

Private Members and the Public Interest
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Introduction

There appear to be two conflicting schools of thought about the role of Private Members' Bills (PMBs). The first is based on the view that it is legitimate for individual members in their role as a Member of Parliament to contribute to the legislative agenda.² The second is based on the presumption that it is the business of Executive Government to introduce legislation which they have responsibility to administer.³

In Uhr's opinion, the first position is the most compelling because it is based on the principle of equality of parliamentary opportunity. To Uhr, this opportunity means more than minorities just having the right to express dissent on the record and to rebut majority views. In this context it means power sharing, so that all parties get their fair share of power to contribute to the agenda of parliamentary business.⁴

Regardless of the perspective adopted, discussions of PMBs frequently tout the merit of procedural reform or alternatively offer pragmatic cautionary tales of consolation as demonstrated in a paper given a number of years ago by the South Australian Clerk:⁵

Particular legislative restrictions in relation to Private members have sometimes led members to become agitated in what they consider to be a restriction on their individual rights to introduce particular legislation which conflicts with the Constitution Act, Standing Orders or established precedence. However, in most cases, Members have been encouraged to take another course to achieve their aims, whilst others have been satisfied with the mere attempt to introduce the legislation, even if it is ruled out of order. They are given the satisfaction of at least being seen to be actively fostering issues which they consider of importance to their electorate or the wider community.

The danger of accepting such a position is that it risks accentuating cynicism about the institution of Parliament among many Members and the public at large at a time when most Parliamentary democracies are struggling to re-engage with the broader community and enhance their relevance, credibility and public standing. If we are not to fall victim to what Quintin Hogg calls the "elective dictatorship"⁶ then the goals of

¹ Thank you to the staff of the Australian Commonwealth and State Parliaments and the New Zealand Parliament for their assistance in the preparation of PMB statistics.

² Brazier, A. & Fox, R. (2010) Enhancing the Backbench MP's Role as a Legislator: The case for Urgent Reform of Private Members' Bills, *Parliamentary Affairs*, Vol 63(1), pp. 201-211.

³ Dixon, N. (2003) *The Role of Private Members' Bills*. Australasian Study of Parliament Group, Annual Conference 18-19 July 2003: Darwin, Northern Territory.

⁴ Uhr, J. (2005) How Democratic is Parliament? A case study in auditing the performance of Parliaments, Discussion Paper, *Democratic Audit of Australia*, June.

⁵ Davis, J. (2004) *Private Members' Bills*, 35th Conference of Presiding Officers and Clerks, Melbourne, p. 9.

⁶ Cited in Gould, B., *Hung Parliaments Can be Effective Too*, 19/4/2010, Accessed from: <http://www.guardian.co.uk/commentisfree/2010/apr/19/hung-parliament-effective-government> on 23/6/2011.

genuine plurality of parliamentary representation and equality of parliamentary opportunity should remain firmly within our sights. In this respect PMBs offer a valuable counterbalance to the dominance of the Executive's legislative agenda. This discussion of PMBs is therefore located firmly within the context of these aspirations.

Role of PMBs in the democratic process

PMB's are an important tool in facilitating equity of opportunity for all Parliamentarians. The entire PMB process contributes to the 'up-skilling' of private members. Private members gain experience in developing and consulting on legislative proposals as well as experience in responding to opposing views on the bill during question time.⁷ Enabling members to participate and gain experience in the consideration and examination of PMBs has a positive effect on the morale and image of the Parliament.⁸

The Electoral and Administrative Review Commission suggest that PMBs allow:⁹

The Opposition and individual Members to introduce legislative proposals that are considered to be in the public interest or which transcend political boundaries (e.g. Conscience issues). PMB's may also serve to stimulate community debate on significant policy issues, even where an Opposition or individual Member perceives that the Bill is unlikely to receive Government or majority support.

PMBs often arise from the support and lobbying of interest groups outside parliament on significant policy issues or gaps in the law, which builds a strong campaign for changes in the law.¹⁰ It may be considered that a private member can more effectively secure support on issues of conscience on behalf of their constituents without the obstacle of party discipline.¹¹ This can also have benefits for the Executive because by removing the restrictions of party policies it allows a contentious issue or innovative idea to be 'road-tested' via the introduction of PMBs with guaranteed majority support.¹²

Collectively, the benefits discussed here emphasise the value of PMBs and although historically there are relatively low numbers of PMBs passed in comparison to the numbers introduced, it should not undermine their democratic and educative value.

History of PMB's

The most famous example of a successful PMB was introduced by William Wilberforce, an independent member of Westminster. The Bill set out to abolish the slave trade in the British Empire and was successfully passed as the *Abolition of*

⁷ Dixon, N. (2003).

⁸ Richards (1981), *Private Members Legislation: The Commons Today*, in *The House of Commons in the Twentieth Century*, Walkland, S., (Ed.) Fontana Paperbacks, London.

⁹ Electoral and Administrative Review Commission, *Review of the Office of the Parliamentary Counsel – Issues Paper No 7*, p. 29.

¹⁰ Brazier, A. & Fox, R. (2010) pp. 205 & 206.

¹¹ Walkland, S. A. (ed) (1979) *The House of Commons in the Twentieth Century: Essays by members of the study of parliament group*. Clarendon Press: Oxford, p 315.

¹² Brazier, A. & Fox, R. (2010) p. 206.

Slavery Act 1807. While this is indeed an extraordinary example of how a PMB can contribute to an epic level of social change, we need to remember that it took Wilberforce over 20 years of agitation as a Private Member to achieve his goal.

Since Federation, 280 PMBs have been introduced in the Australian Parliament. Of these, 15 have been enacted. Among the most notable PMBs introduced and passed are the:

- *Commonwealth Conciliation and Arbitration Act 1904*;
- *Compulsory Voting Act 1924*;
- *Euthanasia Laws Bill 1997*; and
- *Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006*.

Queensland History

Since 1880, 136 PMBs have been introduced in the Queensland Parliament and of these, 5 have been enacted. In 1992, the first successful PMB was introduced by Mr Matt Foley MLA, a then government back-bencher. The *Parliamentary Papers Bill 1992* resulted from the recommendations of a Select Committee on Privileges and related to the privileges which attach to parliamentary papers. It was considered appropriate to introduce the Bill as a PMB as the issue concerned all Members and was not party political.¹³

In 1996 a second PMB was passed. The then Leader of the Opposition, Mr Peter Beattie introduced the *Carruthers Inquiry Enabling Bill 1996* which allowed the resumption of the Criminal Justice Commission's Carruthers Inquiry. The Bill successfully passed with the support of an Independent Member with the balance of power.

In 2003, the third bill was introduced by Independent Member Mr Peter Wellington MP. The *Criminal Code (Palliative Care) Amendment Bill 2003* was introduced when the Labor Government held the majority. The Bill protects doctors from criminal prosecution if administering palliative care to patients dying in pain which may hasten the patient's death. During the second reading debate the Attorney-General indicated the Government's support for the Bill.

In 2007, the fourth successful PMB was also introduced by Independent Member Mr Peter Wellington MP, the *Criminal Code (Double Jeopardy) Amendment Bill 2007* which modified the application of the double jeopardy rule. This Bill was developed in consultation with the Attorney-General and received bipartisan and community support.

The most recent successful PMB was introduced in 2008 by Mrs Rosemary Menkens MP, who at this time was Shadow Minister for Communities, Disability Services, Multicultural Affairs, Seniors and Youth. The *Carers (Recognition) Bill 2008* incorporates a Carers' Charter which provides a framework for all public sector entities to refer to when making decisions that affect carers.

¹³ Dixon, N. (2003)

From these examples drawn from Queensland's Parliamentary history, it is apparent that each PMB emerges in unique political circumstances with a variety of factors influencing the demise or success of the proposal and that a number of those which do succeed have a lasting and profound impact.

The legislative process for Private Members' Bills in Queensland

Most jurisdictions have specific provisions to allocate parliamentary time for private members to introduce legislative proposals. As highlighted earlier it is frequently suggested that the success of a PMB is greatly affected by administrative and procedural hindrances during the development and passage of legislation.

Drafting

In the absence of robust support from the Executive, Private Members frequently face challenges and difficulty in accessing technical advice and resources during the process of drafting a Bill. Section 10 of *Legislative Standards Act 1992* provides that a Member may request the assistance of the Queensland Office of Parliamentary Council (QOPC) to draft a Bill or an amendment to a Bill and QOPC must comply with this request. However the legislation then goes on to qualify this duty by stating that QOPC are not obliged to comply where doing so significantly interferes with the Government's own legislative program. It is acknowledged that there is a finite quantity of legislative drafting time available and it is therefore reasonable that these resources should be directed as a priority to the general business of Government. However unless minimum thresholds of time are apportioned for the drafting of PMB's these Bills run the risk of being of a poor quality in both technical and policy terms. This then increases the prospect that such legislation will struggle to secure support within the Parliament, and that the proposal will fail, not necessarily for lack of merit, but for other entirely avoidable reasons.

The scrutiny of PMBs was considered difficult up until 2003. Prior to 2003 there was no requirement for private members to provide explanatory notes for Bills. In response to recommendations of the Scrutiny of Legislation Committee's Report No. 18 on the *Committee's Monitoring of the Operation of the Explanatory Notes System*, the *Legislative Standards Act 1992* was amended by the *Justice and Other Legislation Amendment Act 2003* to require all members who present a Bill to the Legislative provide explanatory notes for the Bill.¹⁴ This amendment is a move towards reinstating equality in the legislative process, and provides justification that it is indeed all members who are responsible for the introduction of sound legislative proposals. As discussed above, increased access to technical advice in order to develop thorough explanatory notes to supplement PMBs needs to be provided to maintain a high standard of legislative proposals.

Procedural Process

In Queensland, the Standing Rules and Orders of the Legislative Assembly (SO) recognise two types of Bills: Government Bills and Private Members' Bills. Provided

¹⁴ *Legislative Standards Act 1992 (Qld)*, s22(1)

the rules relating to initiation procedures are observed, any Member of the Legislative Assembly has authority to introduce a Bill.

Under Standing Order 129 (2) a Member may present a Private Member's Bill during any time allocated for the introduction of Private Member's Bills. Under Sessional Orders of the Legislative Assembly, the Order of Business includes time for Private Members' business from 5.30-6.30pm on Tuesdays and 7.30-10.00pm on Wednesdays.¹⁵

During the second reading debate of a PMB, members are given 15 minutes to speak to the Bill, compared to 20 minutes during the second reading debate of a government bill.¹⁶

Sessional Order 3 (2) & (3) provides, a Bill which has been reported on by a portfolio or other committee, will be brought on for debate on the sitting Wednesday evening next following the passage of three calendar months after the tabling of the committee's report on the Bill. The House will continue to debate the Bill on each following sitting Wednesday evening until consideration of that Bill has been finalised.

A number of commentators and several Australian jurisdictions maintain that the presence of specific provisions to support PMBs is likely to increase the opportunity for their successful passage through the Parliament. The following section examines this issue across Australian and New Zealand jurisdictions.

Inter-jurisdictional comparison

Table 1 (below) provides a summary of PMBs introduced and passed for all Australian jurisdictions for the 18 years from 1994-2011.¹⁷ This table reveals a wide variation in both the number of PMBs introduced across Australia and New Zealand in this time and the ultimate success of these Bills. In the period surveyed, a total of 1945 Private Members Bills were introduced but only 302 of these Bills were eventually passed. This represents an average rate of assent throughout Australia and New Zealand of 15.5%.

The majority of jurisdictions have introduced specific procedural reforms to encourage and facilitate the passage of PMBs. The most recent of these changes were introduced in the Commonwealth Parliament in 2010 and further changes are anticipated to the NSW Parliament by the end of June 2011.

¹⁵ See Sessional Orders 1 & 3 (Qld).

¹⁶ See Sessional Orders 1 & 3 (Qld).

¹⁷ 1994 is the first year when comparative data was readily available from all Australian jurisdictions and New Zealand.

Table 1: Private Members Bills Introduced and Passed by Legislative Assemblies and House of Representatives in Australia and New Zealand January 1994 – May 2011.

Jurisdiction	PMBs Introduced	PMBs Passed	Specific procedural provisions for PMBs	% passed
Vic	106	2	No	1.9
Cth	192	5	Yes	2.6
WA	270	8	No	3.0
Qld	136	5	Yes	3.7
NT	125	5	Yes	4.0
Tas	212	15	Yes	7.1
NSW	307	24	Yes ¹⁸	7.8
NZ	251	29	Yes	11.6
SA	304	37	Yes	12.2
ACT	340	172	No	50.6
Aust and NZ Total	1945	302	-	15.5

In the period from 1994-2011 the incidence of minority government's and hung parliaments in Australia and New Zealand has increased significantly and since 1989 New Zealand and every State and Territory of Australia has elected a hung parliament at least once, and in 2010 a minority government was elected to the Commonwealth Parliament for the first time in 70 years.¹⁹

The increased frequency of election of minority governments has given rise to more attempts by Opposition and Independent Members of Parliament throughout Australia to reform Parliamentary procedures to ensure that PMBs are treated more favourably than in the past. Those who favour promoting a greater role for Private Members in the legislative process are supportive of these changes however John Uhr reminds us that it is important that there are safeguards against the power of passing majorities to lock in their passing preferences as permanent features of the parliamentary or electoral system.²⁰

It has been suggested by some influential thinkers in the UK Hansard Society that:

*A simple change in the attitude of the Executive will not be enough ultimately, unless the flaws that inhibit the PMB process are dealt with then Great moral and policy issues of the day – will not stand or fall on the strength of parliamentary argument and support, but rather they will be destroyed purely through procedural vulnerability. If so, then the credibility of Parliament in the eyes of the public will risk being diminished still further.*²¹

¹⁸ Outcomes of review of PMB procedural provisions to be announced later in June 2011.

¹⁹ Horne, N. (2010). *Hung Parliaments and minority governments*. Accessed 20 June 2011 from: <http://www.aph.gov.au/library/pubs/bn/pol/HungParliaments.htm>.

²⁰ Uhr, J. (2005) p.18.

²¹ Brazier, A. & Fox, R. (2010) p. 210.

However a breakdown of the number of PMBs passed in New Zealand and Australian jurisdictions on a year by year basis, suggests that the number and success of PMBs appears to be more closely related to the composition of the Parliament than the strength of procedures supporting PMB's.

As is demonstrated in Table 1, although the majority of jurisdictions have introduced procedural reforms intended to facilitate and support PMBs, there does not appear to be a strong relationship between these changes and the ultimate measure of success, the assent of PMBs. Indeed an analysis of information provided from all jurisdictions and the summary data in Table 1 indicates that the presence of specific procedural provisions for PMBs is a poor predictor of the volume and success of Bills passing through the legislature of these jurisdictions. For example, less than 10% of Private Members Bills were assented in 5 of the 7 Parliaments that have Standing and/or Sessional Orders that include specific provisions to facilitate Private Members Business.

There are potentially several reasons for this result. Firstly in bicameral Parliaments, unless the procedural reforms are adopted by both houses of the Parliament then the Bill may falter when it moves from one chamber to the other. Secondly, in a significant proportion of cases, after a PMB is introduced, public engagement and education on the issue may then give rise to the Government adopting the Bill or introducing its own version of the proposal. In this case, the PMB does not complete its passage and ultimately becomes a Bill of the Government, which may account for the very high attrition rate of PMBs in many jurisdictions.²² One jurisdiction noted in their data return for this paper that the introduction of extensive procedural reform for Private Members' business has had little discernable impact. A scan of the various jurisdictions' procedural provisions for Private Members' Business suggests that despite the stated object of the reforms, in several instances the nature of the revised procedural arrangements may have had the unintentional or perverse consequence of further limiting the success of non-Government Bills.

Tasmania has a higher percentage of introduced PMBs passed in comparison to all but one jurisdiction. At the Presiding Officers and Clerks Conference in 2004, the Speaker of the Tasmanian House of Assembly, Mr Michael Polley noted that there were a number of significant changes made to standing orders in 1996 which increased the time available for non-Government Business to 45% of the sitting time of the House. Polley attributes the leverage exerted by non-Government parties upon the minority Government to have stimulated reform in this area of procedure.²³

However it is the Australian Capital Territory (ACT) which has a particularly unusual profile with respect to PMBs in comparison to other Australian jurisdictions. Since gaining self government in 1989, the political landscape in the ACT has been dominated by minority and coalition governments with no single strong governing

²² Hesford, S. (2005). *Being Mauled in the Bear Pit: Opportunities for and the effectiveness of Opposition and Independent Members in the Legislative Assembly of New South Wales*, Paper Prepared for the ANZACATT Parliamentary Law Practice and Procedure Course.

²³ Polley, Michael MHA. (2004) *Non-Government Time in the Tasmanian House of Assembly*, Presiding Officers and Clerks Conference, July 2004.

party. PMBs in the ACT account for 17.5% of all PMBs passed in Australia and New Zealand.

The high rate of introduction and passage of PMBs in the ACT is particularly interesting in view of the fact that it has no Standing or Sessional Orders which deal specifically with PMBs. This point serves to highlight that the absence of a procedural framework to support PMBs need not impede the successful introduction and passage of such legislation.

Similar observations were made by the Scrutiny of Legislation Committee in the 49th Parliament of Queensland when there was a minority Labor Government. The Committee noted that the increase in PMBs was "...no doubt largely due to the composition of the 49th Parliament, with its large proportion of members not affiliated with Government or Opposition parties."²⁴

Indeed, all available evidence suggests that procedural provisions alone are comparatively unimportant when considered alongside the willingness of the government to negotiate on matters where their continuing grip on power is at stake. This indicates that the single most reliable predictor of the rate of successful passage of PMBs is the composition of the Parliament itself. However it is acknowledged that further more detailed analysis which considers a standardised range of variables across jurisdictions is necessary to make this assertion with complete certainty.

²⁴ Scrutiny of Legislation Committee, Queensland Parliament. (2001) *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*. Tabled 9 August 2001, p. 39.