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]

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[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]

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[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]

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[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 bill[17] in response to recommendations by a select committee[18] 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 community[21] 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

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[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 report[26] 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.

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[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.

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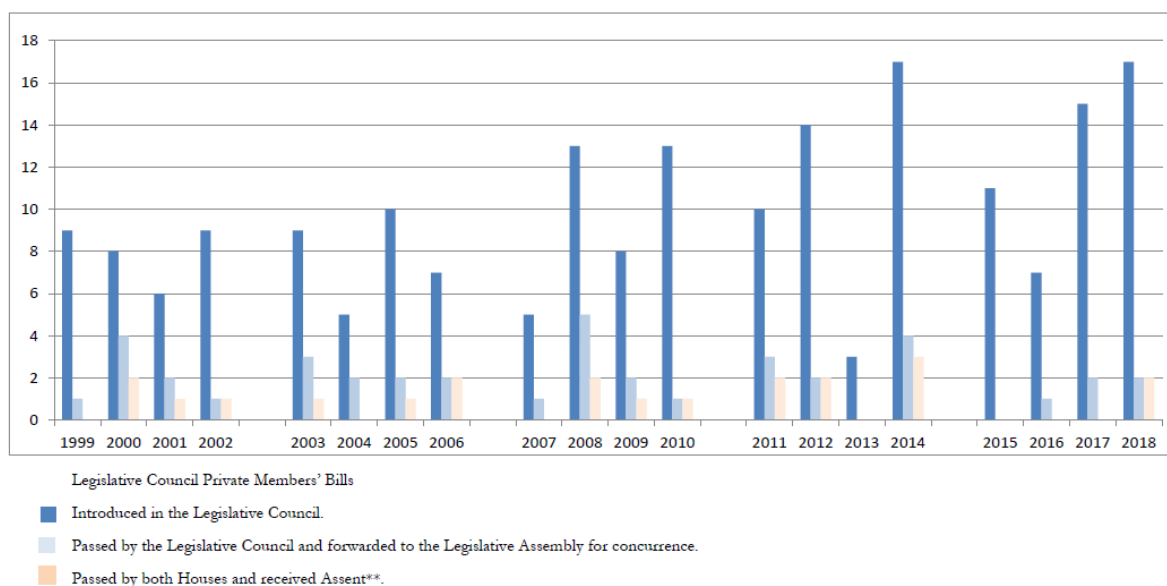
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[38] NSW Legislative Council, *Minutes*, 20 June 2019, pp 272-274.

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*

Legislative Council Private Members' Bills

- ■ Introduced in the Legislative Council.
- ▨ Passed by the Legislative Council and forwarded to the Legislative Assembly for concurrence.
- ▨ Passed by both Houses and received Assent**.

* 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

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

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[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/.

[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:

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

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

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https://www.governanceinstitute.edu.au/magma/media/upload/ckeditor/files/DD%20Workshop%20report%20 0(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.

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

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[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.
[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.

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]

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[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]

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[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?

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

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.