The Centre for Public Integrity

From Box-Ticking to Trust-Building:

Enhancing Integrity in Public Consultation

The Centre for Public Integrity

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The Centre for Public Integrity is an independent research institute dedicated to restoring integrity to the foundations of Australia's democracy. We work to prevent corruption, protect the integrity of our accountability institutions, rein in executive power, and eliminate the undue influence of big money in politics.

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THE SUNRISE PROJECT

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Executive Summary

Efforts to improve the quality of government consultations have generally not been positioned as a core initiative in integrity reform. However, this new research report and position paper from the Centre for Public Integrity explains how robust and accountable public consultation in government decision-making and policy/law development will deliver on a number of important integrity objectives.[1] Genuine public participation and consultation is an important response to disillusionment and declining public trust in representative democracy and its institutions. It can have a number of benefits. At a substantive, or outcomes-based level, it can:

- improve government decision-making and the development of better public policy, because of the enriched data, expertise and experience base; [2] and
- promote respect for the individuals and organisations within the community that might be affected by the decisions.

It also does important work to ensure the operating conditions for good government and trust, by:

- Enhancing the democratic legitimacy of government decisions, flowing from the wider participation in government actions;[3]
- Increasing the accountability of government decision-making;[4] and
- Strengthening public trust in government, and acceptance of final decisions and policies of government.

When public consultation is done well, it can achieve these objectives through:

- Improved transparency around how government decisions are made and policies developed;
- Reduced disproportionate influence exercised by vested interests in government decision-making;
- increased equality of access to government.

Under many pieces of federal legislation, the government is often required, or has the discretion, to consult on certain decisions. In this report, the Centre for Public Integrity has identified 129 Commonwealth statutes that include consultation obligations, and 340 consultation provisions within these statutes.[5]

[1] In this report, we are particularly focussed on consultation undertaken by the government, rather than that undertaken by parliament in its legislative and executive scrutiny functions. While many of the same strategies for good consultation apply to both forums, government consultation is institutionally and often legally different, as it applies to the original decision-maker or in the development of policy, from that of parliament when undertaking its oversight/accountability role.
[2] See further Andrew Edgar, 'Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step Towards Public Consultation' (2014) 33(1) *University of Tasmania Law Review* 56, 59.
[3] See further Andrew Edgar, "Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts" (2016) 27 *Public Law Review* 18, 20, who argues 'effective public consultation should be regarded as an important means of supporting the legitimacy of administrative rule-making'.
[4]See further Branson and Finn JJ in *Wilderness Society Inc v Turnbull* ('Wilderness Society') [2007] FCAFC 175.
[5] This figure was determined by searching the Federal Register of Legislation, by searching principal acts in force, using the terms 'consult', 'public comment', 'public submissions', 'public to comment', 'seek the views' and 'public notice'. 284 search results were returned, and each statute was checked for public consultation (or similar) requirements i.e. statutes that included consultation requirements with government departments or ministers were excluded from the final figure. 129 is likely a conservative figure – further public consultation requirements were possibly not captured using these search terms. For example, the V*eteran's Entitlement Act 1986* ss 196B, 196E-G allow for the Authority to conduct 'investigations' which allow for 'notices' and 'submissions', however was not captured using the above search terms as they did not use the terms 'consult' and 'public'.

Executive Summary

Statutory consultation obligations vary in the form they take, from specific, detailed, enforceable requirements imposed on the decision-maker, to requirements that are vague, discretionary and optional. On one end of the spectrum, detailed public notice requirements may exist for specific decisions, such as action management plans for approved projects under the Environment Protection and Biodiversity Conservation Act 1999[6]. On the other end, the decision-maker may simply have a vague 'function' or 'power' to consult (for example, the Net Zero Economy Authority),[7] or they have the option to consult 'as they think fit' or 'appropriate'.[8]

Regardless of the form they take, statutory consultation requirements frequently arise in portfolio areas that involve significant policy questions or decisions that may affect the rights of vulnerable or marginalised individuals and groups in society.

In addition to the statutory consultation obligations, the Government is committed to public consultation in the development of major policies and legislation, such as through the support provided by the Office of Impact of Analysis, located within the Department of Prime Minister and Cabinet.[9]

Unfortunately, while there is a plethora of consultation obligations and commitments, and a number of institutional supports for consultation, there are significant criticisms and examples of failures of Government to undertake or oversee public consultations in a robust way that delivers these benefits. That is, consultation must be done well: 'mere consultation-based decision-making is not enough'.[10]

The scale and prevalence of these consultation requirements underscore the importance of examining how consultation is conducted in practice, the consequences of good and poor consultation, and how consultation processes can be strengthened and made more accountable across government.

Recurrent shortfalls in consultation have been identified by scholars and studies, and there are a number of examples that we draw on in this report of how the Australian Government is failing to harness the good government and integrity enhancing potential of robust public consultation, in important policy areas.

We conclude this report by advocating for a major and cutting-edge policy reform: the introduction of a Public Consultation Act and an 'Office of Public Consultation', whose role is to enhance the quality and integrity of public consultations through education, oversight, cost-effective and efficient complaint handling.

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[6] See section 134A of the *Environment Protection and Biodiversity Conservation Act 1999*.
[7] See section 203BJ(3) of the *Net Zero Economy Authority Act 2024*.
[8] See, for example, section 13(3) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* which states that when a Minister is considering whether to make a declaration preserving or protecting a specified area from injury or desecration, the Minister may 'consult any other person or body the Minister thinks appropriate'.
[9]Other mechanisms that support include the Australian Centre for Evaluation within the Treasury, that assists agencies determine if they need a formal evaluation of stakeholder consultation: https://evaluation.treasury.gov.au/about/about-australian-centre-evaluation, and the National Indigenous Australians Agency (that assists with First Nations impact assessments) and the Office for Women (that assists with gender impact assessments).
[10] Nicoletta Rangone, 'Effective Consultation as a Tool for Trust' in M. De Benedetto, N. Lupo, N. Rangone (eds), *The crisis of confidence in legislation* (Nomos-Hart, 2020), available at SSRN: https://ssrn.com/abstract=4392714 or http://dx.doi.org/10.2139/ssrn.4392714.

List of Recommendations

1. The Centre for Public Integrity recommends the enactment of a Commonwealth ***Public Consultation Act*** to clarify, support and standardise the performance of statutory consultation obligations across government.

2. The Centre for Public Integrity recommends the establishment of an independent statutory office, the **Office of Public Consultation**, to strengthen the quality, consistency and integrity of public consultation across the Commonwealth. The Office of Public Consultation should be given the following functions:

(a) Provide system-wide oversight and transparency

- Oversee a whole-of-government consultation website providing a single, accessible point of information for all consultations relating to legislation, regulations and significant government decisions.

(b) Build capability and support good practice

- Develop and deliver guidance, resources and training for public officials involved in consultation;
- Support the design of consultation processes that are fit for purpose, including through co-design with affected groups and tailoring methods to the issue, policy context and communities involved.

(c) Monitor, audit and report on consultation practice

- Conduct regular audits of:
  - compliance with statutory consultation requirements;
  - the frequency and quality of consultation in policy development; and
  - the use of representative bodies and advisory mechanisms, including their representativeness, frequency of engagement and substantive influence;
- Publish findings and system-wide assessments of consultation practice.

(d) Receive and investigate complaints

- Receive complaints from individuals and organisations regarding the conduct of specific consultation processes, as well as systemic complaints relating to consultation practices under particular legislation or within particular departments or agencies;
- Investigate such complaints and issue public findings and recommendations.

(e) Advise on consultation obligations

- Be consulted in the development of legislative and administrative proposals that create or rely upon consultation requirements, to support clarity, consistency and effectiveness at the design stage.

(f) Undertake and commission research

- Undertake or commission research into best-practice consultation and emerging challenges, including:
  - the implications of artificial intelligence for consultation processes, such as the volume and form of submissions and opportunities for more effective analysis and engagement; and
  - methods for incorporating the interests of future generations into consultation processes, drawing on international models.

(g) Strengthen participation and trust

- Work with under-represented and seldom-heard communities to build capacity to participate in consultation;
- Provide support, resources and engagement to foster trust between these groups and government, improving the design and effectiveness of future consultation processes.

What is Public Consultation and What is its Relationship to Public Integrity?

In the context of the government, public consultation refers to a practice of engaging with a broad range of individuals and organisations (including the community, affected stakeholders and experts) before making or changing a decision or developing a policy or law.

In Australia, public consultation prior to making a government decision is not required by the general administrative law. Procedural fairness (which gives people the right to be heard) applies only to government decisions that affect a person's rights or interests, but not to individuals as members of the general public.[11]

Although public consultation is not an implied general legal requirement in government decision-making, governments are often compelled by statute to consult prior to making significant decisions. In other cases, including in relation to policy development, governments choose to do so voluntarily because of the advantages broad public consultation provides.

The benefits associated with public consultation are many, and, while the issue is not one that has often been framed as a public integrity issue in Australia, it is closely associated with improving democratic practice elsewhere. In 2006, for instance, the *Rowntree Trust Power to the People: The report of Power: An independent inquiry into Britain's Democracy* argued that as part of restoring trust to the British democracy, all public bodies should be required to meet a duty of public involvement in their decision and policy-making processes.[12]

> Public consultation by government, when performed well, can have a number of integrity benefits.

At a substantive, or outcomes-based level, it can:

- improve government decision-making and the development of better public policy, caused by the enriched data, expertise and experience base[13] and
- promote respect for the individuals and organisations within the community that might be affected by the decisions.

It also does important work to ensure the operating conditions for good government, that is, it can:

- enhance the democratic legitimacy of government decisions, flowing from the wider participation in government actions,[14] this enhanced legitimacy can have positive effects too beyond the public, from other government and parliamentary actors.[15]

[11] *Kioa v West* (1985) 159 CLR 550.
[12] Rowntree Trust, *Power to the People: the report of Power, an Independent Inquiry into Britain's Democracy* (2006), Recommendation 23.
[13] See further Andrew Edgar, 'Procedural Fairness for Decisions Affecting the Public Generally: A Radical Step Towards Public Consultation' (2014) 33(1) *University of Tasmania Law Review* 56, 59.
[14] See further Andrew Edgar, "Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts" (2016) 27 *Public Law Review* 18, 20, who argues 'effective public consultation should be regarded as an important means of supporting the legitimacy of administrative rule-making'.
[15] See further on the role of legitimacy in Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer 2020) 91-119; Cristina Leston-Bandeira, 'The Pursuit of Legitimacy as a Key Driver for Public Engagement: The European Palriament Case' (2014) 67 *Parliamentary Affairs* 415.

- increase the accountability of government decision-making;[16] and
- strengthen public trust in government, and acceptance of final decisions and policies of government.

These objectives are achieved through:

- Improving the transparency around how government decisions are made and policies developed;[17]
- reducing the disproportionate influence that vested interests have in government decision-making and policy making;
- Increasing the equality of access to government.[18]

Conversely, there are serious governance and democratic implications for poorly performed public consultation. Not only can ingenuine public consultation undermine good policy development, it can erode public trust. It can breed disrespect and therefore distrust from for those involved in a performative public consultation process. It can also erode trust where public consultation is undertaken but the policy still does not achieve beneficial impact for the public it is supposed to target.

There is an inherent flexibility in what public consultation requires, depending on the nature of the decision or policy that is being developed. There are more traditional consultation techniques (such as calls for written submissions) and more modern practices that engage more proactively with the community, and particularly historically marginalised groups and individuals.[19]

Public consultation can be undertaken, for instance, through:

- A call for written submissions on general issues, questions, or more specific draft policies, laws, reports.
- Public hearings, where individuals are invited to attend and speak directly to the government and answer questions.
- Public / community forums, which are conducted in the style of a meeting or community event, where people have an opportunity to speak to the government.
- Workshops and focus groups, which consist of smaller groups that are invited to speak or answer questions/scenarios.
- Surveys and questionnaires, which are more structured.

Public consultation can be undertaken through a variety of mediums, from face-to-face activities through to traditional written submission processes or use technology and online platforms to facilitate various forms of engagement.

Where they are set out in statute, public consultation obligations are often expressed in broad terms, with a great deal of latitude and discretion as to how a decision or rule maker might go about such consultation.

The flexibility about what consultation requires across different regimes in Australia has its benefits – public consultation should not be approached as a single one-size-fits-all. What is required by public consultation will differ depending on the circumstances, including the nature of the decision, and the experience and identity of key stakeholders. However, it also comes with dangers. Sometimes the obligation to consult confers so much discretion on the decision-maker that there is no substantive obligation to consult at all, with no accountability recourse.

Despite the many possible benefits associated with public consultation for the government and the public, as we explain in the next part of this report, it is often done poorly.

The next part of this report sets out:

1. the characteristics that have been identified for 'effective' public consultation by governments; and
2. the common mistakes made in public consultation that have been identified by scholars, in studies and demonstrated through case studies.

[16] See further Branson and Finn JJ in *Wilderness Society Inc v Turnbull* ('Wilderness Society') [2007] FCAFC 175.
[17] J Griffith and H Street, *Principles of Administrative Law* (Pitman 1973 5th ed) 118-136.
[18] Ibid.
[19] On these more modern, outreach focussed practices, see, eg, Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(1) *Adelaide Law Review* 441.

The Characteristics of 'Effective' Public Consultation

There are now a number of international standards on effective public consultation,[20] specific standards that relate to consulting with Indigenous people,[21] consultation standards specifically directed at environmental matters,[22] best practice released by government itself, and court required minimum criteria. There is also a developing interest in what makes for good parliamentary engagement and consultation, which has a particular focus on consultation for the purposes of scrutiny, oversight and accountability.[23]

Professor Nicoletta Rangone has identified a number of core criteria of effective consulting that builds public trust:

1. Accessibility of the process, which covers consulting people at the earliest possible stage, ensuring publicity of the process, and reducing the cost of participation;
2. Early stage consultation, before decisions have been made, to increase the possibility of influencing decision-making;
3. Accessibility of the documents being consulted on, including using adequate channels to make sure all stakeholders, particularly those frequently missing, are aware of the consultation and tailoring consultation documents to their needs;
4. Reasonable time to intervene;
5. Feedback and justification of the final decision.[24]

In the United Kingdom, where the courts have developed judicially enforceable consultation obligations under administrative law principles, Lord Woolf MR explained the four requirements for 'proper' consultation, which are:

To be proper, consultation:

1. must be undertaken at a time when proposals are still at a formative stage;
2. it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;
3. adequate time must be given for this purpose; and
4. the product of consultation must be conscientiously taken into account when the ultimate decision is taken.[25]

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[20] European Commission, Communication: *Better Regulation for Better Results – An EU Agenda COM* (2015) 215 final (27 May 2015); OECD, *Best Practice Principles on Stakeholder Engagement in Regulatory Policy* (Consultation Draft, 2017) (intended to complement the OECD Recommendation on Regulatory Policy and Governance (2012).

[21] See,eg, Office of the High Commissioner for Human Rights, F*ree, Prior and Informed Consent of Indigenous Peoples*(Information Document, September 2013) https://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf.

[22] Convention on Access to Information, *Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention, 1998) Australia is not a party.

[23] See further Cristina Leston-Bandeira, 'How Public Engagement has Become a Must for Parliaments in Today's Democracies' (2022) 37 *Australasian Parliamentary Review* 8 and the the guidance recently produced by International Parliamentary Engagement Network, *Guides on Citizen Engagement for Parliaments*, <https://ipen-network.org/public-engagement-guides/>.

[24]Nicoletta Rangone, 'Effective Consultation as a Tool for Trust' in M. De Benedetto, N. Lupo, N. Rangone (eds, *The crisis of confidence in legislation* (Nomos-Hart, 2020), available at SSRN: https://ssrn.com/abstract=4392714 or http://dx.doi.org/10.2139/ssrn.4392714.

[25] Lord Woolf MR in *R v North & East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 258 [108]. Developed from Hodgson J's decision in *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168.

The UK Government has also released a set of consultation principles to provide guidance to government agencies and officials.[26] These are:

1. Consultations should be clear and concise
2. Consultations should have a purpose
3. Consultations should be informative
4. Consultations are only part of a process of engagement
5. Consultations should last for a proportionate amount of time
6. Consultations should be targeted
7. Consultations should take account of the groups being consulted
8. Consultations should be agreed before publication
9. Consultation should facilitate scrutiny
10. Government responses to consultations should be published in a timely fashion
11. Consultation exercises should not generally be launched during national or local elections

These characteristics of 'effective' consultation identified international and in academia are reflected in the government-set practice in Australia.

The Office of Impact Analysis (OIA), located within the Department of Prime Minister & Cabinet (PM&C) (which we explain in more detail below), requires some Australian government policy decisions to go through an impact analysis process. This includes addressing who government consulted with, and how.[27]

The OIA has issued a 'Best Practice Guidance Note'[28] which details what best practice consultation looks like. It emphasises the following factors (summarised here):

- **Continuous** – consultation with key stakeholders should be continuous and should start as early as possible.
- **Broad-based** – the scope of the proposed policy should be considered, and the agency should consult widely to ensure consultation captures the diversity of stakeholders.
- **Accessible** – consultation should ensure that stakeholders can readily contribute to policy development. Stakeholders should be informed of proposed consultation by the most appropriate means. Information should be easy for stakeholders to comprehend e.g. written consultation documents should include summaries.
- **Not burdensome** – consultations should be conducted early, when different approaches are still under consideration. Remember that people you wish to consult may have full-time jobs or business commitments – do not assume they have unlimited time to devote to the consultation process. Timeframes should be realistic. Avoid holiday periods and end of financial year.
- **Transparent** – explain the objectives of the consultation and the context for it, and how and when the final decision will be made. Clearly state aspects of the proposal that have already been finalised and are not subject to change. Information or issues papers should be made available where appropriate. You should show stakeholders how you have taken consultation responses into consideration.
- **Consistent and flexible** – consistency makes it easier for stakeholders to participate.
- **Subject to evaluation and review** – continue to examine ways of making consultation processes more effective. Understand how consultation responses clarified the options and affected the final decision.
- **Not rushed** – a common complaint from stakeholders is the lack of time to provide feedback when asked for it. While longer periods of consultation might seem more appealing for stakeholders, the Government's aim is effective consultation and 'real listening'. Provide realistic timeframes, sometimes set with the input of stakeholders.
- **A means rather than an end** – consultation should be used as a way to improve decisions, not a substitute for making decisions.

What these statements and lists reveal is that there is a generally shared set of accepted high-level principles of good consultation. However, meaningful consultation in practice depends on how those principles are translated into context-specific and community-responsive processes.

[26] https://www.gov.uk/government/publications/consultation-principles-guidance
[27] See *Australian Government Guide to Policy Impact Analysis*: https://oia.pmc.gov.au/sites/default/files/2024-01/australian-government-guide-to-policy-impact-analysis.pdf
[28] This is available at: https://oia.pmc.gov.au/sites/default/files/2023-08/best-practice-consultation.pdf

Consultation as a 'Skill' and its Connection to Listening

Public consultation is closely associated with the idea of government 'listening' to the public. This is an important connection, because it emphasises that a key part of consulting is developing a set of skills – one of the most important being listening. Rhion Jones and Elizabeth Gammell from the Consultation Institute explain that consultation skills are relatively easily learnt, although public officials must also be open to the politics of manipulation and corruption of the process.[29]

There is an increasingly rich theoretical literature that explores what 'institutional' or 'political' listening looks like - that is, 'listening' by organisations such as governments.[30] Scholars such as Andrew Dobson, Susan Bickford and Molly Scudder have developed related ideas of democratic listening in political spaces. The hallmarks of such listening include that it is:

- inclusive, in that it enables the capacity for others to speak and be heard and is not selective in who it seeks to hear from;
- involves mutual respect and openness to new ideas, interpreting what others say as fairly and receptively as possible;
- requires timely and constructive engagement, moving beyond responding and reporting back to more ongoing engagement;
- is not about consensus, but about respect for the agency of others.

Importantly, this scholarship emphasises that good political institutional listening is more than just getting politicians or public servants to listen better, but requires:

1. the active development of listening skills; and
2. institutional support for that activity.

Consultation involving genuine listening to the public is a practice that is at once an individual professional skill for those involved, as well as one that can be supported by the right set of institutional processes.

Effective consultation depends on skills, norms and organisational support. It cannot be left to individual agencies alone. This reinforces the need for a central body to steward good practice at a system-wide level.

[29] Rhion Jones and Elizabeth Gammell, *The Politics of Consultation* (CreateSpace Independent Publishing Platform, 2018).
[30] See further Elizabeth S Parks, Meara H Faw and Laura R Lane, *Listening: The Key Concepts* (Routledge, 2024) and Gabrielle Appleby and Ed Synot 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529.

The Common Mistakes Made in Public Consultation

As Professor Andrew Edgar has written, 'Concerns are commonly expressed that public consultation processes are administered in a tokenistic manner.'[31] This observation is reinforced by research, which also shows that there is significant public concern about the quality of public consultation practices, and the adequacy of legal frameworks for consultation in sensitive areas. The concerns, or common mistakes, that are made in the course of public consultation make a long list. They include:

1/ Predetermined, or 'performative' consultation: where consultation is undertaken after key decisions have already been made, or are structured to legitimise a pre-determined outcome rather than inform policy development. This includes:

- Consulting on a pre-decided outcome; [32]
- Limiting / narrow framing of consultations with specific and targeted questions designed to limit broader input and discussion;
- Ignoring, or cherry picking of submissions/public responses in the final reporting on the decision;
- Avoiding public consultation processes altogether by the overuse of exceptions to consulting and public hearings.

2/ Exclusion and unequal access: where consultation systematically privileges powerful, resourced actors while marginalising under-voiced communities and individuals. This includes:

- Devaluing certain forms of submissions (such as 'form' submissions or survey responses, or responses provided in community forums, or non-traditional/standard submissions), and overvaluing others (such as 'standard' formal submissions, those from peak bodies);
- Giving greater weight and influence to the views of powerful and highly resourced business groups;[36]
- Failing to identify and outreach to key stakeholders and end-users in consultations, so that the under-voiced continue to be ignored while vested interests are given further pathways to access government;[37]
- Failing to tailor consultation processes (information, accessibility, timing) for different stakeholders and subject areas,[38]
- failure to include your target audience/stakeholders at the design stage of the consultation (ie to find out how they want to engage/how to reach their communities) and instead make (flawed) assumptions about process/reach/accessibility.[39]

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[31] Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209, 214.
[32] Ian Holland, 'Consultation, Constraints and Norms: The Case of Nuclear Waste' (2002) 61 *Australian Journal of Public Administration* 76, 81-84
[33] Jim Macnamara, 'Toward A Theory & Practice of Organizational Listening' (2018) 32 *International Journal of Listening* 18-19.
[34] C Althaus, P Bridgman and G Davis, *The Australian Policy* Handbook (4th ed, Allen and Unwin, Sydney, 2007) 105; Brian J Preston, 'Consultation: One Aspect of Procedural Propriety in Administrative Decision-Making' (2008) 15 *Australian Journal of Administrative Law* 185
[35]Australian Senate Regulations and Ordinances Committee, *Consultation under the Legislative Instruments Act 2003: Interim Report* (June 2007) pp 7-9.
[36] Cameron Holley, 'Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes' (2010) 27 *Environment and Planning Law Journal* 360, 363, 387-388.
[37] Jim Macnamara, 'Toward A Theory & Practice of Organizational Listening' (2018) 32 *International Journal of Listening* 18.
[38] Ibid.
[39] Sarah Moulds, 'Connected Parliaments: Creating Space for Young People to Shape our Democracy' in A Pepe (ed), *Beyond Broken: Different Systems for Different Futures* (MOD UniSA, 2024) ch 5.

3/ Inadequate information, time, capacity and independence to engage

- Providing inadequate information (or inaccessible information in technical areas[40]) and time[41] for people to feel they have been engaged in meaningful consultation;
- Inadequate time for making submissions (particularly when compared to the time provided to the decision-making body to consider the same set of issues);
- Inflexible timing of consultations, including timing over holidays and periods known to be busy periods, meaning important stakeholders are not able to engage, or engage in detail;
- Overwhelming the community with consultation processes that are confusing and poorly sequenced;
- Failing to provide the necessary independence for individuals and organisations to tell government what it needs to know – with the views and submissions of individuals and groups often inextricably connected to government funding or the like.

4/ Failures in analysis and engagement with consultation input

- Lack of acknowledgement of submissions;[42]
- Lack of analysis of consultation submissions/findings and therefore genuine input into the outcomes;[43]
- Lack of transparency and follow up reporting as to how consultation findings were incorporated into the final decision-making processes;
- Lack of sharing of consultation findings so as to develop a thematic understanding of the issues raised over time (rather, every new process requiring another submission and therefore consultation/submission fatigue);

The nature of these failures indicates a systemic gap in the integrity of consultation that cannot be addressed on a process-by-process basis rather, it requires central, independent coordination and oversight of public consultation.

Examples of these failures can be found across the Australian landscape. Here, we pull out a number of recent case studies to exemplify just some of these issues.

Case study: Failing to identify and reach out to key stakeholders

***Santos v Tipakalippa* [2022] FCAFC 193**

In this landmark case, the Full Federal Court found that NOPSEMA breached its legal duty under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* when it accepted Santos NA Barossa Pty Ltd's offshore drilling plan in the Timor Sea without ensuring the public consultation requirements were met.

Santos had failed to engage with the traditional owners of the Tiwi Islands, the Munupi clan and their elders. The Court held that their cultural and spiritual connection to the 'sea country' made them directly affected stakeholders. The Court ruled that Santos' consultation process was legally deficient and that NOPSEMA had no lawful basis to accept the environment plan, rendering its approval invalid.

[40] Jim Macnamara, 'Toward A Theory & Practice of Organizational Listening' (2018) 32 *International Journal of Listening* 18.
[41] Ibid.
[42] Jim Macnamara, 'Toward A Theory & Practice of Organizational Listening' (2018) 32 *International Journal of Listening* 18.
[43] Ibid.

Case study: Pre-judged commitment to a decision

Barngarla Determination Aboriginal Corporation RNTBC v Minister for Resources **[2023] FCA 809**

The *Barngarla* case exposed serious flaws in the government's consultation process when selecting Napandee as the site for the national radioactive waste facility. Under the *National Radioactive Waste Management Act 2012* (Cth), s 14, theMinister for Resources was required to follow specific procedural fairness steps before declaring a site, including issuing notices, inviting comments, and genuinely considering submissions from affected parties such as the Barngarla people. The Minister's public statements, letters to the Kimba community, and social media posts created the perception that the 'facility would be situated at Napandee in fact', leaving little genuine scope for opposing voices to influence the outcome. This undermined the integrity of the consultation framework, which is intended to ensure that the views of affected individuals are meaningfully heard and considered.

As a result, the applicants, the Barngarla Determination Aboriginal Corporation RNTBC, sought judicial review of that decision on grounds including apprehended bias. Justice Charlesworth ultimately agreed with the applicant's claim that the statutory steps, though formally taken, were undermined by the Minister's pre-judged commitment to the Napandee waste facility site. The Court held that this conduct gave rise to apprehended bias, holding that a 'fair-minded observer' might reasonably apprehend that Minister Pitt might have had a closed mind at the time that the Decision was made. Justice Charlesworth found that Minister Pitt's comments about the consequences of not passing the Amendment Bill showed he was already committed to selecting Napandee.

Additionally the Minister's remarks reflected strong support for the Kimba residents who backed the facility and a dismissive stance toward the Barngarla people who opposed it. Justice Charlesworth ultimately set aside the Minister's decision under section 16 of the Administrative Decisions Judicial Review Act 1977 (Cth) on the ground of apprehended bias and directed that costs be determined at a separate hearing. This confirmed that lawful consultation requires not only compliance with prescribed steps but also an open mind in assessing the submissions received.

Case Study: Meeting Formal, Technical Consultation Requirements Only Juukan Gorge (2020)

In May 2020, Rio Tinto destroyed the 46,000-year-old Juukan Gorge rock shelters in Western Australia's Pilbara region—sites of deep cultural, archaeological, and spiritual importance to the Puutu Kunti Kurrama and Pinikura (PKKP) peoples. The destruction was lawful, carried out under a valid ministerial consent issued pursuant to section 18 of the *Aboriginal Heritage Act 1972* (WA) and consistent with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Both state and federal frameworks were fully complied with. Yet the result—a lawful obliteration of a sacred site—laid bare how formally correct consultation can still amount to a profound failure. Under the legislation, consultation was treated as a technical step: a notification, not a negotiation. Once ministerial consent was granted, neither Rio Tinto nor the government had any duty to revisit or reconsider the decision, even after new archaeological evidence revealed the site's extraordinary significance. The case illustrates that consultation limited to procedural compliance—without openness, reciprocity, or genuine participation—fails to achieve the purpose of protecting Indigenous heritage or respecting Indigenous authority.

Case study: Manipulation of inflexible timeframes

In December 2023, Tamboran Resources lodged an Environmental Management Plan (EMP) for its 15-well fracking campaign in the Beetaloo Basin, Northern Territory, and the regulatory department opened a statutorily set 28-day public comment window during the lead-up to the Christmas holiday period.

Lock the Gate released a public statement, arguing this timing was deliberate: remote communities were entering holiday periods, transport and communication are disrupted during the wet season, and Indigenous cultural obligations and travel further reduce capacity to engage. No extension of the consultation period was given to account for public holidays or these seasonal constraints, effectively narrowing the window for meaningful public input.

This process raised serious concerns about whether relevant affected stakeholders had the realistic opportunity to participate, thereby undermining the legitimacy of the consultation process.

Case study: Overwhelming communities with confusing and poorly sequenced processes

In its submission to the 2025 Victorian parliamentary inquiry into consultation practices, the Wimmera Southern Mallee Development reported that in the Wimmera Southern Mallee region, communities are repeatedly engaged in rounds of consultation that are poorly coordinated, overlapping, and often out-of-sequence — such that residents face multiple, overlapping requests for input, conflicting governance arrangements, and limited clarity about their role or the sequencing of decisions. These processes create confusion rather than clarity: community members struggle to understand which issues are being consulted on, how their input will be used, and when decisions will be made. As WSMD puts it, "the long-term success … depends on legitimacy in the eyes of communities … in our region that legitimacy has been undermined by inconsistent consultation, untracked promises, and a lack of follow-through." The consequence: fatigue, diminished trust in institutions, and a reduced likelihood of meaningful community participation when consultations are perceived as tokenistic or confusing.

Reasons for and Consequences of Poor Consultation

The reasons for these failures of consultation are undoubtedly diverse. Professor Jim Macnamara has studied government consultations in the UK. Consistent with the above-made point that consulting and political listening are skills that can be institutionally supported, he noted that many staff who have responsibility for undertaking consultations confess 'to being unfamiliar with consultation methods and tools'.[44]

In the Australian context, Professor Cameron Holley has observed that government agencies are often interpreting 'vague terms' such as 'relevant stakeholder' and 'community membership' that provide broad discretion and creates 'a very real risk that in exercising such discretion government agencies will only seek out existing contacts, rather than attempting to undertake the harder tasks of including a broader and more representative portion of the affected community.'[45] There is also an identified concern that government officials consult to meet legal requirements, which results in a formulaic and minimalistic approach, rather than attempting to engage in genuine institutional listening.

Poorly conducted public consultation not only means the benefits of consultation are lost, but it can have serious and damaging consequences for good policy and trust in democracy.

As Professor Nicoletta Rangone has argued, bad consultation can 'paradoxically backfire, leading to weak interests under-voiced, biased data collection, as well as crowding out motivation in taking part in future consultation'.[46]

Poor consultation efforts will often undermine equality objectives. Regulation expert Professor Robert Baldwin has written that there is often little transparency as to who is consulted, and often it is not the marginalised, as not only do they not have a ready vehicle through which to engage, they do not know the language or mechanisms of engagement, and they don't have the power to be vocal critics.[47]

Expert in public participation Sherry Armstein wrote about the power divisions between 'powerless citizens' and the 'powerful' in her influential 1969 article, 'A Ladder of Citizen Participation'.[48] She spoke about the 'critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process', and the need for the redistribution of power for genuine public consultation to be achieved.

Having set out the benefits of public consulting, its ability to be learnt and supported, and the myriad ways it can be done poorly and the consequences, the next part of this report turns to the specific Commonwealth context in which public consultation obligations arise and are supported.

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[44] Jim Macnamara, 'Toward A Theory & Practice of Organizational Listening' (2018) 32 *International Journal of Listening* 18.
[45] Cameron Holley, 'Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes' (2010) 27 *Environment and Planning Law Journal* 360.
[46] Nicoletta Rangone, 'Effective Consultation as a Tool for Trust' in M. De Benedetto, N. Lupo, N. Rangone (eds) *The crisis of confidence in legislation* (Nomos-Hart, 2020), available at SSRN: https://ssrn.com/abstract=4392714 or http://dx.doi.org/10.2139/ssrn.4392714.
[47] Robert Baldwin, *Rules and Government* (Clarendon Press, Oxford Socio-Legal Studies, 1995).
[48] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216.

Case study: *Community Engagement Review* (December 2023), commissioned by the Minister for Climate Change and Energy

The *Community Engagement Review* (December 2023) was commissioned by the Minister for Climate Change and Energy into how renewable energy and transmission projects are engaging with affected communities. Surveys and stakeholder consultations with landholders and community members living within 5 km of a proposed or operating renewable energy/transmission project showed significant disillusionment with engagement on renewable energy projects (see page 8, Image 2, set out below). This included that 92 per cent of respondents were dissatisfied with the extent to which project developers engaged the local community, leading to lack of public trust in renewable energy transition and calls for the government to better regulate the area.

Public Consultation Obligations at the Commonwealth Level

Statutory Consultation Obligations

The Commonwealth government has hundreds of statutory consultation obligations. In addition, it has a policy of consulting on important policy decisions. Yet there is no publicly available way to understand comprehensively what consultation obligations exist or how the Government is meeting them; there is also an absence of consistent oversight to make sure relevant obligations are being undertaken in accordance with recognised best practice.

To help fill in these gaps, the Centre for Public Integrity has searched the statute book, and the government's public policies on consultation, to provide a better understanding of when, on what, and how, the Government consults with the public, and what happens when it falls short.

The Centre for Public Integrity conducted searches of the publicly available Federal Register of Legislation to approximately discern the extent of the government's public consultation obligations. We identified 129 Commonwealth primary statutes that include consultation obligations, and 340 consultation provisions within these statutes.[49] In addition to these primary statutes the Commonwealth would have a multitude of obligations under delegated legislation.[50]

Our research reveals that consultation obligations exist across multiple policy or subject areas, and consistently arise in the following:

- Aboriginal and Torres Strait Islander affairs;
- Agriculture, fisheries and forestry;
- Attorney-General (for things like identity verification, privacy laws);
- Climate change, energy, the environment and water;
- Employment and workplace relations;
- Health, disability and ageing;
- Industry, science and resources;
- Infrastructure, transport, regional development, communications; and
- Veterans' affairs.

That consultation requirements arise in these areas is not surprising: they are areas that often involve vulnerable individuals and/or occur in policy settings that engage a multitude and variety of interests.

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[49] This figure was determined by searching the Federal Register of Legislation, by searching principal acts in force, using the terms 'consult', 'public comment', 'public submissions', 'public to comment', 'seek the views' and 'public notice'. 284 search results were returned, and each statute was checked for public consultation (or similar) requirements i.e. statutes that included consultation requirements with government departments or ministers were excluded from the final figure. 129 is likely a conservative figure – further public consultation requirements were possibly not captured using these search terms. For example, the *Veteran's Entitlement Act 1986* ss 196B, 196E-G allow for the Authority to conduct 'investigations' which allow for 'notices' and 'submissions', however was not captured using the above search terms as they did not use the terms 'consult' and 'public'.

[50] For instance, NOPSEMA's obligation to review consultation requirements in the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023.*

That consultation requirements arise in these areas is not surprising: they are areas that often involve vulnerable individuals and/or occur in policy settings that engage a multitude and variety of interests.

Consultation obligations may vary in the form they take, yet they often involve significant policy questions or decisions that may affect the rights of vulnerable members and groups in society. The following list demonstrates the different forms that statutory consultation obligations may take; with examples of what decisions they may inform or impact:

- Public notice requirements for decisions under an Act, where the decision-maker is often required to publish a notice asking for public comment or inviting submissions as part of the decision-making process. This is often in relation to specific decisions that a Minister or other decision-maker is empowered to make, rather than general policy decisions. This consultation category is often prescribed, by including the following features: the notice must be published on the internet or the Department's website, a specified timeframe of publication, a call for written submissions within that timeframe, and/or a requirement that submissions be publicly available. They often require the decision-maker to consider any written submissions. Where public notice requirements exist, they often relate to decisions that could involve a significant decision impacting individuals or the public more generally, for example decisions relating to the environment. For example, section 134A of the Environment Protection and Biodiversity Conservation Act 1999 allows a Minister to publish an action management plan regarding how potential impacts of a project will be avoided, mitigated or compensated, and invite public comments on that plan within 11 days of publication.
- Industry, expert or representative consultation requirements where a statute may include consultation provisions for a specific decision but does not use the word 'public' or have characteristics that would make the consultation public, like public notice requirements. Unlike public notice requirements, the consultation group is more refined and specifies an industry and/or expert group the decision-maker should or must consult with. Consultation with the public more broadly is not required, and therefore the consultation may exclude stakeholders who have a particular interest in the decision. For example, section 26GC(8) of the Privacy Act 1988 lists the Commissioner's requirements in developing the Children's Online Privacy Code, which includes that they may consult with children, organisations concerned with children's welfare, industry organisations or bodies that may be bound by the Code, the eSafety Commissioner and the National Children's Commissioner.
- Consultation as a general function for a Commission, Authority, Council, Committee, Panel or other similar entity. Consultation is often listed as a 'function' or 'power' of the body, and it is not connected to a particular decision-making power of that body. It may be a general function to conduct public consultation, industry or expert consultation, or both. For example, section 7(1)(c) of the Fisheries Administration Act 1991 lists a function of the Australian Fisheries Management Authority to 'consult, and co-operate, with the industry and members of the public generally in relation to the activities of the Authority'.
- Discretionary consultation provisions do not require the decision-maker to undertake consultation (that is, the statute uses language to indicate that the consultation is optional), nor do they specify who this consultation could be with or how they consultation should be undertaken (as listed above with public notice requirements). In these provisions, language is often used that implies the decision maker has substantial discretion in who they choose to consult with e.g. 'the Minister must consult with such persons (if any) the Minister considers appropriate/thinks fit'. For example, section 13(3) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 states that when a Minister is considering whether to make a declaration preserving or protecting a specified area from injury or desecration, the Minister may 'request such persons as he or she considers appropriate to consult with him or her'.
- Consultation as a requirement for statutory review provisions. Where a statute requires a review of the Act or a particular division or part of the Act, there may be a requirement that that review includes consultation. Again, this can specify public or industry/expert consultation however the wording of the provisions often confers substantial discretion on behalf of the reviewer regarding who and how they consult. For example, section 59(3) of the Climate Change Authority Act 2011 allows for the Climate Change Minister or Parliament to request the Authority to conduct a 'special review' and in conducting that review, the Authority 'must make provision for public

consultation', without any further guidance or specification. Further section 80A(7) of the Net Zero Economy Authority Act 2024 states a review of the operation of the Act 'must make provision for public consultation'.

- A Consultative Committee or Forum can be set up under statute, however the functions and procedures (including, presumably, public consultation) of those bodies is determined in legislative instruments or rules. For example, section 81 of the Australian Broadcasting Corporation Act 1983 allows for a Joint Consultative Committee to be determined in rules, including its functions.

Unusually, a small number of consultation obligations that may allow for payment for consultation were identified. This was found in legislation dealing with agricultural issues.[51]

There are also consultation requirements in legislation which does not fit into the categories identified above. For example, the Native Title Act 1993 includes several provisions requiring consultation with native title claimants or bodies corporate, relating to significant decisions that could impact these groups. Section 26A includes a condition that for a Minister to determine an approval of exploration for mining, they must be satisfied consultation has 'appropriately' occurred with any registered native title bodies corporate and registered native title claimants.[52]

It is unlikely that many of the provisions explained above are enforceable, at least at a practical level. Statutes often only state the decision-maker 'may' consult, or it is simply listed as a function of a decision-maker without being connected to a particular decision they are making. In some provisions the decision-maker 'must have regard to' submissions made during consultation,[53] however this still implies a significant amount of discretion in the final decision.

Further, statutory consultation provisions may be accompanied by a 'no invalidity' clause, so that the decision remains valid even if no consultation was undertaken.[54]

Where statutes empower a decision-maker to determine rules, section 17 of the Legislation Act 2003 states 'rule-makers should consult before making legislative instruments'. Under this provision, rule-makers must be satisfied that there has been consultation that is 'considered by the rule-maker to be appropriate' and 'reasonably practical to undertake'. Guidance is provided on what appropriate consultation could involve: notification, either directly or by advertisement; an invitation for submissions to be made by a specified date; or public hearings. Again, however, by allowing the rule-maker to consult only to the extent they consider it 'appropriate', significant discretion remains, and the requirement for consultation is likely unenforceable.

Policy Development: The Office of Impact Analysis

The Centre for Public Integrity also considered other government commitments to consultation, outside of statutory obligations.

Reflecting the many benefits of public consultation, the government itself has identified the desirability of consultation in the development of policy. The Office of Impact Analysis, (OIA) (formerly the Office of Best Practice Regulation) sits within the Department of Prime Minister & Cabinet and administers the Impact Analysis Framework (IA Framework). The IA Framework aims to support informed, evidence-based policy decision-making by requiring government agencies to undertake Impact Analyses (IAs) of proposed policies: a rigorous process which places particular emphasis on quality consultation. Who the agency consulted with, and how they incorporated their feedback, is one of the seven questions a government agency must address in IAs (which the OIA individually scores).[55]

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[51] See, for example, section 8 of the *Agricultural and Veterinary Chemicals (Administration) Act 1992*, section 10D of the Wine Australia Act 2013 and section 15 of the

[52]Section 26A(6)(c)(i).

[53] See, for example, sections 18-19 of the *National Environment Protection Council 1994*, which states that before making a national environment protection measure, the Council 'is to have regard to any submissions it receives that relate to the measure or to the impact statement'.

[54] See, for example, Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995* which allows the Indigenous Affairs Minister to make a determination prohibiting material in certain areas in the Northern Territory. The Act requires the Minister to ensure relevant information about the determination is provided to people living in the area, and they have been given reasonable opportunity to make submissions. However, section 100A(5) states a failure to comply with these requirements 'does not affect the validity of the determination'.

[55] Question 5 is "Who did you consult and how did you incorporate their feedback? Explain the purpose and objectives of consultation". See Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 58, for how OIA scores each of the four tiers using the seven questions.

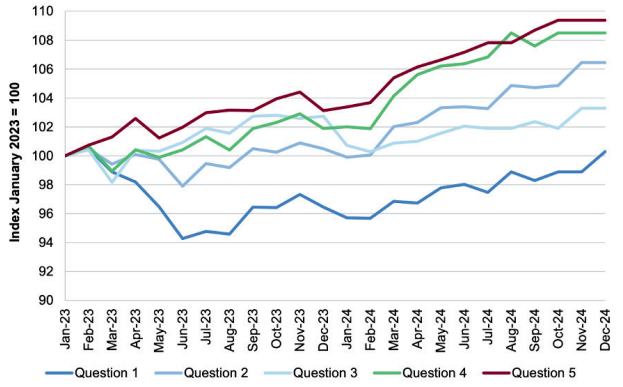
Genuine and timely consultation with affected businesses, community organisations, individuals and other stakeholders is also a key principle the OIA uses to assess the quality of IAs.[56] As stated above, the OIA has also issued a guidance note called *Best Practice Consultation* to provide additional detail to agencies on the application of the consultation principles and the role of the OIA in encouraging best practice consultation.[57]

This focus on consultation under the IA Framework seems to translate to quality, best-practice consultation in policy development. The Centre for Public Integrity analysed 29 completed IAs for the 2024-25 financial year and found that the OIA regularly singles out consultation as contributing towards IAs being compliant and of high quality.[58] The OIA emphasised consultation in their final assessment of ten out of 29 IAs, by, for example, stating that the IA provided 'a detailed discussion of the consultation process'[59] or was 'informed by a high-quality consultation process'.[60]

There is further evidence the IA Framework delivers quality consultation in the Australian National Audit Office's May 2025 report titled Administration of the Impact Analysis Framework. Here, the ANAO analysed the scores the OIA gave to five out of the seven IA questions (relating to policy development process) from January 2023 to December 2024, and found question 5 (consultation) is consistently ranked as the highest scoring question (see Figure 4.2 below).[61]

> The OIA plays an important role in improving policy development and strengthening awareness and practice of public consultation. However, as we consider below, there are limits of what can be achieved by a small, non-independent office operating within the executive.

Figure 4.2: Average IA assessment score by IA question[a], January 2023 to December 2024



Note a: Question 1: What is the policy problem you are trying to solve and what data is available? Question 2: What are the objectives, why is government intervention needed to achieve them, and how will success be measured? Question 3: What policy options are you considering? Question 4: What is the likely net benefit of each option? Question 5: Who did you consult and how did you incorporate their feedback?
March 2023 changes to the IA framework included changes to questions 6 and 7, which disrupt the time series. Questions 6 and 7 have been excluded from the analysis and figure.

Source: ANAO analysis of OIA monthly reporting to the Assistant Minister. Graphic developed by the ANAO.

This analysis of IAs suggests the IA Framework and the IA process itself supports, and likely incentivises, government agencies to conduct quality and thorough consultation when undertaking policy decision-making.

When considering the effectiveness of the IA Framework and process more broadly, analysis by the ANAO reveals the IA Framework, including its requirements to conduct consultation, largely achieves its purpose to 'help government agencies ensure that advice is accompanied by the information that will help government choose the best path forward'.[62] The ANAO's May 2025 report found that administration, governance and implementation of the IA framework was 'largely effective' and 'largely fit for purpose'.[63]

[56] The principle states "4. Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals, as well as other stakeholders, to ensure proposed changes deliver the best possible outcomes for Australia.". See OIA, *Australian Government Guide to Policy Impact Analysis* (2024) <https://oia.pmc.gov.au/sites/default/files/2024-01/australian-government-guide-to-policy-impact-analysis.pdf> 6.
[57] See OIA, *Best Practice Consultation*, <https://oia.pmc.gov.au/resources/guidance-oia-procedures/best-practice-consultation> 1.
[58] See further the figures provided at: https://oia.pmc.gov.au/published-impact-analyses-and-reports. The figure of 29 is reported by the 2024-25 Australian Government Impact Analysis Statement status – by agency: https://oia.pmc.gov.au/sites/default/files/2025-08/2024-25-aus-gov-impact-analysis-status-agency_0.pdf
[59] Veteran's Compensation and Rehabilitation Legislation Reform: https://oia.pmc.gov.au/published-impact-analyses-and-reports/veterans-compensation-and-rehabilitation-legislation-reform
[60] Implementing a Guarantee of Origin Scheme: https://oia.pmc.gov.au/published-impact-analyses-and-reports/implementing-guarantee-origin-scheme
[61]See figure 4.2. Australian National Audit Office, *Administration of the Impact Analysis Framework (Performance Audit Report No 33 2024–25, 21 May 2025)* 73.
[62] OIA, *Australian Government Guide to Policy Impact Analysis* (2024) <https://oia.pmc.gov.au/sites/default/files/2024-01/australian-government-guide-to-policy-impact-analysis.pdf> 5.
[63] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025).

Case study: How Impact Analyses contribute to strong support for policy change: Veterans' Reform

In July 2024, the Government undertook an IA in anticipation of significant legislative reform aimed to simplify and harmonise the veteran compensation regime, a complex regime governed by three different statutes. This reform was also in response to a finding of the Royal Commission into Defence and Veteran Suicide's Interim Report that the previous legislation was 'so complicated that it adversely affects the mental health of some veterans can be a contributing factor to suicidality'.[64]

In answering question five in their IA: who did you consult and how did you incorporate their feedback?, the Government detailed three rounds of consultation, including on a draft bill, with six broad cohorts of stakeholders, including subject matter experts, Veteran Organisations and individual veterans.[65]

The OIA assessed the quality of the Government's IA as 'Good Practice', singling out how it answered question five by stating the IA provided a 'detailed discussion of the consultation process and how feedback informed the preferred option'.[66]

When the Government introduced the Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024, it passed the Parliament without going division, a sign of cross-party support (despite some amendments being debated and voted on).[67] In particular, the then-Shadow Minister for Veteran's Affairs Barnaby Joyce said during the second reading debate 'I would like to commend the minister because I think, on the whole, he has been very diligent on this issue'.[68] Further, while some major interest groups had some specific issues of concern, on the whole they were 'broadly supportive of the proposed reforms'.[69]

[64] https://minister.dva.gov.au/news-and-media/minister/new-legislation-simplify-and-harmonise-veteran-compensation
[65] https://oia.pmc.gov.au/sites/default/files/posts/2024/07/Impact%20Analysis_0.pdf
[66] https://oia.pmc.gov.au/sites/default/files/posts/2024/07/OIA%20Assessment%20Letter_0.pdf
[67] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7217
[68] https://oia.pmc.gov.au/sites/default/files/posts/2024/07/Impact%20Analysis_0.pdf
[69] See Bills Digest, which summarises Senate Inquiry submissions made by the Returned & Services League of Australia, Vietnam Veterans' Association of Australia, Defence Families Australia and more. https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/9882489/upload_binary/9882489.pdf;fileType=application/pdf

However, despite this demonstrated positive value of IAs to incentivise quality consultation, there are only a small number of IAs completed comparative to government decisions made.

Where 29 IAs were completed in 2024-2025 Financial Year, during that same period 88 Government Bills were introduced into the Parliament, with the majority (71) becoming law.[70] In addition, more than 2000 Legislative Instruments also came into force. [71]

Further, in its May 2025 report the ANAO analysed the number of cases opened and preliminary assessments[72] conducted by the OIA, finding that that between July 2022 and June 2024:

- The OIA created 4,530 cases in its case management system for potential policy proposals across 81 entities.[73]
- the OIA conducted around 3,800 preliminary assessments to determine if an IA was required. [74]
- Out of these, 97 IAs (or 3 per cent) were required to be prepared.[75]
- 69 IAs were assessed and published by the OIA, with a further 30 IAs published based on IA equivalent reviews.[76]

There may be several reasons why such a small number of IAs are conducted: IAs are not required for every government policy – they are only required if the policy proposal involves 'more than a minor change in behaviour or impact for people, businesses or community organisations'.[77] This, however, is a vague threshold.

Further, there are multiple exemptions that mean an IA is not required – the ANAO found that between July 2022 and June 2024, 28% of policy proposals with more than minor impacts were exempted from requiring an OIA assessment of IAs.[78] Finally, the OIA only has 16 staff and an annual budget of around $2.5 million,[79] which would limit the number of IAs it can assess.

The OIA's ability to improve government decision-making may also be inhibited by its lack of independence from government. Despite PM&C stating the OIA 'maintain(s) day-to-day independence from the Australian Government in our decision-making', the ANAO's report found that the 'structural arrangements, settings and practices of the [OIA] do not clearly support independence from government – a key principle [of the IA Framework].[80] The ANAO recommended that PM&C 'provide further information to the public, Parliament and policy agencies regarding the structure arrangements, settings and practices it has in place to support the independence of the [OIA]'. [81]

Despite OIA playing demonstrated valuable role in improving how government decisions are made, particularly by requiring consultation in decision-making processes, the OIA's impact is limited because it conducts a very limited number of IAs comparative to government decisions made and is not operating at full arms-length from government.

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[70] This figure was determined by analysis the Parliamentary Bills Page: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results?__VIEWSTATEGENERATOR=20B6B7A5&st=2&sr=0&q=&ito=1&expand=False&drvH=0&pnuH=0&f=01%2F07%2F2024&to=30%2F06%2F2025&pf=01%2F07%2F2024&pto=30%2F06%2F2025&ra=1&np=1&g=1&ps=10

[71] CPI analysis based on the Federal Register of Legislation.

[72] The OIA conducts preliminary assessments to determine if an agency is required to complete an IA. As the IA Framework requires government policies to be assessed for an IA, these figures suggest an approximate number of government decisions made.

[73] These entities include government departments, statutory authorities, boards and public entities operating under the Public Governance, Performance and Accountability Act 2013. ANAO Report page 46.

[74] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 19.

[75] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 6. Note they were able to determine how many preliminary assessments were conducted in the relevant period using raw PM&C data, that is not publicly available. Therefore we can't determine how many preliminary assessments were undertaken for the 2024/25 financial year.

[76] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 6.

[77] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 36; Department of the Prime Minister and Cabinet, *User Guide to the Australian Government Guide to Policy Impact Analysis* (PM&C, 2023), 5. Note there are four exemptions to this requirement: Prime Minister exemptions, IA equivalents, care-outs and sunsetting legislative instruments.

[78] Australian National Audit Office, *Administration of the Impact Analysis Framework* (Performance Audit Report No 33 2024–25, 21 May 2025) 6.

[79]] Ibid 7.

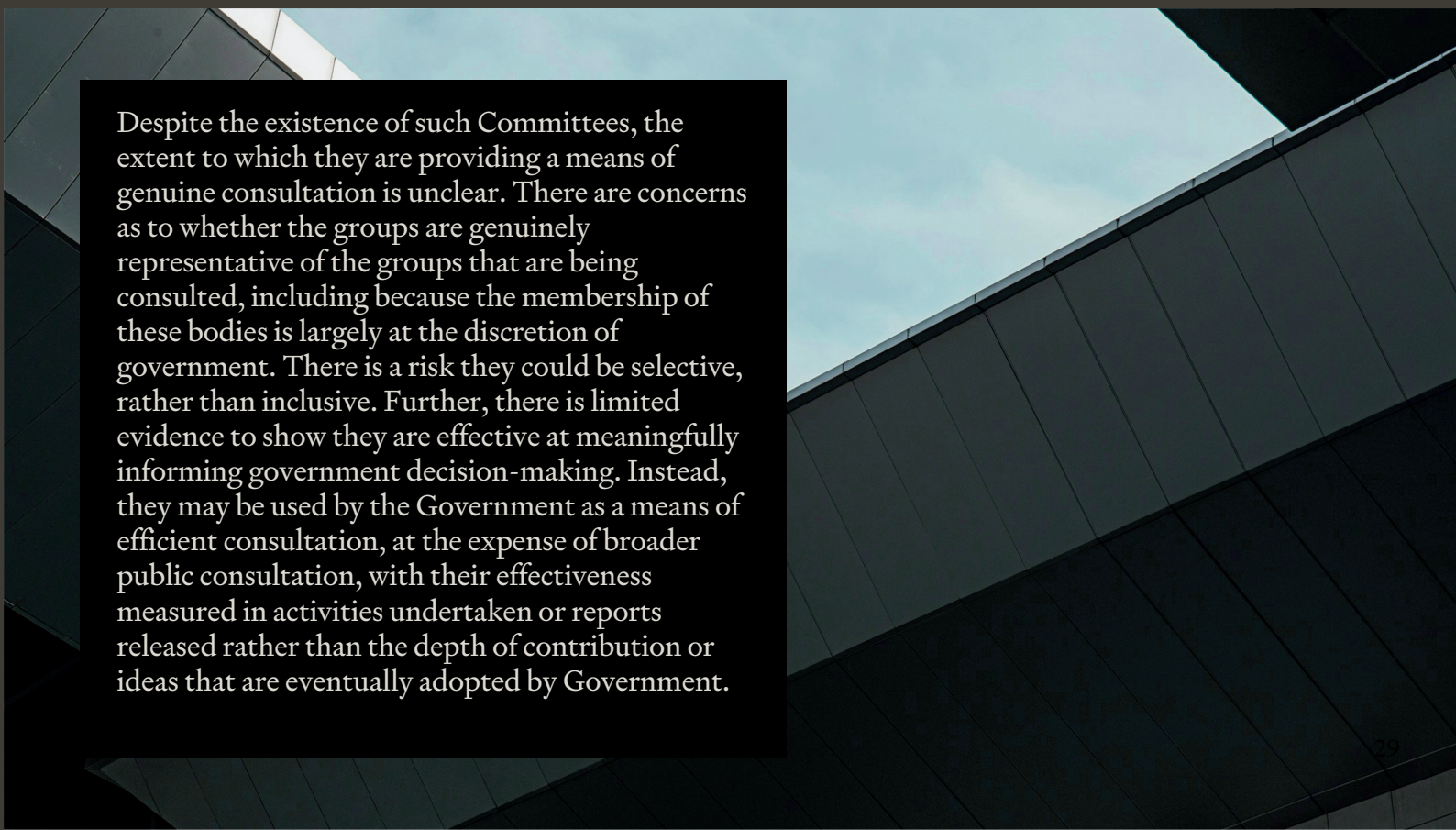
[80] Ibid 8.

[81] Ibid Recommendation no. 1 Para 2.13. Note that PM&C agreed to this recommendation.

Consulting through Committees or Advisory Groups

Government recognition of the benefits of consultation is also evident in the establishment of consultative committees or advisory groups, particularly of vulnerable or previously marginalised peoples, tasked with advising the government on issues impacting the group to which they belong.[82] As we have already noted above, these types of bodies and committees can be established via legislation, or through a policy or budget measures.

[82] Other examples that came up are: NDIS Committees including the Independent Advisory Council which includes NDIS participants: https://www.ndis.gov.au/governance/independent-advisory-council.



Despite the existence of such Committees, the extent to which they are providing a means of genuine consultation is unclear. There are concerns as to whether the groups are genuinely representative of the groups that are being consulted, including because the membership of these bodies is largely at the discretion of government. There is a risk they could be selective, rather than inclusive. Further, there is limited evidence to show they are effective at meaningfully informing government decision-making. Instead, they may be used by the Government as a means of efficient consultation, at the expense of broader public consultation, with their effectiveness measured in activities undertaken or reports released rather than the depth of contribution or ideas that are eventually adopted by Government.

Case study: Office for Youth

The Youth Steering Committee and Youth Advisory Groups are established under the Office for Youth through a $10.5 million budget allocation. Their purpose is to ensure 'young people from all backgrounds have their voices heard on a wide range of issues'[83] and for government agencies and departments to engage with young people. Youth Advisory Groups currently exist on issues like civic engagement, and prevention of gender-based violence. Membership of the Steering Committee is for two years, and appointments to the Youth Advisory Groups change each year. Members for both undergo an open application process, advertised to the public.[84] However, it appears the Minister has the final say on who becomes a member.[85]

Whether Government is genuinely consulting these bodies to inform their policies is questionable. The Office for Youth's website lists 'activities' undertaken by past Steering Committees, however these are predominately attending workshops, summits and other meetings. [86] When considering a recent example of a major policy decision impacting young people - the Online Safety Amendment (Social Media Minimum Age) Bill 2024 – there is no mention of the Steering Committee or any of the Youth Advisory Groups in the explanatory memorandum or in the second reading speech.

[83] https://ministers.education.gov.au/aly/young-australians-play-vital-role-albanese-government
[84] https://www.youth.gov.au/news/announcements/applications-are-open-youth-steering-committee. https://www.youth.gov.au/news/announcements/join-2025-youth-advisory-group
[85] 'The Minister for Youth, the Hon Dr Anne Aly, appointed….' https://www.youth.gov.au/news/announcements/2025-youth-advisory-group-members-announced. https://www.youth.gov.au/news/announcements/new-members-appointed-youth-steering-committee
[86] See for example the list of 'activities' for Steering Committee 2024-25: https://www.youth.gov.au/office-youth/youth-steering-committee#toc-past-committees-2024-2025

Case study: Indigenous Advisory Council/Prime Minister's Indigenous Advisory Council

Established by Prime Minister Tony Abbott to provide advice on Indigenous policy in recognition of the need and benefits of that, the Indigenous Advisory Council (IAC) was criticised for being unrepresentative, unaccountable, and opaque. Members were hand-picked by the government rather than selected by or accountable to Indigenous communities, leading many to view the body as a "friendly" advisory group designed to validate policy rather than challenge it. Its consultation and advice processes were largely secret, with no public reporting or requirement to reflect community views. This structure undermined both the Council's legitimacy and the broader integrity of consultation with First Nations peoples. The IAC's eventual disbandment in 2019 exposed the fragility of advisory mechanisms built without independence or transparency, demonstrating that genuine consultation requires representation, openness, and clear accountability to the communities affected.

Case study: Economic Inclusion Advisory Committee

Established via legislation in 2023, the Committee's purpose is to 'provide independent advice to government before every federal Budget on economic inclusion and tackling disadvantage'.[87] Membership of the Committee shows this is an attempt by government to consult with members of the community affected by government social security policy, and experts in this area: the Committeemust include an academic expert in social security, an economist, a representative of an advocacy organisation for individuals with lived experience of economic disadvantage and unemployment, a representative of the community sector that assists economically disadvantaged people, and representatives of unions and businesses.[88] The legislation provides this direction on who should be a member, yet the final say again rests with the Minister, with legislation specifying that 'the Chair and other members of the Committee are to be appointed by the Minister by written instrument'.[89] The Economic Inclusion Advisory Committee has for the past three years consistently called for a substantial increase in JobSeeker payments in its pre-Budget reports. The first two reports specified an increase of about $17 a day, with the third and latest report recommending 'the Government commit to a substantial increase in the base rates of JobSeeker Payment and related working age payments as a first priority'.[90] The Government has not accepted these recommendations: in the first year they increased JobSeeker to $40 a fortnight (or $2.80 a day) and in the second year they increased Jobseeker by $73.70 (or $5.20 a day) for those who have a partial capacity to work. In the third year the government announced no changes to JobSeeker.

[87] https://www.dss.gov.au/committees/economic-inclusion-advisory-committee
[88] Section 11 Economic Inclusion Advisory Committee Act 2023.
[89] Section 11 Economic Inclusion Advisory Committee Act 2023
[90] https://www.dss.gov.au/system/files/documents/2025-04/economic-inclusion-advisory-committee-2025-report.pdf. Page 10.

The Role of the Courts in Overseeing Consultation

In a small number of cases, consultation requirements are judicially enforceable. Often, the enforceable dimensions of consultation relate to process – that is, for instance, whether the relevant statutory public notice periods have been complied with. In some cases, the courts have also enforced more substantive parts of statutory consultation requirements. However, in other cases, the necessary enforceable statutory provision is lacking.

What the cases reveal is that legally enforceable obligations and the courts do play an important role in creating baselines for consultation, but are not an easily accessible and effective forum for quick review of complaints in relation to decisions.

Case study: *Santos v Tipakalippa*: Judicial Enforcement of Consultation Requirements

The Full Federal Court's decision in *Santos v Tipakalippa* stands as a rare but important example of the judiciary enforcing consultation obligations. In setting aside the approval, the Full Federal Court affirmed that genuine and wide consultation is a legal precondition, not an administrative nicety.

Yet such enforcement remains rare. Despite widespread consultation failures in environmental and resource decision-making, for reasons of standing, opportunity and resources, few reach the courts. Even fewer succeed.

Tipakalippa therefore illustrates both the vital role of judicial oversight in upholding consultation rights and the systemic weakness of regulatory frameworks that rely on community-driven litigation to enforce them.

Case study: Juukan Gorge (2020): The Importance of Law Requiring Meaningful Consultation

The Senate Standing Committees on Environment and Communications' Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia found that while the destruction was lawful, it represented a "catastrophic failure of heritage protection" and a deep breach of trust. The *Aboriginal Heritage Act 1972* (WA) permitted irreversible ministerial approvals without revisiting decisions, while the federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provided only a discretionary, last-resort mechanism for intervention. This legal structure left traditional owners with no enforceable right to be heard, no guarantee of consent, and no pathway for appeal. The Juukan Gorge case demonstrates the necessity of embedding meaningful consultation and consent requirements in law. Without enforceable duties for good-faith engagement, review, and transparency, statutory consultation processes risk legitimising irreversible harm under the guise of legality.

The Role of Parliament in Overseeing Consultation in relation to Executive Law-Making

Where the government makes laws through delegations, section 17 of the Legislation Act 2003 requires that prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken.[91] This obligation is explicitly not enforceable judicially, and rather is overseen politically.

Parliamentary oversight of the government's consultation obligations is proactively performed by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee). The Committee's terms of reference (also known as 'principles') are determined by Senate standing orders, with Senate Standing Order 23(3)(d) requiring the Committee to scrutinise each instrument as to whether 'those likely to be affected by the instrument were adequately consulted in relation to it'. In considering this principle, the Committee also considers compliance with section 17 of the *Legislation Act 2003*.[92]

The Committee has previously raised concerns as to its ability to oversee consultation.

In a 2007 inquiry, the Committee (then known as the Senate Committee on Regulations and Ordinances), raised concerns in relation to:

- an apparent lack of familiarity with the consultation requirements, leading to inconsistency between agencies in relation to levels of compliance;
- the provision of 'cursory, generic and unhelpful' information in explanatory statements; and
- over-reliance on exceptions to the consultation requirements in the Legislation Act.[93]

In 2016, Professor Andrew Edgar noted that:

> The common response of the Committee is that departments and agencies have not included in their explanatory statements the consultation that has been conducted or that they make vague, uninformative statements of their consultation processes.[94]

[91] In addition to Senate standing order 23(3)(d) Senate standing order 23(r)(a) requires the committee to scrutinise compliance with legislative requirements, which includes the *Legislation Act 2003*.
[92] In addition to Senate standing order 23(3)(d) Senate standing order 23(r)(a) requires the committee to scrutinise compliance with legislative requirements, which includes the *Legislation Act 2003*.
[93] Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*, June 2007 5-8.
[94] Andrew Edgar, 'Deliberative Processes for Administrative Regulations: Unenforceable Public Consultation Provisions and the Courts' (2016) 27 *Public Law Review* 18.
[95] For the purposes of this report, CPI examined three annual reports (2022, 2023 and 2024) and 20 delegated legislation monitors, from the period 7 February 2024 to September 2025.

The Centre for Public Integrity has examined the Committee's recent regular delegated legislation monitors and annual reports.[95] This provides a sense of how the government has consulted on significant policies, including where this has fallen short.

What is revealed is that the Committee frequently raises consultation as a scrutiny issue. Indeed, there was an increase in the number of times it was raised as a scrutiny issue between 2023 and 2024,[96] and it was the most raised scrutiny issue in 2024, with 31 per cent of scrutiny issues raised with agencies in 2024 being about the consultation principle, compared with two per cent in 2023.[97] This increase may be attributed to a change in committee guidelines, which 'clarified the committee's expectations that explanatory statements to instruments include a summary of the outcomes of the consultation process'.[98] Further, the Committee has noted that scrutiny concerns about the consultation principle are 'typically resolved via agency correspondence'.[99]

Nonetheless, the Committee has explicitly stated it is 'particularly concerned that the instruments raising concerns under this principle introduced measures with the ability to have a significant impact on the rights and liberties of individuals,' with three out of four of these instruments raised at ministerial level in 2024 falling within the Home Affairs portfolio.[100]

When consultation issues are raised by the Committee, occasional exchanges occur between the Committee and the Department, as the Committee seeks further information and the Department responds. One instrument may be reported on across multiple monitors, which publish these exchanges that raise particular issues:

1. The Department states that it has consulted with government agencies, however the Committee notes it fails to state in detail which ones.[101]
2. The Committee notes the Department fails to state whether persons likely affected by the instrument, their representatives, stakeholders or experts were consulted. The Committee states that this can constitute a failure to undertake 'genuine consultation'.[102]
3. The Committee notes the Department fails to state whether persons likely affected by the instrument, their representatives, stakeholders or experts were consulted. The Committee states that this can constitute a failure to undertake 'genuine consultation'.[103]
4. The Department states that the Office of Impact Analysis was consulted, however the Committee responds that this is not a substitution for consulting individuals or experts, and OIA consultation is an additional requirement separate to Legislation Act requirements.[104]
5. a. The Department states it has made individuals aware of certain legal obligations, however the Committee notes that this does not constitute consultation.[105]

Following these exchanges, the Committee may 'conclude examination' of the instrument in their monitors, but with statements such as it wishes to 'emphasise'[106] certain concerns about the fulfilment of the consultation principle, or that it 'will continue to monitor' the consultation issue.[107]

Through its work, the Committee is able to perform some important oversight, and greater transparency and explanation and therefore accountability in relation to consultation. However, this analysis suggests the process of parliamentary oversight by the Committee is limited in its ability to genuinely improve consultation by the government, despite it being a key scrutiny issue.[108]

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[95] For the purposes of this report, CPI examined three annual reports (2022, 2023 and 2024) and 20 delegated legislation monitors, from the period 7 February 2024 to September 2025.
[96] In the 2023 reporting period, the committee raised concerns under principle (d) regarding the adequacy of consultation six times in total (four at an agency level and twice at a ministerial level) (see Annual Report 2023: https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/annual/Annual_Report_2023.pdf See table 2.1 page 9). In the 2024 reporting period consultation was raised a total of 59 times (55 at agency level and four at ministerial level) (see Annual Report 2024: https://www.aph.gov.au/-/media/Committees/sdlc_ctte/reports/2025/Annual_Report_2024_-_tabling.pdf See table 2.1 page 9).
[97] Annual Report 2024: https://www.aph.gov.au/-/media/Committees/sdlc_ctte/reports/2025/Annual_Report_2024_-_tabling.pdf See table 2.1 page 9.
[98] Annual report 2024 para 2.21 page 11.
[99] Annual report 2024, para 3.46.
[100] Annual report 2024, para 3.47 page 30.
[101] See *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Monitor 1 of 2024, Monitor 5 of 2024 and Monitor 6 of 2024). See *Migration Amendment (Bridging Visas) Regulations 2024* (Monitor 6 of 2024 and Monitor 8 of 2024).
[102] See *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Monitor 1 of 2024, Monitor 5 of 2024 and Monitor 6 of 2024.) See *Biosecurity (Electronic Decisions) Determination 2023* (Monitor 1 of 2024, Monitor 4 of 2024 and Monitor 5 of 2024.) See *Migration Amendment (Biosecurity Contravention) Regulations 2023* (Monitor 4 of 2023, Monitor 2 of 2024 and Monitor 3 of 2024). See *Migration Amendment (Bridging Visas) Regulations 2024* (Monitor 6 of 2024 and Monitor 8 of 2024).
[103] See *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Monitor 1 of 2024, Monitor 5 of 2024 and Monitor 6 of 2024). See *Migration Amendment (Bridging Visas) Regulations 2024* (Monitor 6 of 2024 and Monitor 8 of 2024).
[104] See *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Monitor 1 of 2024, Monitor 5 of 2024 and Monitor 6 of 2024), See *Migration Amendment (Biosecurity Contravention) Regulations 2023* (Monitor 4 of 2023, Monitor 2 of 2024 and Monitor 3 of 2024).
[105] See *Migration Amendment (Biosecurity Contravention) Regulations 2023* (Monitor 4 of 2023, Monitor 2 of 2024 and Monitor 3 of 2024).
[106 See *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Monitor 6 of 2024.)
[107] *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024*. Monitor 5 of 2024.
[108] See further Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation* (2019).

Case study: The limits of parliamentary oversight - migration

Following passage of controversial and rushed legislation introduced in response to the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)* (NZYQ decision), the Government made the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* instrument. Among other things, the instrument amended the *Migration Regulations 1994* to set out the application and operation of certain visa conditions that must be applied to a Bridging R (Class WR) visa (BVR) in certain circumstances and to allow a minister to grant a BVR without an application.

In scrutinising the instrument, the Committee 'identified several significant technical scrutiny concerns', including in relation to consultation with persons affected.[109] This included: lack of detail on who was consulted, failure to consult with a wider cohort of organisations representing the interests of those affected, consultation occurring with a small number of those organisations only after the instrument commenced, and that these concerns were particularly important where the instrument potentially impacts individuals' rights and liberties.[110]

The Committee had placed a notice of motion to disallow the instrument, which they subsequently withdrew while still bringing the instrument to the attention of the Senate. In concluding their examination of the instrument, they 'reiterat[ed] its expectations that consultation should occur on the specific instrument with those likely to be affected by an instrument and/or relevant experts prior to the instrument being made. If no consultation was undertaken, the explanatory statement should justify why no such consultation was undertaken. The committee will continue to monitor this issue in relation to future instruments made'.

The instrument commenced absent of any substantial changes in response to the Committee's concerns. Then, in 2024, the Government introduced another instrument, also in response in the NZYQ decision.[111] In scrutinising this new instrument, the Committee said that it 'raised similar concerns regarding the explanation of consultation undertaken with [the 2023 Regulations]... That instrument also affected the NZYQ-affected cohort... Where the committee raises scrutiny concerns with a particular instrument, the committee expects that government departments and agencies will implement the issues identified by the committee in the preparation of future instruments and their explanatory statements'.

In 2023, the Committee clearly set out its expectations in relation to the government's consultation obligations when it comes to migration regulations, including why genuine and timely consultation was important. It appears this was ignored by government, who only a year later fell short of the Committee's consultation requirements again.

[109] Monitor 1 of 2024
[110] This is a summary of Monitor 1 of 2024, Monitor 5 of 2024 and Monitor 6 of 2024
[111] Migration Amendment (Bridging Visas) Regulations 2024. See Monitor 6 of 2024 and Monitor 8 of 2024.

The Rise of Non-Disclosure Agreements

Understanding when, on what, and how governments consult is impeded by the increasing use of non-disclosure agreements (NDAs). The Parliamentary Library identified eight occasions during the 47th Parliament where the Albanese Labor Government required participants to sign NDAs when they were being consulted with regarding significant pieces of government legislation and policy.[112]

NDAs require consultation to happen behind closed doors. This is a worrying trend, as it undermines transparency of what has happened, and may undermine broader public consultation and debate. It also obfuscates who the government is consulting with, such as powerful corporations or lobbyists capable of disproportionately influencing policy compared to the public or civil society organisations.

[112] This consists of five packages of bills introduced into Parliament, two bills that were never introduced, one agreement (the negotiations for the Community Pharmacy Agreement). The bills are: the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (the Petroleum Resources Rent Tax), the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, the New Vehicle Efficiency Standard Bill 2024 and the New Vehicle Efficiency Standard (Consequential Amendments) Bill 2024, the Nature Positive (Environment Protection Australia) Bill 2024, Nature Positive (Environment Information Australia) 2024, Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024, and the proposed Religious Discrimination Bill (never introduced) and the gambling advertising ban (never introduced).

Case study: NDAs impeding public trust: the Petroleum Resources Rent Tax

In November 2023, the Government introduced the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023. This bill included provisions aimed at reforming the complex petroleum resource rent tax (PRRT), a tax on the profits of companies who sell Australia's gas resources. The bill aimed to limit the proportion of PRRT assessable income that can be offset by deductions. Prior to the bill, 'the accumulation of a large stock of carry forward deductions, compounded by uplifts, [could] defer the payment of PRRT indefinitely'.[113] According to 2023-2024 Budget Papers, 'to date, not a single LNG project has paid any PRRT and many are not expected to pay significant amounts of PRRT until the 2030s'.[114] This was heavily criticised by 'academics, civil society groups and policy bodies' who said 'that the PRRT has not raised sufficient revenue to compensate the public for the use of finite resources'.[115]

There were two reviews undertaken on how to reform the PRRT: the 2017 Callaghan Review modelled an 80 per cent deduction cap, and a 2023 Treasury Review (commenced in 2019, and delayed due to COVID-19) proposed three policy change options to the PRRT, including two that would restructure the PRRT.[116] Instead, the introduced bill went with a third option that 'was not a major reform of the PRRT':[117] a 90 per cent deduction cap; that is, at least 10 per cent of a company's PRRT-assessable receipts each financial year will be subject to the PRRT.

This decision was widely criticised: despite it bringing in $600 million a year, this is tiny compared to the $20 billion revenue of gas companies.[118] When further documents provided to the Senate under an Order for the Production of Documents showed Treasury originally proposed other options that would have raised more revenue,[119] members of the crossbench called for the bill to be amended.[120]

During Senate Estimates, Senators questioned how the Government arrived at a tax amount that should be 'three times higher'.[121] It was revealed that around 10 gas corporations and lobby groups – including INPEX, Woodside and the Australian Petroleum Production and Exploration Association - signed non-disclosure agreements to participate in meetings with the government in March 2023, prior to the bill's introduction in November 2023.[122]

From a range of options, the government ultimately selected the one that had the smallest impact on gas corporations, at the expense of broader community benefit. That NDAs were signed by gas companies and lobby groups brings into question whether this was part of a 'simple consultation process',[123] or was facilitating undue influence of vested interests on a significant policy change.

[113] Page 4: https://treasury.gov.au/sites/default/files/2023-05/p2023-388153.pdf
[114] 2023-2024 Budget Paper No. 1 page 180:
[115] Bills Digest page 28: https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/9479459/upload_binary/9479459.pdf
[116] Page 6: https://australiainstitute.org.au/wp-content/uploads/2024/04/Submission-to-the-Treasury-Laws-Amendment-Tax-Accountability-and-Fairness-Bill-2023.pdf. See also discussion page 28-29 https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/9479459/upload_binary/9479459.pdf
[117] TAI page 6: https://australiainstitute.org.au/wp-content/uploads/2024/04/Submission-to-the-Treasury-Laws-Amendment-Tax-Accountability-and-Fairness-Bill-2023.pdf

How Can we Improve Public Consultations by Government?

To achieve the integrity benefits of consulting the public, governments must engage in that consultation effectively.

Effective consultation is achieved through enhancing both sides of the consultation ledger. This, as Professor Cameron Holley explains, means:

1. enhancing the capacity and role of public agencies as facilitators of participation; and
2. enhancing the capacities of potential participants.[124]

In terms of enhancing the public agencies, there needs to be an effective mechanism of accountability for consultation. As Professor Richard Mulgan has argued, where there is an effective accountability mechanism, officials are likely to change their behaviour.[125]

In this section, we consider the two existing mechanisms for consultation – legal and political oversight – before turning to consider a different institutional response: the creation of an independent oversight body, which we refer to as the Office of Public Consultation.

Case study: Community Engagement Review: Report to the Minister for Climate Change and Energy (December 2023)

The Community Engagement Review (December 2023) was commissioned by the Minister for Climate Change and Energy into how renewable energy and transmission projects are engaging with affected communities. Surveys and stakeholder consultations with landholders and community members living within 5 km of a proposed or operating renewable energy/transmission project, saw concern expressed about the lack of legal accountability. For instance, participants stated (see page 10):

> "Proponents don't do the work because they are not required to do the work. There is no imperative or consequence to not doing it."

> "We would like a national, enforceable code to ensure that transmission infrastructure has enforceable guidelines."

[124] Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209. See also Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, New York, 2003) p 67-8.
[125] Mulgan, ibid.
[126] Andrew Edgar, 'Judicial Review of Public Consultation Processes: A Safeguard against Tokenism?' (2013) 24 *Public Law Review* 209
[127] See further HRW Wade & CF Forsyth, *Administrative Law* (10th edition 2009).

1/ Legal Enforcement

Legally enforceable requirements for genuine public consultation are undoubtedly important. They can provide an important signal of the importance of public consultation, setting minimum standards and expectations of consultation.

However, legally enforceable consultation is not the panacea – there will be limits to how involved courts will want to be. Professor Andrew Edgar has explained that courts are pretty good at enforcing procedural requirements for consultation, but they lack the necessary skills to supervise the substantive consideration of submissions that are lodged, which courts tend to avoid because they don't wish to become involved in the 'merits' of the decision.[126]

There are dangers of relying only on legally enforceable consultation requirements, in that government decision makers become too formally (and formulaically) focussed on meeting legal requirements, resulting in minimalistic consultations.[127] This will not result in the type of democratic listening that genuine consultation requires, and the integrity benefits that flow from this.

Courts, then, can provide important safeguards for oversight of consultation procedures, but they are not effective by themselves in providing a safeguard against tokenistic consultation practices.

2/ Political Accountability

Public consultations in Australia are often overseen through the political process. This is seen, for instance, in relation to the consultation requirements in s 17 of the Legislation Act. It is suggested that the political nature of such decisions makes them more amenable to political oversight and accountability than judicial review.

Political oversight does create some transparency. However, as a complete accountability mechanism it is significantly deficient, focussed as it is on procedural requirements and reporting of consultation rather than that adequacy of the consultation itself. Further, it is often the case that insufficient information is provided to the parliament for political oversight of consultation to be effective.

Case study: Consultation and Transparency in Legislative Reform

The 2025 EPBC reform bills introduced by the Albanese government illustrate the persistent weaknesses in political accountability for consultation. The reforms were extensive and highly technical, amending an already complex statutory framework in an area particularly vulnerable to regulatory capture. Yet, there was very little information provided to Parliament to demonstrate that adequate, broad-based consultation occurred. The Explanatory Memorandum offered general assurances of "extensive consultation", noting that the Minister held over 90 meetings, roundtables and forums with environmental and business groups, First Nations organisations, scientists, and state and territory governments. However, it provided no detail as to the substance, timing or participants in that engagement. Significant stakeholders—such as the Northern Territory's land councils— publicly stated that they were not consulted on the reforms as introduced. Media reports also indicated that key stakeholders had not seen complete draft legislation prior to its introduction, and earlier consultation processes for predecessor bills reportedly involved confidentiality agreements restricting public discussion.

By contrast, the 2014 Carbon Tax Repeal Bills demonstrate how consultation can be documented in a manner that facilitates meaningful parliamentary and public scrutiny. In a highly contested policy area involving powerful commercial interests, the Explanatory Memorandum set out in detail the draft release process, including dates for public consultation and the closing of submissions. It identified the categories of stakeholders consulted—ranging from industry peak bodies and local governments to renewable energy organisations and legal experts—and specified the nature and frequency of engagements, including formal submissions, campaign emails, meetings and teleconferences. An attachment itemised the number and type of engagements with each organisation.

These contrasting examples demonstrate that political accountability for consultation is often undermined because governments fail to provide sufficient information to the Parliament.

[128] Rhion Jones and Elizabeth Gammell, *The Politics of Consultation* (CreateSpace Independent Publishing Platform, 2018) 330.
[129] Ibid 331.
[130] Ibid 336.

3/ A Public Consultation Act and an Independent 'Champion': The Office of Public Consultation ('OPC')

Some of the most important takeaways from the scholarship and studies of consultation are that failures are often systemic, and good practice is a set of skills that can be learnt and supported institutionally.

As Professor Cameron Holley has noted, one way of addressing the challenges of inequality in public participation is to design 'mechanisms' that would provide oversight, monitoring and benchmarking of consultation practices across groups.

One of the challenges of improving public consultation practices in Australia is that we are not starting with a clean sheet. There is, as Rhion Jones and Elizabeth Gammell from the Consultation Institute argue, a 'patchwork quilt' of consultation obligations and processes. There is a real need for consolidation.[128] They suggest that a 'Public Consultation Act' could perform an important role in standard setting across government, providing statutory guidance on how to perform existing consultation requirements. This could then be supplemented by an 'Independent Office of Public Consultation' to stem the credibility problem that is faced in relation to public engagement.[129]

Jones and Gammell argue that an Independent Office of Public Consultation could be a regulator to champion good consultation process, act as an independent rule maker and problem solver. They would be the custodian of consultation standards and a disseminator of best practice, providing recourse for those who complain that a consultation breaches those standards. Importantly:

> The Office would afford consultation a proper and official status in the democratic process: consultation would no longer be just an administrative device of convenience used in a miscellany of contexts and vaguely undefined.[130]

The Office would focus on best practice and commission or undertake research into the effectiveness of different consultation practices, as well as providing a single point of contact for complaints regarding consultations.

The Centre for Public Integrity can see the clear benefit in the introduction of a consolidated statutory basis setting out, at a high level, expectations and standards of consulting by government in its decisions and policy development, providing statutory guidance on existing consultation requirements.

We also see the benefit in establishing an independent public consultation champion, which we have also termed the **Office of Public Consultation (OPC)**. In particular, such an office would build on the strong foundations already established by the Office of Impact Analysis (OIA), which performs important work in promoting good regulatory practice and consultation. However, the OIA's contribution is necessarily constrained by its size and resourcing, its location within the executive, and the scope and focus of its current functions. These limitations mean it is not positioned to provide independent, system-wide oversight of public consultation, to safeguard the independence of participants, or to ensure consistent standards and accountability across government. A new independent office would complement, rather than duplicate, the OIA's work by extending these functions into an independent, adequately resourced, and publicly accountable institutional role.

This new office could provide a single point for government and the public, to:

- provide a whole of government website that provides a single point of contact and information for all consultations on acts, regulations and government decisions, such as the website now used in the UK.
- provide resources and training to public officials who are involved and have responsibilities for engaging in public consultation, including ensuring that consultation processes are appropriately designed for the relevant issue involved (including through co-design with affected groups and tailoring methods to the purpose, context and communities involved);

[131] See, for instance, the Scottish Parliament's Engagement Strategy.

- undertake regular audits in relation to:
  - how well statutory consultation processes are undertaken;
  - how frequently and how well consultations are undertaken in policy development;
  - the use of 'bodies' to provide consultation for certain groups, including how representative they are, how often and how meaningfully they are consulted.
- receive complaints in relation to the conduct of consultations (including specific consultations, or systemic complaints in relation to practices under a piece of legislation or by a particular government department or agency), investigate those complaints and issue public findings in relation to them;
- be consulted when statutory proposals are developed in relation to administrative decisions and rules that might require consultation;
- undertake (or commission) research in relation to best practice consultation and emerging issues in relation to consultation. This might include, for instance:
  - how AI is affecting the conduct and feasibility of consultation, including how government can deal with the number and length of submissions to consultation process that might be generated with the assistance of AI, and how AI can facilitate more meaningful and targeted engagement with public submissions and other forms of input; and
  - how consultation might best take into account the interests of future generations - a cohort that is unable yet to engage in consultation in traditional forms (such as through the Welsh Future Generations Commission).

Another important function that the Office of Public Consultation could undertake, is to work with interest groups within the community that are not frequently engaged in public consultations. The Office could be tasked with providing resources and training to develop the capacities of potential participants, as well as developing greater trust between these groups and government so that future consultation can be better designed to engage these groups.[131]

[131] See, for instance, the Scottish Parliament's Engagement Strategy.

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