

## Report on Barriers to the Adoption of Best Practice Policy Making

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# Report on Barriers to the Adoption of Best Practice Policy Making

***What barriers exist to the adoption of best practice policy making process among the legislative and executive branches of Government, and how can these be overcome?***

**A Legislative Council Inquiry on Green and White Papers has been an effective case study and has shown progress on the adoption of improved policy processes.**

In November 2017, the newDemocracy Foundation convened a symposium with around 80 business leaders, journalists and MPs with the remit of finding common ground when addressing the question “what changes can we agree upon to deliver effective long-term decision-making which earns public trust?”<sup>1</sup>

A proposal was championed by former Secretary of the NSW Treasury, Professor Percy Allan AM, to draw on work from 2012 by Professor Ken Wiltshire to set forth a series of criteria to judge whether an evidence based policy process had been applied. Subsequent research has assessed the process followed in a range of policy reforms, and found that there is scope for governments in Australia to more rigorously follow standards of evidence based policy making.<sup>2</sup>

The Evidence Based Policy Research Project, an independent research initiative facilitated by the newDemocracy Foundation, has been working on the implementation of improved policy development processes.

The recent NSW Legislative Council Procedure Committee Inquiry, entitled “Consultation on highly contentious bills and committee access to external experts” has shown progress on this issue, with the Committee showing interest in the introduction of a Statement of Public Interest with all bills, and asking the Government to consider the matter further.

A Statement of Public Interest would be a simple explanation of the rationale for a bill including the purpose and objectives of the bill, other options considered, costs and benefits, pathway for implementation and consultation undertaken.

This paper summarises the barriers to adoption of best practice public policy processes, and potential methods to encourage their adoption. This Committee Inquiry provided the opportunity to seek feedback from stakeholders and test proposals to assist with the adoption of a more rigorous policy development process, particularly focused on the use of Green and White papers.

For the purposes of this report, the key subject that the Committee was asked to inquire into was:

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<sup>1</sup> Symposium on Trusted Long Term Decision Making, Recommendations Report, p3, [https://newdemocracy.com.au/wp-content/uploads/2017/11/docs\\_activeprojects\\_symposium\\_Symposium-on-trusted-long-term-decision-making-final-report-November-2017.pdf](https://newdemocracy.com.au/wp-content/uploads/2017/11/docs_activeprojects_symposium_Symposium-on-trusted-long-term-decision-making-final-report-November-2017.pdf)

<sup>2</sup> Evidence Based Policy Research Project, <https://www.newdemocracy.com.au/2019/11/06/evidence-based-policy-research-project-2019/>

*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*

*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.<sup>3</sup>*

While this report focuses on the NSW Parliament, the content should be applicable to other jurisdictions around Australia as well.

### ***What did we do?***

Stakeholders were interviewed on their views of the Green Paper and White Paper process. These included Members of Parliament across a range of political parties, including Liberal, National, Labor, Greens, Animal Justice, One Nation, Shooters Fishers and Farmers, as well as advisors to Government Ministers and other stakeholders who have been engaged in the Committee Inquiry process. In total around 15 interviews were conducted by Professor Percy Allan AM and Matt Crocker between July and September 2020.

These interviews allowed particular barriers to be identified and proposals developed to address the concerns raised by stakeholders.

### ***What is the problem?***

In consultation with stakeholders, it was clear that there was an interest in practical improvements to the policy development process, particularly for contentious legislation brought forward by the Government. There was concern from some stakeholders on whether sufficient consultation had taken place and could be demonstrated on some legislation.

In summary, the problem identified by non-Government stakeholders was a concern regarding the perceived quality of legislation presented. From the perspective of Government stakeholders, the problem was more seen to be uncertainty in being able to implement its agenda, as proposed legislation may not be supported in the Legislative Council.

There was general recognition that legislation that went through a better process was more likely to pass Parliament and result in better outcomes. An example raised was the planning reforms under the O'Farrell Government in 2012 that did go through a Green and White Paper process, which was thought to have enhanced Parliament's consideration. The legislation was highly contested, and there were strong views from community groups, business groups and MPs on the reforms and whether it struck the right balance between protecting local community interests and allowing development. These were considered through a comprehensive Green and White Paper. However, as sufficient consensus could not be found between MPs in the Legislative Council, this legislation did not ultimately pass

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<sup>3</sup> NSW Legislative Council Procedure Committee, Consultation on highly contentious bills and committee access to external experts (Report 12), p v.

the Parliament. Despite the legislation not ultimately passing, it was mentioned as a useful benchmark and case study.

There was very strong support for reforms that the Legislative Council had already put in place to improve its deliberation on legislation. The new Selection of Bills Committee considers whether a bill should be referred to a standing committee for inquiry and report. This can allow further consideration and stakeholder consultation on legislation, where there are concerns expressed by members of the Legislative Council. It also gives a role to Legislative Council committees to consider legislation as a regular part of the legislative process. This was particularly identified as an improvement by MPs, who felt it would improve the working of the Legislative Council.

It also became clear that the Legislative Council as a whole is seeking to be more proactive in its role to scrutinise legislation, consult with stakeholders and improve legislation by offering amendments. This may be the result of the different political makeup of the Legislative Council in this term of Parliament, but it has resulted in the Parliament operating differently than it did in the last Parliamentary term.

### ***Barriers to change***

In consultation with stakeholders, the following issues were raised as barriers to the implementation of an improved policy development process, in particular the adoption of Green Papers and White Papers.

- 1. Whose responsibility is it to fix the problem?** While there was recognition of the value of an improved policy development process, there was not a lot of clarity of who was ultimately accountable for addressing the problem. There was resistance from the executive government to have requirements imposed on them by the Parliament, while there were also some concerns whether it was the role of the Parliament to dictate what process the government undertook to develop legislation
- 2. How would the process practically work?** Concerns were raised about how a requirement for the production of Green Papers and White Papers would be practically implemented. This was both in the sense of the authority of the Parliament to require the executive Government to comply, and what the consequence would be if the Government were not to comply. Even if implemented by the Government as policy requirement for all contentious legislation, the issue would arise of how to ensure compliance.
- 3. Are there unintended consequences?** There were concerns about whether there may be unintended consequences of a Green and White Paper process, particularly around the publication of alternative options at the Green Paper stage, and that this might lead to speculation that the Government was considering adopting particular proposals that may be politically unpopular, and were never likely to be adopted.
- 4. Is it the right time to make further change to the policy process?** There is strong support for the Committee system that operates in the Legislative Council, which can act as a method to allow further consultation and consideration of Legislation. In particular, the newly adopted Selection of Bills Committee is considered to be an improvement to Legislative Council process. As such, there were concerns on

making further changes in this area before the impact of the recently introduced reforms could be seen.

5. **Are there alternatives to a Green and White Paper Process?** There was concern for a few stakeholders that Green and White Papers might be considered old-fashioned and not represent modern policymaking processes. There were also points raised about alternative processes. These options included greater effort and regularity in releasing exposure drafts of legislation, or commissioning an inquiry, expert panel, independent agency or Parliamentary Committee to report on an issue identified by Government. These concerns demonstrate that there may be multiple competing options to improve policy processes.
6. **What should the process apply to?** There was some uncertainty on how to define what legislation or policies should require a Green and White Paper. The terms of reference for the committee had defined this 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”. However, it was a regular point of discussion on how such a definition would work in practice and whether there were better or more targeted definitions. Stakeholders also raised the point about the need for flexibility in application, particularly for urgent legislation.
7. **Applicability of any process to Private Members Bills.** Finally, the issue of how a Green and White paper process might be used for private members bills was also raised as an issue, and particularly resources available to MPs through the Parliament to produce documents and manage consultation.

### ***Overcoming and Addressing Barriers***

In response to initial consultations, a number of suggestions were developed to address concerns that had been raised as part of the consultation. These are summarised below and were communicated to the Parliamentary Committee as part of the Committee’s consultation process, by Professor Percy Allan.

### ***Clarification of the Green and White Paper process.***

In order to manage any misconceptions about the purpose, role and applicability of the Green and White paper process, it was important to clearly define the process and its purpose. These concerns were evident from consultations with a small number of stakeholders, and it was considered important to be precise in what was being proposed.

It was clarified that the process should involve the following steps:

1. **Issuing a ‘Green Paper’.** This would be a document issued by the Government that outlines the problem to be addressed, relevant facts and potential policy options, including pros and cons and costs and benefits of these policy options.
2. **Public consultation.** This would seek public input on the Green Paper. Consultation may be done by the Government, or through a Parliamentary Committee inquiring

into the Green Paper.

3. **Issuing a 'White Paper'.** Following consideration of the consultation, the Government would decide on the best policy option and publish a 'White Paper' which would explain the rationale for the chosen policy option, including evidence and data, the main steps planned for implementing the policy and key performance benchmarks to gauge the policy's success.
4. **Introduce legislation.** At this stage, a Bill could be introduced into Parliament. It would have the benefit of early consultation, and a clearly explained rationale. The Legislative Council could choose to refer the Bill for further inquiry, or to debate the Bill.

In this assessment we also made clear that such a process would also be applicable to Private Members Bills but may require resourcing for the Parliament to assist Members with the production of a Green Paper and/or White Paper.

#### ***How to define highly contentious Bills?***

We also addressed the concerns about how to define which legislation should be that the most appropriate way of defining a Bill that should be subject to a Green and White paper process is differentiate between "Principal Bills" and "Amending Bills".

This NSW Parliamentary Counsel's Office defines the distinction between the two types of Act as:

- A principal Act is an Act that contains substantive legal provisions that are not limited to the repeal or amendment of other legislation. An example of a principal Act is the Crown Land Management Act 2016.
- An amending Act is an Act that is limited to provisions that either repeal or amend other legislation (or both). An amending Act typically has the word "repeal" or "amendment" (or both) in its name. See, for example, the Industrial Relations Amendment (Industrial Court) Act 2016.<sup>4</sup>

Using this definition, it was proposed that:

1. Principal Bills should be subject to a Green and White Paper process. As these Bills are significant legislation, a detailed policy development and consultation process is appropriate, and in many cases already occurs.
2. Amending Bills may be subject to a Green and White Paper process, at the discretion of the Government (or private member) if they believe the Bill is likely to be highly contentious. Where the Legislative Council or a Committee requests, an Amending Bill that is considered highly contentious, and has not been subject to the process could be referred back to the Government to complete it. The Selection of Bills Committee would potentially be in a position to perform such a role.

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<sup>4</sup> NSW Parliamentary Counsel, Types of NSW Acts, <https://www.legislation.nsw.gov.au/information/types-of-nsw-acts>

### ***An alternative approach - a Statement of Public Interest***

As an alternative option if the adoption of a Green and White Paper process was too onerous, it was suggested that all Bills could be accompanied by a Statement of Public Interest when tabled in Parliament. A Statement of Public Interest would be a simple explanation of the rationale for the Bill including the purpose and objectives of the Bill, other options considered, costs and benefits, pathway for implementation and consultation undertaken. A Statement of Public Interest would answer six fundamental questions that every member of Parliament and interested citizen is entitled to know before a Bill is considered. These questions are:

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?
5. **Pathway** - What are the timetable and steps for the policy's rollout and who will administer it?
6. **Consultation** - Were the views of affected stakeholders sought and considered in making the policy?

### ***What did the Committee decide?***

In its final report<sup>5</sup>, the Committee did not make a recommendation to require the implementation of the Green and White Paper process. The two recommendations made in the report were focused on establishing, and seeking funding for, a panel of external experts to assist the Parliament in its functions.

The report did note the benefits of better policy development and consultation processes, stating "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."<sup>6</sup>

However, the view of the Committee was that "a mandated Green and White Paper process is ultimately a decision for the Government"<sup>7</sup>, and that "the House has no power to direct that a specific consultation process be undertaken for government legislation."<sup>8</sup> The Committee also stated 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."<sup>9</sup>

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<sup>5</sup> NSW Legislative Council Procedure Committee, Consultation on highly contentious bills and committee access to external experts (Report 12), p viii

<sup>6</sup> Ibid, p 17

<sup>7</sup> Ibid, p 17

<sup>8</sup> Ibid, p 17

<sup>9</sup> Ibid, p 17

The Committee did see value in the suggestion of a statement of public interest. The Committee stated it 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.”<sup>10</sup>

### ***Green and White Papers in action***

In the course of the project, we became aware of two initiatives that have adopted significant elements of the Green and White Paper process. Both of these processes show interest from Government in adopting stronger policy making and consultation processes.

#### *Review of the State Records Act 1998*

The Hon Don Harwin MLC, Special Minister of State, and Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, has adopted a modified Green and White Paper process in the review and the State Records Act 1998 which is considering the merger of two Government agencies. Under this approach:

1. The Department of Finance, Services and Innovation (DFSI) produced a policy paper in consultation with stakeholders that recommends reforms to the State Records Act 1998 including the merger of the State Archives and Records Authority of NSW (SARA) and the Historic Housing Trust (HHT), also known as Sydney Living Museums.
2. The Minister submitted the DFSI Policy Paper to the Parliament's Select Committee on Social Issues with a request for the Committee to inquire into and report on the Act and the Policy Paper.
3. The Select Committee is currently conducting the inquiry in accordance with the Minister's proposed terms of reference, inviting public submissions in response to the Inquiry and the Policy Paper, holding hearings to both examine the proposed changes and hear from stakeholders.
4. It is expected that the Committee will produce a Report outlining its findings and recommendations, which the Minister and Government will be required to respond to.
5. If required, the Government will produce legislation to implement its final decision on whether or not to merge the two agencies under the State Records Act.

There are some potential areas for improvement, particularly at the Policy/ Green Paper stage which would further strengthen this approach:

- Report the key concerns and objectives of key stakeholders,
- Quantify both the fiscal and socio-economic costs and benefits of its proposed changes and any alternative options rejected, and

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<sup>10</sup> Ibid, p 17



- Explain the possible steps and timeframe for rolling out any proposed changes and any obstacles and risks that would need to be managed.

However, overall there is much to recommend in this approach. The innovative nature of the proposal is that it incorporates a Green and White Paper process with the Parliamentary Committee process. The Government has produced a policy paper and has made use of the Parliamentary Committee process to scrutinise the case and consult with stakeholders before coming to a final policy position. This approach has the potential to be an effective policy development and consultation methodology, while also engaging MPs in the complexities of this policy issue.

Consideration of this process as a case study in future Evidence Based Policy Project work would serve to highlight the strengths and any weaknesses of this approach. It would be open to the Government to use this approach on more policy reform processes, which is considered in the next section of this paper.

#### *NSW Productivity Commission Green Paper*

The NSW Productivity Commissioner, Peter Achterstraat AM, released a wide ranging and comprehensive Green Paper on productivity reform, titled *Continuing the Productivity Conversation* in August 2020.<sup>11</sup>

In the Green Paper, the intended process was explained as: “In October 2019, we kickstarted a productivity conversation with the release of a Discussion Paper....Since the release of the Discussion Paper, the Commission has consulted widely with stakeholders....These insights have informed the draft recommendations presented in the Green Paper. There is an opportunity to provide comments and feedback on specific draft recommendations...All feedback will be reviewed by the Commission prior to finalising recommendations supporting a productivity reform agenda for consideration by the NSW Government.”<sup>12</sup>

This process shows the NSW Government adopting a highly consultative process in developing reform proposals in difficult and often contentious areas.

#### ***What have we learned?***

The Procedure Committee inquiry has acted as a useful case study in understanding opinions and perspectives of policy process, and the value of a more rigorous and consultative process, such as Green and White papers.

In our conversations with stakeholders, we found:

- Strong interest and engagement from stakeholders on the issue. The topic as one that MPs and other stakeholders understood and were interested in. The practical implications of better policy process were also evident to many stakeholders, and the challenges that are presented when there is not a strong policy development and consultation process.

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<sup>11</sup> NSW Productivity Commissioner, Productivity Commission Green Paper – Continuing the Productivity Conversation

<sup>12</sup> Ibid, p14

- Recognition that better policy process was in the interests of both those proposing legislation, usually the government, and Members of Parliament in deliberating on legislation.
- A lack of clarity on whose responsibility it was to improve the process. While most stakeholders agreed with the principle, there did not appear to be strong motivation to improve the status quo. This is reflected in the report of the Committee, which while supportive of better policy making and consultation, did not make a recommendation for change.

While there was motivation to improve the policy process, there were differing opinions on what a better process would look like. For example, while there was significant support for the strengthened Parliamentary Committee system, a Parliamentary Inquiry does not offer the same opportunity for public input as a Green and White Paper process. A Green and White Paper Process invites public input after it has disclosed its preliminary findings and possible policy options while a Parliamentary Inquiry seeks public input before its findings and recommendations are known.

In considering methods to encourage greater adoption of a Green and White Paper process, there appear to be three options:

1. Continue to advocate for the Parliament to make a Green and White Paper process a requirement or expectation for contentious legislation.
2. Seek the Government to adopt Green and White Papers as a mandatory requirement for all contentious legislation.
3. Encourage policy makers to undertake the process, because they understand the value of achieving better outcomes.

The alternative approach is for the Government to consider a Statement of Public Interest for all Bills. This proposal received supportive comments in the Procedure Committee's Final Report and would have real prospects of improving the legislative process. If the Government was to be favourably disposed to it, it would appear to have broad support in the Parliament.

The Committee considered that it had 'no power' to compel a specific process for the development of government legislation. However, it is clear that through its decisions on how to consider legislation, such as a decision to refer proposed legislation to a Committee, the Legislative Council can create significant incentives on Government for an improved policy process if it chooses to. Given the Committee Report, it is difficult to see the Legislative Council deciding to make the Green and White Paper process a requirement. However, the Government is required to respond to the Committee Report within six months.

The Government response will also give an indication on the potential for the second option - the Government adopting a Green and White paper process across a wider range of legislation and policy reforms.

However, there is evidence that the third approach has the most prospects for success. Fundamentally, what the Evidence Based Policy Project is seeking to achieve is a change in the culture of policy making. While Green and White papers could be imposed by the Parliament or the Government, it is likely to be most effective if it is adopted by policy makers because they understand the benefits and strengths of the process, rather than it being a requirement that is imposed upon them. It would then become a norm and ingrained in the way that that governments and Parliaments operate, rather than a process that is resisted, seen as an unnecessary obligation, or complied with in form, but not in spirit.

The two Green Paper processes that are currently underway demonstrate that this path has merit. This would be supported by the ongoing work of the Evidenced Based Policy Project in assessing both failures and successes in best practice policy making. By the end of this year 60 case studies of the quality of past government decision making at federal and state levels will have been completed.

Over time, this has the potential to change the culture of policy making, and for practitioners to see the practical benefits of a better policy process. This process of cultural change and creating better policy making norms also increases the likelihood of support for a future policy of requiring Green and White Papers for major or contentious reforms.

There is certainly value in the Parliament or Government imposing requirements for improved policy processes, particularly as a way of ensuring that contentious and complex issues get the consideration needed to deliver the best outcome. In the short term, the Statement of Public Interest would be seen to have the highest prospects for success in policy change and would be a significant addition to the transparency and effectiveness of the legislative process.

### ***Next Steps***

**It is recommended that the Evidence Based Policy Project continue with its case studies on government decision making, as a way of highlighting the value of strong policy processes. If possible, the two identified Green Paper processes should be included in a future round for assessment.**

**The Evidence Based Policy Project should also continue to advocate for the adoption of evidence and consultation-based policy making using Green and White Papers across a range of portfolio areas and seek to educate MPs and policy makers on the benefits of the process.**

**Finally, the Evidence Based Policy Project should advocate to Government, Opposition and Minor parties for the adoption of a Statement of Public Interest in response to the Procedure Committee report.**