

Procedure Committee

Consultation on highly contentious bills and committee access to external experts

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Terms of reference

Consultation on highly contentious bills

The terms of reference were referred to the committee by the Legislative Council on 20 June 2019.¹

That the Procedure Committee inquire into and report on the parliamentary modernisation proposals that:

- (a) prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process, and
- (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

Committee access to external experts

The terms of reference were referred to the committee by the Legislative Council on 16 October 2019.²

That:

- (a) this House notes that Portfolio Committee No. 3 – Education is currently conducting an inquiry into measurement and outcome-based funding in New South Wales schools,
- (b) on 18 September 2019, the Committee resolved to seek advice from the Clerk of the Parliaments about engaging an external expert to assist with the inquiry, such as a secondee from a government agency or an academic,
- (c) the advice of the Clerk of the Parliaments received on 26 September 2019 accurately canvassed a range of issues and uncertainty about external committee assistance, and
- (d) this House refer this matter to the Procedure Committee to develop, if appropriate, guidelines for how committees can benefit from expert assistance external to the Parliament while also easing the workload pressures on the committee secretariat.

¹ *Minutes*, NSW Legislative Council, 20 June 2019, pp 275-276.

² *Minutes*, NSW Legislative Council, 16 October 2019, p 521.

Committee details

Committee members

Hon John Ajaka MLC	Liberal Party	<i>(Chair)</i>
Hon Robert Borsak MLC	Shooters, Fishers and Farmers	
Hon Mark Buttigieg MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
Hon Emma Hurst MLC	Animal Justice Party	
Hon Don Harwin MLC	Liberal Party	
Hon Trevor Khan MLC	The Nationals	
Hon Natasha Maclaren-Jones MLC	Liberal Party	
Hon Shayne Mallard MLC	Liberal Party	
Hon Sarah Mitchell MLC	The Nationals	
Revd the Hon Fred Nile MLC	Christian Democratic Party	
Hon Adam Searle MLC	Australian Labor Party	
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Chair's foreword

This report covers two references received from the House:

- consultation on highly contentious bills, and
- the use of an expert panel.

I thank members of the committee for their consideration of these important matters and the secretariat for managing these inquiries.

Hon John Ajaka MLC

President

Recommendations

Recommendation 1

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That the NSW Parliamentary Library establish a panel of external experts to be utilised by the three parliamentary departments as needed.

Recommendation 2

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That Department of Parliamentary Services seek approximately \$269,000 in additional funding for the necessary resources to establish and administer a panel of external experts.

Conduct of inquiry

In June and October 2019 the Procedure Committee received two references from the House directing the committee to examine proposals for enhanced consideration of highly contentious bills and how parliamentary committees might benefit from formalised access to external experts. The two references share a number of common elements.

Consultation on highly contentious bills

On 20 June 2019 the House considered a motion moved by the Hon. Mark Latham MLC that noted the Premier's goal of making the Parliament modern and progressive, with less focus on process and more focus on outcomes, and proposed new procedures for consideration of highly contentious government bills, including a Green and White Paper process.³

The motion also sought to establish new procedures for private members' bills, including the use of services provided by the NSW Parliamentary Library for preparing issues papers, and of services provided by newDemocracy for facilitating community input on legislation.⁴

During debate on the motion members spoke in general support of improving parliamentary processes and maximising opportunity for consultation. However, the Leader of the Government outlined the Government's position on the issue:

The position of the Government is that we do not believe the House ... should be dictated to by sessional order as to which path it goes down—whether it be a green paper-white paper process, a discussion paper-exposure draft process or, as we did, for example, on the law of provocation, a standing committee process. All of these options are available and I believe that, on Government legislation, it should be up to the Government of the day to make the choice. If it makes the wrong choice, that is at its own peril.⁵

Ultimately, the House agreed to an amendment to refer two modernisation proposals to the Procedure Committee in two stages:

1. That the Procedure Committee inquire into and report on the parliamentary modernisation proposals that:
 - (a) prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process, and
 - (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

³ NSW Legislative Council, *Hansard*, 20 June 2019, pp 101-104.

⁴ NSW Legislative Council, *Minutes*, 20 June 2019, p. 275.

⁵ NSW Legislative Council, *Hansard*, 20 June 2019, p. 103.

2. That, when a member who has carriage of a highly contentious private members' bill, moves to refer the bill to a committee for inquiry and report, the member may also move that:
 - (a) the New South Wales Parliamentary Library prepare an Issues Paper on the bill,
 - (b) the newDemocracy Foundation be commissioned to facilitate community input into the bill, such as a citizens panel or jury, to complement the traditional forms of evidence gathering by committees, such as seeking submissions and taking oral evidence, and
 - (c) Legislative Council committees will respect the foundation's remit as an independent and non-partisan research organisation.
3. That the operation of paragraph 2 of this resolution lapse on the last sitting day of 2020 and then stand referred to the Procedure Committee for inquiry and report.
4. That the House notes that the newDemocracy Foundation has offered to provide this service during 2019 and 2020 for no charge to the Parliament.

This report examines proposals contained in paragraph (1) of the resolution agreed to by the House. A separate report of the Procedure Committee on the trial outlined in paragraph (2) of the resolution will be prepared once the trial period concludes on the final sitting day of 2020.

The Chair, on behalf of the committee, invited relevant parties to make submissions to the inquiry. Twelve submissions were received. The full list of submissions is reproduced at Appendix 1. One submission author lodged a late submission and a number of other subsequent communications. These are also listed in Appendix 1.

A discussion paper was prepared by the committee secretariat to assist stakeholders in preparing submissions and for consideration of the committee during its deliberations.

The discussion paper canvassed definitions of a green and white paper process, pre-legislative consultation processes currently followed in New South Wales; the views of proponents of the use of green and white papers; proposals for encouraging pre-legislative consultations in New Zealand and parliamentary procedures to promote scrutiny of and consultation on government bills.

In relation to a modified research and deliberative process for highly contentious private members' bills, the discussion paper examined the current consideration of private members' bills and the trial being conducted under the resolution of the House; the capacity of the Parliamentary Library research services to assist with bill inquiries; the deliberative democracy approach and the role of the newDemocracy Foundation and examples of other research and deliberative processes being undertaken in Australia.

The discussion paper is reproduced at Appendix 4.

Inquiry into the use of an expert panel

On 3 July 2019, Portfolio Committee No.3 – Education self-referred an inquiry into the measurement and the proposal for outcome-based funding in New South Wales schools.⁶

On 18 September 2019, the Committee resolved to seek advice from the Clerk of the Parliaments about engaging an external expert to assist with the inquiry. On 26 September 2019, the advice from the Clerk of the Parliaments, which canvassed a range of issues, was received by the committee.⁷

On 15 October 2019, the Chair of Portfolio Committee No. 3 – Education, the Honourable Mark Latham MLC, gave a notice of motion in the House, noting the self-reference and advice from the Clerk, and calling on the House to refer the matter to the Procedure Committee to develop, if appropriate, guidelines for how committees can benefit from the assistance of experts external to the Parliament while also easing the workload pressures on the committee secretariat.

On 16 October 2019, the House agreed to the motion and the matter was referred to the Procedure Committee for inquiry and report.⁸

Structure of this report

Chapter 1 examines the proposals for a Green and White Paper process for highly contentious government bills and a modified research and deliberative process for highly contentious private members' bills.

Chapter 2 then examines the second reference to the committee, how parliamentary committee inquiries might benefit from the assistance of external experts and any potential guidelines for how such assistance should be arranged.

Chapter 3 outlines the position reached by the committee with respect to the proposals put forward for its consideration.

⁶ *Minutes*, NSW Legislative Council, 6 August 2019, pp 305-306.

⁷ The advice from the Clerk included information about previous use of external assistance which has been used to inform this report.

⁸ *Minutes*, NSW Legislative Council, 16 October 2019, p 521.

Chapter 1 Consultation on highly contentious bills

The committee is tasked with investigating whether all highly contentious government legislation should be subject to a Green and White Paper process prior to introduction into the Legislative Council and whether a modified research and deliberative process should be available for all highly contentious legislative proposals put forward by private members.

The Green and White Paper process

- 1.1 Paragraph (a) of the inquiry terms of reference requires the committee to examine whether, prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process.
- 1.2 The discussion paper prepared by the committee for the assistance of stakeholders canvassed a number of definitions of the meaning of 'green paper' and 'white paper'. The committee has adopted the following definition from the United Kingdom Parliament during its inquiry:
 - **Green Papers** are consultation documents produced by the Government. The aim of this document is to allow people both inside and outside Parliament to give feedback on its policy or legislative proposals.⁹
 - **White Papers** are policy documents produced by the Government that set out their proposals for future legislation. White papers ... may include a draft version of a Bill that is being planned. This provides a basis for further consultation and discussion with interested or affected groups and allows final changes to be made before a Bill is formally presented to Parliament.¹⁰
- 1.3 The committee received 12 submissions (and an additional late supplementary submission and correspondence) from a range of stakeholders responding to the discussion paper and commenting on a number of themes relevant to paragraph (a) of the terms of reference. All of the submissions expressed general support for comprehensive consultation on contentious legislation, though several emphasised that such consultation should be used to complement current procedures rather than to replace them. Submissions also noted that consultation on legislation is often subject to short timeframes, which limits stakeholders' ability to fully participate in the legislative process.
- 1.4 The submission from the 'Evidence Based Policy Research Project facilitated by the newDemocracy Foundation'¹¹ supports the Green and White Paper process. The submission details the results of an analysis by both a free market think tank and a social democratic think tank assessing case studies against criteria for best practice policy development. Participants from both think tanks returned similar results, arguing that overall government decision

⁹ <https://www.parliament.uk/site-information/glossary/green-papers/>.

¹⁰ <https://www.parliament.uk/site-information/glossary/white-papers/>.

¹¹ Submission 1, Evidence Based Policy Research Project facilitated by the newDemocracy Foundation, p 5.

making is lacking in terms of providing a cost/benefit analysis, a comprehensive policy statement and a process to elicit public feedback. The submission argues that a Green and White Paper process would address these issues.

- 1.5** Submissions from the Honourable Kevin Rozzoli AM, former Speaker of the Legislative Assembly, Unions NSW and the NSW Nurses and Midwives Association contend there is a lack of evidence that Green and White Paper processes make a significant contribution to improved decision making and outcomes.¹²
- 1.6** Unions NSW opposed a compulsory Green and White Paper on the basis that such a process may become cumbersome and a disincentive to introducing pivotal legislation.¹³
- 1.7** The submissions from Mr Rozzoli, Unions NSW and the NSW Nurses and Midwives Association also argue that a mandated Green and White Paper process is unnecessary as the power of the House to conduct inquiries and examine witnesses is sufficient, and need only be used to their maximum potential. Mr Rozzoli also stated: "The answer is not to bypass traditional parliamentary processes but to re-invigorate them."¹⁴
- 1.8** Unions NSW and the NSW Nurses and Midwives Association further note that the Council already has the power and an obligation to inform itself and that a Green and White Paper process should be considered as an option only where appropriate and beneficial.¹⁵

Statements of public interest

- 1.9** Professor Percy Allan from the Evidence Based Research project proposed in a late submission that if a Green and White Paper process is not adopted, the government should, at a minimum, provide a "Statement of Public Interest" (SPI) with every contentious bill. Professor Allan explained that:

A[n] SPI would answer six fundamental questions that every member of Parliament and interested citizen is entitled to know before a bill is considered, viz:

- 1. Need**
Why is the policy needed based on factual evidence and stakeholder input?
- 2. Objectives**
What is the policy's objective couched in terms of the public interest?
- 3. Options**
What alternative policies and mechanisms were considered in advance of the bill?
- 4. Analysis**
What were the pros/cons and benefits/costs of each option considered?

¹² Submission 3, The Hon Kevin Rozzoli, p. 1. Submission 8, Unions NSW, p. 5. Submission 7, NSW Nurses and Midwives' Association, p. 2.

¹³ Submission 8, Unions NSW, p. 4.

¹⁴ Submission 3, The Hon Kevin Rozzoli, p. 1.

¹⁵ Submission 8, Unions NSW, p. 2.

5. Pathway

What are the timetable and steps for the policy's rollout and who will administer it?

6. Consultation

Were the views of the affected stakeholders sought and considered in making the policy?¹⁶

1.10 Professor Allan subsequently clarified the governance arrangements for the Evidence-Based Policy Research project as separate and distinct from the new Democracy Foundation.¹⁷ Finally, in addressing concerns raised as to the definition of a “contentious” bill, Professor Allan submitted the following two options for consideration by the Committee:

1. All principal bills be preceded by a G&W Papers (Green and White papers) process and where a Standing Committee requests it an amending bill be referred back to its initiator to undergo such a process, or
2. All bills be accompanied by a Statement of Public Interest when tabled in Parliament.¹⁸

Recent Practice of the Legislative Council – Selection of Bills Committee and referral of bills for inquiry

1.11 The Select Committee on the Legislative Council Committee System conducted an inquiry into the Legislative Council Committee System in 2015 and 2016. In its November 2016 report, the Select Committee stated that Legislative Council committees should play a greater role in the substantive review of bills and recommended the establishment of a Selection of Bills Committee, on a trial basis, to ensure more draft legislation is referred to committees for detailed consideration. The committee also recommended that a Regulation Committee be established, again on a trial basis. On 23 November 2017, the Legislative Council established the Selection of Bills Committee on a trial basis to commence on the first sitting day of 2018 and conclude on the last sitting day of 2018. The House also required that the Selection of Bills Committee table an evaluation of the effectiveness of the trial by the last sitting day in November 2018.

1.12 The evaluation considered the inquiries into the four bills¹⁹ referred during the trial and deemed the trial a considerable success:

It has allowed members to harness the strength of the committee system to assist them in their role as legislators, thus fostering a respectful culture in the House in which legislative scrutiny is embraced. For this reason the committee supports establishing the Selection of Bills Committee as a standing committee at the commencement of the 57th Parliament in 2019. Given the success of the trial this year, it is likely that an increased number of bills will be referred in future parliaments. Therefore the committee has also

¹⁶ Professor Percy Allan AM, Chair, Steering Committee, Evidence Based Policy Research Centre, late submission, 8 January 2020, p. 2.

¹⁷ Professor Allan, email communication to the President and committee secretariat entitled “Clarification of our Submission to the Procedure Committee”, dated 8 July 2020.

¹⁸ Professor Allan, email communication to the president and committee secretariat entitled “Procedure Committee – Resolving Contentious Bill Inquiry issues”, dated 21 July 2020.

¹⁹ By way of contrast, only 11 bills had been referred by the House to a committee during the period 1997-2016.

recommended that the Department of the Legislative Council be provided with additional resources to support this additional committee inquiry workload.

1.13 The Selection of Bills Committee was subsequently re-established as a standing committee at the commencement of the 57th Parliament.²⁰ Since its reestablishment, the committee has recommended the referral of 11 bills to a committee, 8 government and 3 private members' bills.

1.14 On 16 June 2020, two bills were referred via the Selection of Bills Committee process to Portfolio Committee No. 4 - Industry, the Constitution Amendment (Water Accountability and Transparency) Bill 2020 (a government bill) and the Water Management Amendment (Transparency of Water Rights) Bill 2020 (a private member's bill). On the following day, another private member's bill relating to water management, the Water Management Amendment (Water Allocations - Drought Information) Bill 2020, was also referred to Portfolio Committee No. 4 – Industry, by way of an amendment to the second reading of the bill, and is being considered concurrently with the other two bills.

Bills referred to a standing committee on the recommendation of the Selection of Bills Committee

Date	Bill	Referred to Committee	Report by
28/05/2019	Ageing and Disability Commissioner Bill 2019	Standing Committee on Social Issues	4/06/2019
6/08/2019	Reproductive Health Care Reform Bill 2019*	Standing Committee on Social Issues	20/08/2019
24/09/2019	Right to Farm Bill 2019	Portfolio Committee No. 4 - Industry	21/10/2019
15/10/2020	Road Transport Amendment (Mobile Phone Detection) Bill 2019	Portfolio Committee No. 5 – Legal Affairs	12/11/2019
12/11/2019	Digital Restart Bill 2019	Portfolio Committee No. 6 – Transport and Customer Service	17/03/2020
12/11/2019	Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019	Portfolio Committee No. 7 – Planning and Environment	17/03/2020
19/11/2019	Work Health and Safety Amendment (Review) Bill 2019	Portfolio Committee No. 1 – Premier and Finance	24/03/2020
24/03/2020	Firearms and Weapons Legislation Amendment Bill 2020	Portfolio Committee No. 5 – Legal Affairs	First sitting day in 2021
16/06/2020	Constitution Amendment (Water Accountability and Transparency) Bill 2020	Portfolio Committee No. 4 – Industry	31/07/2020
16/06/2020	Water Management Amendment (Transparency of Water Rights) Bill 2020*	Portfolio Committee No. 4 – Industry	31/07/2020
16/06/2020	Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020*	Portfolio Committee No. 5 – Legal Affairs	31/07/2020
4/08/2020	Work Health and Safety Amendment (Information Exchange) Bill 2020	Standing Committee on Law and Justice	11/09/2020

****Private members' bills***

²⁰ *Minutes*, NSW Legislative Council, 8 May 2019, pp 97-99.

The need for flexibility around consultation on legislation

- 1.15** Several submission authors were of the view that any process of determining which bills should be subject to the Green and White Paper process must be flexible in order to account for unique circumstances.
- 1.16** While the Law Society of New South Wales strongly supports a prescribed consultation process on legislation, it notes that any model adopted "should incorporate an element of flexibility, noting that context surrounding some bills may require different treatment".²¹
- 1.17** Unions NSW propose that, should the Green and White Paper process become compulsory, an escape clause be included in the mechanism to ensure that consultation of this nature is undertaken only where appropriate and necessary.²²
- 1.18** The submission from the NSW Council for Civil Liberties (NCCL) explores several forms of 'contentious' legislation, noting instances where prescribed consultation is unlikely to affect outcomes or where circumstances simply do not allow for extended consultation.²³ For example, on matters of conscience, such as abortion or assisted dying, the views of stakeholders and members are often well established and unlikely to change as a result of a Green and White Paper process.
- 1.19** The NCCL also notes that when legislation is prepared quickly in response to a crisis, there is often insufficient time for thorough consultation or the preparation of Green and White Papers.

The definition of 'highly contentious' and widespread public interest

- 1.20** A number of submissions raised issues around the defining a 'highly contentious' bill, as proposed in the resolution, for the purposes of a mandated process.
- 1.21** Unions NSW and the NSW Nurses and Midwives Association both call for clarification of the terms 'likely to substantially alter' and 'provoke widespread public interest', noting that such clarity would increase efficiency in determining which bills would be subject to the process.²⁴
- 1.22** The NSW Council of Social Service cautions that not all contentious legislation provokes widespread interest from the public,²⁵ and that in some circumstances, contentious legislation affects only small subsets of the community that are in some way vulnerable.²⁶ Such legislation while worthy of consultation, risks being overlooked if it does not fit the proposed definition of 'contentious'.
- 1.23** The Law Society of New South Wales expressed a similar view:

²¹ Submission 10, The Law Society of New South Wales, p. 1.

²² Submission 8, Unions NSW, p. 5.

²³ Submission 11, NSW Council for Civil Liberties, pp 3-4.

²⁴ Submission 8, Unions NSW, p. 5. Submission 7, NSW Nurses and Midwives' Association, p. 2.

²⁵ Children and Young Persons (Care and Protection) Amendment Bill 2018.

²⁶ Submission 5, NSW Council of Social Service, p. 1.

"numerous bills that would impact the rights of an accused may not provoke widespread public interest but could potentially have a significant impact ... and therefore be of very significant social concern".²⁷

Modified research and deliberative processes for private members' bills

- 1.24 Paragraph (b) of the inquiry terms of reference required the committee to examine a proposal that:
- (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

Private members' bills in the Council

- 1.25 While any member of the Legislative Council may propose legislation in the House, it is often the case that, due to lack of resources, private members' bills have not been the subject of widespread consultation prior to introduction.
- 1.26 Over the last 20 year period between three and 17 private members' bills have been introduced in the Council each year, with an increasing number in recent Parliaments. However it is rare that the House has supported private members' bills, with the vast majority being defeated at the second reading stage, 47 passing the Legislative Council but not the Legislative Assembly, and only 20 proceeding through both Houses during that period.
- 1.27 Inquiry and report by Legislative Council committees allows stakeholders to put the case in support or against the bill and for amendments or redrafting to be proposed or alternatives for addressing public policy concerns to be considered. Yet, despite provisions in the standing orders, in the last 20 years only six private members' bills have been referred to a committee for inquiry and report. The recent trial and subsequent establishment of the Selection of Bills Committee has increased the referral of bills to a committee for inquiry, but these have, in the main, related to government bills. As noted above, during the trial period in 2018, four bills (all government bills) were referred to a committee. Since the re-establishment of the committee in 2019, eleven bills (eight government and three private members' bills) have been referred to a committee.
- 1.28 Recently, the House referred the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill, a private members' bill, to the Standing Committee on State Development for inquiry and report. This is discussed further at paragraph 1.35.
- 1.29 Two of the submissions received by the committee proposed different models for consultation and research on highly contentious private members bills – the newDemocracy Foundation and the NSW Parliamentary Library.

²⁷ Submission 10, The Law Society of New South Wales, p. 2.

Deliberative Democracy

- 1.30** Deliberative democracy is a broad theoretical and practical approach aimed at expanding meaningful public participation in political decision-making.²⁸ Citizens panels and juries – groups of randomly selected community members who consider a particular topic, examine expert witnesses and ultimately provide recommendations to the relevant organisation or government – are some of the most common forms of deliberative democracy.
- 1.31** The submission from the newDemocracy Foundation focused on this deliberative process, which will also be considered as part of the committee's report on a trial for the consideration of private members' bills.²⁹ newDemocracy Foundation is a not for profit deliberative democracy research organisation that works with governments to design and operate public engagement projects to enable everyday people to contribute to reaching shared recommendations around challenging areas of public policy.
- 1.32** newDemocracy Foundation argues that citizens juries lead to increased public confidence in policy decisions. However, critics of citizens juries argue that they are organised by government-friendly organisations, that facilitators can influence outcomes, and that ultimately governments can choose not to accept recommendations.³⁰
- 1.33** newDemocracy Foundation contends that "contributions to parliament have a natural skew towards the most polarised. They are not necessarily reflective of the wide community. Rather, they are often the ones with the most at stake" and that representation on matters before parliament should be broader and represent more diverse viewpoints. According to newDemocracy, public participation in the form of citizens' juries would address such gaps.
- 1.34** The newDemocracy Foundation proposes that a trial of their service during the course of the committee's inquiry into contentious legislation (part 2 of the resolution of the House of 20 June 2019) would demonstrate the value of the newDemocracy Foundation process, and allow committee members to make an informed decision with regard to its value. At the time of reporting, there has only been one inquiry into a private members' bill that considered using the services of the newDemocracy Foundation.

Inquiry into the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill

- 1.35** On 6 June 2019, on the motion of the Hon Mark Latham MLC, the House referred the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019 to the Standing Committee on State Development for inquiry and report. As part of the inquiry the committee was to commission the newDemocracy Foundation to facilitate community input into the bill, such as a citizens panel or jury, to complement the traditional forms of evidence gathering by committees, such as seeking submissions and taking oral evidence. The reference also required the NSW Parliamentary Library to prepare an issues paper on the bill.

²⁸ NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p. 57.

²⁹ Submission 2, newDemocracy.

³⁰ Peter McLaverty, *Is deliberative democracy the answer to representative democracy's problems? A consideration of the UK government's programme of citizens' juries*, Representation, Vol. 45, No. 4, 2009, p. 381.

- 1.36** In working with the committee, newDemocracy proposed a deliberative poll process for the inquiry into the bill. This would involve recruiting random samples from the community, setting their remit through a clearly defined question, providing them with detailed, in-depth information about an issue, using various processes and techniques to develop their thinking, and giving participants abundant time to allow immersion in the topic. A process that would typically take several months.
- 1.37** Following extensive consideration and negotiations, it was mutually agreed between the Foundation and the committee that the deliberative poll should not proceed for the inquiry. The polarising nature of the topic of nuclear power and the timing involved did not make it a feasible option within the timeframe for the inquiry.
- 1.38** As part of its decision not to proceed, the committee took into consideration the resources required and administrative costs to the Legislative Council including significant use of committee staff time to assist with the process.

A new resourcing model for the NSW Parliamentary Library Research Service

- 1.39** The NSW Parliamentary Library³¹ submission focused on a proposal for expanded resources to allow the library to respond to the needs of the House and its committees.
- 1.40** The discussion paper attached to this report describes the research services currently provided to Council members by the New South Wales Parliamentary Library, noting the quality of the research and the high demand on, and the resource limitations of the service.
- 1.41** While supportive of initiatives to modernise parliament, the NSW Parliamentary Library notes in its submission that the research team is currently not funded or resourced to undertake or maintain the resource intensive 'modified research' model outlined in the discussion paper.³²
- 1.42** There has been a significant increase in member requests for research since the commencement of the 56th Parliament, including the issues paper for the Standing Committee on State Development inquiry into the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019.
- 1.43** The submission notes that due to the broad scope of the topic, and the need at the same time to respond to an increasing number of member research requests, it took approximately three months and the involvements of six different authors to produce the issues paper. The need to use a pool of authors reflected the resourcing challenges that the Parliamentary Library research service faced in trying to balance the needs of the Standing Committee for a comprehensive issues paper, respond to incoming member research requests and complete its own original research publications.³³
- 1.44** Based on the experience of preparing that issues paper, the Parliamentary Library outlines a proposal for a new resourcing model to allow the research service to respond quickly and flexibly to urgent research requests from members and on highly contentious bills, with the

³¹ Submission 9, NSW Parliamentary Library.

³² Submission 9, NSW Parliamentary Library, Department of Parliamentary Services, p. 2.

³³ Submission 9, NSW Parliamentary Library, Department of Parliamentary Services, p 4.

costs and service to be shared between the Legislative Council, Legislative Assembly and the Department of Parliamentary Services.

- 1.45** The model involves the recruitment of three additional senior research staff and the establishment of a panel of subject matter experts. The panel would be administered by the Parliamentary Library Research Services and accessed on an as needs basis.
- 1.46** The model estimates the cost of a subject matter expert for a committee inquiry at \$40,000 and also assumes the allocation of one FTE Research Service officer to prepare an Issues Paper for each inquiry. On that basis, the estimated cost of providing research for four bill inquiries in a year is \$613,370.00, and the cost for seven bill inquiries is \$876,244.00.
- 1.47** The administration and operation of an expert panel is discussed in more detail below in relation to the inquiry into engagement of external expert assistance by committees.

Chapter 2 Committee access to external experts

A main feature of parliamentary committee inquiries is taking of evidence from experts in subjects relevant to the matters under inquiry. Often experts present opposing views on questions under consideration by an inquiry and it is the committee's task to weigh and balance these opposing views. Committees have also, on occasion, sought the direct assistance of subject experts to assist in understanding complex concepts.

The inquiry into assistance of external experts received one submission from the NSW Parliamentary Library, which outlined a proposed new research service model which includes establishing a panel of external experts in areas such as law, economics, political science, education, statistics and environmental science to be accessed on an as needs basis. Under the proposed model, the cost of and access to external expert assistance would be shared between the Department of Parliamentary Services, the Legislative Council and the Legislative Assembly.

While it is noted that the proposal for an expert panel, does not solely provide for the engagement of external experts for committee inquiries, this report has focussed on the potential for Legislative Council committees.

The Committee Office of the Department of the Legislative Council

- 2.1 The Committee Office of the Department of the Legislative Council has an establishment of 23 full-time equivalent positions. The Clerk-Assistant Committees is responsible for overseeing the Committee Office with four Directors managing its day to day operations. Eight Principal Council Officers, assisted by four Senior Council Officers, are responsible for managing inquiries. These officers are supported by six administrative officers.
- 2.2 Committee staff in the Legislative Council are employed as generalists, meaning they are not permanently attached to a particular committee but may be asked to work on any inquiry of any committee. Staff are employed from a range of academic backgrounds.
- 2.3 It is important for staff to be flexible as it is commonplace for officers to work concurrently on more than one inquiry into very different subject matters. While this can, on occasion, prove challenging, it provides staff with the opportunity for professional development and diverse inquiry experience.
- 2.4 For inquiries that have required specialist or technical knowledge, committees have on occasion requested a briefing from experts or from departmental staff at the commencement of an inquiry. This practice can assist members and the committee secretariat to better understand complex matters before receiving evidence.
- 2.5 There is an extremely high level of satisfaction among the members of the Legislative Council with the service and support provided by the Committee Office. Numerous members have placed on the parliamentary record that they find participation in committee inquiries to be one of the most rewarding aspects of being a member of parliament. During take note debates on committee reports members invariably take the opportunity to acknowledge the professionalism of the Committee Office and the quality of the work it produces.

- 2.6 In 2015-16, the Select Committee on the Legislative Council Committee System was established to inquire into and report on how to ensure that the committee system continues to enable the Legislative Council to effectively fulfil its role as a House of Review. The discussion paper prepared for the inquiry canvassed the issue of access to external experts,³⁴ however, the issue was not raised as priority by stakeholders during the inquiry. Ultimately the final inquiry report did not make any recommendations regarding external experts, content with the practice of committees only seeking expert assistance when considered necessary.

The use of external experts by Legislative Council committees

- 2.7 Under Standing Order 234(2), a committee may, with consent of the appropriate Minister, make use of the services of any staff or facilities of a government department, administrative office or public body. This provision was introduced as part of a 1988 resolution of the House which stemmed from recommendations made by the Select Committee on Standing Committees in 1986.³⁵
- 2.8 In accordance with Standing Order 234(2), it is not uncommon for Legislative Council committees to request a briefing from public servants at the commencement of an inquiry to assist committee members and secretariat staff to understand complex matters.³⁶ For example, the Standing Committee on Law and Justice receives a briefing from officers of the relevant government agencies involved in the committee's oversight reviews at the start of each Parliament.³⁷
- 2.9 Committees have also sought external expert advice from specialists to conduct consultations on behalf of committees with people with special needs, including disability³⁸ and Aboriginal Australians.³⁹ Committees have also commissioned accounting or consulting firms to provide actuarial advice⁴⁰ and economic modelling.⁴¹
- 2.10 On occasion, committees have made use of roundtable discussions. For example in 2012, the Standing Committee on Social Issues for its inquiry into domestic violence trends in New South Wales, held a roundtable style hearing to exchange ideas with subject experts from

³⁴ Footnote, p54 of the report entitled *The Legislative Council committee system*, November 2016

³⁵ NSW Legislative Council, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018), p 761.

³⁶ NSW Legislative Council, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018), pp 760-761.

³⁷ NSW Legislative Council, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018), footnote 393, p 761.

³⁸ Standing Committee on Social Issues, NSW Legislative Council, *The Group Homes Proposal: Inquiry into residential and support services for people with a disability*, Report No. 19, 1999.

³⁹ Standing Committee on Social Issues, NSW Legislative Council, *Enhancing Aboriginal Political Representation*, Report No. 18, 1998.

⁴⁰ General Purpose Standing Committee No. 1, NSW Legislative Council, *Review and monitoring of the NSW Workers Compensation Scheme*, Report No. 22, 2002.

⁴¹ Select Committee on Greyhound Racing, NSW Legislative Council, *Greyhound Racing in NSW*, Report No. 2, 2014.

government agencies, community groups and academics.⁴² In another example, the State Development Committee held round table discussions in 2011 for its inquiry into Economic and social development in central western New South Wales.⁴³

- 2.11** In the majority of cases, the assistance of public servants, the engagement of specialists and the use of roundtables have been cost neutral to the Department of the Legislative Council. On a small number of occasions, supplementation has been sought to support particularly resource intensive committee inquiries, for example travel costs in the case of the inquiry into recreational fishing, and an actuarial expert for both the review and monitoring of the NSW Workers compensation scheme and the inquiry into greyhound racing.
- 2.12** The issue of whether to engage external experts or seek specialist advice has been considered by various committees over the years.⁴⁴ While committees have acknowledged the benefits and convenience of having access to expert advice, they have also acknowledged difficulties that may arise in maintaining full control of the direction of an inquiry.⁴⁵ In addition, for the Department of the Legislative Council to effect its roles and responsibilities, it must operate impartially, and be perceived as impartial. The use of external assistance, including public servants and government bodies through secondment, can raise concerns about ability of such public servants to remain impartial given their responsibilities to both the Minister, through their agency, and to the committee.

The experience in other parliamentary jurisdictions

- 2.13** The issue of how committees can benefit from external expert assistance is one that has been considered by other parliaments.
- 2.14** In November 2019, the Legislative Council posted a request for advice on the Australian and New Zealand Association of Clerk's-at-the-Table (ANZACATT) e-catt forum as to whether other jurisdictions had a policy on the engagement by committees of external subject experts, their experiences with experts, either formalised or ad hoc, and any issues encountered regarding the engagement of external experts.⁴⁶
- 2.15** While a number of parliaments have a practice of engaging external experts, the degree and regularity of engagement varies. The Australian Senate and the Victorian Parliament have regular, formalised and contractual arrangements with legal experts for their scrutiny and

⁴² Standing Committee on Social Issues, NSW Legislative Council, *Domestic violence trends and issues in NSW*, Report No. 46, 2012, p 2.

⁴³ Standing Committee on State Development, NSW Legislative Council, *Economic and social development in central western New South Wales*, Report No. 36, 2012, pp 2-3.

⁴⁴ Select Committee on Standing Committee of the Legislative Council, NSW Legislative Council, *Standing Committees*, 1986; Select Committee on the Legislative Council Committee System, NSW Legislative Council, *The Legislative Council committee system*, 2016.

⁴⁵ Select Committee on Standing Committee of the Legislative Council, NSW Legislative Council, *Standing Committees*, 1986, pp 57-58.

⁴⁶ The Legislative Council received nine responses through the forum. The Legislative Council did not receive a response from the South Australian or Northern Territory Parliaments nor do their Standing Orders address the issue of external experts.

oversight committees due to their technical nature. In addition, some parliamentary committees are required by statute to engage external experts such as an auditor.

- 2.16** A common theme across the parliamentary jurisdictions was the engagement of external experts through the form of seconded staff. While the House of Representatives and the Legislative Assembly of Western Australia found that secondments allowed more flexibility and are more straightforward to arrange, issues for consideration included the management of conflicts of interests.
- 2.17** While most Parliaments do not have a formal policy position on the engagement of external subject experts, the committee notes that the method of contracting external experts when used largely follows public sector procurement policies. Parliaments such as the Legislative Assembly in the ACT noted that given the infrequent use of experts, committee staff needed to be trained or refresh their knowledge of procurement processes to ensure they are applied correctly.
- 2.18** Other issues encountered by other jurisdictions when engaging external experts included tight timeframes for producing their advice, the relatively small pool of available experts to draw upon, and "mission creep" with requests from committee members who seek additional information beyond the scope of the expert's contract.
- 2.19** A summary of the responses is reproduced at Appendix 2.

A model for an expert panel considered by the committee

- 2.20** The NSW Parliamentary Library, Department of Parliamentary Services proposes a model for the establishment of a panel of external experts that would be available to all three departments in the NSW Parliament to enhance the library's capacity to provide research services.

NSW Parliamentary Research Service

- 2.21** Currently, the Parliamentary Research Service in the NSW Parliamentary Library consists of seven full time equivalent (FTE) staff who conduct impartial, evidence-based research for members of the NSW Parliament. While research service staff have expertise in broad disciplines, such as law, political science, education, statistics and environmental science, they are not experts on a specific topic.⁴⁷
- 2.22** The research service at present is not funded to use external experts on an ongoing basis. However, the research service recently secured ad hoc funding to publish several studies of the New South Wales election results by an external expert, Antony Green.⁴⁸

⁴⁷ Submission 1, Department of Parliamentary Services, NSW Parliament, p 2.

⁴⁸ The publications prepared by Antony Green provide detailed analyses of election trends, including analysis of the 2019 NSW election and comparisons with the 2015 election.

The proposed expert panel

- 2.23** The NSW Parliamentary Library proposes the establishment of a panel of external experts, to be administered by an additional senior research officer, which would act in a 'surge capacity' to provide an immediate response to the urgent research needs of all departments.⁴⁹
- 2.24** The engagement of external experts would occur through the development of a database maintained by the Parliamentary Library's research service, as the initial consultation and liaison point between LC and LA committees and the Parliament's departments and the panel of experts.⁵⁰ An additional senior research officer would be responsible for the administration and ongoing maintenance of the expert panel. As part of their duties, the officer would establish a panel through a formal recruitment policy which would involve vetting candidates to determine their suitability to provide expert advice to the Parliament.⁵¹
- 2.25** The senior research officer would consult and liaise with the departments, committee staff and members to engage the appropriate subject matter experts from the panel.⁵²
- 2.26** Experts would be evaluated and vetted on their formal qualifications, working experience, current work role and institution, and their membership of professional organisations with recognised accreditation standards. Prior to the inclusion on the panel, all experts would be vetted, taught the principles of Parliamentary research practice and receive a formal induction to the Parliament. All experts recruited to undertake research for the Parliament would be required to adhere to the principles of independence, impartiality and the use of authoritative evidence in analysis.⁵³
- 2.27** The NSW Parliamentary Library noted that should the proposal be agreed to, expenditure and demand would be tracked throughout the first year of operation, with a review to then be undertaken to inform the ongoing approach, maintenance and funding of the panel in future years.⁵⁴
- 2.28** The proposal would cost \$269,000 per year, for a senior research officer at \$119,000 and \$150,000⁵⁵ to be shared across DPS, the Legislative Council and the Legislative Assembly.
- 2.29** In its submission to the committee's inquiry into highly contentious bills, the NSW Parliamentary Library estimated the cost of engaging external experts to assist committees at \$40,000 per inquiry, based on the daily rate for an expert over a six-week engagement.

⁴⁹ Submission 1, Department of Parliamentary Services, NSW Parliament, p 2.

⁵⁰ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵¹ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵² Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵³ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵⁴ Submission 1, Department of Parliamentary Services, NSW Parliament, p 4.

⁵⁵ In its submission to the inquiry on highly contentious bills, the new research model proposed by DPS included an initial estimate cost of \$120,000 for accessing external experts for departmental research. That figure was revised to \$150,000 in the DPS submission to this inquiry.

Addressing key concerns

- 2.30** As noted above, other parliamentary jurisdictions have encountered a number of issues when engaging external experts. These include unrealistic timeframes, the need for impartiality, conflicts of interest or perceived conflict of interests, and the need to train staff in procurement and contractual arrangements.
- 2.31** The NSW Parliamentary Library contends that their proposal addresses these issues. The allocation of funding for a senior research officer responsible for the administration and ongoing maintenance of the expert panel, and to be the key point of contact between committee staff and members with the external experts would mitigate many of the potential risks.⁵⁶ This core responsibility of the role would also alleviate the burden of committee secretariats in facilitating contractual and procurement arrangements.
- 2.32** Further, all external experts recruited to the panel would need to respond at short notice to work on any request for assistance from parliamentary committees or other research matters.⁵⁷ All experts would be required to adhere to the principles of independence and impartiality.⁵⁸

⁵⁶ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵⁷ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

⁵⁸ Submission 1, Department of Parliamentary Services, NSW Parliament, p 3.

Chapter 3 Committee comment

Mandated Green and White Paper process

- 3.1** The committee acknowledges the view that all legislation benefits from a comprehensive and timely consultation process. The committee also notes that during second reading debates, members routinely refer to the extent of public consultation undertaken as an indicator of community support and comprehension of legislation, particularly controversial legislation. Legislative proposals that have been subject to and guided by appropriate consultation are more likely to receive the support necessary for passage through the House.
- 3.2** The committee notes that the majority of submissions suggest that a mandated Green and White Paper process may be unnecessarily prescriptive and not appropriate for all government legislation.
- 3.3** The committee acknowledges that a mandated Green and White Paper process is ultimately a decision for the Government. The House has no power to direct that a specific consultation process be undertaken for government legislation.
- 3.4** However, the House does have the power to refer any bill for inquiry and report if it believes that more consultation or examination is warranted prior to agreeing to the bill's passage.
- 3.5** Whilst it does not substitute for a process of public consultation and expert assessment prior to the introduction of legislation, the Committee also notes the rapid development of the process of scrutiny of bills by Legislative Council Committees over the last 12 months, particularly arising from recommendations of the Selection of Bills Committee. The Committee endorses and applauds this important development in the evolution of the practice of the Legislative Council and the development of its legislative scrutiny function in the system of responsible government.
- 3.6** The committee has reviewed the proposal from Professor Allan for a statement of public interest and sees some utility in the suggestion. The committee suggests that the Government consider the proposal to table a statement of public interest with each bill introduced. The committee will then review the standing orders in light of the Government's response to this report.

Modified research and deliberative process for highly contentious private members bills

- 3.7** The committee was directed to consider proposals for a modified research and deliberative process for highly contentious private members' bills. While this remit is relatively broad, the committee acknowledges that its genesis lies in the original motion moved by the Hon. Mark Latham MLC which proposed that the services of the NSW Parliamentary Library should be used to produce issues papers and that the newDemocracy Foundation be commissioned to facilitate community input.

- 3.8** The committee received two submissions that touched on this aspect of the inquiry – one from the newDemocracy Foundation and one from the NSW Parliamentary Library, Department of Parliamentary Services.
- 3.9** The committee notes that to date one committee inquiry into a private members’ bill – the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill – sought to make use of a modified research and deliberative process as envisaged by the Honourable Mark Latham MLC. While the Parliamentary Library did prepare an issues paper, a community input process facilitated by the newDemocracy Foundation did not proceed.
- 3.10** The committee has been directed to examine and report on the outcome of any inquiries into private members bills in 2020 that do engage newDemocracy to facilitate community input.
- 3.11** The committee acknowledges the comments of the NSW Parliamentary Library that it is not currently resourced to regularly prepare issues papers on complex bills within parliamentary committee inquiry timeframes.

Greater demand for research services and the engagement of external expert assistance by committees

- 3.12** The NSW Parliamentary Library has provided submissions to the two inquiries addressed in this report. The submissions go to the central point that for the NSW Parliamentary Library to provide the kind of services that members and the House have recently been requesting, additional funding and resources are required.
- 3.13** In its submissions, the NSW Parliamentary Library propose two interconnected proposals, both of which include the establishment of a panel of external experts.
- 3.14** The first, in their submission to the Inquiry into highly contentious bills, is a comprehensive proposal that includes:
- Three additional staff for the Parliamentary Research Service being two senior research officers and one part time senior research officer who would be an economist (2.8 equivalent).
 - One of the additional senior research officers would be responsible for establishing and administering a panel of external experts.
 - Funding for engaging experts to provide support to committees or to produce issues papers on contentious bills (estimated at \$40,000 per engagement).
 - Additional funding of \$120,000 to be allocated between the three departments for use of external experts on important research, eg budget analysis etc.
- 3.15** Based on the allocation of both a subject matter expert, and one FTE Research Service staffer to prepare an Issues Paper for each inquiry, the table below estimates costs for four inquiries in a year and seven inquiries in a year:

Table 1: Resource cost estimates by number of Bill inquiries

<i>Number of Bill inquiries</i>	<i>Staff costs⁵</i>	<i>Expert panel</i>	<i>Total cost</i>
4	\$333,370	\$280,000	\$613,370
7	\$476,244	\$400,000	\$876,244

- 3.16** On the other hand, the NSW Parliamentary Library Research Service submission to the inquiry into committee access to external experts provides a proposal for the establishment of an expert panel and additional resources for the Research Service to establish and administer the panel only.
- 3.17** The NSW Parliamentary Library submission to the expert panel inquiry provides a proposal for the establishment of an expert panel and additional resources for the library to establish and administer the panel.⁵⁹ The estimated cost in that submission includes the cost of a senior research officer and an allocation of funds of \$150,000 for engaging experts by the three departments at a total cost of \$269,000.

Way forward

- 3.18** The committee agrees that the demand for research services from the NSW Parliamentary Library is increasing. Ideally, in order to support a modern and progressive parliament, the NSW Parliamentary Library would be able to respond to research requests from individual members, provide research assistance to parliamentary committees and the parliamentary departments and produce its own catalogue of forward looking independent research articles. It is clear, that the NSW Parliamentary Library does not have the resources to achieve all these goals.
- 3.19** The committee acknowledges the potential in the proposal for an increased research capacity in the NSW Parliamentary Library both of which include a structure for accessing external experts when appropriate.
- 3.20** However, at the current time, the committee does not see the need for, or the justification for the additional funding required to establish the capacity to produce a green and white paper or issues paper on every highly contentious private member's bill. On that basis, the committee, at this time, is unable to support the more comprehensive research proposal from the NSW Parliamentary Library.
- 3.21** The committee believes that a managed structure for the engagement of external experts could provide the Parliament with an opportunity to access independent expertise in a timely and cost-effective manner that would enhance the overall efficiency and effectiveness of the parliamentary research services.
- 3.22** The committee supports the proposal for the establishment of an expert panel as outlined in the submission from the NSW Parliamentary Library to the committee's inquiry into the engagement of external expert assistance by committees and therefore supports any submission by the Department of Parliamentary Services to Treasury for funding the necessary funding as outlined above.

⁵⁹ Submission 1, Department of Parliamentary Services, NSW Parliament, p 4.

Recommendation 1

That the NSW Parliamentary Library establish a panel of external experts to be utilised by the three parliamentary departments as needed.

Recommendation 2

That Department of Parliamentary Services seek approximately \$269,000 in additional funding for the necessary resources to establish and administer a panel of external experts.

Appendix 1 List of submissions

No	Author
1	Evidence Based Policy Research Project facilitated by The newDemocracy Foundation
2	newDemocracy
3	The Hon Kevin Rozzoli
4	Information and Privacy Commission NSW
5	NSW Council of Social Services (NCOSS)
6	NSW Business Chamber
7	NSW Nurses and Midwives Association
8	Unions NSW
9	NSW Parliamentary Library, Department of Parliamentary Services
10	The Law Society of New South Wales
11	NSW Council for Civil Liberties
12	Procedural Services, House of Commons, Canada
13	Additional late submission of Professor Percy Allan AM, Chair, Steering Committee, Evidence Based Policy Research Project, c/o The New Democracy Foundation
14	Various email communication from Professor Percy Allan AM, Chair, Steering Committee, Evidence Based Policy Research Project, c/o The New Democracy Foundation

Appendix 2 Summary of responses from ANZACATT post

Legislative Assembly of Western Australia

The Legislative Assembly in Western Australia does not have a specific policy on external support but does seek out people from government departments with relevant expertise, legal professionals and other industry people when the need arises.

Secondments are considered straightforward to arrange, and are managed via contracts that include confidentiality clauses. At times, the Legislative Assembly has arranged exchanges with their staff and with oversight agencies such as the Ombudsman and Auditor General.

Tasmanian House of Assembly

The Tasmanian House of Assembly has no formal policy in place regarding external expert assistance to committees. However, in the past, it was relatively common practice for assistance to be provided to committees by relevant government departments, and where the government supported establishing a select committee on a particular issue, they would usually be open to providing technical assistance from the relevant department.

The Assembly has not had any recent examples of a committee engaging external expert assistance, other than committees seeking legal advice, but listed examples from the 1990s where committees had access to external assistance including for a Joint Select Committee on Workers Compensation⁶⁰, a Joint Select Committee on Superannuation⁶¹ and a Joint Select Committee on HIV/AIDS.⁶²

For the above mentioned inquiries, the committees resolved to admit the external parties to deliberative meetings, the external parties were provided detailed briefings on confidentiality and privilege matters, and parliamentary staff involved were mindful of issues of conflicts of interest that could arise as a result of the arrangements.

Legislative Council of Western Australia

The Legislative Council of Western Australia does not have a policy in relation to the engagement of experts and such assistance is not undertaken very often.

The most common external experts the Legislative Council of Western Australia engage are barristers for the provision of legal opinion for the Joint Standing Committee on Audit. The committee is required to 'appoint a suitably qualified person ... to conduct ... a performance and legislative review'.⁶³

⁶⁰ The order of the House establishing the committee authorised the committee to establish a working group consisting of specified external experts to assist and advise the committee.

⁶¹ The order of the House establishing the committee included a provision that the committee shall have access to expert superannuation advice from Treasury.

⁶² Officers from the department of health were allocated to assist the committee.

⁶³ *Auditor General Act 2006* (WA), s 48(3).

In 2015/16, the committee split the review and hired two different firms; one to conduct the performance audit and one to conduct the legislative review of the Auditor General Act 2006. The committee followed procurement policies that apply to the public sector, amending those policies where relevant to reflect the unique characteristics of the Parliament as a contracting party.

Legislative Assembly for the Australian Capital Territory

The Legislative Assembly in the Australian Capital Territory (ACT) maintains a modest budget allocated every year to allow committees to access external advice. To secure funds, a committee writes to the Speaker seeking approval and explains why the committee cannot access the required expertise within the Committee Support unit. The Speaker may grant initial approval to begin procurement but also signs the resulting contract.

The funds are usually allocated to a Budget Advisor to the annual Select Committee on Estimates. The Budget Advisor is in place of a dedicated Parliamentary Budget Office to provide written analysis of the budget, a private briefing to the committee and to answer any follow-up questions the committee may have.

There have been recent inquiries where standing committees have sought initial approval from the Speaker to engage technical experts but have not proceeded with the procurement. The Legislative Assembly also engages legal advisors to the Scrutiny Committee under contract for each term of the Assembly.

Some issues encountered with engaging external experts include the limited pool of relevant experts to draw upon, "mission creep" from committee members who seek additional information and work beyond the scope of the expert's contract and, given the infrequent use of contractors, and the need to train and refresh staff knowledge of procurement processes to ensure they are applied correctly.

New South Wales Legislative Assembly

The NSW Legislative Assembly does not have a current policy for the engagement of consultants or experts to work with committee secretariats. Pursuant to section 48A of the Public Finance and Audit Act 2013, the Public Accounts Committee (PAC) tenders for the engagement of contractors to review the Audit Office every four years. The scope of the work is decided by PAC and the engagement of the contractors is undertaken by the Clerk.

In 2003/4 the Legislation Review Committee (LRC) established a panel of legal experts for review of legislation for the committee. Under this arrangement, bills were allocated to the experts for review and the writing of reports. The legal experts were paid for the work undertaken and were not on a retainer. Issues such as the tight timeframes for producing reports, panelists' availability at short notice and tight turnaround time of back-to-back sitting weeks, were identified.

In the past, Assembly administered committees have also requested expert assistance from public sector agencies, such as the Audit Office, facilitated by secondments.

The Assembly has not engaged external subject experts for other Assembly administered committees in recent years.

Legislative Council and Legislative Assembly of Victoria

The Legislative Council and Legislative Assembly of Victoria have no specific policy position on the engagement of external subject experts beyond normal parliament wide policies on the engagement of consultants.

The standing orders of the Legislative Council of Victoria state that:

Each committee shall be provided with all necessary staff, facilities and resources and shall be empowered to appoint persons with specialist knowledge for the purposes of the committee, with the approval of the President.⁶⁴

The Legislative Assembly standing orders state that:

A committee may commission a person to investigate and report to the committee on any aspects of a proposal, matter or thing being inquired into or being considered by the committee.⁶⁵

The Legislative Assembly standing order also makes provisions for engagement of public servants, most often a secondment arrangement, with the consent of the Premier.

Some committees in the Victorian parliament have standing, formalised or contractual arrangements with external experts. For example, the Joint Scrutiny of Acts and Regulation Committee retains a human rights expert over the life of the parliament. Further, some committees are required by statute to engage external experts such as an auditor. At times of high workload committees have engaged para-legals or researchers for limited periods by approaching a university directly.

Notwithstanding these provisions, the Victorian parliament advised that it is relatively unusual to seek expert assistance. However, examples of when assistance has been sought include matters requiring specific legal research or advice⁶⁶, a technical scientific matter⁶⁷, and a matter of significant economic or financial complexity which the secretariat does not have the internal skills to meet.⁶⁸

The committee procedure manual for staff outlines the mechanics of engaging experts and issues they need to consider in contract management. For example, the committee needs to approve the choice of expert and the expert needs to meet with the committee as required. The expert takes direction from the committee manager to understand committee practice.

Australian Senate

Standing Order 25(17) of the Australian Senate require committees to be provided with "all necessary staff, facilities and resources." The Senate has sought expert external assistance from outside the Parliament to provide specialist knowledge that is not available within a secretariat.

Committees have occasionally seconded specialists to the staff of the secretariat for a defined period, subject to the availability of their funding. This option is available where the specialist is a Commonwealth officer seconded to the committee by the officer's home department.

⁶⁴ Legislative Council of Victoria, Standing Orders, 2018, 23.31, p 77.

⁶⁵ Legislative Assembly of Victoria, Standing Orders, 2019, 226A, p. 94.

⁶⁶ For the inquiry into child abuse by religious organisations.

⁶⁷ For the for the inquiry into fracking a hydrogeologist was engaged.

⁶⁸ For the inquiry into the lease of the Port of Melbourne.

Another option available to committees, but seldom used, is to engage a specialist as a consultant to advise on matters of technical complexity arising during an inquiry. This is subject to the formal resolution of the committee and approval of the President. In these circumstances, the secretary of the committee is responsible for drawing up the contract of engagement and managing the quality, timeliness and cost effectiveness of the consultant's contribution.

The three legislative scrutiny committees supported by the Department of the Senate: Regulation and Ordinance, Scrutiny of Bills and the Joint Committee on Human Rights, are the only committees to have a regular arrangement for expert advice⁶⁹, reflecting the technical nature of the legislative scrutiny role performed by the committees.

Australian House of Representatives

House of Representatives committee secretariats have employed expert advisors from time to time. Such appointments are usually for the duration of a specific inquiry or the performance of a specified task of limited scope, where particular skills or subject matter knowledge is required to supplement the secretariat's own resources.

In recent times, secretariats have called on specialist external assistance where it has been necessary to obtain legal advice on the role and powers of statutory committees. Engagements of external experts are subject to availability of funds and compliance with usual procurement or employment policies. Committee Office publications contain advice to secretariats regarding the need for consultants to represent value for money and avoiding risks associated with the contracting process.

Committee secretariats also frequently obtain external assistance in the form of seconded staff from the public service or defence force. Secondments can afford greater flexibility than engaging an external consultant, but may give rise to other issues for consideration including the management of conflicts of interest.

New Zealand House of Representatives

In the New Zealand Parliament, engaging an independent specialist to provide advice or support to a committee is a regular occurrence. The Parliament has developed two codes of practice for the assistance of the Auditor-General and the Parliamentary Commissioner, and guidelines for the engagement of expert assistant to Select Committees.

Any committee can access independent expertise via the Office of the Clerk and funding is set aside by the Office for such requests. Requests do not need to be approved by the Speaker, but a committee resolution to engage an expert is required, the committee having generally considered a short list of candidates with the necessary skills and experience. Committee members are free to suggest candidates but it is up to the committee to decide who to engage. Experts are then contracted by the Office of the Clerk to provide the support, and contracts are managed by the Clerk of Committees.

Sometimes external assistance can be ongoing, such as the expert tax advisor position that has been available to the Finance and Expenditure Committee since 1992 for its consideration of tax legislation.⁷⁰

⁶⁹ Each committee receives support from a consultant legal advisor.

⁷⁰ Harris M et al, McGee Parliamentary Practice in New Zealand, 4th edition, 2017, ch 21, p 302.

However, generally, advisers are engaged ad hoc for a particular item of business before the committee.⁷¹

Issues identified by the New Zealand Parliament when engaging an external expert include the relatively small pool of available experts who do not have a perceived conflict of interest, "mission creep" with requests from committee members, and making sure experts use contract hours appropriately.

The Office of the Clerk has also recently started a pilot to align researchers and analysts from the subject teams in the Parliamentary Library with committees as another source of independent expertise and information. Researchers attend committee meetings and committees are able to make information or research requests to them.

⁷¹ For example, the Environment Committee recently used an independent expert on their inquiry into food waste.

Appendix 3 Minutes

Minutes No. 1

Thursday 20 June 2019

President's Dining Room, 2.00 pm

1. Members present

Mr Ajaka (*Chair*)

Mr Borsak

Mr Harwin

Ms Hurst

Mr Khan

Mr Mallard

Mrs Mitchell

Mr Moselmane

Revd Mr Nile (from 2.13 pm)

Mr Searle

Mr Secord

2. Apologies

Ms Faehrmann

Mrs Maclaren-Jones

3. Correspondence

Resolved, on the motion of Mr Searle: That the committee note the following items of correspondence:

Received:

- Letter from the Premier to the President requesting that the Procedure Committee inquire into measures to modernise and improve the function and efficiency of the Legislative Council
- Letter from The Hon Taylor Martin MLC to the President requesting that the Procedure Committee inquire into the broadcast of proceedings resolution of continuing effect
- Letter from Ms Cate Faehrmann MLC to the President requesting that the Procedure Committee inquire into the broadcast of proceedings resolution of continuing effect.

4. Letter from the Premier

Resolved, on the motion of Mr Borsak: That the President write to the Premier:

- (a) indicating that the Procedure Committee had discussed her letter,
- (b) forwarding a copy of the Legislative Council's sessional orders highlighting the changes on 8 May 2019 and noting that the Procedure Committee will monitor and evaluate the operation of the changes during the Spring sitting period, and
- (c) noting that the Procedure Committee would keep abreast of any reforms adopted by the Legislative Assembly and would consider these, or any other proposals that the Premier may have in mind.

5. Inquiry into the broadcast of proceedings resolution

Resolved, on the motion of Mr Mallard:

That the Procedure Committee inquire into and report on:

- (a) the broadcast of proceedings resolution of continuing effect, adopted on 18 October 2007, and
- (b) any other related matter.

Resolved, on the motion of Mr Moselmane:

1. That the committee secretariat prepare an issues paper on the topic of broadcasting for discussion at the next meeting of the committee.
2. That the Chair write to all members of the Legislative Council and other relevant parties seeking submissions on the inquiry terms of reference.
3. That the Chair write to all Legislative Council committee chairs advising that the Procedure Committee has adopted terms of reference for an inquiry into the broadcast of proceedings resolution and that until such time that a new resolution is adopted, members must continue to adhere to the current resolution.

6. Other business

Mr Khan raised the consistency in the application of procedural rules for Legislative Council committees.

7. Adjournment

The Committee adjourned at 2.16 pm *sine die*.

David Blunt

Clerk to the Committee

Minutes No. 2

Wednesday 18 September 2019

President's Dining Room, 2.00 pm

1. Members present

Mr Ajaka (Chair)
Mr Borsak
Mr Buttigieg
Ms Fachrmann
Mr Harwin
Ms Hurst
Mrs Maclaren-Jones (from 2.09 pm)
Mrs Mitchell
Mr Moselmane
Mr Searle
Ms Sharpe

2. Draft minutes

Resolved, on the motion of Mr Searle: That draft minutes no. 1 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 28 June 2019 – Letters from the President to Chairs of Legislative Council Committees advising that committee members should adhere to the current broadcasting resolution (example letter attached).
- 28 June 2019 – Letter from the President to the Premier responding to the Premier's letter requesting that the Procedure Committee inquire into measures to modernise and improve the functions and efficiency of the Legislative Council (attached).

- 24 July 2019 – Letter from the President to Hon Justin Field, Chair of Select Committee on the Proposal to Raise the Warragamba Dam Wall, advising that committee members should adhere to the current broadcasting resolution (attached).

4. Conduct of committee proceedings

Resolved, on the motion of Mrs Mitchell: That unless the committee decides otherwise, the following procedures are to apply for the life of the committee:

1. Submissions to inquiries are to be published, subject to the committee clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration.
2. Media statements on behalf of the committee be made only by the Chair.

5. Broadcast of proceedings resolution inquiry

5.1 Issues paper

The committee considered the issues paper prepared by the secretariat.

5.2 Submissions

Resolved, on the motion of Mr Searle: That the committee publish submission nos 1-7.

6. Consultation on highly contentious bills inquiry

The Chair tabled the terms of reference for the inquiry referred by the House on 20 June 2019.

The committee considered the reference and conduct of the inquiry.

Resolved, on the motion of Mrs Mitchell:

That:

1. The committee secretariat prepare an issues paper on the topic of consultation on highly contentious bills for discussion at the next meeting of the committee.
2. The secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to nominate additional stakeholders.
3. The closing date for submissions be 8 November 2019.

7. Adjournment

The Committee adjourned at 2.11 pm, *sine die*.

David Blunt

Committee Clerk

Minutes No. 3

Wednesday 17 June 2020

Preston Stanley Room, 1.42 pm

1. Members present

Mr Ajaka (*Chair*)

Mr Borsak

Mr Buttigieg

Ms Faehrmann

Ms Hurst

Mr Khan

Mr Latham (*participating*)

Mrs Maclaren-Jones

Mr Mallard
Mrs Mitchell
Mr Roberts
Mr Searle
Ms Sharpe
Mr Tudehope

2. Draft minutes

Resolved, on the motion of Mr Searle: That draft minutes no. 2 be confirmed.

3. Correspondence

Resolved, on the motion of Mr Searle: That the committee note the following items of correspondence:

Received:

- 14 October 2019 – Email from Mr Richard Pye , Clerk of the Senate to the Secretariat, advising that the Department of the Senate will not be making a submission to the Consultation on highly contentious bills inquiry.
- 15 October 2019 - Email from Ms Lori Gray, Assistant Private Secretary, The Scottish Parliament to the Secretariat, advising that the Scottish Parliament will not be making a submission to the Consultation on highly contentious bills inquiry.

4. Inquiry into ePetitions

The Chair tabled the terms of reference for the inquiry referred by the House on 24 March 2020. The Chair also tabled a briefing paper prepared by the Secretariat in relation to the ePetitions system being developed by the Legislative Assembly.

5. Inquiry into the broadcast of proceedings resolution

The committee noted that the report on the inquiry into the Broadcast of Proceedings is currently being drafted.

6. Inquiry into consultation on highly contentious bills

Resolved, on the motion of Mr Mallard: That the committee publish submission no. 1.

7. Inquiry into committee access to external experts

Resolved, on the motion of Mrs Maclaren-Jones: That the committee publish submission nos 1-12.

8. Consideration of Chair's draft report on inquiries into consultation on highly contentious bills and committee access to external experts

Consideration of the draft report was deferred until the next meeting.

9. Other business

Consideration of the draft report having been deferred, and given the time available, the President enquired with members whether there were any other matters they wished to raise. No matters being raised, the President invited the Clerk to provide an update to members on work being undertaken in the Legislative Council Procedure Office in relation to orders for the production of documents under SO52. The Clerk therefore advised members that the Procedure Office is currently:

- Finalising a set of drafting guidelines and an agenda for a workshop for members and their staff, along the lines of previous procedural workshops conducted in 2019, and with a view to identifying the sorts of information required by the Procedure Office in order to be able to assist members to appropriately target their SO52 motions.
- Finalising specifications for the development of a system that could facilitate electronic returns to orders for papers.

Discussion ensued. Mr Searle raised the proposal put forward by the Independent Legal Arbiter for a round table in relation to the arbiter process.

The President proposed that the Clerk prepare a briefing paper for members of the Committee to be tabled for the information of members at the next meeting.

10. Adjournment

The Committee adjourned at 2.16 pm until Wednesday 5 August at 1.30 pm.

David Blunt

Clerk to the Committee

Minutes No. 4

Thursday 3 September 2020

Preston Stanley Room, 10.04 am

1. Members present

Mr Ajaka (*Chair*)

Mr Borsak

Mr Buttigieg (*from 10.06 am*)

Mr Harwin

Ms Hurst

Mr Khan

Mrs Maclaren-Jones

Mr Mallard

Mrs Mitchell

Mr Roberts

Mr Searle

Ms Sharpe

Mr Shoebridge (*substituting for Ms Faehrmann*)

Mr Tudehope

2. Substitutions

Mr Shoebridge substituted for Ms Faehrmann.

3. Draft minutes

Resolved, on the motion of Mr Roberts: That draft minutes no. 3 be confirmed.

4. Correspondence

Resolved, on the motion of Mr Searle: That the committee note the following items of correspondence:

Received:

- 8 January 2020 – Email from Mr Percy Allan, Chair, Steering Committee, Evidence Based Policy Research Project, providing a further late submission to the inquiry.
- 8 July 2020 – Email from Mr Percy Allan, Chair, Steering Committee, Evidence Based Policy Research Project, clarifying that the Evidence Based Policy Research Project is separate from the newDemocracy Foundation and subsequent emails.
- 21 July 2020 – Email from Mr Percy Allan, Chair, Steering Committee, Evidence Based Policy Research Project, providing a further late submission to the inquiry.
- 18 August 2020 - Email from Mr Percy Allan, Chair, Steering Committee, Evidence Based Policy Research Project, providing a further late submission to the inquiry.

5. Consideration of Chair's draft report on inquiries into consultation on highly contentious bills and committee access to external experts

The Chair submitted his draft report which, having been circulated, was taken as being read.

The committee considered the report as a whole.

Resolved, on the motion of Mr Shoebridge: That the following paragraphs be inserted after 3.5:

- 3.6** The committee has reviewed the proposal from Professor Allan for a statement of public interest and sees some utility in the suggestion. The committee suggests that the Government consider the proposal to table a statement of public interest with each bill introduced. The committee will then review the standing orders in light of the Government's response to this report.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.45 be amended to read:

- 1.45** The model involves the recruitment of three additional senior research staff and the establishment of a panel of subject matter experts. The panel would be administered by the Parliamentary Library Research Services and accessed on an as needs basis.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.46 be amended to read:

- 1.46** The model estimates the cost of a subject matter expert, for a committee inquiry at \$40,000 and also assumes the allocation of one FTE Research Service officer to prepare an Issues Paper for each inquiry. On that basis, the estimated cost of providing research for four bill inquiries in a year is \$613,370.00, and the cost for seven bill inquiries is \$876,244.00.

Resolved, on the motion of Mr Shoebridge, that paragraph 3.14 be amended to read:

- 3.14** Based on the allocation of both a subject matter expert, and one FTE Research Service staffer to prepare an Issues Paper for each inquiry, the table below estimates costs for four inquiries in a year and seven inquiries in a year:

Resolved, on the motion of Mr Shoebridge, that paragraph 3.15 be amended to read:

- 3.15** On the other hand, the NSW Parliamentary Library Research Service submission to the inquiry into committee access to external experts provides a proposal for the establishment of an expert panel and additional resources for the Research Service to establish and administer the panel only.

Resolved, on the motion of Mr Searle, that paragraph 1.26 be amended to read:

- 1.26** Over the last 20 year period between three and 17 private members' bills have been introduced in the Council each year, with an increasing number in recent Parliaments. However, it is rare that the House has supported private members' bills, with the vast majority being defeated at the second reading stage, 47 passing the Legislative Council but not the Legislative Assembly, 47 passing the Legislative Council but not the Legislative Assembly, and only 20 proceeding through both Houses during that period.

Resolved, on the motion of Mr Buttigieg: That the draft report, as amended, be the report of the committee and the committee present the report to the House.

That the report be tabled on 15 September 2020.

That the submissions, minutes of proceedings and correspondence relating to the inquiry be tabled in the House with the report.

6. Inquiry into ePetitions

The Chair tabled a briefing paper prepared by the Secretariat in relation to the ePetitions system being developed by the Legislative Assembly.

Resolved, on the motion of Mr Shoebridge: That the Clerk continue to work with IT to develop an ePetitions system for the Council based on the current Legislative Assembly system.

Resolved, on the motion of Mr Shoebridge: That the Secretariat draft a report for consideration by the committee including:

- the rules and processes adopted by the LA
- any feedback from the LA on the operation of the ePetitions system
- any variations recommended or required based on current practices and procedures in the Council
- a sessional order for the implementation of ePetitions in the Legislative Council.

7. Briefing paper on orders for papers issues

The Chair tabled a briefing paper prepared by the Secretariat in relation to orders for papers. The committee noted that the briefing paper will be included as an agenda item at the next meeting.

8. Inquiry into the broadcast of proceedings resolution

The committee noted that the draft report on the inquiry into the Broadcast of Proceedings will be circulated prior to the next meeting.

9. Adjournment

The Committee adjourned at 11.07 am, *sine die*.

David Blunt
Clerk to the Committee

Appendix 4 Discussion Paper – Highly contentious bills

Discussion Paper

Section 1: The green and white paper process

Paragraph (a) of the terms of reference for the current inquiry requires the committee to inquire into and report on:

the parliamentary modernisation proposal that:

- (a) prior to its introduction in the Legislative Council, all highly contentious government legislation – defined as a bill likely to substantially alter economic, employment, social, legal or environmental conditions in New South Wales and to provoke widespread public interest in the proposed changes – be subject to a comprehensive and consultative Green and White Paper process...

To facilitate consideration of paragraph (a) this paper examines:

- the meaning of 'green paper' and 'white paper'
- pre-legislative consultation processes currently followed in New South Wales
- the views of proponents of the use of green and white papers
- proposals for encouraging pre-legislative consultations in New Zealand
- parliamentary procedures to promote scrutiny of and consultation on government bills.

The paper concludes with a series of questions the committee may wish to consider when progressing this limb of the inquiry.

What are green and white papers?

The terms 'green paper' and 'white paper' usually refer to government publications designed to facilitate public consultation in the development of legislative, regulatory or policy reforms.

The UK Parliament's website provides the following definitions:

Green Papers are consultation documents produced by the Government. The aim of this document is to allow people both inside and outside Parliament to give the department feedback on its policy or legislative proposals.¹

White papers are policy documents produced by the Government that set out their proposals for future legislation. White Papers ... may include a draft version of a Bill that is being planned. This provides a basis for further consultation and discussion with interested or affected groups and allows final changes to be made before a Bill is formally presented to Parliament.²

¹ <https://www.parliament.uk/site-information/glossary/green-papers/>

² <https://www.parliament.uk/site-information/glossary/white-paper/>

The Queensland Department of Premier and Cabinet's website distinguishes between 'Discussion Papers (Green)' which are prepared for the purposes of public discussion and do not commit the government to a particular direction, and 'Policy Papers (White)' which embody a statement of government policy on a topic of significance and are approved by Cabinet.³

A similar distinction was drawn during debate in the Legislative Council on the establishment of this inquiry:

Green papers are typically open-ended documents outlining an issue, the facts surrounding the issue and alternative solutions to fixing the issue.

White papers typically take into account public responses to the green paper, the Government's preferred position and reasons for taking this position. A white paper is generally approved by Cabinet, tabled in Parliament and made available to the general public for consideration and input.⁴

The process of developing a white paper may encompass a range of strategies to ascertain the views of experts, stakeholders and the public. For example:

- The Commonwealth Government's 2017 Foreign Policy White Paper was developed following a series of roundtable discussions, meetings with experts, a call for public submissions and the implementation of a social media strategy.⁵
- The Commonwealth Government's 2016 Defence White Paper was developed following publication of an Issues Paper which indicated that an Expert Panel would host public meetings and that public submissions would be sought.⁶

The green and white paper process is one of the ways in which governments can involve the public in decision-making. The Guidance Note on Best Practice Regulation published by the Office of Best Practice Regulation within the Commonwealth Department of Prime Minister and Cabinet discussed the role of various forms of public consultation, including green and white papers:

Information or issues papers—such as draft assessments of compliance costs or draft regulation impact statements, white papers, green papers (policy options papers) or exposure drafts of legislation—as well as submissions to government inquiries should, wherever possible and appropriate, also be made available to stakeholders to enable them to make informed comments on proposals and proposed legislation.⁷

³ Queensland Government, Department of Premier and Cabinet, *Cabinet Handbook*, 6.3, 'Discussion (Green) Papers and Policy (White) Papers'.

⁴ Legislative Council, *Hansard*, 20 June 2019, p 103 (Mr Harwin).

⁵ Commonwealth Government, 'Foreign Policy White Paper Public Consultation Summary Report', 9 November 2017, pp 7-13; <https://www.fpwhitepaper.gov.au/public-consultations>

⁶ Australian Government, Department of Defence, 'Defence Issues Paper', 2014, p 2; 'Defence White Paper', 2016.

⁷ Australian Government, Department of Prime Minister and Cabinet, Office of Best Practice Regulation, Guidance Note, 'Best Practice Consultation', February 2016, page 5.

The New South Wales Better Regulation Office has noted that:

It is important to ensure that the method of consultation is appropriate and proportional to the problem being addressed, the number and interest of stakeholders and the available time and resources.⁸

During debate in the Legislative Council on the establishment of this inquiry Minister Harwin expressed the view that it should be up to the Government of the day to determine what consultative processes are undertaken and that the Government bears the responsibility if it fails to make the right choice:

The position of the Government is that we do not believe the House ... should be dictated to by sessional order as to which path it goes down—whether it be a green paper-white papers process, a discussion paper-exposure draft process or, as we did, for example, on the law of provocation, a standing committee process. All of these options are available and I believe that, on government legislation, it should be up to the Government of the day to make the choice. If it makes the wrong choice, that is at its own peril.⁹

Pre-legislative consultation in New South Wales

While 'green' and 'white' papers do not appear to be widely used in the development of legislation in New South Wales there have been occasions on which the process has been applied. For example, the evolution of draft reforms to the planning laws included the following steps:

- In July 2012 a green paper was published setting out proposed reforms to the planning system, responding to an independent review and seeking community and industry feedback.¹⁰
- In April 2013 a white paper was published outlining how the planning system would be transformed building on the changes proposed in the Green paper and seeking public comment.¹¹
- Exposure drafts of the Planning Administration Bill 2013 and the Planning Bill 2013 were released alongside the white paper.¹²
- In October 2013 the Planning Administration Bill 2013 and the Planning Bill 2013 were introduced into Parliament.

A guide published on the Department of Premier and Cabinet's website which discusses a project scenario involving the development of a bill suggests a public engagement plan that includes industry summits, online and regional forums, stakeholder interviews, and green and white papers.¹³

⁸ NSW Government, Better Regulation Office, *Consultation Policy*, November 2009, p 6.

⁹ Legislative Council, *Hansard*, 20 June 2019, p 103.

¹⁰ NSW Government, *A new Planning system for NSW – Green Paper*, July 2012.

¹¹ NSW Government, *A new planning system for NSW: White Paper*, April 2013.

¹² <https://legislation.nsw.gov.au/#/browse/bills/consultation/P>

¹³ 'Preparing for effective engagement: A guide to developing engagement plans', prepared for Department of Premier and Cabinet by Elton Consulting, September 2012, pp 44-46.

Other types of tiered consultation mechanisms which are similar to the green and white paper process have also been employed such as the publication of issues papers followed by a report, or the publication of a discussion paper followed by the release of a set of recommendations for reform.¹⁴

Another method of facilitating consultations on proposed reforms has been the release of a draft bill for comment.¹⁵ This may be accompanied by an issues or discussion paper and other strategies to ascertain and respond to the public's views. For example, the consultation process relating to a recent draft bill included webinars, information sessions, workshops, written submissions, verbal submissions, feedback via the Government's Have Your Say online portal and additional targeted stakeholder consultations arising from issues raised in submissions.¹⁶

In one case the government prepared a draft bill¹⁷ in response to recommendations by a select committee¹⁸ and consulted the committee, as well as the public, before the bill was introduced into Parliament.¹⁹

In contrast to the position with bills, the government is required to invite public comment and consult affected groups before making a principal regulation.²⁰ The statutory consultation provisions are supplemented by Better Regulation Requirements and Principles which acknowledge the importance of consultation with stakeholders, business and the community²¹ and by a Consultation Policy which discusses the role of various consultation methods including green paper and white papers.²²

There have also been government initiatives to promote public participation in the development of policies and services more broadly such as the *Charter for Public Participation - a guide to assist agencies and promote citizen engagement* released by the New South Wales Information Commissioner in June 2018.

Support for use of green and white papers

In a discussion paper published in 2012 the Institute of Public Administration Australia (IPAA) argued that governments must replace 'policy on the run' with a 'business case' approach to policy-making to regain the public's confidence in the policy process. To facilitate this approach the paper identified ten criteria for the development of good public policy based on an article by Professor Kenneth

¹⁴ Institute of Public Affairs, *Evidence based policy research project: 20 case studies, A report commissioned by the Evidence Based Policy Research Project facilitated by the newDemocracy Foundation*, October 2018, pp 33, 36.

¹⁵ Consultation drafts of bills publicly released before introduction since 1999 are published at <https://www.legislation.nsw.gov.au/#/browse/bills>.

¹⁶ <https://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage/legislation/draft-aboriginal-cultural-heritage-legislation-2017-consultation>; <https://www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw>

¹⁷ Draft Crimes Amendment (Provocation) Bill 2013.

¹⁸ Legislative Council Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, April 2013.

¹⁹ Legislative Council, Hansard, 5 March 2014, p 27034 (Revd Nile); Legislative Assembly, Hansard, 8 May 2014, p 28501 (Mr Hazzard).

²⁰ *Subordinate Legislation Act 1989*, section 5.

²¹ NSW Treasury, TPP19-01, Policies and guidelines paper, *Guide to Better Regulation*, January 2019, p 4, p 5.

²² NSW Better Regulation Office, *Consultation Policy*, November 2009, pp 5, 7-8.

Wiltshire of the University of Queensland Business School (see Appendix 1). The eighth criterion, which was to be observed before legislation was introduced into Parliament, provided that:

8. Publish Proposals: Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.²³

In 2018 the newDemocracy Foundation commissioned a research project in which two 'normally 'opposed'' think tanks were asked to benchmark a series of federal and state government policies against the ten steps for good decision-making identified by Professor Wiltshire.²⁴

When applying the criterion concerning green and white papers to the policies selected for the project the think tanks agreed that any sequence of a discussion paper followed by a policy paper would 'count'.²⁵ Accordingly, for example, one of the case studies from New South Wales (Greyhound Racing Laws) was assessed as including a green and white paper on the basis of a commission report followed by a panel report²⁶ or the release of issues papers followed by a final report.²⁷

In reporting on the outcomes of the project the newDemocracy Foundation noted that the think tanks reached remarkably similar scores when applying the Wiltshire criteria to the selected policies. It also noted that there was clear agreement on the areas in which there was 'most scope for improvement' including 'issuing a Green Paper to elicit public feedback before announcing a policy decision in a White paper'.²⁸

In light of these outcomes the project proponent and co-funder, Professor Percy Allan, a former secretary of the New South Wales Treasury, has called on political parties to commit to applying evidence-based and inclusive engagement processes when making major policy decisions, including by 'giving the public an opportunity to not only react to ... possible options, but propose other solutions through a separate Green/White paper exercise'.²⁹

Proposals for encouraging pre-legislative consultations in New Zealand

The importance of consultative processes during the development of government bills has been discussed in number of recent reports in New Zealand.

²³ Institute of Public Administration Australia, Public Policy Discussion Paper, 'Public Policy Drift; Why governments must replace "policy on the run" and "policy by fiat" with a "business case" approach to regain public confidence', 4 April 2012, p vii-viii.

²⁴ newDemocracy Foundation, 'New research shows Right and Left can agree on good policy making', media release, 5 October 2018.

²⁵ Per Capita, *Evidence based policy analysis 20 case studies*, a report commissioned by the Evidence Based Policy Research Project and facilitated by the newDemocracy Foundation, September 2018, p 6.

²⁶ Per Capita, *Evidence based policy analysis, 20 case studies*, a report commissioned by the Evidence Based Policy Research Project and facilitated by the newDemocracy Foundation, September 2018, p 22.

²⁷ Institute of Public Affairs, *Evidence based policy research project, 20 case studies*, a report commissioned by the Evidence Based Policy Research Project facilitated by the newDemocracy Foundation, October 2018, p 33.

²⁸ The other two measures were 'using cost/benefit analysis' and 'designing a rollout plan in conjunction with a policy statement': newDemocracy Foundation, 'New research shows Right and Left can agree on good policy making', media release, 5 October 2018, p 2.

²⁹ <https://www.themandarin.com.au/99997-percy-allan-process-not-policy-is-where-the-left-and-right-can-agree/>

In a review of the standing orders in 2017 the New Zealand Standing Orders Committee argued that pre-legislative consultations 'can only improve legislative quality' and that '[m]eaningful public input and political consultation before the introduction of a bill may well ease its subsequent parliamentary process'. The committee noted however that the short electoral cycle provides a 'disincentive to engaging in a drawn-out pre-legislative process'.

To address this issue the committee considered the idea of amending the Standing Orders to provide 'concrete rewards for inclusive and robust pre-legislative policy-making by the Government'. Ultimately, however, the committee concluded that rather than amending the standing orders the House's Business Committee 'should find ways to encourage and reward the use of inclusive and robust pre-legislative processes by the Government'. The committee also supported a suggestion for the Clerk of the House 'to collaborate with relevant central agencies to identify ways that pre-introductory policy and consultation processes by Government agencies could align more closely with the House's consideration'³⁰

In a report published in July 2019 the Institute for Governance and Policy Studies, Victoria University of Wellington, identified a range of options for making governments more accountable for the quality of their long-term decision-making including 'encourag[ing] pre-legislative consultation with parties across the House (as well as with the public), to foster durable legislative solutions'.³¹

In a conference paper delivered in 2019 the Rt Hon Trevor Mallard, Speaker of the New Zealand House of Representatives, argued that comprehensive pre-legislative processes that include public consultation 'arguably result in greater legitimacy of legislation'. The Speaker also argued that the House could recognise and reward such processes by measures such as providing additional sitting time without the usual ban on simultaneous select committee meetings.³²

Parliamentary procedures to promote scrutiny of and consultation on bills

While parliamentary scrutiny does not directly affect consultations during the development of a bill it could be argued that the existence of robust scrutiny processes provides an incentive for governments to conduct comprehensive consultations before introducing contentious bills.

Reforms for enhancing the effectiveness of legislative scrutiny include:

- At the end of 2017 the New South Wales Legislative Council established a Selection of Bills Committee considers all bills other than the appropriation bill introduced in either House of Parliament and reports on whether the bill should be referred to any of the Council's standing committees for inquiry and report. On the tabling of a report recommending that a bill be referred to a committee the Chair of the Selection of Bills Committee may move without notice that the House agree to the recommendation. If the House agrees to that recommendation the bill may not be further considered by the House until the committee has reported.

³⁰ New Zealand Parliament, Standing Orders Committee, *Review of Standing Orders 2017*, July 2017, pp 24-25.

³¹ Institute for Governance and Policy Studies, Victoria University of Wellington, *Foresight, insight and oversight: Enhancing long-term governance through better parliamentary scrutiny*, June 2019, pp 16, 80-81.

³² Rt Hon Trevor Mallard, Speaker of the New Zealand House of Representatives, 'Fit for purpose: reviewing and enhancing parliamentary effectiveness', paper presented at the Presiding Officers and Clerks Conference 2019, p 15.

- In the New Zealand Parliament almost every bill stands referred to a committee for consideration after its first reading.³³ Immediately after the bill is read a first time the Speaker puts the question without debate on the particular select committee which is to consider the bill as nominated in the speech by the member in charge of the bill. Once the committee's final report on the bill has been presented the bill is set down for second reading on the third sitting day following.³⁴ Similarly in the Queensland Parliament if the question for the first reading of a bill succeeds the bill stands referred to a committee which must report on the bill within six months.³⁵ Further, in the Australian Senate approximately 40% of all bills including government bills and private senators' bills are referred to legislation committees for inquiry.³⁶
- In a recent review of its functions the New South Wales Parliament's Legislative Review Committee received evidence asserting that parliamentary scrutiny could be improved by requiring the minister or member responsible for a bill to respond to comments made by the committee in the second reading speech on the bill.³⁷ To address this issue the Committee recommended that the Houses give consideration to amending their respective Standing Orders to require the Member with carriage of a bill to address any matters identified by the Legislation Review Committee during debate on the bill.

Questions for consideration

Issues which could be considered when progressing this aspect of the inquiry include:

- 1 (a) Should the government be required to follow a consultation process before introducing all highly contentious legislation?
- (b) If so should a particular consultation process be prescribed such as green and white papers, issues and discussion papers, or some other specific mechanism, or should it be a matter for the government to determine in each case?
2. Should the Legislative Council be exploring ways in which it can enhance its role in scrutinising government bills and expand opportunities for the House to consider the public's views on such bills? For example, would it be useful to investigate the potential for a greater use of committees as occurs New Zealand, Queensland and the Australian Senate?

³³ The main exceptions to this rule are appropriation bills (although the contents of such bills are examined by committees) and bills to which the House has accorded urgency.

³⁴ *Parliamentary Practice in New Zealand*, 4th Edition, 2017, pp 405-408, p 421.

³⁵ Queensland Parliament, *Queensland parliamentary procedures handbook*, August 2014, p 26.

³⁶ Department of the Senate, Submission to the Select Committee on the Legislative Council Committee System, p 6 (available at parliament.nsw.gov.au/committees)

³⁷ Legislation Review Committee, *Inquiry into the operation of the Legislation Review Act 1987*, Report 1/56, November 2018, para 2.52.

Section 2: Modified research and deliberative process

Paragraph (b) of the terms of reference for the inquiry into consultation on highly contentious bills requires the committee to inquire into and report on:

the parliamentary modernisation proposal that:

- (b) a modified research and deliberative process be available for highly contentious private members' bills to ensure that the intent and possible ramifications of the draft legislation are fully explored.

This refers to a trial of the following procedure for highly contentious private members' bills which is taking place until the final sitting day of 2020:

That, when a member who has carriage of a highly contentious private members' bill, moves to refer the bill to a committee for inquiry and report, the member may also move that:

- (a) the New South Wales Parliamentary Library prepare an Issues Paper on the bill,
- (b) the newDemocracy Foundation be commissioned to facilitate community input into the bill, such as a citizens panel or jury, to complement the traditional forms of evidence gathering by committees, such as seeking submissions and taking oral evidence, and
- (c) Legislative Council committees will respect the foundation's remit as an independent and non-partisan research organisation.³⁸

To facilitate consideration of paragraph (b) this section examines:

- current consideration of private members' bills
- current trial of modified research and deliberative process
- New South Wales Parliamentary Library research service
- what is deliberative democracy?
- types of deliberative democracy, including citizens' juries
- the role of the newDemocracy Foundation
- examples of modified research and deliberative processes being undertaken

The section then concludes with a list of questions the committee may wish to consider when progressing this term of reference.

Private members' bills

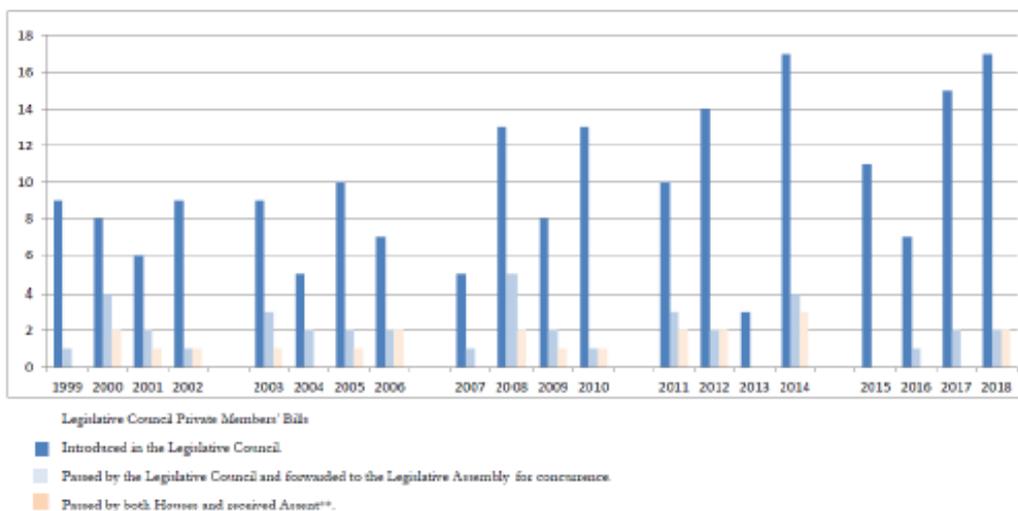
Any member of the Legislative Council may introduce a bill into the Chamber as a private member. Members may seek assistance from Parliamentary Counsel's Office to draft their private members' bills which may then be considered in the House on Thursdays.

While there may be public support for these bills, private members do not have the same resources as the government to undertake thorough consultation before introducing a bill, such as a green and white paper process.

³⁸ NSW Legislative Council, *Minutes*, 20 June 2019, pp 272-274.

As noted in the table below, between 3 to 17 private members' bills are introduced each year into the Legislative Council. Only a small number of these bills pass the Council, and an even fewer number pass both Houses to become law (20 bills in the last 20 years). This is vastly different to government bills where approximately 300 to 500 bills pass both Houses each Parliament.

Private Members' Bills introduced in the Council per calendar year since 1999*



* Note: does not include Legislative Assembly Private Members' Bills

** Passage through Legislative Assembly and receipt of Assent could occur in subsequent year

Since 1997 only the following five private members' bills have been referred to Legislative Council committees for inquiry and report:

- Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000
- Macedonian Orthodox Church Property Trust Bill 2010
- Education Amendment (Ethics Classes Repeal) Bill 2011
- Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019
- Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019.

The Crimes Amendment bill passed both Houses following its inquiry while the Macedonian Orthodox and Education Amendment bills were not considered again by the House following their respective inquiries. The Uranium Mining bill is a new bill and is discussed below.

With the new Selection of Bills Committee process it is likely that more private members' bills will be referred to committees in the future.

Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019

On 6 June the Honourable Mark Latham moved to refer his private members' bill, Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019, to the Standing Committee on State Development for inquiry and report. The motion included that an issues paper be prepared for the committee by the Parliamentary Library and that the committee commission the newDemocracy Foundation to facilitate a citizens' jury. This was agreed to by the House.³⁹

In moving this motion, Mr Latham stated that the purpose of the process is 'to try to deepen the democratic dialogue beyond slogans and scare campaigns so the public gets the information that is needed' before members consider a contentious bill.⁴⁰

The Parliamentary Library published an issues paper in September and the committee met with the newDemocracy Foundation on 22 August to discuss options.

NSW Parliamentary Library

The Research Service in the NSW Parliamentary Library, Department of Parliamentary Services is a small team of seven staff members who conduct nonbiased, analytical research for the benefit of all members of the NSW Parliament.

The service produces public reports on important policy areas and conducts confidential research for members. The Research Service has previously provided confidential advice to members on legislation and committee inquiries and has, on occasion, produced briefing papers for committees.

Because of the quality of research undertaken by the Research Service and other workload demands it takes the team approximately two months to produce an issues paper.

Deliberative democracy

Deliberative democracy is a broad theoretical and practical movement that aims to expand meaningful public participation in political decision-making.⁴¹ It is grounded in the idea that individuals' positions are not determined by political power but rather that they can reflect upon their own preferences, values and judgements in light of political dialogue with others.⁴² Majority views should be legitimated 'by their power to generate consent through the force of open argument and sustained political

³⁹ NSW Legislative Council, *Hansard* (Mark Latham), 6 June 2019, p 60.

⁴⁰ NSW Legislative Council, *Hansard* (Mark Latham), 6 June 2019, p 60.

⁴¹ NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p 57.

⁴² David Blunt, Clerk of the Parliaments, *Parliamentary speech and the location of decision making*, *Australasian Study of Parliament Group*, 2014 National Conference Sydney, 2 October 2014, p 3.

justification, as distinct from the tyranny of numbers'.⁴³ In a parliamentary context this may involve members genuinely listening to each other and being willing to change their view point.

The academics Janette Hartz-Karp and Michael K Briand describe deliberative democracy as a practice of democratic politics within a democratic system of government that emphasises a high degree of public participation, high-quality discussion, and cooperation.⁴⁴ In reaching this definition, they stated:

... 'deliberation' increasingly has been employed to characterise a particular form of public discourse in conceptions of democracy that emphasise a more substantial degree of participation in the political process by the largest feasible percentage of 'the people' — i.e. 'ordinary' citizens. Definitions vary, but generally speaking 'public deliberation' is widely understood to be a maximally inclusive form of political discourse with a problem-solving orientation, a discourse in which citizens collectively — even cooperatively — analyse a 'problem'; establishing criteria by which to evaluate public responses to it; identify multiple options that reflect different sets of values or value-priorities held by members of the public; weigh arguments for and against each option in light of the criteria established previously; and, through an indefinite period of continuing discussion (that may or may not include voting), approach a measure of agreement that (ideally) most participants can accept as a collective 'decision'.⁴⁵

Hartz-Karp and Briand argue that:

Deliberative democracy is grounded in the conviction that, to the greatest degree feasible, the conclusions at which citizens arrive and the rationales that support those conclusions should be arrived at through mutually-respectful discourse, rather than through competition among political elites and organised advocacy groups whose influence is rooted in the crude currencies of power.⁴⁶

The Centre for Deliberative Democracy and Global Governance at the Institute for Governance and Policy Analysis, University of Canberra explains that deliberative democracy is concerned with improving collective decision-making. It emphasises the right, opportunity, and capacity of anyone who is subject to a collective decision to participate in consequential deliberation about that decision.⁴⁷

A report by the institute following a 2015 workshop featuring deliberative democracy researchers and practitioners throughout Australia indicated that while deliberative democracy is not a new idea, it is now becoming mainstream. It is argued that it has the potential to restore trust in political decision-making and can reveal to citizens the complexity of reaching decisions. The researchers and

⁴³ John Uhr, *Deliberative Democracy in Australia: the changing place of parliament*, Cambridge University Press, 1998, p 10.

⁴⁴ Janette Hartz-Karp and Michael K Briand, Institutionalising Deliberative Democracy: Theoretical and Practical Challenges, *Australasian Parliamentary Review*, Autumn 2009, Vol. 24(1), pp 169-170.

⁴⁵ Janette Hartz-Karp and Michael K Briand, Institutionalising Deliberative Democracy: Theoretical and Practical Challenges, *Australasian Parliamentary Review*, Autumn 2009, Vol. 24(1), p 169.

⁴⁶ Janette Hartz-Karp and Michael K Briand, Institutionalising Deliberative Democracy: Theoretical and Practical Challenges, *Australasian Parliamentary Review*, Autumn 2009, Vol. 24(1), p 171.

⁴⁷ John Dryzek and Simon Niemeyer, Centre for Deliberative Democracy and Global Governance, Institute for Governance and Policy Analysis, University of Canberra, 15 February 2012, available at: <https://deldem.weblogs.anu.edu.au/2012/02/15/what-is-deliberative-democracy/>.

practitioners agreed that deliberative democracy is not a 'panacea but a pathway to a richer democracy'.⁴⁸

newDemocracy Foundation

newDemocracy Foundation is a not for profit deliberative democracy research organisation that works with governments to design and operate public engagement projects to enable everyday people to contribute to reaching shared recommendations around challenging areas of public policy. newDemocracy states that it seeks to work exclusively with government and does not work for private individuals or companies.⁴⁹

newDemocracy operates on the following five principles:

1. **Clear remit** – people must consider a plain English question, phrased neutrally
2. **Random selection** – to ensure results are reached by people who are 'just like us'
3. **Time** – to ensure people are adequately informed in order to reach a decision the process generally takes six months, including meeting in person for at least 40 hours
4. **Information** – while neutrality of information is a core principle, people are informed that all writers/experts have their own bias and perspective and their comments should be critically analysed
5. **Upfront authority** – recommendations reached by the people must be actioned and must not be consumed within the bureaucracy.⁵⁰

Types of deliberative democracy

There are many forms of deliberative democracy. The Victorian deliberative democracy agency, Mosaic Lab, notes that deliberative processes include:

- citizens' juries
- participatory budgeting
- deliberative panels and forums
- citizens' assemblies.⁵¹

NCOSS and the University of Sydney, in their joint 2014 publication *Have your say ... but how? Improving public participation in NSW* also list consensus conferences, planning cells and deliberative opinion polls as further forms of deliberative democracy.⁵²

Citizen's juries

⁴⁸ Wendy Russell and Lucy Parry, *Deliberative Democracy Theory and Practice: Crossing the Divide*, University of Canberra, Institute for Governance and Policy Analysis, 2015, p 3, available at: [https://www.governanceinstitute.edu.au/magma/media/upload/ckeditor/files/DD%20Workshop%20report%20\(final\).pdf](https://www.governanceinstitute.edu.au/magma/media/upload/ckeditor/files/DD%20Workshop%20report%20(final).pdf).

⁴⁹ newDemocracy Foundation, *How we work*, <https://www.newdemocracy.com.au/governance/>.

⁵⁰ newDemocracy Foundation, *Principles*, <https://www.newdemocracy.com.au/principles/>.

⁵¹ Mosaic Lab, *About Mosaic Lab*, <https://www.mosaiclab.com.au/about-us>.

⁵² NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p 15.

Citizen's juries are one of the most common forms of deliberative democracy. newDemocracy Foundation describes citizens' juries as 'a group of randomly selected members of a community convened to consider a given topic and provide a response or recommendation to the governing body'.⁵³

The academic Peter McLaverty describes citizens' juries as follows:

In Britain, most citizens' juries have been sponsored by public sector organisations such as central government, local authorities, health authorities and so on. They bring together up to 25 people who are selected by stratified random sampling. ...The jury members come together usually to consider a specific topic which is determined by the sponsoring organisation. The jury members convene for a number of days, during which time they normally are given literature to read, hear evidence from witnesses, question witnesses and deliberate among themselves about the topic in hand and the evidence they have received. The aim is that jury members will be open-minded and willing to abandon prejudices when confronted by arguments that are better than their own. To aid this process of deliberation, it is generally the case that people who have taken action on the topic in question are excluded from membership of the jury. A facilitator, or facilitators, helps to stimulate deliberation among jury members and to iron out any problems. A report is produced at the end of the jury and this is presented to the relevant authorities. Citizens' juries do not have to reach a consensual position and it is common for the final report to include both majority and minority views, where they exist.⁵⁴

newDemocracy argue that the success of the jury model is because the public at large are more willing to trust a decision if they know that a group of their fellow citizens have reached a consensus, rather than it being made solely by people in elected office or the public service. newDemocracy state that more than 1,100 case studies of citizens' juries globally have shown that this model produces stronger public engagement and higher quality decisions.⁵⁵

NCOSS and the University of Sydney also note that there is now substantial evidence internationally showing public participation can successfully address complex issues. This includes examples of 'citizen's juries being used to decide state budgets (Porto Alegre, Brazil), rewrite national constitutions (Iceland), decide renewable energy options [NSW Public Accounts Committee], and address alcohol related violence (City of Sydney)'.⁵⁶

However, McLaverty argues that the government's use of citizens' juries in the United Kingdom has been 'strongly criticised from a number of angles', by many commentators including that they are constantly controlled by their facilitator, are organised by government-friendly organisations meaning

⁵³ newDemocracy Foundation, *What is a Citizens' Jury?*, <https://www.newdemocracy.com.au/what-is-a-citizens-jury/>.

⁵⁴ Peter McLaverty, *Is deliberative democracy the answer to representative democracy's problems? A consideration of the UK government's programme of citizens' juries*, *Representation*, Vol. 45, No. 4, 2009, pp 380-381.

⁵⁵ newDemocracy Foundation, *What is a citizen's jury?*, <https://www.newdemocracy.com.au/what-is-a-citizens-jury/>.

⁵⁶ NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p 45.

the government often gets the result that it wants and governments can always pick and choose whether to accept recommendations.⁵⁷

Deliberation democracy in action

While there are many examples of deliberative democracy, the following are some examples from the NSW and Scottish parliaments and governments around Australia.

NSW Parliament

The NSW Parliament has previously used citizens' juries for the Legislative Assembly's 2012 Public Accounts Committee inquiry into the economics of energy generation. Two citizens' juries (one in Sydney and one in Tamworth) were facilitated by the newDemocracy Foundation with the committee's report stating: 'This innovative process of deliberative democracy was highly valued by the committee and should serve as a pilot for similar future public engagement and consultation by governments of all levels'.⁵⁸ The report also included a recommendation that the NSW Government consider adopting similar processes in other areas of policy where appropriate.⁵⁹

In developing a proposal for the committee, newDemocracy noted that a citizens' jury is not a parliamentary proceeding and would not attract parliamentary privilege.⁶⁰

When forming the juries, 8,000 invitations were distributed by newDemocracy and names were selected at random from a database provided by Telstra. From this, 54 people participated in the juries across both groups. Each group met four times over ten weeks, with the Sydney group voting to meet a fifth time. Participants were provided with copies of submissions made to the inquiry, and the groups invited experts to provide further information. Participants also had access to an online forum hosted by newDemocracy. A total of 2,089 documents were accessed through this process. Both groups produced reports to the committee and reached a unanimous consensus.⁶¹

In advice to NCOSS, newDemocracy noted that the recommendations by the citizens' juries were later mirrored by the Productivity Commission, received a positive response from the business community and were trusted by citizens. In addition, the recommendations were acknowledged by both political parties as sensible approaches that were 'electorally unappealing but made practical sense'.⁶²

⁵⁷ Peter McLaverty, Is deliberative democracy the answer to representative democracy's problems? A consideration of the UK government's programme of citizens' juries, *Representation*, Vol. 45, No. 4, 2009, p 381.

⁵⁸ NSW Legislative Assembly, Public Accounts Committee, The Economics of energy generation, Report No. 6/55, November 2012, p vii.

⁵⁹ NSW Legislative Assembly, Public Accounts Committee, The Economics of energy generation, Report No. 6/55, November 2012, p ix.

⁶⁰ NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p. 193.

⁶¹ NSW Legislative Assembly, Public Accounts Committee, The Economics of energy generation, Report No. 6/55, November 2012, p 4.

⁶² NCOSS and the University of Sydney, *Have your say ... but how? Improving public participation in NSW*, November 2014, p 21.

Scottish Parliament

Another parliamentary example is from the Scottish Parliament where its Environment, Climate Change and Land Reform Committee recently organised for a citizen's jury to examine how funding and advice for land management should be designed to help improve Scotland's natural environment.⁶³

Over one weekend in March 2019, 21 jury members heard from a range of experts about the topic and worked together to come up with a set of principles the committee should consider. The jury also came to a consensus on preferred aspects for a new funding model. The report noted that this process is an example of 'the Parliament moving towards a more participative approach to scrutiny, as recommended by the Presiding Officer's Commission on Parliamentary Reform'.⁶⁴

NSW Government and City of Sydney

In 2014 the Office of the Premier of New South Wales and the Lord Mayor of the City of Sydney commissioned the newDemocracy Foundation to run a citizen's jury to consider ways to ensure there is a vibrant and safe nightlife in Sydney.⁶⁵

The jury unanimously agreed to a series of recommendations to enhance the safety and vibrancy of Sydney's nightlife regarding transport, police and safety, education and media, lockouts and licensing and diversity.⁶⁶

In reaching these conclusions the jury deliberated for over 40 hours across nearly three months. It received evidence in the form of submissions and presentations from experts and went on a night time site visit to Kings Cross.⁶⁷

South Australian Government

In 2016 the South Australian Government commissioned the newDemocracy Foundation to conduct two citizens' juries about the potential to increase South Australia's involvement in the nuclear fuel cycle. The process was designed to give the community an opportunity to examine and deliberate on the Nuclear Fuel Cycle Royal Commission's report, to come to an informed judgement and provide a series of recommendations to Government.⁶⁸

⁶³ Scottish Parliament, Environment, Climate Change and Land Reform Committee, *Scottish Parliament Citizens' Jury on land management and the natural environment*, July 2019, p 1.

⁶⁴ Scottish Parliament, Environment, Climate Change and Land Reform Committee, *Scottish Parliament Citizens' Jury on land management and the natural environment*, July 2019, p 1.

⁶⁵ newDemocracy Foundation, *Report of the Citizens' Policy Jury Vibrant and Safe Sydney Nightlife*, April 2014, p 1.

⁶⁶ newDemocracy Foundation, *Report of the Citizens' Policy Jury Vibrant and Safe Sydney Nightlife*, April 2014, p 1.

⁶⁷ newDemocracy Foundation, *Report of the Citizens' Policy Jury Vibrant and Safe Sydney Nightlife*, April 2014, pp 9-13.

⁶⁸ Nuclear Citizens' Jury, *What are the parts of the Nuclear Fuel Cycle Royal Commission's Report that everyone needs to discuss?*, July 2016, p 1; South Australian Government, *Get to Know Nuclear, Citizens; juries*, <https://nuclear.yoursay.sa.gov.au/the-program/citizens-jury>.

This resulted in one of the largest deliberative democracy processes so far in Australia with 52 participants in the first jury and 350 participants in the second jury. The second jury deliberated for six days and provided recommendations to government. Unlike a number of other citizen's juries discussed so far in this paper the jury did not come to a consensus. The second jury's final report included a minority report which also noted that a number of jurors considered that the jury selection process allowed for selection bias.⁶⁹

Questions for consideration

Particular issues the committee may wish to consider when progressing this aspect of the inquiry include:

- Should Legislative Council committees incorporate deliberative democracy processes into their evidence gathering? What are the benefits and/or challenges?
- Is incorporating deliberative democracy processes appropriate for private members' bills?
- Are there any lessons to be learned from other parliaments or governments?
- What are the financial and resourcing implications for the Department of the Legislative Council and the Department of Parliamentary Services for incorporating these processes?

⁶⁹ South Australia's Citizens' Jury on Nuclear Waste, *Final Report*, November 2016.

APPENDIX 1

Ten Criteria for a Public Policy Business Case

1. **Establish Need:** Identify a demonstrable need for the policy, based on hard evidence and consultation with all the stakeholders involved, particularly interest groups who will be affected. ('Hard evidence' in this context means both quantifying tangible and intangible knowledge, for instance the actual condition of a road as well as people's view of that condition so as to identify any perception gaps).
2. **Set Objectives:** Outline the public interest parameters of the proposed policy and clearly establish its objectives. For example interpreting public interest as 'the greatest good for the greatest number' or 'helping those who can't help themselves'.
3. **Identify Options:** Identify alternative approaches to the design of the policy, preferably with international comparisons where feasible. Engage in realistic costings of key alternative approaches.
4. **Consider Mechanisms:** Consider implementation choices along a full spectrum from incentives to coercion.
5. **Brainstorm Alternatives:** Consider the pros and cons of each option and mechanism. Subject all key alternatives to a rigorous cost-benefit analysis. For major policy initiatives (over \$100 million), require a Productivity Commission analysis.
6. **Design Pathway:** Develop a complete policy design framework including principles, goals, delivery mechanisms, program or project management structure, the implementation process and phases, performance measures, ongoing evaluation mechanisms and reporting requirements, oversight and audit arrangements, and a review process ideally with a sunset clause.
7. **Consult Further:** Undertake further consultation with key affected stakeholders of the policy initiative.
8. **Publish Proposals:** Produce a Green and then a White paper for public feedback and final consultation purposes and to explain complex issues and processes.
9. **Introduce Legislation:** Develop legislation and allow for comprehensive parliamentary debate especially in committee, and also intergovernmental discussion where necessary.
10. **Communicate Decision:** Design and implement a clear, simple, and inexpensive communication strategy based on information not propaganda, regarding the new policy initiative.

Source: Institute of Public Administration Australia, Public Policy Discussion Paper, 'Public Policy Drift; Why governments must replace "policy on the run" and "policy by fiat" with a "business case" approach to regain public confidence', 4 April 2012, p vii-viii.