



THE CAMBRIDGE HANDBOOK OF

Deliberative Constitutionalism

Edited by
Ron Levy, Hoi Kong,
Graeme Orr and Jeff King

CAMBRIDGE

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Deliberative democratic theory emphasises the importance of informed and reflective discussion and persuasion in political decision-making. The theory has important implications for constitutionalism – and vice versa – as constitutional laws increasingly shape and constrain political decisions. The full range of these implications has not been explored in the political and constitutional literatures to date. This unique Handbook establishes the parameters of the field of Deliberative Constitutionalism, which bridges deliberative democracy with constitutional theory and practice. Drawing on contributions from world-leading authors, this volume will serve as the international reference-point on deliberation as a foundational value in constitutional law, and will be an indispensable resource for scholars, students and practitioners interested in the vital and complex links between democratic deliberation and constitutionalism.

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Introduction: Fusion and Creation

Ron Levy and Hoi Kong

This book aims in equal parts at fusion and creation. It combines insights from two vast and important fields – deliberative democracy and constitutionalism. And, taken as a whole, it yields not merely a sum of parts, but something singular and new. All of the book's chapters respond to aspects of the following questions: *how do judges, ordinary citizens, legislators and others deliberate about constitutional norms? And how do the features of a constitution, such as human rights, the separation of powers and federalism, affect how democracies deliberate?* These questions invite authors to describe two broad strands of connection between the fields, focusing at turns on how democratic deliberation shapes constitutionalism and how constitutionalism shapes democratic deliberation.

Deliberative democracy can be read as a reaction against traditional democratic models that principally sought to tally the fixed preferences of majorities or interest groups. Over time such preference-aggregating democratic practices began to look inadequate as they failed to provide opportunities for meaningful deliberation. Theory and practice alike fixated too much on who wields what power and by what means, yet not enough on thoughtful exchanges about policy. The decisions resulting from aggregative democracy appeared ill-informed and simplistic, as collective decision-making centred largely on the polarising contests of interest groups jostling for control of the levers of government. These problems intensified in recent decades as many matters of policy-making – the environment, healthcare and national security, to name a few – became at once more urgent and more complex.

A key consequence was the rapid rise of research into how political institutions can curb or correct traditional democracy's deliberative pathologies. Deliberative democratic theory imposes significant moral demands upon citizens, such as the requirement that each citizen remain open to other citizens' views: listening attentively and trying to understand them. Citizens should also be willing to change their views or preferences in light of what they learn from discussions. These moral demands respond directly to the concerns about democracy identified above. According to deliberative democratic theory, democratic choice should be not merely an exercise in majoritarianism or preference aggregation; it should also result from informed and reflective discussion and persuasion, which seeks to divorce policy-making from mere partisan loyalty and unreasoned power, and to meet the complexity of today's governance challenges.

Constitutionalism – the study and practice of constitutions and constitutional institutions – has long had a place in deliberative democratic theory. Early works assigned key deliberative functions to institutions in constitutional orders, such as high courts and legislatures. By accounting for constitutionalism, deliberative democratic theory refined its vision of how

and expert commissioners) in practice possess outsized powers of control: they are called upon to reshape second-order constitutional norms, sometimes with only minimal involvement of the broader public. Using primary empirical data regarding a selection of constitutional elites, Levy illustrates how these elites may, or may not, live up to deliberative constitutionalists' lofty expectations.

This collection is the result of an enormous amount of work by an extensive network of collaborators. Our co-editors, Graeme Orr and Jeff King, contributed to the project their organisational prowess, editorial acumen and outstanding judgement. We owe them a debt of gratitude. We would also like to thank the chapter authors for their insights, diligence and professionalism, without which this volume would not have seen the light of day. The chapters were presented at workshops held on three continents, at the Australian National University, University College London and McGill University. The logistical challenges involved in mounting such events are significant and, for her efforts, we would like to acknowledge with deep appreciation Amy Preston-Samson's work on the project. Excellent copy-editing by Jon Lloyd and research assistance from Gregory Dale, Samuel Rutherford and Samara Cassar resulted in a tightly edited and formatted manuscript. And we have been guided through the editorial process at Cambridge University Press by the expertise of Elizabeth Spicer, Finola O'Sullivan, David Morris, Gail Welsh and Gemma Smith. Finally, we are grateful for grants provided by the Australian Research Council, the Social Sciences and Humanities Research Council of Canada, McGill's Faculty of Law, University College London and the Australian National University, which supported this project through its various stages.²³

²³ ARC Discovery Project, 'The Law of Deliberative Democracy: Theory and Reform' DP130100706.

The 'Elite Problem' in Deliberative Constitutionalism

Ron Levy*

A. INTRODUCTION

What is, and what should be, the relationship between ordinary citizens and the democratic governments that notionally serve them? Others of course have asked and answered this question before – and from many angles. In this chapter I pose the question again, however, from the perspective of deliberative constitutionalism.

Deliberative constitutionalism is a relatively novel subject of systematic research. The 'systematic' modifier here is important. Several works in the early deliberative democracy literature, and others since, have taken constitutions into account.¹ Equally, constitutional theory has occasionally included deliberation among its normative criteria for judging and understanding constitutional phenomena, themes, values, actors, etc. Nevertheless, sustained and broad-ranging accounts of how deliberative democratic and constitutional theory intersect – and whether they share objectives in common or can profit from each other's insights – are still emerging.² In recent years, work on deliberative constitutionalism has expanded to fill new corners of the field, not least through the efforts of many of this volume's contributors.

The newly expanded literature is not easily summarised. Yet, as a rough generalisation, the contributions in this book and elsewhere focus predominantly on normative theory and institutional prescription. It also seems fair to describe the deliberative constitutionalism literature as generally optimistic. To be sure, many authors offer normative propositions tentatively or with the aim of critiquing them. But many authors on deliberative constitutionalism – a subfield of deliberative democracy – are hopeful, for instance, about the capacities of constitutions and constitutional actors to improve democratic deliberation: to create conditions for deliberative democracy.³ Many others assess deliberation's roles in constitutional creation, carrying on a long

* I gratefully acknowledge funding from the Australian Research Council (Discovery Project 'Confronting the Devolution Paradox' DP140102682); helpful comments from Jeff King, Francesco Bailo, Mark Bruerton and participants at a McGill University symposium of the Project on Deliberative Governance and Law; and Sam Rutherford's usual excellent research assistance.

¹ See, e.g., Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans), MIT Press, 1996); John Rawls, *Political Liberalism* (expanded edn, Columbia University Press, 2005).

² See, e.g., Conrado H Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013); Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

³ See, e.g., the chapters in this volume by Jerry Mashaw, Mary DeRosa and Mitt Regan, and Gabrielle Appleby and Anna Olijnyk.

tradition that views deliberation as normatively required in this process.⁴ Still others imagine deliberative institutions helping democracies to clear some of traditional constitutionalism's obstacles, such as the legitimacy problems posed by counter-majoritarian rights.⁵

The aim of this chapter is to interrogate the assumptions underlying some of deliberative constitutionalism's more confident claims. I focus on what I have long suspected is deliberative constitutionalism's most problematic element – and the one least likely to meet expectations.⁶ Elites of many kinds are integral players in the processes that deliberative constitutionalists describe. This raises what I call the 'elite problem'. To the extent that constitutional elites are not on side with the goals or methods of deliberative constitutionalism, the best-laid plans of deliberative constitutionalists may remain unfulfilled.⁷ Elites are pivotal – but perhaps only tenuously committed – players in deliberative constitutional processes.

In the past I have found suggestive, but still inconclusive, evidence that many elite actors resist the aims and methods of deliberative constitutionalism.⁸ In the present chapter, I rely on new and largely unprecedented data from Australia to test, relatively directly, the attitudes of elite constitutional actors towards deliberative constitutionalism's objectives. The data help to assess whether elites fit the roles presumed for them.

I will generally use 'constitutional elites', or simply 'elites', as a shorthand for juridical and other governmental actors who are empowered to write, veto, amend or significantly influence the making of laws or settled policies on behalf of the wider polity. These elites include legal practitioners: lawyers, and especially judges and the advocates who help to frame legal issues in the courts. They also include 'policy-makers': public servants (in some places called 'civil servants') or parliamentarians within the executive and legislative branches of government who enact legal and policy norms or who influence their development. These assorted elites are integral to a government's vast complex of activities involving law and other settled norms, and they play roles in some of the key processes that deliberative constitutionalists identify.

I focus on a subclass of constitutional elites: public servants, who are putatively apolitical and intimately involved in the development of law and settled policy. To generate a full picture of the attitudes of constitutional elites towards their presumed functions in deliberative constitutionalism, additional studies building on the present one would be useful. However, the present study itself provides valuable lessons. It offers evidence that at least one large category of constitutional elites do not act as deliberative constitutionalists might hope or predict.

The chapter begins, in section B, by outlining the elements of a potential elite problem in deliberative constitutionalism. I observe how the problem might manifest differently depending on the kinds of constitutional norms involved and on the roles of elites expected for each kind. In section C, I move from speculation to measurement. I examine the noted data for evidence that public servants either fulfil or reject their presumed deliberative roles as constitutional

⁴ See, e.g., the chapters in this volume by Elstub and Pomatto, and Suteu and Tierney.

⁵ See, e.g., Hoi Kong and Ron Levy, 'Deliberative Constitutionalism' in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, forthcoming).

⁶ Ron Levy, 'Deliberative Constitutional Change in a Polarised Federation' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2011).

⁷ For authors assessing similar claims in the broader deliberative democracy literature, see, e.g., Yannis Papadopoulos, 'On the Embeddedness of Deliberative Systems: Why Elitist Innovations Matter More' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012); Carolyn M Hendriks, 'When the Forum Meets Interest Politics: Strategic Uses of Public Deliberation' (2006) 34(4) *Politics & Society* 571, 582.

⁸ Levy, above n 6.

elites. In the result, I find evidence broadly confirming the existence of an elite problem among this class of elites. In section D, I briefly consider why the problem might have developed. This discussion dovetails with the conclusion (section E), in which I suggest that elites may yet have the ability to mitigate the problem I have named for them.

B. ELITE ROLES IN DELIBERATIVE CONSTITUTIONALISM

What I have described as a singular problem potentially divides, in practice, into further varieties. The nature of the elite problem might especially depend on whether it affects deliberation and decision-making about 'first-order' or 'second-order' norms.⁹

1. First-Order Deliberation

Throughout this chapter, 'norms' will refer to enacted laws or regulations, or other forms of rules short of law – for instance, internal directives, informal guidelines, and formally adopted and publicly promulgated policy statements. First-order norms, in particular, directly affect the interests of citizens (e.g., laws regulating healthcare, education and the environment). A main question for deliberative constitutionalism is whether the practices associated with constitutional norms can enhance deliberation in the making of first-order norms ('first-order deliberation'). This question has special relevance for the elites who write or adjudicate first-order norms while relying upon constitutional norms to inform, delimit and shape the scope of their task.

Many deliberative democrats describe processes in which raw public values, interests and preferences are filtered through elite bodies – especially legislatures and courts – in the course of being transformed into first-order norms.¹⁰ According to Habermas, 'binding decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts'.¹¹ Similar descriptions recur throughout theories of elite-mediated democratic deliberation: governmental elites are seen as reshaping widely sourced public values, interests and preferences into specific norms. This process requires elites to weigh and accommodate the diverse and sometimes contradictory needs or instructions of citizens, as well as to rely on their own legal, scientific or other expertise to ensure the legal validity and practical effectiveness of norms.

Can constitutional practices enhance deliberation amid elite-mediated first-order deliberation? Answers to this question have several variations – each a way in which constitutional practices might expand the sources or improve the rigour of deliberation. Most obviously, binding *substantive* constitutional guarantees – especially bills of rights, but also other sources of rights – might force policy-makers to enact norms in line with human rights or face the possibility of judicial reversal later on. This can widen the set of relevant issues informing policy-making.

⁹ Related distinctions between types of norms appear, e.g., in HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

¹⁰ James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2011) 15–17.

¹¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) 354–6.

In addition, and more subtly, particular forms of constitutional practice can alter the *process* of deliberation. For example, constitutional reasoning often relies on comparative perspectives,¹² impels the development of binding norms in line with evolving social attitudes,¹³ and helps to clarify the relation of norms under scrutiny to their normative foundations and rationales.¹⁴ Most of all, proportionality testing is a ubiquitous mode of constitutional reasoning that subjects laws to forms of structured scrutiny that can help decision-makers consider, at length, the impacts of the norms they create. Proportionality is an example of a more fundamental presumption – central to liberal democracies – against the arbitrary and excessive use of power.¹⁵ Testing the proportionalities between rights and countervailing public objectives takes place in most formalised processes of elite reasoning about rights. Such processes include those where judges have the final say on rights, where judges and legislatures are jointly responsible for interpreting rights content (the ‘dialogue’ model) or where a legislature itself largely takes on this responsibility (e.g., legislative human rights scrutiny committees).

Proportionality reasoning also frequently arises in relation to the uses of public power in jurisdictions where such power is divided between federal/central and state/devolved governments. The reasoning applies to whether a given norm falls within one government’s grants of power.¹⁶ This kind of reasoning takes place both within the courts and, more directly, among the leaders of the contending governments themselves. In either case, the constitution partly frames and structures the debate.

These are examples of deliberative constitutionalism in practice. They are first-order deliberations that, without the actions of constitutional (or quasi-constitutional) norms and processes, might have reflected a narrower range and more superficial course of decision-making. However, deliberative constitutionalism is, as noted above, a subfield of deliberative democracy: crucially, the objective of deliberative constitutionalism is to improve democratic decision-making rather than to supplant democracy. Hence, even as elite-mediated constitutional practices reshape deliberation, the ‘sluices of democratic and constitutional procedures’ must remain open. Information about public values, interests and preferences should have means of flowing to elites – of being expressed publicly and incorporated into elite deliberations. Also importantly, the elites at the centre of deliberative constitutionalism must choose to be open to using the information to inform their deliberations. Whether they fulfil these requirements in practice remains a live question.

2. Second-Order Deliberation

The picture above becomes more complex for deliberation over the making of second-order norms (‘second-order deliberation’). Second-order norms regulate a government’s systems of collective deliberation and law-making (e.g., rules regarding elections, separation of powers and tenure of governments). On the one hand, second-order deliberation raises the same basic

¹² See, e.g., *Roper v. Simmons*, 543 US 551 (2005) (examining the prevalence of executions of minors in foreign jurisdictions applying the death penalty).

¹³ See, e.g., *Roach v. Electoral Commissioner* (2007) CLR 162 (extending Australian prisoners’ right to vote in light of evolving social attitudes).

¹⁴ See, e.g., *Reference Re Secession of Quebec* [1998] 2 SCR 217 (identifying principles foundational to the Canadian constitutional system).

¹⁵ Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2014) 124 *Yale Law Journal* 3094.

¹⁶ See, e.g., judicial interpretations of the Australian Commonwealth (federal) government’s defence and external affairs powers.

question for deliberative constitutionalism as does first-order deliberation: how do constitutional systems affect deliberation when norms are amended or created? On the other hand, second-order deliberation uniquely entails deliberation about the system of governmental deliberation itself.

Such 'meta-deliberation'¹⁷ gives elites the ability to make far-reaching decisions about political systems. Juridical elites participate in the adjudication and interpretation of second-order norms. And elites in the legislative and executive branches occasionally aid in a formal process of amending such norms (sometimes alongside others temporarily assigned to the task);¹⁸ in most places elites still initiate, run and publicly advocate for or against significant reforms. Second-order deliberation thus allows constitutional elites to serve as unusually powerful political gatekeepers. They may decide on the design of democratic systems – notably including whether to institutionalise deliberative or alternative models of governance. Almost any act of political process reform raises difficult decisions about whether to emphasise or de-emphasise political values such as liberty, equality, integrity and deliberation.

Reforms often involve trade-offs between deliberation and seemingly contradictory values.¹⁹ Consider efforts to enhance the deliberative rigour of political speech, such as the speech of candidates and media during election campaigns. Governments have legislated to provide funding or free broadcast airtime to candidates and to mandate formats for such broadcasts (e.g., high-information content);²⁰ to provide rights of reply to people criticised in news media;²¹ to regulate political opinion polling to require publication of methodological information and statistical accuracy;²² to mandate statements of personal endorsement in candidate advertisements; and to regulate campaign financing through the public disclosure of donations. These examples are useful since arguably none more than trivially curbs speech. Each is an 'additive', and perhaps low-impact, regulation that seeks to enhance deliberation, whether by increasing the breadth of communicative content or by providing useful background to existing content.²³ The regulations may be consonant with a long-standing view in constitutional theory that deliberation is an essential part or precondition of communicative liberty.²⁴ However, in practice deleterious impacts are often assumed. Legislators and judges – and even US presidents wielding vetoes – have blocked additive deliberative regulations on free speech grounds.²⁵

A main second-order risk for deliberative constitutionalism is therefore that constitutional elites will use their privileged roles to exclude deliberative values from the design of political systems. Other values, such as liberty (read thinly, without a deliberative component), habitually overshadow deliberation. Of course, there may be good reasons for this: constitutional elites

¹⁷ Dennis Thompson, 'Deliberative Democratic Theory and Empirical Political Science (2008) 11 *Annual Review of Political Science* 497.

¹⁸ Complicating matters somewhat, the other appointees are often active or retired judges.

¹⁹ Graeme Orr and I elaborate on this point in Levy and Orr, above n 2, chs 3–6.

²⁰ See, e.g., Political Broadcasts and Political Disclosures Act 1991 (Australia – Cth), invalidated in *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.

²¹ Fairness in Public Broadcasting Bill, S 742, 100th Congress (1987), amending 47 USC §§ 151–622 (current).

²² See, e.g., Canada Elections Act, SC 2000, c 9, ss 326–7.

²³ Levy and Orr, above n 2, 82–3. To be sure, in practice curbs on speech tend to be enacted alongside many of these measures. For example, the Political Broadcasts and Political Disclosures Act 1991 (Australia – Cth) also curbed alternative forms of political broadcasting.

²⁴ Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965) 75; Owen Fiss, 'Why the State?' (1987) 100 *Harvard Law Review* 781, 785; Christian F Rostbøll, 'Freedom of Expression, Deliberation, Autonomy and Respect' (2011) 10 *European Journal of Political Theory* 5, 6.

²⁵ President Reagan vetoed the bill cited in n 21 above. The US Supreme Court invalidated a similar law in *Miami Herald Publishing Co v. Tornillo*, 418 US 241 (1974).

might harbour reasonable doubts about the value or plausibility of democratic deliberation. Yet, a more problematic reason for such elite reticence is that deliberative democracy 'potentially clash[es] with views based on elite (indeed, *elitist*) institutional and empirical preconceptions' about the capacities of members of the general public to engage in deliberation.²⁶ In sections C and D, I gauge the extent of these preconceptions and suggest that they are at least sometimes inaccurate.

To be sure, the functions of constitutional elites are not as straightforward or discrete as I have portrayed them thus far. For example, many second-order norms are constitutional in status,²⁷ which raises the complication that, according to some constitutional theorists, any constitutional amendment must involve specially deliberative procedures.²⁸ Among members of the broader public, too, whether a formal process of constitutional amendment is appreciably deliberative – as opposed to being, for instance, abjectly partisan – influences trust in the process.²⁹ Hence, a full picture of second-order deliberation accounts not only for whether new second-order norms help to improve democratic deliberation, but also whether robust deliberative democratic procedures created the new norms.³⁰

Moreover, above I described first-order processes as essentially unidirectional – transmitting information about values, preference and interests from bottom to top, from the general public to elites. But Habermas, among others, sees the route of transmission as 'circulating from the bottom up and the top down throughout a multilevel system'.³¹ Rawls and others imagine elite deliberative bodies telescoping into the broader public sphere their own, relatively rigorous methods of deliberation – essentially leading by example with respect to both the substance and the style of reasoning.³² These bodies' reasons and methods can inform and discipline debates according to salient points of logic or principle, and 'educate citizens in how to reason with one another on contested issues'.³³

Finally, in practice first- and second-order functions sometimes influence each other, such that the boundaries between them can be indistinct. While reasoning about first-order problems, constitutional elites might of course not confine themselves to considering how constitutional laws apply to a case at hand. Generalised questions about the rationales and scope of rights or of

²⁶ Levy and Orr, above n 2, 47.

²⁷ They are constitutional in a sense that Jon Elster articulates: they regulate the formation or interpretation of a host of other laws; see Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 366.

²⁸ Donald S Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 80(2) *American Political Science Review* 355; Ron Levy, '“Deliberative Voting”: Realising Constitutional Referendum Democracy' [2013] *Public Law* 555.

²⁹ Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 834–7.

³⁰ This creates a feedback loop, as it is the responsibility of second-order law-makers to provide for deliberative second-order law-making. For example, a largely non-deliberative process (e.g., a process of constitution-making wholly led by partisan elites) might yield second-order laws that provide in future for largely non-deliberative processes of law-making (e.g., of laws that make elections less competitive and entrench the power of political incumbents). A more deliberative approach would begin by instituting an arm's-length and impartial commission, as many jurisdictions have done.

³¹ Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' (2006) 16(4) *Communication Theory* 411, 415.

³² Rawls, above n 1, 137.

³³ Zum, above n 2, 192. Rawls (ibid) and Zum both focus here on courts. Other authors make similar observations regarding bodies such as mini-publics: see, e.g., John Gastil, Robert C Richards and Katherine R Knobloch, 'Vicarious Deliberation: How the Oregon Citizens' Initiative Review Influenced Deliberation in Mass Elections' (2014) 8 *International Journal of Communication* 62.

political powers can also arise and contribute to new second-order doctrines. The record of legislative or judicial practice in individual cases creates durable precedents – customs, conventions and case law – that may help to constitute second-order rules.

Nevertheless, within the deliberative constitutionalism literature, a basic distinction between works focusing on first-order versus second-order roles of constitutional elite is evident. In the next section, then, while presenting evidence on whether actual elite practices match assumptions in the literature, I focus predominantly on the basic roles in isolation from each other. However, occasionally I also advert to areas of overlap between first-order and second-order elite deliberation.

C. MEASURING THE ELITE PROBLEM

Constitutional elites might decline or fail to fulfil the idealised deliberative roles described above. In this section, I examine the prevalence and reach of certain aspects of this problem for deliberative constitutionalism. I rely on results from the Future of Australia's Federation Survey, which in 2016 gauged attitudes of policy-makers in relation to constitutional issues.³⁴

'Policy-makers' are a subset of the group I referred to above as constitutional elites. Policy-makers can include both public servants and elected officials (or their staffers), in the executive and legislative governmental branches, whose research and decision-making activities inform or author policies and laws. As noted, in this chapter I focus on public servants in Australia who are putatively apolitical career officers of governmental agencies and departments.³⁵ This chapter – like the Survey on which it is based – excludes partisan officers of the executive such as certain ministerial advisors.

Nearly 3,000 public servants answered the Survey's 39-point questionnaire online. Respondents occupied positions across three levels of Australian government (federal, $n = 1637$; state, $n = 468$; local, $n = 863$). But, since local governments differ significantly from state (or territorial)³⁶ and federal governments, and since the local government survey questions also therefore significantly differed, I omit further mention of local government. In the rest of this section, references to Survey 'respondents' will signify state and federal public servants, of various executive departments, who occupy high-level positions; federally and in some states, these officers are known as being part of the Senior Executive Service. Though the governmental departments covered in the Survey have diverse titles, they can be distilled as the offices serving the prime minister/premier/chief minister/cabinet, and departments of treasury/finance, attorneys-general, health, education, environment, planning/transport and human/social services.

Circumscribing the classes of constitutional elites considered yields relatively focused results that are useful for testing a number of assumptions of deliberative constitutionalism (and potentially, in some cases, of deliberative democracy more generally). Some results pertained to questions about how first-order decision-making in the Australian constitutional system is conducted, and others to second-order questions regarding decision-making about the constitutional system itself.

³⁴ I was a member of the research team that led the Survey.

³⁵ John Halligan, 'The Australian Public Service: Redefining Boundaries' in John Halligan (ed), *Civil Service Systems in Anglo-American Countries* (Edward Elgar, 2003) 88.

³⁶ The survey included the two populous Australian territories – the Australian Capital Territory and the Northern Territory – which, for the sake of simplicity, I combine with 'state' results.

1. *First-Order Studies*

Above I introduced key conditions for first-order deliberative constitutionalism, including that 'information about public values, interests and preferences should have means of flowing to elites', who in turn must 'choose to be open to using the information to inform their deliberations'. The Survey included questions shedding light on whether public servants satisfy these conditions in practice.

One such question queried 'how much direct interaction' public servants 'personally have' in the course of their work with an array of interlocutors stipulated in the questionnaire. (The Survey allowed respondents themselves to interpret most terms, including 'direct interaction'.) Respondents reported the most frequent interactions with five particular groups. Of these, one does not itself represent public views: 'senior ... government public servants' within the public servant's own government.

Four other groups of high-frequency interlocutors at least ostensibly serve as entry points for general-public values, preferences and interests into the making of laws and settled policies. These include two kinds of civil society (i.e., 'nonelectoral')³⁷ representatives of public views: 'industry, professional or community organisation representatives' and 'client or consumer group representatives'. Another group is that of 'ministers or ministerial staff' within the public servant's own government; this group is also putatively representative of public views. A final group is that of 'members of the general public' themselves.

From the standpoint of deliberative democratic theory, there is reasonable doubt about which of the latter four groups of interlocutors provide the best means of transmitting public views to policy-making elites. Interactions with the general public offer the most direct and unfiltered form of transmission of general public views to governments. But ministries might present a less disorganised and more coherent picture. And civil society groups transmit the views of the public, or subsets thereof, only after aggregating them into the narrower and simpler set of propositions on which the groups themselves focus.³⁸

Figure 26.1 illustrates federal and state public servants' reported frequencies of interaction with the five interlocutor groups noted. Public servants reported lower interactions with a range of other groups: journalists, backbench members of parliaments, intergovernmental agencies and the public servants or ministerial officers of other governments. The figures in this chapter do not show these further results, most of which were negligible.³⁹

Public servants at both federal and state levels of government reported 'frequent (once a week to once a month)' or 'every day' interactions with other, senior public servants most of all. Since, as noted, this is the least representative of the five groups, these results offer a first suggestion that

³⁷ Jonathan W. Kuyper, 'Systemic Representation: Democracy, Deliberation, and Nonelectoral Representatives' (2016) 110(2) *American Political Science Review* 308, 312.

³⁸ The brevity required in a lengthy questionnaire raises further ambiguities. For instance, the 'industry, professional or community organisation representatives' category amalgamates a range of citizen groups. Finer-grained questions about the groups within the category could prompt different responses, depending on whether the organisation represents commercial or 'community' interests.

³⁹ For example, non-ministerial 'backbench' parliamentarians in public servants' own governments (federal respondents: frequent 2.36 per cent, every day 0.24 per cent; state respondents: frequent 4.17 per cent, every day 0.34 per cent), journalists (6.38 per cent, 0.71 per cent; 8.22 per cent, 0.96 per cent), ministerial staff in other governments (2.84 per cent, 0.24 per cent; 2.73 per cent, 0.27 per cent), inter-governmental agencies (21.75 per cent, 2.6 per cent; 19.86 per cent, 2.53 per cent) and public servants in other governments (22.70 per cent, 3.07 per cent; 11.07 per cent, 0.48 per cent). While not as high as results in Figure 26.1, the last two sets of results here indicate more than negligible inter-state or state-federal policy-making interactions.

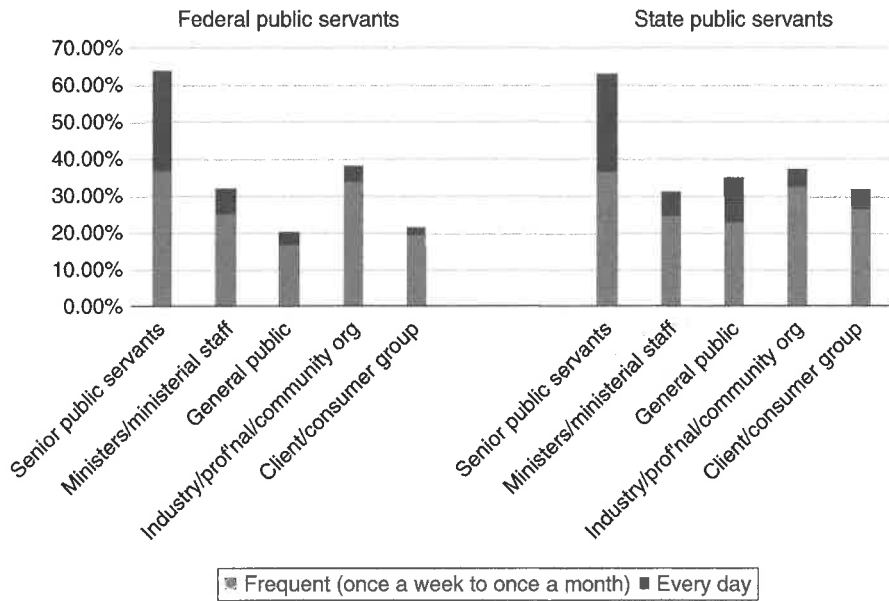


FIGURE 26.1 Frequency of interactions

public servants chiefly engage in deliberations internally with each other rather than reaching out to the general public and its representatives.

On the other hand, public servants of course must interact with their immediate colleagues while conducting their work. The high reported frequencies of interactions with other public servants do not necessarily deny that meaningful interactions also take place with the public or its representatives. Many public servants – though a minority in each case – also reported frequent interactions with the general public; with industry, professional or community organisation representatives; client or consumer group representatives; and ministers or ministerial staff within their own governments. Some public servants even reported everyday interactions with these groups, albeit to lesser degrees. Hence, interactions with interlocutor groups capable of representing public views are generally secondary in frequency to interactions with public servants, but arguably still influential.

Subsequent survey questions looked beyond the frequency of interactions to consider their quality. One question asked public servants to consider the nature of interactions with various interlocutor groups. Figure 26.2 outlines the percentage of respondents who described the most frequent interactions (i.e., those identified in Figure 26.1) as 'somewhat positive' or 'very positive'. We can presume that public servants are more likely to pursue those interactions that they describe as positive or very positive, and to permit these interactions to influence policy-making.

Respondents reported generally positive interactions with all of their highest-frequency interlocutors. However, within these overall sanguine results, there were notable variations. Respondents reserved their most positive responses for interactions with other public servants. At both government levels, the next most positive responses were for interactions with industry, professional and community organisations, client and consumer group representatives, and ministers and ministerial staff. At both government levels, too, members of the general public attracted the least positive results – perhaps further evidence of resistance to public input.⁴⁰

⁴⁰ State public servants reported slightly higher positive responses in relation to the general public – consistent with some conventional assumptions that state governments are more democratically accessible.

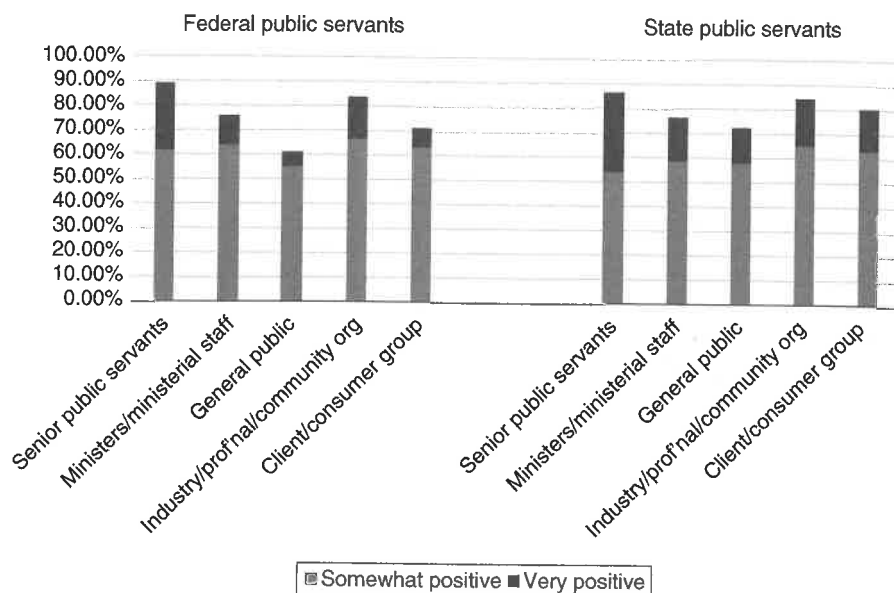


FIGURE 26.2 Quality of interactions

However, again a possible conclusion is that the public servants remain amenable to public input into law-making, but simply prefer that civil society groups or ministries first aggregate public views into more coherent or convenient forms.

Another set of results unpacked the purposes behind the public servants' highest-frequency interactions and again yielded ambiguous conclusions. Asked what were 'the main reasons' for their interactions, respondents indicated varying rationales for engaging with particular interlocutors.

A first rationale, 'policy analysis or development', is the one presumably most relevant to the creation of settled policies or laws. Figures 26.3 and 26.4 show that, at both levels of government, respondents described this policy-making work as involving interactions with other public servants most of all and with members of the general public least of all. Yet civil society organisations and ministerial actors were reported as secondary but still significant players in policy analysis or development. Again, arguably even these lesser interactions can serve as significant entry points into policy-making for public views, even if direct engagement with members of the general public is more modest.

Another rationale, 'accountability and reporting', describes public servants' statements regarding the effects of the policy and legal norms they create. This function is significant for first-order policy-making where, as previously seen, communication flows between governments and their constituents ideally involve two-way discussion. Governments presumably improve the quality of such communication by publicly reporting on the goals, methods and results of policy-making – presenting feedback that in turn can better inform public opinions about governments. However, the responses for accountability and reporting show substantially more frequent interactions of this type with governmental insiders (other public servants and ministerial actors) than with either members of the public or their civil society representatives.

Two further public servant functions – 'regulation and enforcement' and 'service delivery' – describe the implementation of existing norms rather than policy-making deliberation. Both thus imply interactions with people who are the passive subjects of policy-making, rather than its

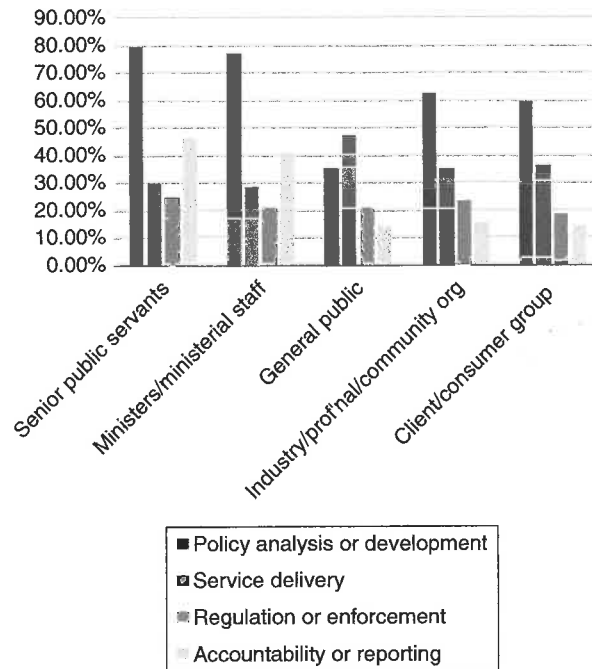


FIGURE 26.3 Reasons for interactions (federal public servants)

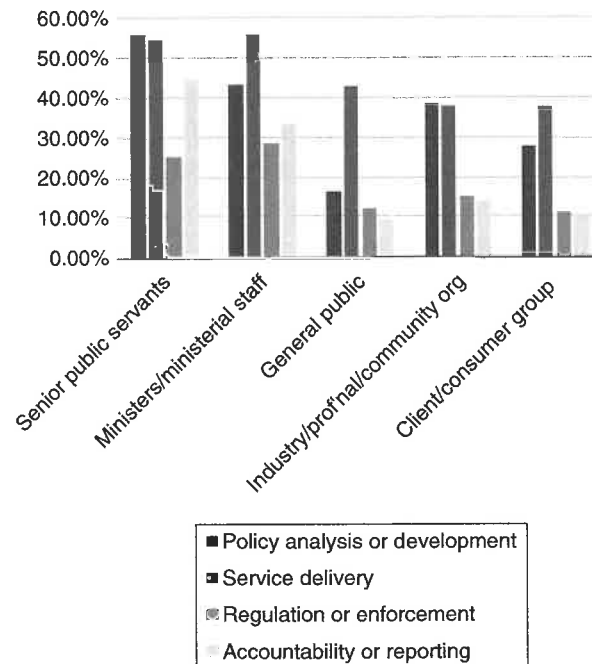


FIGURE 26.4 Reasons for interactions (state public servants)

active contributors. The regulation or enforcement function did not produce clear results, perhaps because only a minor subset of respondents considered their work to involve this function. However, federal and state respondents both notably described service delivery as the most common reason for their interactions with members of the general public. Additionally, federal

respondents cited service delivery as a reason for interactions with the general public more often than for interactions with all other groups. (State respondents differed here by more frequently citing service delivery in relation to public servants and ministerial actors.)

To summarise thus far, on the one hand, answers to first-order questions in the Survey generate a picture of policy-making as relatively closed to public input. There is ample evidence that public servants interact – and prefer to interact – with fellow public servants amid policy-making. Sometimes as well, in this function public servants are content to interact with the public's putative representatives. However, members of the public themselves are relatively excluded from the process. On the other hand, the first-order results consistently raised an ambiguity: the results also potentially supported an alternative interpretation according to which public servants are open to public views, but simply insistent that representative civil society groups or ministerial actors pre-filter these views – organising and aggregating them to improve the quality of their transmission.

To be sure, leaving the transmission of public views to civil society organisations raises difficulties. One is the matter of selection. The set of groups that governments consult might not accurately reflect the array of values, preferences and interests of the wider public. The set of existing civil society groups may itself be under-representative, especially if skewed towards partisan, vocal and well-resourced people and interests. Transmitting public views through ministries may also be problematic. Individual ministers (and the staff who assist them) represent the public at best in the approximate and indirect manner of elective democracy. The representation is subject to potentially cross-cutting influences of cabinet decision-making, and prime ministerial and party directives.

More fundamentally, the results leave open the question of whether public servants' tepid support for direct policy-making contributions by the public reflects accumulated experience or merely prejudicial attitudes – antipathies at least partly unsupported by evidence. Put another way, it is unclear whether direct public engagement is of poor quality and therefore devalued by public servants or whether public servants presume poor quality and therefore devalue such engagement.

2. *Second-Order Studies*

The Survey's answers on second-order questions generally affirmed that public servants presume members of the public to be poorly suited to decision-making, in this case on matters of constitutional reform. Importantly, second-order questions allow us to decouple public decision-making from existing approaches. The questions do not merely ask respondents to reflect on their accumulated experience about the quality of contributions to policy-making, but to imagine a set of alternative decision-making arrangements. The responses to the previous, first-order set of questions could be explained as reactions to the lack of any institutional provision for robust public deliberation under existing models. Yet, when we turn – as we do next – to questions about newer or speculative decision-making models, public servants tellingly still prefer to see elites play dominant or even exclusive roles.

A premise of institutionalist deliberative democracy is that 'it is not that ordinary people cannot deliberate, but that existing liberal democratic structures do not allow them the chance to develop those deliberative capacities'.⁴ Indeed, dismissing the possibility of robust public

⁴ John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 186–7.

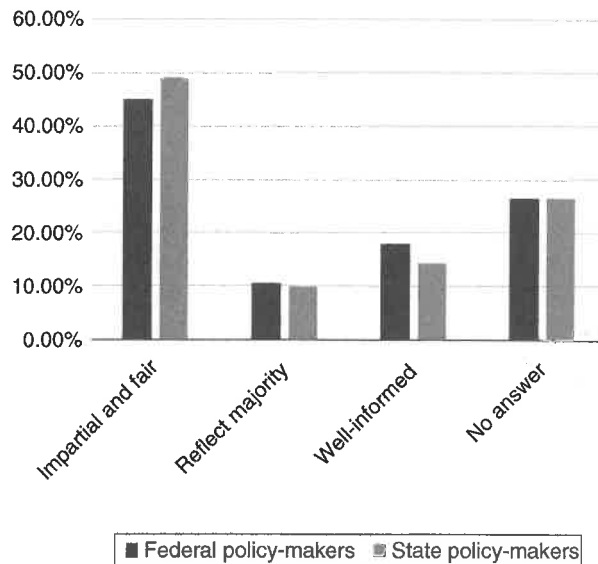


FIGURE 26.5 Values of reform

decision-making even under improved institutional conditions contradicts extensive empirical findings about deliberative practices. Summarising a large field, we may say that members of the general public can deliberate well – even sometimes significantly better than certain elites – given particular institutional supports (section D below briefly considers some of these past findings). However, as we will see, the respondents seemed to presume that the quality of deliberation by members of the general public remains poor irrespective of institutional design.

An initial second-order question queried which of three key values public servants viewed as important in 'any process for reforming Australia's federation'. (Any such process would be likely to entail constitutional reform.) The process could be 'handled in a way' that is 'impartial and fair to all Australians', 'reflect[s] what the majority of people want' or is 'well-informed about constitutional issues'. Respondents ranked each option from first- to third-most important. Figure 26.5 shows the first-place results for these three values of reform.

Of particular note here is that the respondents clearly placed impartial and fair decision-making (suggesting equal and unbiased consideration of all citizens' interests) ahead of the two other constitutional reform desiderata. A process handled by people who are well-informed was distantly the second-most frequently selected option, and respondents selected majoritarian process least often.

Of these three value sets, 'impartial and fair' and 'well-informed' processes are most obviously values of deliberative democracy. But the data seem to show public servants de-emphasising the other element of deliberative democracy, namely democracy. (The ratios of respondents selecting 'impartial and fair' versus 'reflect majority' were greater than 4:1 federally and nearly 5:1 at the state level.) Deliberative democracy is not 'deliberation, without modifier',⁴² but an account of how deliberative values can improve, but leave largely intact, democratic (majoritarian) rule. A previous nationwide public opinion poll also saw members of the public rank 'impartiality and fairness' unambiguously ahead of the two other values; however, 'reflect majority' ranked a relatively strong second (2:1 ratio of values).⁴³

⁴² John Parkinson, 'Legitimacy Problems in Deliberative Democracy' (2003) 51(1) *Political Studies* 180, 180.

⁴³ Australian Constitutional Values Survey, partly reported in Levy, above n 29, 834–7. A difference in the previous survey was that respondents slightly preferred the value of majority reflection to that of well-informed process. But

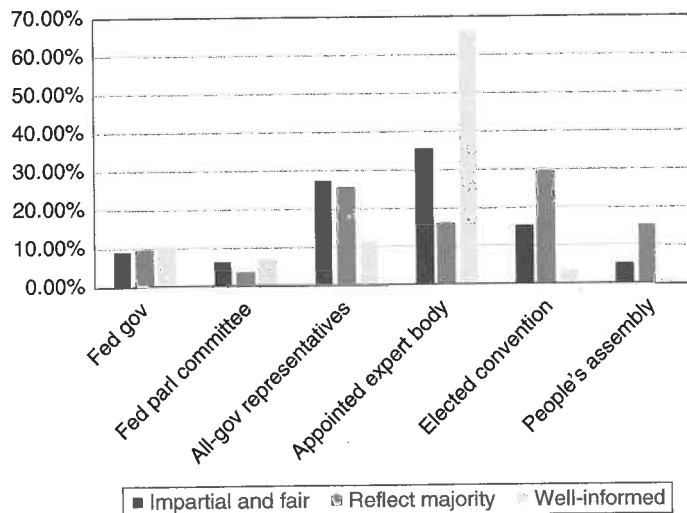


FIGURE 26.6 Values ascribed to reform procedures (I)

Returning to the Survey of public servants, having established what respondents considered to be the most important values of constitutional reform, out of the three listed, the questions sought to tie these values to particular institutional actors potentially involved in reform. The options listed were: 'the Federal Government', a 'federal parliamentary committee', 'representatives of all levels of government', an 'appointed expert panel or commission', 'an elected convention' and a 'randomly chosen people's assembly'.

The final option in effect briefly described a mini-public. Mini-publics are favourites of many deliberative democracy scholars and increasingly of governments undertaking law reform around the world. The bodies rely on selection by sortition: choosing members at random from the broader population, but stratifying selections to reflect broader-population demographics. Mini-publics often fare well as robustly deliberative bodies. While it is unrealistic for an entire public to become fully apprised of all the considerations bearing on a reform, a small assembly can do so more readily. Institutional supports for mini-public deliberation can include the provision of relevant expert knowledge, mutual and sustained exposure of lay members to each other's perspectives, collectively agreed norms of cooperation, and the use of neophyte members unaccustomed to power and unaffiliated with political parties.

Three of the institutional options presented in the Survey were standard parliamentary and governmental approaches to decision-making – options that are democratic to the extent that they are representative and electorally accountable. Yet a further option, the 'appointed expert panel or commission', stresses deliberative but not democratic credentials. This was the method employed in the most recent (and abortive) Australian constitutional reforms. The Survey asked which of these bodies respondents would 'have the most trust and confidence in, to achieve' a range of results phrased as process values, including the three values introduced above.

As Figure 26.6 shows, the appointed expert body was the favourite in respect of impartiality and fairness – the value that, as we saw, is far and away the most important to respondents. Respondents described the two most elite-dominated bodies – the expert body and the

note that any direct comparison between the two surveys must be cautious: there were some differences of wording and six years elapsed between the surveys.

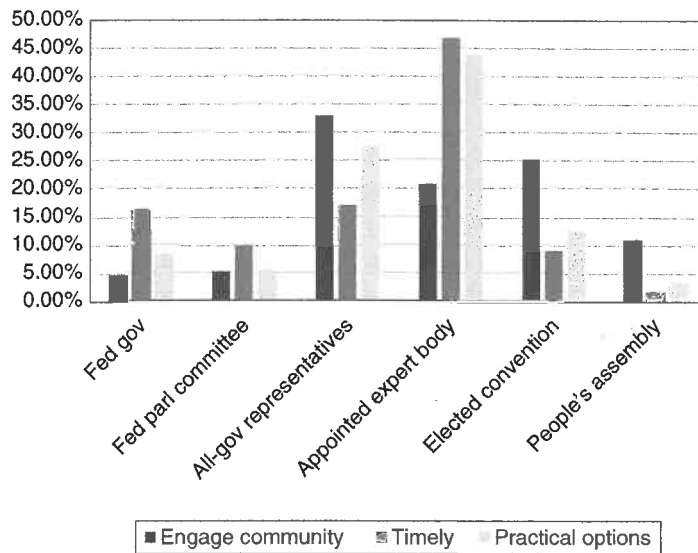


FIGURE 26.7 Values ascribed to reform procedures (II)

all-government body – as more impartial and fair than all others. (While notionally democratically accountable, the hypothetical all-government body would be largely detached from the general public – essentially a representative body for representative bodies.) Figure 26.6 also indicates that only a small number of public servants viewed random selection from members of the public as likely to promote impartiality and fairness. This contradicts a large deliberative democracy literature noting, among their other benefits, the relative absence of ideologically inflexible partisans in these bodies.

Respondents viewed the expert body as 'well-informed' markedly more than all other bodies. Here the two bodies that most directly involve members of the public – the elected convention and the people's assembly – trailed all the others.

The value of 'reflect majority' produced complex results. Respondents saw an elected convention as the most majoritarian of the options, followed by an all-government body. All remaining responses for this value were generally low. However, it is notable and surprising that the appointed expert body was the option third-most frequently described as reflective of the majority. Also interestingly, the people's assembly was seen, most of all, as a majoritarian body. Deliberative democratic mini-publics indeed descriptively represent many social subgroups roughly in proportion to their prevalence in the main population. But a primary objective of mini-publics – as with other deliberative democratic institutions – is to ensure that minority views, too, are robustly voiced and considered.

For all three of the values noted thus far, respondents generally disfavoured the two federal government-led processes. Public servants (particularly those in state governments) may have resisted the notion of federal decision-makers making unilateral choices on federal-state constitutional arrangements.

The Survey also included questions regarding three further reform process values: 'engag[ing] the community', 'proceed[ing] in a timely way' and 'deliver[ing] practical options' (Figure 26.7).

Once again respondents generally favoured the appointed expert body – especially in this case for its ability to yield timely and practical options (the latter presumably denoting sound and effective reform outcomes). The all-government body again generally attracted relatively

favourable responses. Intriguingly, out of the various options, respondents assumed this latter, largely elite process would be best positioned to engage the public. Respondents saw the people's assembly option as considerably less likely than an expert or all-government body, or an elected convention, to do so.

Some results in this section are surprising in light of international and Australian experience with deliberative democratic and other methods of reform. Expert-led processes for Indigenous and local-government constitutional reform in Australia have repeatedly been unsuccessful in recent years; the federal government has more than once aborted reform initiatives, citing low public awareness and engagement. By contrast, the largely lauded British Columbia Citizens' Assembly and Irish Constitutional Convention mini-public processes, for example, inspired widespread public interest and influenced the content and tone of broader public deliberations on constitutional issues.⁴⁴

Results from the Survey seem to confirm that public servants hold unfavourable – and sometimes factually unsupported – assumptions about deliberation and decision-making by members of the general public. Most notable is the dismissal by public servants of mini-public decision-making, which suggests a preference for expert-led decision-making cultures of closed and under-representative decision-making. The data raise doubt that members of the general public are viewed as welcome contributors even to a process of constitutional decision-making – a task long understood in constitutional theory to require meaningful public involvement (at least via elected or other representatives).⁴⁵ Given an open choice among processes for reform, respondents still preferred processes conducted by all-government panels or experts. While it is possible that at least some respondents assumed that such elite-led approaches would include robust public consultation, the Survey options made no mention of such consultation. Indeed, consultations in recent Australian constitutional reform attempts (i.e., in the years since the 1999 republic referendum) have in practice been brief and severely limited in scope.

In sum, after the first-order Survey results, an ambiguity remained as to whether the apparently habitual exclusion of direct public voices reflected weaknesses in existing processes of public consultation or a more profound opposition by public servants to public participation in any form. The second-order results helped to resolve this ambiguity. Presented with various second-order reform options for constitutional amendment, support for deliberative democratic options was often weakest. In the next section, I discuss several possible reasons for these results.

D. CAUSES OF THE ELITE PROBLEM

If deliberative constitutionalism faces an elite problem, what are its possible causes? Consider five possibilities.

First, constitutional and other elites often confidently express sceptical views about deliberative democracy despite being poorly apprised of its aims and methods. Such elites especially seem to misunderstand deliberative democracy's reciprocal deliberative and democratic elements – that is, how deliberation can enrich democracy and vice versa. For instance, by involving randomly selected neophyte members, a mini-public can mitigate democratic pathologies

⁴⁴ Fred Cutler, Richard Johnston, R Kenneth Carty, Andre Blais and Patrick Fournier, 'Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda Setter' in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008); Brian Tobin, 'Marriage Equality in Ireland: The Politico-legal Context' (2016) 30(2) *International Journal of Law, Politics and the Family* 1.

⁴⁵ Above n 28.

such as the tendency of elected political partisans to adhere narrowly to polarised and rigid categories of reasoning.⁴⁶ Extreme partisanship is a specifically *democratic* problem when it causes representatives to fail to reflect the diverse views of their constituents. At the same time, democratic decision-making can enable high levels of popular inclusion in decision-making, which is a hallmark of deliberation.⁴⁷

Though democratic representation and deliberation can thus be of mutual benefit, the point is not obvious. Many elites instead view democracy and deliberation as being in tension. A common critique in media commentary, for instance, has it that a body such as a mini-public is merely a populist – and dangerous – participatory tool.⁴⁸ Indeed, in the study above, Survey respondents may not have known otherwise. By design, the Survey did not provide information about the deliberative elements that are standard to a mini-public; the Survey instead sought to gauge public servants' attitudes based on their actual levels of knowledge. By contrast, the previously noted public opinion poll provided a brief explanation of mini-publics and found markedly more positive attitudes towards the people's assembly model.⁴⁹

Second, the differences between general-public and elite attitudes towards deliberative democratic institutions also likely reflect elite assumptions about the fitness of the general public to deliberate.⁵⁰ The earlier public opinion poll also uncovered intriguing differences based on whether respondents belonged to one or more of several classes of elites. Notably, university-educated elites favoured deliberative democracy least out of all the groups. Other elites also demonstrated tepid support, including those who reported consistently voting for mainstream political parties and those who inhabited large cities – especially in Australia's main south-eastern population centre.⁵¹

Empirical research on the practice of deliberative democracy demonstrates that ordinary citizens are, contrary to assumptions, often able to deliberate rigorously. Whether they do turns largely on whether they are provided with relevant information and adequate institutional support.⁵² A related point – which I have developed elsewhere⁵³ – is that members of the general public may be especially effective at deliberating on certain constitutional matters that reflect basic, ubiquitous and broadly accessible principles (e.g., equality and national independence).

While elites under-estimate popular deliberation, they also over-estimate their own deliberative capabilities. Many elites are relatively well-informed as a general matter, but this may cause them to over-estimate their more particular knowledge about political behaviours and institutions. As I have noted previously with a co-author:

elites, relying on broad presupposition or personal anecdotal experience, may not be best-placed to gauge the deliberative capacities of non-elites ... [M]any classes of elites may be generally well-informed, but it does not follow that they possess a clear view of how much non-elites know or do not know on matters relevant to decisions at hand.⁵⁴

⁴⁶ Levy and Orr, above n 2, 26.

⁴⁷ James Bohman, 'Deliberative Democracy and the Epistemic Benefits of Diversity' (2006) 3 *Episteme* 175.

⁴⁸ See, e.g., Ian Urquhart, 'An Ill-Advised Leap in the Dark: Ontario Electoral Reform Panel Will Meet for Almost a Year and a Loopy Outcome is a Possibility', *Hamilton Spectator*, 28 March 2006.

⁴⁹ Levy, above n 29, 837.

⁵⁰ Several studies have found evidence of this view internationally; see, e.g., Lawrence C Walters, James Aydelotte and Jessica Miller, 'Putting More Public in Policy Analysis' (2000) 60(4) *Public Administration Review* 349.

⁵¹ Levy, above n 6.

⁵² Simone Chambers, 'Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?' (2009) 37(3) *Political Theory* 323, 325.

⁵³ Ron Levy, 'The Deliberative Case for Constitutional Referenda' (2017) 16(1) *Election Law Journal* 213.

⁵⁴ Levy and Orr, above n 2, 47. See also the chapter in this volume by Castil and Hale on the effectiveness of jury deliberation.

Moreover, elite reasoning on political matters often itself fails to stray from rigidly fixed starting positions – a habit directly contrary to deliberative democratic ideals. In a significant irony, many elites put their greater intellectual resources towards the factual cherry-picking and logical sophistry required to bend new information to their existing ideologies and partisan loyalties.⁵⁵

Third, decision-making institutions themselves might cause elites to decide second-order matters incompatibly with deliberative democracy. One example, which I explored in past work, is the ubiquitous constitutional proportionality test. Standard forms of proportionality discourage the complex, reciprocal forms of decision-making described above as essential to deliberative democracy. Proportionality testing subjects deliberative democratic initiatives to a reductive analysis, which:

disassembles democratic deliberation into component parts – with popular expression on one side, and rigour, reflection, cooperation, policy holism, etc, on the other. Indeed, this kind of analysis presupposes that such parts cannot be reconciled ... [P]roportionality therefore often leads to a miscategorisation of deliberative democratic projects. Understood more thickly, as democratic deliberation, democratic speech is a coherent compound of elements.⁵⁶

Proportionality has become entrenched throughout key areas of constitutional reasoning (as we saw in section B). Its reductivity is part of its appeal: needing to settle multi-faceted problems in relatively simple and final terms, judges and policy-makers frequently rely on proportionality testing to simplify their task. However, for deliberation, simple is not always best.

Fourth, as Carolyn Hendriks observes, governmental organisations and other elite groups may favour deliberative democratic institutions selectively, based on whether they can identify a strategic case for doing so – for instance, ‘when it presents an opportunity to improve public relations and promote trust, distribute information and market products, sell and legitimize expertise, or advocate for a particular cause’.⁵⁷

Fifth and finally, the decisional procedures, structures and values maintained by substantially autonomous elite classes of decision-makers – such as public servants – risk rupturing the Habermasian two-track cooperative relationship between elites and the general public. On the one hand, policy-making often parallels the ideals of elite-led deliberative democracy, in which elites gauge broad public views and translate these into coherent law and policy norms. For instance, general-public values potentially inform policy-making through formal processes of voting and consultation. Constitutional elites can also take informal and impressionistic notice of public sentiment. On the other hand, public servants are often viewed – and view themselves – as specially learned and apolitical actors in the formation of law and policy.⁵⁸ Their policy-making might therefore involve not merely elite reception of public views, but elite dominance of the process from within a closed system. The system may be governed by, and largely focused upon, internal norms and sources of decision-making.

⁵⁵ Dan M Kahan, ‘Ideology, Motivated Reasoning, and Cognitive Reflection’ (2013) 8(4) *Judgment and Decision Making* 407, 417–18. Kahan describes these principally as processes of self-deception rather than as conscious efforts to mislead others.

⁵⁶ Levy and Orr, above n 2, 50.

⁵⁷ Hendriks, above n 7, 593.

⁵⁸ For discussion of this and related notions, see, e.g., H George Frederickson, *The Spirit of Public Administration* (Jossey-Bass, 1997).

E. CONCLUSION: SOLVING THE PROBLEM

This chapter has used a large new data trove to query whether constitutional elites – albeit of a certain kind and in a particular national and institutional setting – are potentially disruptive to the aspirations of deliberative constitutionalists. In the result, it has uncovered attitudes and prejudices of a class of constitutional elites that should indeed be concerning. Many such elites appear to favour deliberations largely abstracted from democratic decision-making. This is an important result especially where, as in Australia, such elites exercise considerable control in policy-making and in the design of policy-making systems.

Perhaps none of the canvassed causes of the elite problem, however, is intractable. Each identifies a dominant attitude among certain constitutional elites or an institutional condition preventing elite deliberation from meeting particular ideals. Each of these problems therefore reflects choices – whether attitudinal or institutional – that might be open to revision. Constitutional elites who are unaware, for instance, of the capacities of their non-elite counterparts to deliberate might be disabused of their misconceptions. Moreover, institutions that reinforce partisan or reductive decisions can be reformed. While such solutions are difficult to implement, at root they present rhetorical challenges. Thus, there may be benefit in better communicating the counter-intuitive goals and methods of deliberative constitutionalism, including those outlined throughout the present volume.