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An Independent Research Project facilitated by The newDemocracy Foundation
(<https://www.newdemocracy.com.au/our-work/477-evidence-based-policy>)

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Chair: Ajaka, John (LIB, LC Member)

Members: Borsak, Robert (SFF, LC Member), Buttigieg, Mark (ALP, LC Member); Faehrmann, Cate (GRNS, LC Member); Harwin, Don (LIB, LC Member); Hurst, Emma (AJP, LC Member); Khan, Trevor (NAT, LC Member); Maclaren-Jones, Natasha (LIB, LC Member); Mallard, Shayne (LIB, LC Member); Mitchell, Sarah (NAT, LC Member); Moselmane, Shaoquett (ALP, LC Member); Nile, Fred (CDP, LC Member); Searle, Adam (ALP, LC Member); and Sharpe, Penny (ALP, LC Member).

Submission to the Procedure Committee of the NSW Legislative Council on the Contentious Bills Motion of the 20th June 2019



The Hon John Ajaka and members of the Procedures Committee,

This submission is on behalf of the Steering Committee of **the Evidence Based Policy Research Project**, an independent research initiative facilitated by the newDemocracy Foundation as part of its broad remit to seek improvements to the functioning of Australian democracy.

It builds on the submission that was made earlier this year to political party leaders in the NSW Legislative Council before the Council passed a motion on the treatment of Contentious Bills that was referred to the Procedures Committee for inquiry and reporting.

Issue

How to manage contentious Bills introduced in the NSW Legislative Council to ensure they are evidence and consultative based.

Background

In 2018 the non-partisan newDemocracy Foundation facilitated a research project into the quality of government decision-making at federal and state levels.

It commissioned a free market think tank (IPA) and a social democratic think tank (Per Capita) to separately rate 20 case studies using a ten point criteria for good policy-making devised by Ken Wiltshire AO, Professor of Public Administration at the University of Queensland Business School.

Professor Wiltshire is also the Australian Representative on the Executive Board of UNESCO and a member of the Commonwealth Grants Commission.

The think tanks' yes or no scores on the ten Wiltshire questions were remarkably similar in almost all cases. Here are their Average Yes Ratings out of a possible total score of 10.

Excellent Process:

- ☐ Vic: Voluntary Assisted Dying Law (Average rating 9/10)
- ☐ Qld: Legalising Ride-sharing Apps (9/10)

Sound Process

- ☐ NSW: Criminal Justice Reforms (8.5/10)
- ☐ Vic: Access to Medical Cannabis Law (8/10)

Acceptable Process

- ☐ Fed: Electoral Amendment Act (7.5/10)
- ☐ NSW: Greyhound Racing Laws (7.0/10)
- ☐ Vic: Aboriginal Victorians' Treaty Process 7.0/10)

Deficient Process

- ☐ Fed: National Energy Guarantee (6.0/10)
- ☐ Fed: Future Submarine Program (6.0/10)
- ☐ Vic: Climate Change Law (6.0/10)
- ☐ Qld: Alcohol Fuelled Violence Law (6.0/10)
- ☐ Fed: Enterprise Tax Plan (5.0/10)
- ☐ Fed: Replacement of 457 Visa (5.0/10)
- ☐ Qld: North Queensland Stadium (5.0/10)
- ☐ Fed: Broadcasting Reform Law (4.0/10)
- ☐ NSW: Fire & Emergency Services Levy (4.0/10)

Unacceptable Process

- ☐ Fed: Marriage Law Postal Survey (2.5/10)
- ☐ NSW: Local Council Mergers (2.5/10)
- ☐ Qld: Vegetation Management Laws (2.5/10)
- ☐ Fed: Creation of 'Home Affairs' Dept. (2.0/10)

Wiltshire Criteria

The ten questions asked of each federal and state government policy were:

- 1. Need**
Was there a statement of why the policy was needed based on factual evidence and stakeholder input?
- 2. Objectives**
Was there a statement of the policy's objectives couched in terms of the public interest?
- 3. Options**
Was there a description of the alternative policy options considered before the preferred one was adopted?
- 4. Mechanisms**
Was there a disclosure of the alternative ways considered for implementing the chosen policy?
- 5. Analysis**
Was there a published analysis of the pros/cons and benefits/costs of the alternative options/mechanisms considered in 3 and 4?
- 6. Pathway**
Was there evidence that a comprehensive project management plan was designed for the policy's rollout?
- 7. Consultation**
Was there further consultation with affected stakeholders after the preferred policy was announced?
- 8. Papers**
Was there (a) a green paper seeking public input on possible policy options and (b) a white paper explaining the final policy decision?
- 9. Legislation**
Was there legislation and adequate Parliamentary debate on the proposed policy initiative?
- 10. Communication**
Is there an online official media release that explains the final policy in simple, clear and factual terms?

Comment

The near unanimous scores of the Right and Left think tanks suggests that while Australians disagree on political values and direction they are likely to agree on the process they want governments and parliaments to follow in framing and approving legislation on contentious matters.

The think tanks found that the three things most missing in government decision-making were:

- ☐ Cost/benefit analysis,
- ☐ A Rollout Plan in conjunction with a policy statement, and
- ☐ A Green Paper to elicit public feedback in advance of a decision.

Professor Wiltshire AO, the author of the project's benchmarking methodology remarked:

"My 35 years of research suggest that good policy processes result in better outcomes than decisions made without a strong evidence base and close consultation with stakeholders."

Professor Percy Allan AM, chair of the Research Project, observed:

"Governments lose support because of half-baked policies foisted onto an unwitting public which provokes a backlash. A more productive and popular path is to target real community needs through fact-gathering and citizen-input when crafting a policy. That removes the element of surprise and wins consensus. Good policy process is also good politics."

The research found that contentious policy issues that underwent a thorough Green/White Paper decision-making process were better received by the media, public and parliament than those that were decided on the run or intentionally by-passed good process. Indeed the latter largely back-fired and required intensive damage control.

This suggests that any Government Bill on a highly contentious issue stands a better chance of obtaining the approval of an Upper House where governing parties are not in a majority if that Bill is preceded by a proper and transparent Green/White paper process to elicit the known facts, policy options, their pros and cons and citizen feedback before MPs are asked to consider it.

The newDemocracy Foundation is facilitating a further research project in 2019 examining another 20 case studies on legislative decisions at federal and state level of which four relate to the NSW Parliament. The research report findings are scheduled to be publicly released in November 2019.

NSW Legislative Council Motion

The NSW Legislative Council following representations to all party leaders by the Chair of the EBP Research Project agreed to the following amended motion on the 20th June 2019:

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

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

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

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

(a) The New South Wales Parliamentary Library prepare an Issues Paper on the bill;

(b) The newDemocracy Foundation be commissioned to facilitate community input into the bill, such as a citizens panel or jury, to complement the traditional forms of evidence gathering by committees, such as seeking submissions and taking oral evidence, and

(c) Legislative Council committees will respect the foundation's remit as an independent and non-partisan research organisation.

3. That the operation of paragraph (2) of this resolution lapse on the last sitting day of 2020 and then stand referred to the Procedure Committee for inquiry and report.

4. That the House notes that The newDemocracy Foundation has offered to provide this service during 2019 and 2020 for no charge to the Parliament.

Source: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-79292>

NSW Legislative Council Consultations

Following the passage of the above motion the Chair of the Evidence Based Policy Research Project approached leaders of the Government, Opposition, The Greens and One Nation in the Legislative Council to discuss what might come out of the Procedures Committee's inquiry into the motion. The tenor of those discussions are summarised in Appendix A to this submission.

The Chair of the Evidence Based Policy Research Project was heartened by the positive ideas arising from these discussions and recognises that a Parliamentary Committee hearing on public responses to a Green Paper could precede a Government response to the outcome of such a hearing in the form of a White Paper and the tabling of a Bill.

Recommendation

That the Legislative Council adopt a procedural rule requiring any future Bill on a highly contentious public issue be preceded by a full Green/White Paper process.

The **Green Paper** should inform the general public of:

1. The relevant facts and figures about the social, economic, environmental or other problem/s that any legislation is meant to address; and
2. The alternative solutions to fixing the problem/s and the pros and cons as well as the quantified costs and benefits for each of these policy options.

The **White Paper** should inform everyone of the:

1. Public responses to the Green Paper, including the views of an impartially chaired focus group representative of the wider public and exposed to contending arguments; and

2. The reasons for the Government's decision to favour a particular policy in preference to other options in its proposed legislation.

A Departmental Green Paper would:

- a) Present factual evidence to demonstrate that a particular public issue (e.g. social, economic, environmental or financial problem) warrants priority attention;
- b) Present known public views on the issue (e.g. drawing on opinion polls and focus groups)
- c) Present 2-3 alternative solutions (i.e. options) for fixing the problem and the pros and cons of each option.
- d) Quantify the wider public cost/benefits of each possible option.
- e) Seek public input through formal submissions and a citizens' jury (comprising a representative cross-section of citizens with the right to cross-examine experts).

A Government White Paper would:

- (a) Repeat the content of the Green Paper, but take account of public input to make corrections to factual evidence, expand on possible options for solving the problem and update pros/cons and cost benefit analysis of options to reflect fresh information obtained through the public engagement phase of the Green Paper.
- (b) Decide the optimal policy option (i.e. solution) based on weighing up the relative pros and cons, public cost/benefit and general public views canvassed in the White Paper.
- (c) Provide a simple flow-chart of the main steps planned for rolling out the preferred (optimal) policy option.
- (d) Provide key performance benchmarks to gauge the policy's success after 3 to 5 years. These policy targets should be SMART (i.e. specific, measurable, achievable, relevant and time-based).

This recommendation is submitted for consideration and support in the Procedures Committee's inquiry and final report.

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Appendix A.

Outcome of Discussions with Legislative Council Party Leaders in Sept 2019

Hon. David Shoebridge

Proposes that if the Legislative Council decides that a contentious Government Bill does not adequately reflect such an evidence-based and consultative policy-making process it may

refer the Bill to an Independent Review Office of the Parliament to prepare a Green Paper to assist it make an informed decision on whether the Bill best serves the public interest.

Amenable to Harwin's proposal if done in conjunction with above proposal, but says it will require extra resources for Parliament.

Hon. Don Harwin

Proposes a Sessional Order that would require contentious policy matters proposed for the Legislative Council to go through these steps:

1. A Green paper process
2. A Parliamentary Committee hearing on public responses to the Green Paper
3. A Government response to the outcome of the Parliamentary hearing in the form of a White Paper Decision and Bill
4. A Selections of Bills Committee decision on whether to refer the Bill to the House or to a Standing Committee for further inquiry

Hon. Adam Searle

Amenable to both the Harwin and Shoebridge proposals, but says they will require an extra budget allocation for Parliament.

Hon. Mark Latham

Supports Harwin's proposal.