legislative Assembly provide too few opportunities for real participation by Members in the shaping and enactment of legislation, …and that much more can and should be done to enhance the ability of*

[24] David Clune and Gareth Griffith, *Decision and Deliberation The Parliament of New South Wales 1856–2003*, The Federation Press, 2006, pp. 540-541.

[25] *Charter of Reform*, October 1991. Accessed at: https://www.parliament.nsw.gov.au/researchpapers/documents/minority-governments-in-australia-texts-of-accor/3 nsw 1991.pdf.

[26] *Charter of Reform*, p. 1.

> *Members to make the Executive Government … more accountable to the Legislature.*[27]

Thus the Charter set out proposals to be trialled as sessional orders with a view to incorporating them in the standing rules and orders and becoming established parliamentary practice. The 'unaligned' independents also sought the conversion of the standing orders into plain English.[28]

The parliamentary aspects of the Charter are the focus of this article. It set in train the transformation of Assembly practice to improve its capacity to scrutinise the government and to increase opportunities for members. The Charter will frame this case study to assess its impact on parliamentary practice.

PROTECTION OF THE INDEPENDENCE OF THE PARLIAMENT

The first principle in the Charter stated the independence of the parliament was fundamental to ensuring 'the accountability of executive government to the parliament'.[29] The key elements of this section, implemented by statute together with additional support services for members, will show how the independence of the parliament has augmented responsible government.

Fixed Four Year Terms

On 31 October 1991, immediately after the Memorandum of Understanding was signed, Tim Moore, the Leader of the House for the Government, introduced the Constitution (Fixed Terms Parliament) Amendment Bill and the Constitution (Fixed Terms Parliament) Special Provisions Bill. This legislation fixed the date for general elections to be held on the fourth Saturday in March every fourth year.[30] Should a vote of no confidence ever be carried, provision was made for a 'baton change' to first test whether an alternate government could be formed.[31] These amendments have been entrenched in the *Constitution*.

The significance of the bills as stated by the Leader of the House, when introducing the bills and in reply to close the second reading debate was:

[27] *Charter of Reform*, p. 4.

[28] *Charter of Reform*, p. 7.

[29] *Charter of Reform*, p. 3.

[30] *Constitution Act (No. 32) 1902* (NSW) s 24A.

[31] *Constitution Act (No. 32) 1902* (NSW) s 24B (6).

- removing the capacity for the government of the day 'to manipulate the timing of an election to suit its own political purposes'[32] and
- to shift along the continuum 'from the present dominance of the executive' to greater accountability of the executive to the parliament.[33]

Constitutional Recognition of the Independence of the Presiding Officers and the Manner of the Election of the Speaker

The powers, functions and duties of the Speaker are constitutional, ceremonial, statutory, procedural, employer and setting the direction in the administration of the Department of the Legislative Assembly.[34] As well as having joint responsibility with the President of the Council in regard to the administration of the Parliament and including the 'control and management of the Parliamentary Precincts'.[35] However, the most visible function of the Speaker is presiding over meetings of the Assembly[36] for the orderly conduct of business, adjudicate on points of order, and otherwise intervene in proceedings to ensure order in the House.

As the office of Speaker is in the fiat of the government, some have seen the office as a consolation for those overlooked for ministerial appointment. At times there has also been criticism of partiality shown by some Speakers when in the Chair.

To overcome any concerns, the *Constitution* was amended by the Constitution (Amendment) Bill 1992,[37] introduced in the Assembly on 17 November 1992 by Premier John Fahey,[38] to recognise the Presiding Officers, being the Speaker and the President of the Council, 'as the independent and impartial representatives of those Houses'[39] to the executive. This Bill also

[32] Mr Moore, Second Reading Speech, 'Constitution (Fixed Term Parliaments) Amendment Bill,' *NSW Parliamentary Debates,* 31 October 1991.

[33] Mr Whelan, Second Reading Speech, 'Constitution (Fixed Term Parliaments) Amendment Bill,' *NSW Parliamentary Debates,* 31 October 1991.

[34] Russell D. Grove, editor, *New South Wales Legislative Practice, Procedure and Privilege*, Ligare Pty Ltd, 2007, pp. 25-32.

[35] *Parliamentary Precincts Act 1997* (NSW) s 7.

[36] *Constitution Act 1902* (NSW) s 31 (3).

[37] *Constitution Amendment Act 1992* (NSW) assent 8 December 1992.

[38] Second Reading Speech, *NSW Parliamentary Debates*, 17 November 1992, pp. 9004-9005.

[39] *Constitution Act 1992 (NSW)* s 22G (1) and 31 (1).

included an amendment to provide 'that the election of the Speaker be conducted by secret ballot'.[40]

The constitutional recognition of the Speaker as independent and impartial together with the method of election is significant for recognising and strengthening the position as above politics. Election by secret ballot also provides a veil for a potential cross-party vote for the speakership.

Power to Veto and Parliamentary Appropriation Legislation

Parliamentary oversight committees received the additional function to give 'approval of Cabinet nominations'[41] proposed to certain independent offices (such as the Commissioner of the Independent Commission Against Corruption and the Ombudsman among others). The amendment to the parliamentary oversight committees' legislation[42] maintains the right of the executive to propose an appointee but requires the minister to refer to the relevant committee the proposed appointee which could veto the proposed appointment.[43] This legislative provision is a further moderating consideration for the executive when proposing appointees for such positions.

The Charter also led to the Parliament's budget being removed from the annual appropriation for government services. Since 1993-94 The Legislature's appropriation is contained in a separate bill, the Parliamentary Appropriation Bill. This is symbolic as the Parliamentary Appropriation Bill is a cognate bill considered together with the Government's appropriation legislation.[44]

Additional Support Services for Members

Through the Charter, all private members were granted access to the services of the Office of the Parliamentary Counsel to draft their bills. The Parliamentary Counsel had previously been the exclusive resource of the executive. Together with subsequent procedural changes in the routine of general business, there was a proliferation of private members' bills. This enabled

[40] *Constitution Act 1992 (NSW)* s 31B.

[41] *Charter of Reform*, p. 4.

[42] Statutory Appointments Legislation (Parliamentary Veto) Amendment Bill 1992.

[43] For instance, the *Independent Commission Against Corruption Act (No. 35) 1988* s 64A.

[44] *Votes and Proceedings*, NSW Legislative Assembly, 7 September 1993, no. 25, entry 35.

backbenchers to place legislative proposals before the House requiring the executive to consider its policy response and on occasion introduce its own legislation later.

The government also agreed to provide the savings from the reduction in the membership of the Assembly from 109 to 99 members available to the Assembly[45] and to the parliament including expanding the research services of the Parliamentary Library available to members as well as improving information technology for members.[46] The enhanced capacity of research services and technological resources have been most helpful to members in the House.

REFORM OF THE PROCEDURES OF PARLIAMENT

The second principle of the Charter outlined the dual purposes of the reform to parliamentary procedure to provide more opportunities for members in shaping legislation and make the executive more accountable.[47] In each of the four sessions of the 50th Parliament the major elements of procedural reform were adopted as sessional orders.[48] These included:

- estimates committees
- legislation committees
- question time
- questions on notice
- broader opportunities for private members

How these sessional orders transformed the procedures and practice of the Assembly and their impact on both the Assembly and the parliament is discussed below. Legislation committees and other key elements referred to under the principle of reform of the legislative processes will be discussed in that section.

[45] *Charter of Reform*, p. 6.

[46] *Charter of Reform*, pp. 5 & 6.

[47] Charter of Reform p. 4.

[48] *Votes and Proceedings*, NSW Legislative Assembly: 19 September 1991, no. 13, entry 8, at pp. 176-182; 24 September 1991, no. 14, entry 7; 13 November 1991, no. 27, entry 16 at pp 343-352; 14 November 1991, no. 28, entry 47; 20 February 1992, no. 1, entry 12, at pp. 8-27; 24 February 1993, no. 1, entry 21, at pp.23-36; 16 September 1993, no.30, entry 22; 1 March 1994, no, 1, entry 23, at pp. 22-40.

Estimates Committees

Debate on the annual Appropriation Bill in the Assembly had become a stage for set piece speeches. Not just the Treasurer's but for the Leader of the Opposition in reply, ministers, shadow ministers and the parochial nature of private members' contributions. With a decline in committee of the whole stage of the bill the opportunity to closely examine the detail of the budget estimates for each ministry had become progressively inadequate.

Speaking in reply to the Premier's ministerial statement when tabling the Memorandum of Understanding for the Charter of Reform, John Hatton highlighted that:

> *Neither the Parliament nor an individual member of Parliament had a role in the formulation of a budget.*

and

> *The most important financial document each year, the Budget, has been a fait accompli and has never been amended, except by Executive Government, in my 18 years in this place.*[49]

To address this, a sessional order was adopted that during the second reading debate on the Appropriation Bill, a minister *shall* move a motion to appoint estimates committees for the purpose of examining and reporting on the expenditure proposed for each minister.

The Assembly when on to appoint estimates committees in each year of the 50th Parliament. The estimates committees met jointly with their counterpart Council committees for an allocated 3 hours to question each minister on their portfolios.

The creation of estimates committees has enhanced the parliament's ability to scrutinise the government beyond the second reading debate on the Appropriation Bill and the Budget Papers. At estimates committee proceedings members can directly quiz ministers along with senior departmental officers drilling down to seek explanations of expenditure in the past year and details of proposed expenditure for the coming year. The reports of each estimates committee are to be considered with the relevant clause of the Appropriation Bill during the committee of the whole stage.

Though the sessional order was incorporated into the standing orders approved in December 1994, under majority governments the Assembly has not appointed estimates committees since. This has not been to the detriment of responsible government as the consideration of the budget estimates is now vigorously undertaken by the estimates committees of the Council

[49] John Hatton, *NSW Parliamentary Debates*, Legislative Assembly, 31 October 1991, p. 4035.

over at least two rounds each year. In October 1996 the Assembly ceded the estimates function to the Council when it amended the standing order that on motion of a minister, the House *may* move appoint estimates committees.[50]

Question Time

For the general public question time is the most well-known means of holding the executive to account in the House.[51] However, by 1991 it was losing its effectiveness. Question time had a hard cap of 45 minutes while ministers were not limited by time when answering questions. Questions could be answered in any manner so long as the answer was generally relevant to the subject of the question. Ministers had got into the habit of giving longer answers to 'Dorothy Dix' questions set up for government backbenchers and then giving short shrift to questions asked by the opposition as if not worthy of consideration.

Question time was then also the only time for oppositions to move procedural motions to suspend standing orders for the urgent consideration of motions. The speaking time taken to establish the urgent necessity of a motion and any subsequent division came out of the 45 minutes. Consequently, considerable time set aside for questions was frequently eroded. Oppositions had to assess the benefit of highlighting an issue by seeking an urgency debate at the cost of further decreasing already limited opportunities to hold the government to account. This made question time ripe for reform.

Sessional orders, and subsequent standing orders, adopted during the 50th Parliament to nullify time wasting has maximised the time available for questions to strengthen the House's ability to hold the government to account. First, while question time remained at 45 minutes it was to continue until the answering (*not the asking*) of a minimum of ten questions. One supplementary question was permitted to be asked per question time, arising out of an answer, but only by the member who asked the original question. Supplementary questions count as one of the ten questions.[52] Question time was also preserved solely for questions as suspension motions were prohibited from being moved during question time.[53]

[50] Standing Order 284 (1), Legislative Standing Rules and Orders, amended October 1996.

[51] In the Parliament of the Commonwealth of Australia, the House of Representatives Standing Committee on Procedure has since 1992 reported three times on inquiries regarding questions and question time: *The Standing Orders governing Questions Seeking Information*, June 1992; *About Time: Bills, Questions and Working Hours*, October 1993; *A window on the House: practices and procedures relating to Question Time*, March 2021.

[52] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p. 347.

[53] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p. 345.

It is noted that the opposition proposed a series of amendments to this tranche of the sessional orders moved by the government, including two specifically related to Question time.[54] One was to increase the answering of questions to 14 during question time was unsuccessful.[55] As from time-to-time governments had also 'hijacked' question time, the opposition successfully moved an amendment, without division, to include the convention that the Leader of the Opposition receive the call to ask the first question at question time.[56]

Questions on Notice

A particular source of frustration for John Hatton and the opposition was that there was no compulsion for ministers to answer questions on notice. A sizeable number of questions remained on the paper unanswered[57] or answered in such an untimely manner that often rendered the information superfluous. To highlight the point some frustrated opposition members started asking questions on notice for the reasons for the delay in answering the substantive original question![58]

A sessional order, a form of which was incorporated into the standing orders, required answers to questions on notice to be submitted within 15 sitting days after the question was first published. If an answer is not submitted by the due date, on the next sitting day the Speaker is to inform the House and call on the minister to explain the reason for non-compliance. Then on each subsequent three sitting days until an answer is lodged. The embarrassment of being called to account before the House has become a big incentive for ministers to lodge their answers in time.

As a trade-off for the mandatory answering of questions a limit was imposed on the number of questions on notice that members could ask. Previously unlimited, questions were restricted to ten per sitting week for the Leader of the Opposition and four per sitting week for other

[54] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at pp. 348-352.

[55] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p. 350.

[56] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p. 352.

[57] For instance, see the paper *Business Undisposed of the Close of the Session 1990-91* which contains all the questions remaining unanswered at the end of that session. Accessed at: https://www.parliament.nsw.gov.au/hansard/Documents/HHP/Pre1991/Votes/Papers/Sessional%20Papers%20-%2049th%20Parliament%201990.pdf

[58] Examples being Questions on Notice numbers 126, 127 and 128 in *Business Undisposed of the Close of the Session 1990-91*. Accessed at: https://www.parliament.nsw.gov.au/hansard/Documents/HHP/Pre1991/Votes/Papers/Sessional%20Papers%20-%2049th%20Parliament%201990.pdf

members. A proposed amendment moved by the opposition sought to permit more questions per week and for answers to submitted earlier was defeated.[59] For the second (1992) and third (1993) sessions, the limit on questions per week was increased to twelve for the Leader of the Opposition and five for other members.[60] By the fourth session (1994), when the sessional orders were being re-adopted by the House, the government increased the limit on questions to four per *sitting day* for the Leader of Opposition and three per *sitting day* for other members. In addition, the opposition successfully moved an amendment to reduce the time to lodge answers. As it can take as long as five sitting weeks to reach 15 sitting days, which together with non-sitting weeks could possibly span over months, answers must be lodged within 35 calendar days or five calendar weeks.[61]

Broader Opportunities for Private Members

John Hatton's extensive experience made him acutely aware of the lack of opportunities for all backbench members, especially the then procedural roadblocks within general business (i.e. non-government business). New procedural pathways providing greater opportunities for private members adopted as sessional orders throughout the 50th Parliament, and incorporated into the standing orders, were:

- matters of public importance[62] and consideration of urgent matters[63]
- hours of sittings[64]
- routine of business on Thursdays[65]
- consideration of public bills introduced by private members[66] and order of general business[67]

[59] *Votes and Proceedings*, NSW Legislative Assembly: 19 September 1991, no. 13, entry 8, at pp. 181-182; 24 September 1991, no. 14, entry 7 at pp. 191-193.

[60] *Votes and Proceedings*, NSW Legislative Assembly, 20 February 1992, no. 1, entry 12, at p. 23; 24 February 1993, no. 1, entry 21, at p. 27.

[61] *Votes and Proceedings*, NSW Legislative Assembly, 1 March 1994, no. 1, entry 23, at p. 3.

[62] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no, 27, entry 16, at pp. 345-346.

[63] *Votes and Proceedings*, NSW Legislative Assembly, 24 November 1992, no. 52, entries 12 & 14.

[64] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16, at p. 345.

[65] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16, at pp. 343-344.

[66] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16, at pp. 346-347.

[67] *Votes and Proceedings*, NSW Legislative Assembly, 14 November 1991, no. 28, entry 46 at p. 357.

- reports from committees.[68]

Sessional orders for matters of public importance (MPI) and motions for urgent consideration were included in the House's routine of business to remedy previous problematic practice. These procedures were an opportunity to hold the executive to account by raising issues and debating policies. However, these procedures themselves later became questionable in government majority Houses.

In subsequent parliaments MPIs became discussions rather than debate on propositions contained in a motion requiring the House to express a view. The standing order for MPIs has been repealed. The gradual increase in the number of private members' statements available each sitting week provides somewhat of an alternate outlet for members.

The sessional order constraining the moving of motions to suspend standing orders[69] imposed a stern procedural restriction, particularly for the opposition to bring on debate on urgent matters. In 1992 the leave of the House was denied on 27 occasions when it was sought to move for the suspension of standing orders.[70] In response the opposition, on notice, moved for a new sessional order to provide a process for the consideration of urgent matters within the routine of business. Though the government voted against the motion it passed on division 47-45.[71] The independents supported the motion as a potential accountability measure within the principles of the Charter. However, as to whether urgent matters were to proceed to the substantive motion was still determined by a vote of the House. This worked well in a hung House where the independents performed a 'jury' like role. In the 50th Parliament, especially for the opposition, motions for the consideration of urgent matters became an effective 'work around' to the requirement for leave to effect suspension motions.[72]

After the 50th Parliament this procedure became motions accorded priority. Its use was overwhelming dominated by government members. While opposition members were relegated to making a statement of up to five minutes to establish the case for the priority of their motion. Invariably the allocated speaking time was eroded by points of order about

[68] *Votes and Proceedings*, NSW Legislative Assembly, 19 September 1991, no. 13, entry 16, at p. 180.

[69] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16, at p. 345.

[70] *Index to the Votes and Proceedings, 50th Parliament – Second Session 1992-93*. Reference to the Votes and Proceedings, p. liii. Accessed at: https://www.parliament.nsw.gov.au/hansard/Documents/1992-93%20Index.pdf

[71] *Votes and Proceedings*, NSW Legislative Assembly, 24 November 1992, no. 52, entries 12 & 14.

[72] For instance, to consider Clover Moore's motion concerning construction of the Eastern Distributor going through her electorate, *Votes and Proceedings*, NSW Legislative Assembly, 3 March 1993, no. 4, entry 6 at p 60. The new procedure for the consideration of urgent matters was also used to establish select committees and call for returned to order.

straying from establishing urgency into the substantive matters of the motion. These factors combined to devalue the procedure as a means of holding the government to account. The procedure has itself evolved. In the 57th Parliament it evolved for the better into what is now called the public interest debate which provides a proportionate allocation of motions moved by government, opposition and crossbench members.

A sessional order amended the Assembly's sitting hours[73] provided for the House to meet at 9.00 a.m. on Thursdays. This thorough revamp of the routine of business for Thursdays[74], together with the earlier starts, created more time for private members' business. Time was allocated for the consideration of each category of private members' business. Over the course of the 50th Parliament a set period was allocated to deal with notices of motions, debate on motions and non-government bills. The sessional order for the consideration of public bills introduced by members also provided for the potential passage of those bills through the Assembly.[75] Indeed, in the 50th Parliament, 16 private members' bills introduced in the Assembly passed both Houses.[76]

There was also a sessional order that turned the order for considering general business 'upside down'. Previous practice was for the freshest notices to appear at the top of general notices of motions while the oldest were pushed down the list and never moved. This simple amendment has seen items of general business retaining their relative places from the top down in the order they were given. This encouraged a rapid escalation in the number of notices given by private members. While there is only the most remote chance notices will come on for debate it has become well established practice for private members to simply highlight issues.

Prior to the 50th Parliament committee reports were often ignored to 'gather dust'. Under the Charter a sessional order introduced the take not debate.[77] Then the member tabling a committee report moved that the House take note of the report and another member, with a dissenting view, was permitted to make a statement immediately following. The take note debate was then set down to resume at the dedicated time in the routine of business on Thursdays. Take note debates give members the opportunity to discuss committee findings and debate the merits of committee recommendations.

[73] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p 345.

[74] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at pp 343-344.

[75] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at pp. 346-347.

[76] *Decision and Deliberation*, Table 8.3, p. 555.

[77] Reports from Committees: *Votes and Proceedings*, NSW Legislative Assembly: 19 September 1991, no. 13, entry 8 at pp. 180; 24 September 1991, no. 14, entry 7; and sessional order amended 13 November 1991, no. 27, entry 16 at p. 347.

The provision of dissenting statements was subsequently not incorporated into the standing orders at the end of the 50th Parliament. Nor does the member tabling the report speak at the time of tabling. The debate now occurs when the order of the day is called on for the debate to take note of the committee report. In 2009 the standing orders were strengthened to require a written response from the government, within six months of a committee report being tabled. The response is to include what action the government proposes to take in relation to each committee's recommendation. Responses are reported to the House and published. These provisions remain.[78]

REFORM OF THE LEGISLATIVE PROCESS

Means of making the executive accountable to the parliament include the range of procedural options to examine legislation at each stage of its passage. Opposition and independent members had long complained about legislation 'rammed' through the House by the government without adequate scrutiny and debate. They had called for the opportunity to consider bills in detail and to propose amendments. Thus, the third principle of the Charter focused on reforming the legislative process to include 'wider opportunity for community scrutiny of legislation involving major issues of public interest' to assist in evolving conventions for consultation.[79] This aspiration resulted in three new procedural measures.

Suspension of Standing Orders

It had been routine for governments to suspend standing orders, use closure motions (the gag) and the allocation of time for debate (the guillotine) to maintain control of the House, manage the legislative programme and curtail debate. Practices that are the antithesis of the principles of government accountability to the House! Through the Charter the government acknowledged:

> *that the use of these devices should be for the orderly management of the Parliamentary programme rather than to prevent adequate debate occurring.*[80]

The Charter aspired to seek alternatives to the use of the gag and guillotine but remained untouched. While there was no reference to suspensions of standing orders, a sessional order was adopted that incorporated the very powerful requirement of the leave of the House to

[78] Standing Order 303A, *Standing Orders*, NSW Legislative Assembly, February 2023.

[79] *Charter of Reform*, p .8.

[80] *Charter of Reform*, p. 5.

move for the suspension of standing orders. By practice, suspension motions were exclusively in the hands and numbers of the government. A new sessional order provided standing orders could be suspended by any member *but* with the constraint, *including for ministers*, of obtaining the leave (that is unanimous consent) of the House.[81]

This was a fundamental shift in the power between the House and the executive as it only takes any one individual member to deny leave. This was a strong restraint on the government by preventing the abuse of the suspension procedure to 'ride roughshod' over the House. This meant the executive had to consult and make the case for the necessity of each suspension motion to secure the pre-requisite leave. Within seven sitting days of the return of a majority government in the 51st Parliament a sessional order soon restored the ability of ministers to move for the suspension of standing orders *without* first seeking leave.[82] Though, unlike pre-50th Parliament, the standing order retained that any member may also move to suspend standing orders provided the leave of the House is obtained. In the 58th Parliament the suspension pendulum has again swung to empower non-executive members. Any member now may, at any time between 10.00 am and 1.15 pm, move to suspend standing orders without seeking leave first.[83]

While the restraint of leave to move suspension motions is no longer in the standing orders its impact has contributed to a cultural shift in the way governments use the suspension procedure as outlined below under 'Outcomes of the Charter'.

Legislation Committees

The Charter proposed the appointment of legislation committees to consider and report on amendments to improve 'landmark' bills.[84] After the second reading of a bill, that is the House adopting the principle of the legislation, the minister may refer the bill to a legislation committee.[85] This is distinct from the traditional referral of a bill to a select committee by way of an amendment to the motion that a bill be read a second time which offers wider scope for inquiry, including the desirability of the legislation altogether. More often than not this procedure is used as a tactic to delay the bill should the referral be agreed to.

Legislation committees enhance the parliamentary scrutiny of a bill through the process of consultation with key stakeholders and the public, submissions, formal evidence, and

[81] *Votes and Proceedings*, NSW Legislative Assembly, 13 November 1991, no. 27, entry 16 at p. 345.

[82] *Votes and Proceedings*, NSW Legislative Assembly, 1 June 1995, no. 7, entry 24 at p. 114.

[83] Standing Order 365, *Standing Orders*, NSW Legislative Assembly, February 2023.

[84] *Charter of Reform*, pp. 5 & 8.

[85] *Votes and Proceedings*, NSW Legislative Assembly: 19 September 1991, no. 13, entry 8, at p. 175.

recommendations to improve the bill. To not unduly delay a bill, legislation committees have a reporting deadline of six months.

The sessional order prescribed that the committee chair be a government member of the committee. However, within the parameters of the sessional order there are two powerful measures to fulfil aspects of the Charter, being accountability and participation in the shaping of legislation. The committee membership of six has a split of not more than three being members of the government and not more than three being non-government members. To compensate the lack of a committee majority, in the case of an equality of votes, the chair has a casting vote. Also, upon request from the committee, the minister having portfolio carriage of the bill is to provide the committee with 'drafting and support services'.

In effect, a legislation committee is an optional extra stage between the second reading debate and consideration in detail in the passage of legislation. During the 50th Parliament, at least 10 bills and their cognate bills[86] were considered by legislation committees. This produced some substantive reports, constructive amendments and even 'dissenting reports'.[87] However, since the 50th Parliament to the end of the 57th Parliament no bills have been referred to legislation committees.

Unproclaimed Legislation

A particular annoyance for John Hatton were Acts, or parts of Acts, which had commencement provisions of 'on a date to be proclaimed', rather than upon Assent or a specified date. Waiting for proclamation may be for valid reasons, such as to ensure that administrative mechanisms are in place to support the operations of the Act. Or, at times, delays might be deliberate for political purposes. Undue delays are also contrary to the wishes of the parliament having passed the legislation. Hatton was also concerned about the lack of transparency when navigating through the maze of legislation to identify which provisions, especially of complex legislation, were in force.

[86] See appendix 1 for the list of bills. Compiled from information under 'Committees – Legislation' in *References to the Votes and Proceedings, 50th Parliament*, being the Index to Votes and Proceedings for each of the sessions of the 50th Parliament. Accessed at:
https://www.parliament.nsw.gov.au/hansard/Documents/HHP/Pre1991/Votes/indexes.

[87] David Clune and Gareth Griffith, *Decision and Deliberation The Parliament of New South Wales 1856–2003*, The Federation Press, 2006, p. 547.

Therefore, a sessional order,[88] since made a standing order, requires the executive to forward to the Speaker a list of legislation or parts of legislation remaining unproclaimed 90 days after assent. The list is tabled on the second sitting day of a new session and then updated for tabling each subsequent 15th sitting day.

REVIVAL OF CERTAIN PROCEDURE

The absence of a government majority in the Assembly not only presented opportunities for the transformation of practice but also for the revival in the use of existing standing orders. These existing accountability measures just needed the circumstances, not the need to make sessional orders, to fulfil elements of the Charter. The examples below well demonstrate Norton's contention that 'procedure matters' when holding the government to account.

Amendments to Bills

At times, both before and after the 50th Parliament, the committee of the whole stage (now known as consideration in detail) to move amendments to bills in the Assembly had fallen out of use. For example, shadow ministers in the Assembly often used the refrain that the opposition reserved the right to move amendments in the Council. At times, even on bills that had originated in and had passed the Council! Basically, giving up knowing that their amendments would be lost.

The 50th Parliament saw extensive use made of the Committee of the Whole procedure. In the hung Assembly there was a great increase in the number of amendments proposed to government legislation. Amendments were moved by the independents, the opposition and the government itself. An extraordinary 75% of all amendments were carried.[89] So rather than impeding the government it demonstrates that the House made effective use of existing procedure to shape legislation.

Papers Returned to Order

It was not until 1994 that the opposition came across the standing order, last used in the 1920s, to order ministers to table papers. The opposition, unable to move suspension motions, used the 1992 sessional order for the consideration of urgent matters as a procedural 'work around'

[88] *Votes and Proceedings*, NSW Legislative Assembly: 19 September 1991, no. 13, entry 8, at p. 179; 24 September 1991, no. 14, entry 7 at pp. 191-193.

[89] 920 amendments of the 1,172 moved were successful. Clune and Griffith, *Decision and Deliberation*, p. 552, Table 8.2.

to move motions ordering ministers to table papers.[90] Successful motions for the return to order for papers to scrutinise executive decisions included: the tendering process for certain Sydney Water Board projects; the NSW Agent General in London; the relocation of the Royal Agricultural Society to Homebush Bay; land rezoning; and the authorised and actual numbers of police strength.[91] The Council has since made prolific use of its return to order power.

Expansion in the Use of Committees

In addition to the work of legislation committees, estimates committees and the new veto power of statutory based committees referred to above, the executive was scrutinised through a sizeable increase in the number of select committees appointed. Committee inquiries were conducted into important issues such as: gun law reform; police administration; public sector superannuation; the government's home funding scheme; the Sydney Water Board; motor vehicle emissions; lead pollution; and bushfires.[92] Many of these committees were given very tight reporting deadlines by the House. In response the Assembly administration created a Committees Office to manage the significant increase in the staff necessary to service the additional workload of Assembly administered committees.

In 1992 the Tamworth Tourist Information Centre Bill, a private bill promoted by Tamworth City Council, passed. Through the quirks of archaic procedure this bill was the first private bill[93] to have originated in the Assembly and pass since 1910. This procedure opens the object of a bill to a process of community consultation and parliamentary scrutiny through a select committee. The government supported this bill as it had intentions of regaining the seat. Indeed, after the committee reported, the government facilitated passage of the remaining stages of the bill in the Assembly during time for government business and through the Council as government business.[94]

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[90] *Votes and Proceedings*, NSW Legislative Assembly: 17 March 1994, no. 9, entry 19.

[91] For the subject of the 11 Order for Papers motions see *Index to the Votes and Proceedings, 50th Parliament – Fourth Session 1994*. Reference to the Votes and Proceedings, p. xxxii. Accessed at: https://www.parliament.nsw.gov.au/hansard/Documents/HHP/Pre1991/Votes/indexes/Index%20-%2050th%20Parliament%20-%201994.pdf

[92] See Appendix 2 for the details of those committees. Information compiled from the List of Committees accessed at: https://www.parliament.nsw.gov.au/committees/listofcommittees/pages/committees.aspx?h=la

[93] For the provisions governing private bills see Standing Orders 358-363, *Standing Orders*, NSW Legislative Assembly, February 2023.

[94] NSW Parliament, 'Tamworth Tourist Information Centre Bill 1992', Bills Homepage, *Website*, Accessed at: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=17897

THE STANDING ORDERS

One expectation under the 'Reform of the Procedures' was that the procedural elements would be trialled with the view of inclusion in the standing orders. The process for transforming practice before the end of the 50th Parliament was a 'complete overhaul of the Standing Orders of the Legislative Assembly'.[95]

The Speaker and the Clerks-at-the-Table undertook the task of incorporating all the trialled sessional orders into the standing orders, as well as translating what some considered the impenetrable language of procedure into 'plain' English for clearer understanding and use by members.[96] One former member had described the language of the standing orders and procedure as 'Clerks' mumbo jumbo'.

The proposed new standing orders were recommended in a report to the Assembly by the Standing Orders and Procedure Committee, adopted by the House on 2 December 1994 and presented to the Governor. They were approved on 12 December, just over one hundred years after the previous edition was approved in 1894.

OUTCOMES OF THE CHARTER

The debate on the last sitting of the 50th Parliament to adopt the report of the Standing Orders and Procedure Committee and to forward the new standing orders to the Governor for approval reflected positivity and constructively on the new standing orders. Particularly converting the standing orders into plain English. However, each of the four members who spoke in the debate made divergent and illuminating contributions not just on the standing orders but procedural culture.

Garry West, the Leader of the House, noted that:

> *There was no sessional order that has not become a standing order.*[97]

Paul Whelan, the Shadow Leader of the House, predicted that:

> *Undoubtedly, standing orders will be changed by future administrations to suit the government of the day or to suit the position of members of Parliament.*[98]

[95] *Charter of Reform*, p. 7.

[96] Debate on the motion to adopt the new standing orders, *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, pp. 6273-6275.

[97] *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, p. 6274.

[98] *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, p. 6274.

John Hatton cited the procedures that increased opportunities for private members and the new accountability measures. He expressed the hope:

> *that as a result of these initiatives it will not be as easy for the Executive to regard Parliament as a convenience to serve its wishes or demands.*[99]

While the opposition back bencher 'Mick' Clough lamented that question time had become tedious and asked that consideration:

> *be given to ensuring that Ministers do not read lengthy answers to prepared questions that are read…*[100]

The new standing orders have provided a tangible foundation for the transformation of parliamentary practice to continue beyond the 50th Parliament. However, the Charter also had an intangible component noting reform will:

> *also need to evolve through convention and practise as it is not easy to encompass all changes in a written formula.*[101]

It is straight forward to track how the sessional orders, as adopted in the 'written formula' of the standing orders, have endured. Most of those reforms now continue as unquestioned routine proceedings. Others have been tweaked after not working as originally intended. Other procedures have not been abused or not used at all; only one element was reversed by a majority government, and two were repealed but replaced with a better alternate procedure.[102]

The impact in terms on the evolving nature of parliamentary culture is more subtle. Thirty years on is an appropriate time to assess the impact on the Charter's stated aims of executive accountability and opportunities for members.

My insight is that the cultural shift reflects the behavioural response of both the executive and members as a direct consequence of trust in the implementation of the Charter. Steven Reynolds noted, in his article *The Role of Parliament: Handbrake or Oiling the Wheels of Good Government*,[103] the Charter as an agreement was not legally binding. He makes a comparison with the slightly earlier agreement, the Accord of 1988-1992, made between the Government

[99] *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, pp. 6274.

[100] *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, pp. 6274.

[101] *Charter of Reform*, p. 5.

[102] See appendix 3.

[103] Steven Reynolds 'The Role of Parliament: Handbrake or Oiling the Wheels of Good Government', *Policy*, Summer 1996-97 edition, pp. 34-37.

and the Greens in Tasmania. Citing Haward and Larmour, many regarded the Accord 'as having failed because of lack of goodwill on both sides'.[104]

Unlike the Accord, the Charter provided for stable minority government in return for a transformation of parliamentary practice. The independents were mindful of balancing the right of the government to govern ('within the doctrine of the separation of powers')[105] against enhancing responsible government.

The initial motivation of the government may simply have been political pragmatism to remain in power. However, the second reading speech of Tim Moore referred to earlier and from my observation of his actions, reflects positively on that government for carrying through on its side of the agreement. The government's commitment to the reforms in the long run were specifically mentioned by the Governor in his speech when opening the third session of the 50th Parliament in 1993.[106] Indeed, Hatton in his speech in supporting the new standing orders especially praised Tim Moore though:

> *many of his suggestions were not adopted, his drive, vision and dedication with regard to the standing orders … the formulation of the charter of reform shone through at all times.*[107]

Beyond the procedural reforms, the Charter gave a compass for a cultural shift in 'the operations of and attitudes in the Assembly'. Expressing the hope that:

> *the changes will assist in evolving conventions which will ensure that consultation on major issues becomes the practice for future Governments.*[108]

A cultural evolution has been discernible enduring beyond any given generation of members. Changes have been reinforced by the expectations and diversity that comes with each wave of new members. One example is the system of portfolio standing committee that stemmed not from a hung House but ironically from the landslide victory of a new government in 2011. Portfolio standing committees have boosted the Assembly's ability to hold the executive to account by giving those committees terms of reference with wide scope to examine relevant policy, bill, regulation, financial matter, annual report and public works related to the portfolio area.

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[104] M. Haward and P. Larmour (eds), *Tasmanian Parliamentary Accord and Public Policy*, Federation Research Centre, 1993.

[105] *Charter of Reform*, p. 4.

[106] *Votes and Proceedings*, NSW Legislative Assembly: 24 February 1993, no. 1, entry 4 at p. 12.

[107] *NSW Parliamentary Debates*, Legislative Assembly, 2 December 1994, p. 6273.

[108] *Charter of Reform*, p. 8.

While it is open for a majority government to amend the standing orders at any time to suit itself there is an awareness that a government will eventually be in opposition. Since the 50th Parliament it is evident governments have been mindful to not abuse the use of procedure. Prime examples being the previous ruthless use of the suspensions of standing orders, the gag and guillotine. This is to lessen the risk of subsequent opposition payback and obstructionism.

Rather than ambush oppositions it is customary for most motions for the suspension of standing orders to be flagged with the opposition and the crossbench. As such, now few suspension motions require a division.

While right to raise concerns about the use of the gag and the guillotine the Charter found the complexities too difficult to consider at the time. Perhaps they need not have worried as those procedures are now rarely resorted to. It seems the Assembly has kicked the habit. This provides a clear indicator of a changing procedural culture. The gag is used infrequently. The last occasions debate on government legislation has been closured was eight times between September 2008 and March 2014.

The use of the guillotine has completely fallen out of favour. From the 51st Parliament, notices for the 'allocation of time for discussion' on legislation, as the procedural euphemism for the guillotine in the standing orders, were given on 18 occasions. Of those notices, the guillotine was moved 11 times. This was between June 1995 and June 1997,[109] within two years of John Hatton leaving parliament. The most 'recent' notices, given more than 20 years ago in June and November 2003, were not triggered at all. That legislation is no longer 'rammed' through by cutting off all remaining debate is a positive marker for responsible government.

CONCLUSION

This article sets out the context and circumstances that resulted in the Charter before examining its impact in transforming parliamentary practice. In short, the outcomes of the Charter were: a strengthening of procedural mechanisms for the Assembly, and broadly the Parliament, to hold the executive to account; to provide greater opportunities for members to raise issues in the House; and, to improve the Assembly's 'procedural culture'. A demonstrated commitment to the spirit of the Charter formed the basis for an ongoing evolution of parliamentary practice. The procedural reforms have been consolidated and incrementally bolstered over the ensuing 30 years with the outcome of strengthening Norton's 'constraining hand' of procedure over the government to refine the guardrails for responsible government.

[109] Figures collated from the *Index to the Votes and Proceedings of the Legislative Assembly*.

The 2023 general election for the 58th Parliament of New South Wales resulted in a minority government. To date, faced with an Assembly of fewer members with a much larger crossbench of thirteen than in the 50th Parliament, the government has been able to both get on with governing and work with the crossbench. Some polls are predicting a minority government in the forthcoming Commonwealth general election due in 2025. Like the hung parliament between 2010 and 2013 it will be interesting to observe how a government might navigate the House of Representatives without a majority.

Despite the undue fears of chaos and an unworkable parliament, the example from the Legislative Assembly of the 50th Parliament resulted in an executive 'responsible to the Parliament in reality as well as theory'[110] together with a range of procedural reforms that have endured. With the impetus of key members, a hung House is not to be feared.

[110] David Clune, *'The NSW experience with minority government? It's an improvement'*, The Sydney Morning Herald, 16 March 2019. Accessed at: https://www.smh.com.au/nsw-election-2019/the-nsw-experience-with-minority-government-it-s-an-improvement-20190312-p513op.html.

APPENDIX 1: LEGISLATION COMMITTEES

Legislation Committee	Appointed	Report Tabled
Committee on the Defamation Bill	November 1991	7 May 1992 (Discussion Paper)
		14 October 1992 (Final Report)
Committee on the National Parks and Wildlife (Aboriginal Ownership) Amendment Bill and cognate bills	November 1991	25 November 1992 (Final Report)
Committee on the Draft Local Government Bill and cognate bills	December 1991	6 May 1992 (First Report)
		4 September 1992 (Second Report)
Committee on the Government Publicity Control Bill	March 1992	29 April 1993 (Final Report)
Committee on the Natural Resources Management Council Bill and cognate bills	June 1992	19 November 1992 (Final Report)
Committee on the South East Forests Protection Bill	September 1992	24 ember 1992 (Final Report)
Committee on the Whistleblowers Protection Bill No.2	November 1992	7 September 1993 (Final Report)
Committee on the Endangered and Other Threatened Species Conservation Bill	June 1992	1 December 1994 (Final Report)
Committee on the National Parks and Wildlife (State Conservation Parks) Amendment Bill and cognate bill	May 1992	29 October 1992 (Final Report)
Committee on the Forestry (Amendment) Bill	September 1992	11 March 1993 (Final Report)

APPENDIX 2: LEGISLATIVE ASSEMBLY INITIATED SELECT OR JOINT SELECT COMMITTEES

Committee	Appointed	Terms of Reference	Report Tabled
Joint Select Committee upon Gun Law Reform	September 1991	Improve systems for licensing shooters and categories of gun licensing after the Strathfield Square shooting	15 October 1991
Select Committee on the Legislative Assembly Budget Allocation	16 October 1991	To report on the priorities of members regarding the expenditure of the Assembly's supplementary budget allocation	14 November 1991
Joint Select Committee on the Management of the Parliament	7 May 1992	To report on the management of the Parliament	25 November 1992
Joint Select Committee upon Police Administration	October 1992	Inquire into accountability issues in the Police Service	
		Interim Report on Disclosure of In Camera Evidence	26 February 1993
		First Report on Resignation of Minister for Police and Emergency Services	31 March 1993
		Second Report on Police Service (Management) Amendment Bill 1993	13 May 1993
		Final Report on Remaining Issues	8 October 1993
Select Committee upon Public Sector Superannuation Schemes	November 1992	Consider adequacy of existing public sector superannuation schemes and future benefits	9 November 1993
Select Committee upon the Port Macquarie Base Hospital Project	May 1992	Compare benefits of private vs. conventionally funded public hospital at Port Macquarie	1 March 1994
		Minutes of Evidence of the Committee	14 February 1994
Select Committee upon Homefund and FANMAC	April 1993	Investigate whether FANMAC Trusts breached the Commonwealth State Housing Agreement	11 May 1994
Joint Select Committee upon the Sydney Water Board	May 1993	Investigate water quality, pricing, catchment management, drainage, and accountability	19 April 1994
		Issues Paper on Sydney Water Board	23 June 1993
Select Committee upon Bushfires	March 1994	Report on summer bushfires and prevention measures	30 November 1994

		Interim Report on bushfires	30 September 1994
Select Committee upon Motor Vehicle Emissions	April 1994	Report on systems for monitoring motor vehicle emissions and air quality	24 November 1994
Select Committee upon Lead Pollution	September 1994	Report on extent of lead pollution in New South Wales and its community impact	5 December 1994 (tabled with the Clerk)

APPENDIX 3: TRACKING THE SESSIONAL ORDERS AND PRACTICE ARISING FROM THE CHARTER ADOPTED INTO STANDINGS ORDERS

Subject	Standing Order (December 1994)	Standing Order (February 2023)	Key Changes/Notes
Legislation Committees	363	323	Deputy Chair provision added for election, and the Deputy Chair must be a government member.
Estimates Committees	284	246	Substantively the same.
Unproclaimed Legislation	126	117	Wording unchanged.
Reports from Committees	347	306	Substantively the same, but with additional clarification: excludes reports from standing orders and procedure committee; flexibility to debate multiple reports; reduced time for debates.
Questions on Notice	141	132	Changes include clarification of timing for lodging questions and answers, provision for publishing answers received during non-sitting weeks, and codifying the Speaker's authority to amend non-conforming questions.
Routine of Business	110	97	More flexibility in the current standing orders, allowing for non-government business to proceed if government business is not required; updated procedure for public interest debates replacing motions for urgent consideration.
Suspension of Standing Orders	405	365	1994 version required a member to seek leave to move a suspension moti9on. While 2023 allows any member to move a suspension between 10 am and 1:15 pm and a minister may move a motion suspension at any time (excluding during question time).

Consideration of Urgent Motions – Opposition, Matters of Public Importance	120 (Urgent Motions)	121 (Matters of Public Importance)	Replaced with public interest debates and petition debate (standing orders 109 and 125A in 2023).
Consideration of Public Bills introduced by Private Members	118	106	The essence remains but now included in the broader scope of general business, allowing private members to reorder bills within the weekly routine.
Questions Without Notice	140	131	Enhanced accountability measures: 3-minute answers, 2-minute supplementary answers, 55-70 minutes for question time, and Speaker authority to stop the clock to counter time wasting.
Re-ordering of General Business	118	106, 107	New standing orders offer flexibility for managing general business, with reduced speaking time for private members' motions.
Order of General Business	117	105(1)	New standing order retains the same wording but adds lapsing provisions for incomplete general business.

Turbocharging Civics Education for Parliamentary Resilience: A Case Study of Queensland Parliament's 2024 'Build Your Parliament in Minecraft' Competition for Schools

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Abstract: This article explores how Queensland's Parliamentary Education Team leveraged the engagement power of Minecraft Education to transform their education offerings. The 2024 'Build Your Parliament in Minecraft Competition' engaged students from diverse backgrounds, including those in remote locations, in a project-based learning experience by tasking them with the creation of a virtual legislative chamber. Against a backdrop of declining civic engagement, this initiative demonstrates how gamification and virtual reality can foster critical thinking, creativity, and teamwork while deepening students' understanding of the work of the parliament and avenues for democratic participation. The article outlines the competition project, highlighting its success in increasing student engagement. The project's outcomes offer insights for educators and policymakers about integrating digital technologies and experiential learning into civics curricula. Such initiatives contribute to parliamentary resilience. By equipping young people with the skills and knowledge needed for active citizenship, we can safeguard our democratic institutions into an uncertain future.

INTRODUCTION

Parliamentary resilience relies on citizens who are both informed and engaged in democratic processes. This article examines how innovative educational approaches can strengthen democracy by equipping young people with the knowledge and skills needed for active participation. It argues that gamification, virtual reality, and experiential learning are powerful

[1] In the preparation of this paper, references and source materials were located using ChatGPT, a large language model developed by OpenAI (OpenAI, 2024).

tools for fostering civic engagement, particularly in a digital age where traditional methods often fail to capture students' interest.

The article first explores the challenges facing democratic sustainability, including declining trust in government, misinformation, and disengagement among younger generations. It then examines Australia's ongoing efforts to address these issues through civics education, focusing on the 2024 Parliamentary Inquiry into Civics Education and the perspectives of young Australians.

Next, the discussion turns to the role of parliamentary education specialists in bridging gaps in the curriculum. Drawing on educational theory, the article highlights the importance of active learning strategies, digital tools, and gamification. The final section presents a case study of Queensland's 'Build Your Parliament in Minecraft' competition, demonstrating the effectiveness of student-led learning in developing civic knowledge. The article concludes with recommendations for integrating interactive civics education into broader educational frameworks, ensuring democratic resilience for future generations.

DEMOCRACY DIAGNOSTICS: ADDRESSING PARLIAMENTARY FRAGILITY

Democracy, as a system, is a relatively recent achievement for much of the world. Despite the ancient origins of parliaments such as those in Iceland and the Isle of Man, many of the world's democracies are still being road-tested, with most yet to reach their centenary.[2] Like any complex machine, the engines of democracy are fuelled by the active participation of citizens. Recent events such as the 2021 attack on the United States Capitol and the prorogation of the UK Parliament in 2019 demonstrate the system's susceptibility to breakdown, highlighting that democratic stability must not be assumed a self-sustaining machine.

It is broadly accepted that the sustainability of parliament is impacted by factors such as public trust, polarisation, misinformation, civic education, and political engagement. Citizens in established democracies are increasingly sceptical of their governments' ability to address issues like corruption, inequality, and economic instability.[3] This scepticism fuels growing disenchantment with democratic governance, particularly among younger generations, who

[2] Bastian Herre, Lucas Rodés-Guirao and Esteban Ortiz-Ospina, 'Age of electoral democracy, 2023'. Accessed at: ourworldindata.org/grapher/number-electoral-democracies-age.

[3] Pippa Norris and Ronald Inglehart, R. *Cultural backlash: Trump, Brexit, and authoritarian populism*. Online: Cambridge University Press, 2019.

often view it as ineffective or irrelevant to their lives.[4] In response, scholars and experts advocate for revitalised civics education to safeguard democracy's future.

The 2023 'Trust and Satisfaction in Australian Democracy' survey underscores the vital role of civics education in keeping democracy on course.[5] Those equipped with civic knowledge show a higher level of satisfaction with the system – 72% compared to 54% of those without such education – indicating that understanding the mechanism of democracy facilitates participation.[6] Civic education also fuels greater engagement in democratic activities like voting, helping to keep the engines of democracy running efficiently. Furthermore, it serves as a key defence against the roadblocks of misinformation and disinformation, providing citizens with the critical thinking skills needed to navigate complex political landscapes. Ultimately, the findings highlight that civic education is essential for keeping democracy in gear and ensuring its long-term resilience on the road.

CIVIC OPTIMISATION AUDIT: AUSTRALIA'S PARLIAMENTARY INQUIRY INTO CIVICS EDUCATION

Following a referral from the Special Minister of State, Senator Don Farrell, the Australian Parliament's Joint Standing Committee on Electoral Matters launched an Inquiry into civics education, engagement, and participation in Australia in March 2024, with a focus on improving the understanding and involvement of Australians in democratic processes.[7] Public hearings were held in Canberra, the Northern Territory and Queensland.[8] In July 2024, representatives from the Cairns Youth Council and other stakeholders provided testimony about their experiences with civics education, contributing several important points and making recommendations for improvement. These can be summarised under four distinct areas:[9]

[4] Roberto Stafan Foa and Yascha Mounk, 'The Danger of Deconsolidation: The Democratic Disconnect'. *Journal of Democracy*, 27(3) 2016, pp. 5-17.

[5] Australian Public Service Commission, 'Trust and Satisfaction in Australian Democracy: 2023 National Survey'. Accessed at: apsreform.gov.au/resources/reports/trust-and-satisfaction-australian-democracy-survey-report

[6] Australian Public Service Commission, 'Trust and Satisfaction in Australian Democracy'.

[7] Parliament of Australia, Joint Standing Committee on Electoral Matters, 'Inquiry into civics education, engagement, and participation in Australia'.2024. Accessed at: aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Civicseducation.

[8] Joint Standing Committee on Electoral Matters, 'Public Hearings'.

[9] Joint Standing Committee on Electoral Matters, 'Public Hearings'.

Gaps in formal civics education

Despite engaging with civics education at school, many students felt that they did not have a deep understanding of how elections or the Australian parliamentary system works before participating in the Young Mayors program[10]. They noted that while their school curriculum covered general history, Australian colonial history, and political structures, it did not sufficiently prepare them for real-world civic participation, such as voting or evaluating campaign materials.

> *Since primary school all I learnt about was Federation, which is the first major step towards civics and citizenship. The next time I was introduced to that was last year, in grade 9, and we only went in with basics there. I feel like, at that stage, we needed to go more in depth about it because I didn't really know much then. With civics now, we're learning about it internationally. I want to know more about Australia and what's happening locally.*[11]

Emphasis on international systems over Australian politics

The representatives expressed concern that insufficient time was spent on learning about Australia's political system. They felt that a greater emphasis should be placed on Australian political history, voting processes, and the structure of the government.

> *Some of us felt there was too much emphasis placed on international political systems and ideologies, with little time spent on Australia's political system, and that maths and science were valued more highly than civics. […] we would like to see […] more focus on Australia's political system, parties, politics and how our government is set up.*

Lack of practical civic learning opportunities

The Cairns Youth Council members highlighted the importance of practical learning experiences. They advocated for more opportunities to engage in activities like mock elections, which they found valuable in understanding the electoral process and the roles of parliament.

[10] Young Mayors Program, 'About', Cairns. Accessed at: https://www.fya.org.au/program/young-mayors/.

[11] Parliament of Australia, Joint Standing Committee on Electoral Matters, 'Inquiry into civics education, engagement, and participation in Australia'.2024, Submission by Aiden Senaratne, Cairns Youth Council, Foundation for Young Australians.

They also recommended expanding programs that provide hands-on civic learning opportunities for all students.

> *I am definitely a big supporter […] of the practical way to learn about it.*
>
> *[…]*
>
> *I've noticed that practical stuff helps you learn a lot more than just learning from a PowerPoint or out of a book.*[12]

Challenges in civic engagement among peers

Also noted was the fact that programs like Young Mayors attract students who are already engaged, but the broader challenge is in reaching students who are less interested in civics. The youth representatives recommended creating more inclusive opportunities that engage a wider range of students in civic learning and participation.

> *[Activities such as Young Mayors, YMCA Youth Parliament, visits to Canberra and regional sittings of state parliament] are not universal opportunities [and are] also often extracurricular, elective senior subjects or optional additional experiences, meaning that [other] students never experience them.*[13]

The Cairns hearing highlighted concerns that civics education in Australia needs to be more practical, relevant, and accessible to ensure that all young Australians are well-prepared to participate in their democracy.

The Joint Committee's final report[14] includes 23 recommendations. Recommendations 1, 2, 3, and 4 call for a fully implemented, nationally consistent and mandatory, standalone civics and citizenship curriculum, including a specified minimum number of teaching hours across Years 9 to 12. Recommendations 7, 8, and 9 support education and outreach by calling for increased funding and expanded access for regional and remote students through digital programs. Recommendations 5 and 6 call for nationally aligned, high-quality professional development

[12]Parliament of Australia, Joint Standing Committee on Electoral Matters, 'Inquiry into civics education, engagement, and participation in Australia'.2024, Submission by Antonije Dimitrijevic, Mayor, Cairns Youth Council, Foundation for Young Australians, (JSCEM, 2024)

[13] Parliament of Australia, Joint Standing Committee on Electoral Matters, 'Inquiry into civics education, engagement, and participation in Australia'.2024, Opening statement by Aiden Senaratne.

[14] Parliament of Australia, Joint Standing Committee on Electoral Matters, *From Classroom to Community: Civics education and political participation in Australia,* Report. 5 February, 2025 Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~/link.aspx?_id=59EB708D91904DB88857CD6E7C86B31F&_z=z.

for teachers of civics, mandating collaboration between government, states, and teacher associations to equip educators with effective training for debate-based instruction.

More broadly, the submissions and findings emphasise the imperative for civics education to move beyond a rigid, text-based approach and instead adopt teaching strategies that are practical, engaging and experiential, ensuring that students not only learn about democratic processes but also see and feel their relevance in everyday life.

It is not yet clear which, if any, of these recommendations will be implemented by federal government in an election year. Nevertheless, the inquiry's findings are amplified by the stark backdrop of the 2024 NAPLAN[15] Civics test results released by ACARA[16] in February 2025, revealing that 'Australian students' proficiency levels in civics and citizenship have fallen to their lowest level in two decades', with a mere 28% of the current Year 10 cohort meeting proficiency standards.[17]. These results compel parliamentary educators in Australia to urgently consider how they can best support schools in strengthening students' knowledge and understanding of our democratic systems. Leveraging current educational theory, effective strategies for engagement, and well-designed resources will be key to successfully engaging young people in effective civics learning.

BALANCE AND ALIGNMENT: CHECKING THE CURRICULUM TRAILER LOAD

Whenever social issues like declining civic engagement arise, the response often shifts responsibility onto schools. Despite acknowledgement of an overloaded curriculum, dissatisfaction with civics education in Australian schools persists. The term 'crowded curriculum' is frequently used to describe the extensive content teachers must cover. Successive Australian education ministers have acknowledged that a 'cluttered' curriculum hampers progress in core areas such as literacy and numeracy.[18] Balancing broad content with

[15] National Assessment Program – Literacy and Numeracy, Australian Curriculum, Assessment and Reporting Authority.

[16] Australian Curriculum, Assessment and Reporting Authority.

[17] ABC, 'Australian students record worst ever civics result with 72 per cent not understanding the basics of democracy', 18 February 2025. Accessed at: https://www.abc.net.au/news/2025-02-18/civic-education-curriculum-assessment-students/104946138?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web.

[18] A. Keddie & C. Harris-Hart, 'A crowded curriculum? Sure, it may be complex – but so is the world kids must engage with', The Conversation, 7 April 2021. Accessed at: https://theconversation.com/a-crowded-curriculum-sure-it-may-be-complex-but-so-is-the-world-kids-must-engage-with-157690.

developing critical skills adds further pressure on educators working within limited instructional time. This debate highlights the challenges of curriculum design in Australia, where schools must prepare students for a complex world while addressing foundational needs.

In this educational landscape, leveraging specialised content teams is essential. For example, parliamentary educators are crucial in fostering democratic resilience by providing accurate information, training, and resources for civics programs. With direct access to authentic parliamentary procedures, personnel and materials, and accurate and up-to-date information, we are uniquely positioned to deliver programs, training, and resources, ensuring high-quality, engaging educational experiences that promote active citizenship.

Reconditioning Civics: Scanning Education Strategies in a Comprehensive Service

For parliamentary educators to fulfill their crucial role and enhance democratic understanding, adopting proven educational strategies is crucial. Over a century ago, progressive educational theorist John Dewey advocated for experiential learning, arguing that students learn best through active engagement, rather than passive reception[19]. Dewey argued that memorisation of abstract information over hands-on, experiential learning disconnects the subject matter from the learner's needs. A 'learning by doing' philosophy highlights the importance of active, practical engagement in effective instruction, incorporating critical thinking and problem-solving throughout the learning process. This participatory, student-led model – referred to as a 'thick' approach by scholars cited in Heggart and Flowers[20] – is particularly relevant to civics education. It promotes deeper engagement with democratic processes and equips students with the skills necessary for active citizenship beyond voting.

In today's digitally connected classrooms, technology plays a pivotal role in fostering experiential learning. 'The digital disruption, or 'digital turn'[21] has opened a range of possibilities for young people to access and use technology in their everyday lives. Information and communication technology (ICT) also provides young people with exciting options for

[19] J. Dewey, *Democracy and Education: An Introduction to the Philosophy of Education*. Macmillan, 1916.

[20] K. Heggart & R. Flowers, 'Justice-oriented, 'thick' approaches to civics and citizenship education in Australia: Examples of practice', in A. Peterson, G. Stahl & H. Soong (eds), *The Palgrave Handbook of Citizenship and Education*. Accessed at: https://opus.lib.uts.edu.au/handle/10453/132902.

[21] Buchanan (2011) cited in A. Petersen & L. Tudball (eds), *Civics and Citizenship Education in Australia: Challenges, Practices and International Perspectives. Bloomsbury Academic*, 2017. Accessed at: https://dokumen.pub/civics-and-citizenship-education-in-australia-challenges-practices-and-international-perspectives-9781474248198-9781474248228-9781474248211.html.

active learning, both in and beyond the classroom […].'[22] As Australian educationalist Kathryn Moyle reasons, 'Educators have to reflect upon their roles and capabilities, to revisit their expectations and understandings of learning in light of the educational possibilities now afforded by complex software – such as online games and simulations – and to move on from simply expecting students to use word processing software for the presentation of assignments.'[23]

Research by Squire and Jenkins,[24] Gee,[25] and Barab et al[26] demonstrates the effectiveness of virtual environments for improving knowledge retention, especially in complex subjects like civics and government. Digital games provide unique opportunities for deep learning and critical engagement that are difficult to replicate through traditional instructional methods. These trends highlight the value of incorporating digital tools to enhance civic education and make it more engaging.

Pedagogical Upgrade: Gamified Injection for a Civics Engine Overhaul

Gamification has become a powerful educational strategy, incorporating game design elements such as points, badges, leader boards, and rewards into learning activities. It draws on principles from behavioural psychology and game theory to make learning tasks more enjoyable and compelling. As Deterding et al argue:

> *Playful design elements […] can significantly enhance user motivation and participation in learning environments.*[27]

[22] Petersen and Tudball (2017), p. 50.

[23] K. Moyle, Building Innovation: Learning with Technologies. Camberwell, Vic.: *ACER Press*, 2010, p. 61. Accessed at: http://research.acer.edu.au/cgi/viewcontent.cgi?article=1009&context=aer.

[24] K. Squire & H. Jenkins, 'Harnessing the power of games in education', in M. J. P. Wolf & B. Perron (eds), *The Video Game Theory Reader*. Routledge, 2003, pp. 63–87.

[25] J. Gee, 'What Video Games Have to Teach Us About Learning and Literacy'. *Computers in Entertainment*, 1(1) 2003, p. 20. doi:10.1145/950566.950595.

[26] S. A. Barab, M. Gresalfi & A. Ingram-Goble, 'The Quest Atlantis Project: A game-based learning system in the 21st century'. *Teachers College Record*, 107(5) 2005, pp. 985-1002.

[27] S. Deterding, D. Dixon, R. Khaled & L. Nacke, 'From game design elements to gamefulness: Defining 'gamification''. In Proceedings of the 15th International Academic MindTrek Conference: Envisioning Future Media Environments, 2011, p. 11.

Gamification clearly has the potential to transform learning by promoting critical thinking, collaboration, and civic participation among young learners.[28] By integrating game-like elements, educators can make abstract civic concepts more accessible and engaging, fostering a deeper connection between students and democratic processes.

Civics Turbo Boost: Adding Virtual Reality to the Fuel Formula

When combined with gamification, virtual reality (VR) can significantly boost learning outcomes by creating immersive and interactive environments that deepen student engagement.[29] VR allows students to apply abstract concepts in realistic, simulated settings, enhancing their understanding and making learning more impactful. Virtual environments offer immersive and experiential learning, allowing students to engage with complex concepts in dynamic and interactive ways[30].

The author has witnessed firsthand the power of VR tools to enhance literacy units in primary classrooms. Students given time to immerse themselves in Epic Citadel on iPod Touch[31] demonstrated marked improvements in descriptive writing achievements. The use of Minecraft worlds such as Fantastic Mr Fox[32] or the Harry Potter universe[33] enable simulated character interactions and immersive study of detailed literary settings, increasing student engagement and enriching their understanding of literary devices.

Sasha Barab et al's Quest Atlantis (QA) used an immersive virtual learning space designed for children aged 9-12 to provide inquiry-based learning experiences, blending elements of online role-playing games with educational research. The QA project revealed that, '[s]tudents who engaged with the 3D Multi-User Virtual Environment demonstrated deeper engagement and

[28] J. Gee, 'What Video Games Have to Teach Us About Learning and Literacy'. *Computers in Entertainment*, 1(1) 2003, p. 20. doi:10.1145/950566.950595 | C. Steinkuehler & S. Duncan, 'Scientific habits of mind in virtual worlds'. *Journal of Science Education and Technolog*y, 17(6) 2008, pp. 530-543. Accessed at: https://doi.org/10.1007/s10956-008-9120-8.

[29] L. Jaramillo-Mediavilla, A. Basantes-Andrade, M. Cabezas-González & S. Casillas-Martín, 'Impact of Gamification on Motivation and Academic Performance: A Systematic Review'. *Education Sciences*, 14(6) 2024, p. 639. Accessed at: https://doi.org/10.3390/educsci14060639.

[30] C. Steinkuehler & S. Duncan, 'Scientific habits of mind in virtual worlds'. *Journal of Science Education and Technology*, 17(6) 2008, pp. 530-543. Accessed at: https://doi.org/10.1007/s10956-008-9120-8.

[31] Epic Games. (2011). Epic Citadel (Version1.0) [Mobile application software for iOS]. Apple App Store.

[32] Minecraft Education. (n.d.). *Fantastic Mr. Fox* [Minecraft world]. Minecraft Education Edition. Retrieved December 4, 2024, from https://education.minecraft.net/en-us/worlds/fantastic-mr-fox.

[33] Floo Network. (n.d.). *Harry Potter Adventure Map* [Minecraft Map]. Planet Minecraft. Accessed at https://www.planetminecraft.com/project/harry-potter-adventure-map-3347878/.

improved learning outcomes, maintaining significant knowledge retention even two months after the intervention.'[34]

In the realm of civics education, VR enables students to simulate governance structures, form political parties, hold elections, and make decisions within a virtual space. This hands-on, immersive experience allows students to better understand the complexities of civic participation and policymaking. By integrating gamification and VR, educators can create dynamic learning environments that promote active engagement and prepare students for real-world democratic challenges.[35]

Resource Tune-up: Calibrating Civics Education for Today's Learner

Recognising the need to inject some VR 'zhuzh' into their traditional educational offerings, Queensland's Parliamentary Education team began investigating platforms for a virtual civics resource. The aim was to develop a realistic simulated environment as a conduit for interactive and experiential learning about the parliament, enabling students to actively participate in simulated democratic processes in appealing and collaborative ways. Drawing inspiration from the growing prevalence of virtual tours, Augmented Reality (AR) experiences and immersive digital models of venues such as Cairns Convention Centre and Queensland's Old Government House the team faced limitations due to the significant budget typically required for professional digital scanning and production. Consequently, they shifted their focus toward freely available gaming platforms.

With over 56 million daily active users[36],the massive multiplayer open-world game 'Roblox' is a major platform for user-generated content and interactive experiences. An online community called '*AU | Australia* on Roblox' simulates real-life governance, engaging in civics simulations including an elected parliament, judiciary, law enforcement and media coverage via X[37]. However, Roblox's open nature, lack of strict content moderation, and risks of exposure to

[34] Barab et al (2007) 2007, p. 178.

[35] Marougkas, A., Troussas, C., Krouska, A., & Sgouropoulou, C. (2024). How personalized and effective is immersive virtual reality in education? A systematic literature review for the last decade. *Multimedia Tools and Applications, 83*(1), 18185–18233. Retrieved September 7, 2024 from https://doi.org/10.1007/s11042-023-15986-7 | Han, J., Liu, G., & Gao, Y. (2023). Learners in the metaverse: A systematic review on the use of Roblox in learning. *Education Sciences, 13*(3), 296. https://doi.org/10.3390/educsci13030296

[36] Priori Data. (2024). *Roblox users, revenue & statistics 2024*. Priori Data. Retrieved September 8, 2024 from https://prioridata.com/data/roblox-users/

[37] Roblox AUS News [@roblox_ausnews]. (2024). *Posts on X.* X (formerly Twitter). Retrieved May 13, 2024, from https://x.com/roblox_ausnews

inappropriate material and cyberbullying make it unsuitable for use in most classroom contexts.

In contrast, Minecraft Education provides a safer, more structured platform for learning. Given Minecraft's high engagement potential and its widespread availability in schools, the Parliamentary Education team proposed a novel solution to address the lack of VR funding – enlisting the expertise of the students themselves. Involving students in the development of a Minecraft Chamber model in a competition for schools not only generated the desired VR civics resource but significantly increased student participation and engagement across the state.

BUILDING CIVIC TORQUE: THE POWER OF QUEENSLAND'S MINECRAFT CHAMBER

The above conditions gave rise to the conception of the 'Build Your Parliament in Minecraft Competition' (the Competition) in 2024. Student teams competed to build an accurate parliamentary chamber model in Minecraft Education. This section of the article outlines the Competition's objectives, planning, execution, and outcomes, demonstrating its resounding success and offering recommendations to increase the potential for future gain.

Background

In 2022, Queensland's Parliamentary Education team piloted a Minecraft chamber build with 27 Year 7 students enrolled in a Minecraft Elective at a Brisbane inner-city school. This class was suggested by a member of the Teacher Advisory Group (TAG), which is a consultative body of experienced educators who provide insights to ensure that our resources effectively engage students and align with curricular standards. The Minecraft class and their teachers embraced the ready-made project idea and greatly enjoyed the opportunity to visit Parliament House to research their build on location. To quote a quip from the Speaker with reference to their visit, 'While you are here, I am not sure whether you need to worry about MPs or 'creepers''[38]. (Any Minecraft gamer can explain.)

For several reasons, the resulting chamber model was not fit-for-purpose: Key features such as the coat of arms were omitted; and students populated the model with Non-Playable Characters (NPCs) representing the 93 Members of Parliament, limiting its usefulness as a blank template for future activities with other groups. Nevertheless, valuable insights from this pilot project helped to shape the 2024 Competition's rules and structure. For example, restricting

[38] Legislative Assembly of Queensland, Queensland Parliament Hansard: Record of proceedings, First session of the fifty-seventh parliament. Queensland Parliament, 2022. Accessed at: https://www.parliament.qld.gov.au/work-of-assembly/hansard.

the size of student teams to maximise opportunities for collaboration and the provision of timely, structured guidance to support progress and encourage a reflective, goal-oriented approach.

Competition objectives:

The 2024 Competition had two key objectives:

1. To provide an authentic, project-based learning experience to deepen students' understanding of Queensland's Parliament.

Leveraging the engagement power of a popular gaming platform and encouraging healthy competition, the Parliamentary Education Team offered Queensland schools an opportunity to develop skills in iterative design, creativity, teamwork and problem-solving, along with civics content knowledge.

2. To publish the resulting virtual chamber, providing an engaging digital civics resource at minimal cost which could be used to teach the structure and functions of parliament.

This resource particularly benefits regional and remote students who may never have an opportunity to visit the Parliament in person.

Competition task

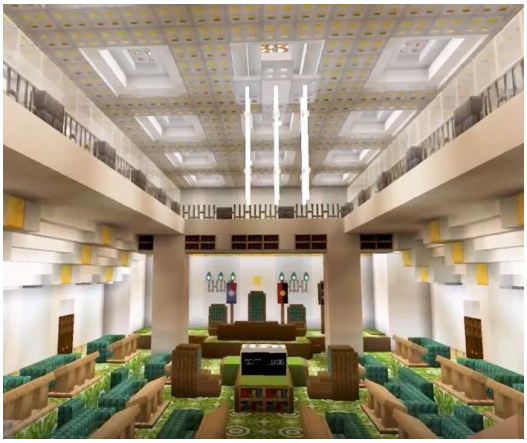
Participants were tasked with building a scale model of the Queensland's Legislative Assembly Chamber using Minecraft Education, replicating all key features (flags, mace, timer clocks, public gallery etc.) and reflecting the existing colours and surfaces as accurately as possible. Representing curved seating in a blocky gaming platform is no simple task. Students were challenged to use the available Minecraft materials in creative ways.

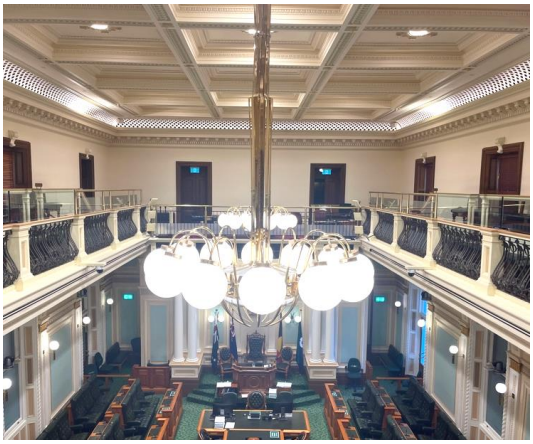
While links to learning resources on the Queensland Parliament website[39], such as Fact Sheets and instructional videos, were provided to participating teachers, the Competition focused on accurate representation of the Chamber in Minecraft, therefore any civics learning outcomes were incidental. Nevertheless, it was evident from many of the submitted entries, and from

[39] Queensland Parliamentary Education Office, Explore Your Parliament in Minecraft Education: Teacher Guide and Lesson Sequence. Queensland Parliament, 2024. Accessed at: https://www.parliament.qld.gov.au/Visit-and-learn/Education/Teacher-Resources/Classroom-Activities.

the questions emailed to the team during the building period, that development of knowledge and understanding of civics content was implicit throughout the process.

**Images showing ceiling detail in student-built Minecraft Chamber models (left), compared with the real Chamber photos provided to schools (right).*





Consultation, communications and marketing

Communications were key to the success of the competition. As a first step, a contact list was compiled to share competition details with administrative and curriculum leaders across all educational jurisdictions in the state. Parliament's Communications and Marketing team sought advice from Microsoft's Education Success Manager about using Minecraft graphic assets in the design of promotional graphics and prize merchandise. Early consultation with ICT Engagement Officers at Brisbane Catholic Education yielded valuable advice such as the requirement of a screen recording of the Minecraft build to be submitted with entries. This circumvented the need for judges to load each world in the Minecraft Education app which saved significant time during this period.

A social media pack was prepared for education leaders, schools, and Members of Parliament to support promotion of the competition. Following registration, Members were informed of the participating schools in their electorates, and many scheduled school visits to offer support and feedback on students' Minecraft models.

The marketing plan incorporated email updates and reminders at key stages as well as social media posts which included graphic assets, photographic images, and a compilation of entry videos.

Project timeline

The stages of implementing the Competition project proceeded as follows:

Date		**Action**	**Weeks prior to launch**
2023	July	Consultation: Information Technology and Communications and Marketing Teams	36
	October	Speaker's submission – approval received Email communications and promotion to key education contacts	48
	November	Creation of graphic assets Expressions of interest invited	44
	12 March	Social media promotion	
2024	25 March	Team registrations open prior to school holiday break	2
	15 April	Term 2, Week 1 – Resource pack link emailed to registered teams	0
	5 June	Entry submissions due	-8
	Judging period (2 weeks)		
	18 June	Winners announced	-10
	24 July	Minecraft classroom resources published online	
	5 August	Prize presentation (date negotiated with winning school)	-12

Eligibility, registration and resources

The competition was open to Queensland school students from Years 4 to 12. Teams of 2 to 5 students were invited to participate, with separate categories for Junior (Years 4 - 8) and Senior (Years 9 - 12) students.

Teachers submitted an online form to register one or more teams of students. There was no entry fee and no obligation for a registered team to submit a completed entry.

While balancing their ongoing responsibilities, the Parliamentary Education team sought to ensure equal access for all participants by reducing any barriers to involvement. To assist entrants, they provided a link to a 'Resource Pack' that included Chamber floor plans and photographs.

The dedicated Minecraft page on the Queensland Parliament website[40] provided:

- A Competition Handbook outlining terms, conditions, rules and guidelines, key dates, technical requirements, submission details and judging criteria.
- Curriculum alignment details to demonstrate how participation in the competition supports implementation of the Australian Curriculum across several learning areas such as Maths, Civics and HASS (History and Social Sciences).
- A Flyer to facilitate marketing via professional networks and schools' Learning Management Systems.
- A Social media pack including suggested text content and images, to support promotion of the school's involvement to their community.

Judging

Entries were evaluated based on creativity, accuracy, complexity, and presentation. The judging rubric in the Competition Handbook provided a clear framework for scoring entries. All 107 submitted entries were viewed, evaluated, and scored according to the judging rubric published in the Competition Handbook. Panel members were invited via the Parliament's Heritage Management Group or volunteered themselves due to personal interest.

Judges employed various methods to score, select and/or eliminate entries to identify finalists. Three of the judges were experienced Minecraft players and provided valuable insights into the intricacies of build techniques that were not immediately obvious to a Minecraft novice.

[40] Up-to-date project information and supporting documents were published at www.parliament.qld.gov.au/Minecraft

The judging panel met to share their individual findings and selected one winner by mutual agreement.

The winning team

Competition winners, students from Fairview Heights State School, Wilsonton, were honoured during a special Presentation Day at Parliament House, during which they enjoyed a VIP tour of the precinct, visiting areas not normally accessible to the public such as our heritage carpenter's workshop.

The presentation event included a formal prize presentation in the Green Chamber witnessed by an audience of enthusiastic and supportive Parliamentary Service staff. The formal presentation was followed by lunch for the winners and their guests at the Queensland Parliament's heritage Strangers Restaurant.

Resulting resource

The now-published Minecraft chamber model[41] is accompanied by a Teachers' Guide[42] produced by the Parliamentary Education team. This guide supports teachers to integrate the Minecraft chamber model into their civics programs in a way that realises its potential as an open and interactive VR resource. The Teacher Guide includes:

- Learning goals
- List of required resources
- Links to useful supporting materials on the Queensland Parliament website
- Detailed lesson sequence
- Assessment opportunities
- Differentiation for struggling and advanced learners
- Ideas for further extension

[41] Available to download from the Queensland Parliament website: https://www.parliament.qld.gov.au/Visit-and-learn/Education/Teacher-Resources/Classroom-Activities

[42] Queensland Parliamentary Education Office (2024). *Explore Your Parliament in Minecraft Education: Teacher Guide and Lesson Sequence*. Available on the Queensland Parliament website: https://www.parliament.qld.gov.au/Visit-and-learn/Education/Teacher-Resources/Classroom-Activities

- Opportunities for integration with English, Maths and Digital Technologies to further use of the model.

Learnings and recommendations

Early communications with key curriculum leaders proved effective in extending reach, achieving buy-in from schools that exceeded expectations. The provision of attractive graphic assets facilitated effective promotions and marketing.

A weekly document with 'Tips for Teams' – such as strategies for managing available time, allocating team roles and strategic progress points – were greatly appreciated by teachers. This initiative provided essential support for teachers unfamiliar with the Minecraft platform, enabling them to guide their teams effectively through the project. It also promoted the development of self-management and teamwork skills among students. Additionally, when individual teachers sent questions, responses were shared with all participants, ensuring consistent and equitable support throughout the build phase.

Elements to be reviewed

The provision of Junior and Senior sections proved unnecessary. No completed entries were submitted in the senior category. An imbalance of entry numbers across categories would have made judging more complex and offered an unfair advantage to teams in the under-represented section.

Contact with key Information Technology Support personnel within Education Queensland (EQ) prior to the Competition launch would have mitigated the negative impacts of unanticipated technical issues. Two weeks into the build time, Microsoft rolled out an update to Minecraft Education which blocked the sharing of Minecraft worlds in many state schools. This update necessitated a change to EQ networks to allow the students to continue sharing and collaboration in their builds. Precious competition days were lost while links were being drawn between the multiple and increasingly frantic reports of connection issues. Once key personnel within EQ were identified and the issue diagnosed, the necessary change was quickly escalated and implemented overnight. Had those key contacts been ascertained prior to launch, the impact of this outage would have been minimal.

Next steps

The Parliamentary Education team plans to establish an annual 'Parliamentary Education Cup' competition, continuing in 2025 with a second Minecraft Education challenge for schools to add the Red Chamber, formerly used by Queensland's Legislative Council to the existing Minecraft model. This expanded VR resource will serve to enhance students' understanding of the Council's abolition in 1922 and the state's current unicameral system. Future competitions could broaden engagement by incorporating creative fields like song writing, game design, or

digital animation to showcase parliamentary functions, attracting students with skills and interests beyond civics classes, thereby reaching a wider audience.

CONCLUSION: ENSURING DEMOCRACY'S CONTINUED RESILIENCE ON THE ROAD

Gamifying civics education with Minecraft Education offers a multitude of opportunities for enhancing student engagement and learning. Students can design their own virtual parliaments, comparing examples from other jurisdictions and creating bespoke chambers for hypothetical constituencies such as 'future-proof' or hi-tech parliaments. In-game legislative challenges simulate real-world scenarios, such as debating bills or negotiating to form coalitions, investigating the challenges and benefits of a hung parliament scenario, navigating committee processes and debating and amending bills. Role-playing deepens understanding, while quests and missions provide targeted learning about parliamentary functions. Additionally, achievement systems with badges incentivise learning, and simulated elections offer hands-on experience with the electoral process. Staging community engagement projects can raise awareness of current civic issues in a protected, supervised space. By leveraging the collaborative and immersive nature of gaming platforms with these extensions, educators harness the 'thick' approach to civics education, fostering active citizenship though deeper understanding.

Clearly, 3D virtual environments – such as Minecraft Education – offer unique opportunities for collaborative learning and creativity, enabling students to construct and explore, from their own classrooms, engaging situations that mirror real-world scenarios. Moreover

> *[d]igital environments provide a space where students can interact with civics issues in a meaningful way, applying their knowledge to simulated political or environmental challenges, and reflecting on the real-world consequences of their actions …*[43]

In an era marked by rapid technological advancements and societal transformations, the resilience of parliamentary institutions is vital to the sustainability of democratic institutions. 'Build Your Parliament in Minecraft' has explored the transformative potential of gamified learning and digital engagement in civics education. Brodie-McKenzie encourages an approach to civics education that shifts the focus from merely acquiring civic knowledge to engaging in

[43] Barab, et al (2007) p. 157.

meaningful participation, placing students at the heart of their learning.[44] By adopting innovative teaching strategies and leveraging the engagement power of educational technologies, parliamentary institutions can help young people understand that citizenship is an active and ongoing process rather than a fixed outcome.

Investing in educational strategies that foster civic engagement is crucial for ensuring democracy's resilience against emerging challenges. Recognising that young individuals have agency in shaping their role as citizens, civics education can and should empower them to take ownership of their civic responsibilities and actively contribute to their communities. 'Democracy is not a natural condition. It has to be learnt.'[45] Nurturing an informed and engaged citizenry through agile, future-focused approaches, will safeguard the vitality and effectiveness of modern democracy into an uncertain future.

[44] A. Brodie-McKenzie, 'Empowering students as citizens: Subjectification and civic knowledge in civics and citizenship education'. *JAYS,* 3, 2020, pp. 209–222. Accessed at: https://doi.org/10.1007/s43151-020-00023-3.

[45] M. Print, 'Students are missing out on a real education in democracy'. *ABC News*, 20 October 2015. Accessed at: https://www.abc.net.au/news/2015-10-20/print-students-are-missing-out-on-a-real-education-in-democracy/6865876.