2016 AUSTRALIAN STUDY OF PARLIAMENT GROUP NATIONAL CONFERENCE

ADELAIDE, AUSTRALIA

5 OCTOBER – 7 OCTOBER 2016

ADDRESSING THE BALANCE:

THE EXECUTIVE AND THE PARLIAMENT

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INTRODUCTION

This paper explores some important aspects of the relationship between the parliament and the executive in Australia, paying particular attention to the role of upper houses and committee systems in ameliorating increasingly un-feted executive power. In addition to considering the theoretical balance that should, or could, exist between the parliament and the executive, it seeks to examine the imbalance between them. The second part of the paper considers the current situation in Western Australia, highlighting worrying trends and discussing case studies which provide some cause for hope.

A strict constitutional definition of Parliament includes the Governor General or Governor, as well the upper and lower houses. However, in order to focus on the relationship between the parliament and the executive in the parliamentary sphere the role of the Governor excluded from this discussion. Similarly, the role of Governor has been excluded from discussions of the executive, which in this paper refers to the Ministry and the Bureaucracy (or Public Service).[1]

IN THEORY — RESPONSIBLE AND ACCOUNTABLE GOVERNMENT

When considering modern democratic states a key assumption is often made about the manner in which power relationships are organised, namely that those who govern should be in some way made accountable and answerable to those who are governed[2], as Emy and Hughes explain:

> The whole issue of accountability is a crucial one for the liberal democratic state because loss of accountability strikes at the basic theoretical justification offered for this kind of polity. The legitimacy of such a state is closely related to its claim to be able to control the exercise of power effectively by legal and rational (or constitutional) means. Loss of accountability implies loss of democratic control over those in charge of the coercive powers of the state.[3]

In the Australian context, the executive should be held directly accountable to the parliament. Parliament is central to the whole rationale of the system of responsible government and to the liberal ideals that the system is said to embody.[4] In theory there is a chain of responsibility that indirectly holds the government and the public sector accountable to the electorate: the public sector are responsible to the government; the government to the parliament; and the parliament, in turn, to the voters.[5] In theory, this chain of accountability allows for the governed to hold the governors to account. This system of linked accountability is most commonly referred to as ‘responsible government’, the characteristics of which have been provided by the Westminster model:

> The framers of our constitution, almost as a matter of course, took the Westminster model of responsible government (influenced by the colonial experience and by the experience of the United States of America) and

> fitted it into the federal scheme. Thus the role and functions of the House of Representatives are direct derivatives of the House of Commons, principal features being the system of Cabinet Government and the traditional supremacy of the lower House in financial matters.[6]

The adoption of the Westminster system also delivered bicameral legislatures in Australia in the which the dominant chamber is the lower house, where governments are formed and finances are controlled.[7] In contrast to Westminster, where the House of Lords is unelected and subordinate in authority to the House of Commons, the Federal Parliament and State Parliaments' upper houses hold powers that are scarcely less then their respective lower houses.[8]

In theory, parliamentary procedures and practices provide the parliament with the tools to scrutinise legislation and hold the executive and its agencies to account.[9] Established parliamentary procedures, practices and bodies such as Question Time, committee systems, censure motions and urgency debates are potentially important to the checking and restraining role the legislature can play.[10] Despite the theory of 'responsible government' adopted in Australia, in practice the relationship between the executive and the parliament deliver a very different reality.

IN PRACTICE — CONSTITUTIONAL FOLLY AND THE DOMINANCE OF THE TWO PARTY SYSTEM

In contrast to Westminster's loose and uncodified set of constitutional rules, practices, conventions and ordinary laws of parliament, the Australian Commonwealth Constitution is a single, clearly identifiable document that sets out the system of government.[11] However, the constitutional founders did not define the various parliamentary and executive roles, or how they should interact, as Chalmers and Davis explain:

> In the Federation debates, most speakers drew on a traditional British language of ministerial responsibility and accountability. They appeared to expect an important role for the Parliament in holding the Executive to account. But the founders failed to codify that role or to provide the Parliament with accountability mechanisms outside simple majority rule (for example, by insisting on an independent speaker, committees chaired by non-government members, individual election of Ministers or confirmation of senior public service and statutory appointments by parliament).[12]

A century on from federation it is clear that the executive has come to dominate the parliament. This is a direct result of the rise of the disciplined modern political party, a development related to, but postdating, the Constitution.[13] During the first decades of the twentieth century, when lower house party majorities became secure, the parliament was made subordinate to the party room of the governing executive. The successful acquisition of dominant parliamentary power by political parties was made possible by the "folly of an ambiguous constitution".[14]

It is important to note that party control is arguably more enforced in Australian parliaments than in many other parliamentary jurisdictions. As Harry Evans suggests, such is the party control over members of Australian parliaments that its party system is qualitatively different from those of other countries.[15] In Australia, unlike the United Kingdom, there is no such thing as a backbench rebellion, as every member of parliament 'is bound to vote for the party every time on pain of excommunication'.[16] Members who 'cross the floor' to vote with the other side do so in the knowledge that they are seriously endangering their political future.

The reality of strong party control has lead some to argue that "'responsible cabinet government' disguises a reality that would better be described as 'responsible *party* government'".[17] Thus in practice, the ideal primary conflict between the executive and the parliament is supplanted by the *real* political battle between the the government and opposition parties, for as long as the governing party holds its majority, the executive are more accountable to their party than to the parliament.[18] By facilitating executive dominance, the rise of the rigidly controlled two party system has profoundly undermined the notions of responsible government upon which the parliament was designed.[19]

WESTERN AUSTRALIA — DANGEROUS LEGISLATIVE DEVELOPMENTS

The Western Australian state's parliamentary structure is set out in the Constitution Acts which, like its federal counterpart, provides a framework for parliamentary government.[20] Crucially, the State followed the tradition of British parliamentary government in not defining the office of Premier, the role of Ministers and their relationship with the Parliament and Governor.[21] This has resulted in the development of executive dominance of the parliament in much the same manner as discussed in the national context, which, as we shall see, is evident when examining trends in legislation, such as the increasing use of Henry VIII clauses and skeletal legislation.

Henry VIII Clauses

Henry VIII Clauses are defined as clauses in acts of parliament authorising the executive branch of government to make secondary legislation that amends or repeals provisions in primary legislation.[22]

One of the issues confronting parliament is the inability or the unwillingness of the executive to act transparently regarding when and why such clauses have been used. The current Chair of the Standing Committee on Uniform Legislation and Statutes Review has stated that there appears to be "a constant issue about Henry VIII clauses being put into various bills, and also a lack of reference to those clauses in the explanatory memorandum".[23] The Committee summed up the issue after identifying a Henry VIII clause that was not declared in the *Gene Technology (Western Australia) Bill 2014*:

> The Executive is accountable to the Parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is fulfilling its duty to the Parliament of full, proactive disclosure on legislation, ensuring it is fully briefed. A quality explanatory memorandum, which should contain an explanation for any provision within a bill that appears to infringe the terms of reference of the relevant parliamentary committee scrutinising the proposed legislation, will assist the Executive in fulfilling this duty.[24]

The executive's lack of transparency with regard to Henry VIII clauses suggests a growing contempt for the parliament. It also underlines the enormous information advantage that the executive has over the parliament. Overtime the volume and complexity of legislation has increased making it increasingly difficult for the parliament and its members to provide the required level of scrutiny to government legislation and proposals.[25]

The *Rail Safety National Law (WA) Bill 2014* is a classic example of Henry VIII clauses in action in the Western Australian Parliament. The Uniform Committee identified two Henry VIII clauses in its enquiry into the bill, the first of which, subclause 50(2), stated:

> (2) Regulations made under subsection (1) may provide that specific provisions of the Rail Safety National Law (WA) —
>
> (a) do not apply; or
>
> (b) apply with specific modifications, to or in relation to any matter.[26]

In this case, the explanatory memorandum for the bill did not draw the parliament's attention to the significance of this subsection, merely stating:

> **Transitional regulations**
>
> This clause will provide for regulations to be made to address transitional matters.
>
> Subclause (1) will provide for the Governor to make transitional regulations where there is no sufficient provision in the Act.
>
> Subclause (2) will provide that regulations under subclause (1) can disapply provisions in the Rail Safety National Law (WA), or apply them with modifications.[27]

Subclause 50(2) clearly enables the National Law to be amended by regulation rather than by an act of parliament. Although the offending clause was transitional in nature, concerns were raised that there was no limit to the period of the effect of the transitional regulations. The Committee therefore recommended "an amendment to clause 50 of the *Rail Safety National Law (WA) Bill 2014* to provide for regulations made under clause 50 to expire after a period of no more than 3 years".[28]

Furthermore, the Committee identified another Henry VIII clause at subsection 7(3):

Railways to which this Law does not apply

(3) Despite subsection (2)(b), the national regulations may prescribe a specified railway of a class referred to in that paragraph to be a railway to which or in relation to which this Law applies.

Subsection 7(2)(b) provides:

(2) This Law does not apply to or in relation to the following railways —

(b) a railway that —

(i) is used only for the purposes of an amusement structure; and

(ii) is operated only within an amusement park; and

(iii) does not operate on or cross a public road; and

(iv) is not connected with another railway in respect of which a rail transport operator is required to be accredited or registered under this Law.

These subsections clearly constitute Henry VIII clauses as they enable the National Law to be amended by regulation.

In their consideration of this bill the Committee identified "a concerning trend in the increasing use of Henry VIII clauses in national scheme legislation".[29] When discussing the use of Henry VIII clauses the State's Attorney General gave an insight into the executives' attitude to the principles of parliamentary sovereignty:

> In an increasingly complex legislative environment, it is not always possible to have effective lawmaking without some modification or compromise of principle. We have that quite frequently with the use of regulations, and those are quite an accepted part of devolving the attention to minutiae in order that acts of Parliament can be made to work and massaged as necessary without the necessity of bringing bills before the Parliament.[30]

Skeletal Legislation

In Western Australia there has been a well observed trend towards increasingly skeletal Acts, accompanied by increasingly comprehensive delegated legislation. The Standing Committee on Legislation provide the following definition of this type of legislation:

> Legislation can be described as 'skeletal' where it covers major policy matters and principles in the barest terms, and leaves detailed, substantive matters, to be set out in regulations. These regulations are typically made by the Executive government, sometime after the legislation has been passed by the Parliament. Legislation that is skeletal in nature interferes with the generally accepted fundamental legislative principle that Parliament is the principal legislative body in the State; and, adversely impacts on the ability

> of Parliament to scrutinise Executive government. This has been documented in numerous publications and reports.[31]

The increased use of skeletal legislation highlights the infringement of the doctrine of separation of powers in the context of a society governed by the 'rule of law'. In a representative democracy the representatives of the people — as a parliament — make the laws governing the people and the executive administers those laws. Skeletal legislation is generally designed to leave policy decisions to the executive.[32] There is an obvious cause for concern at the impact of this trend on the Westminster system of representative democracy.

A former Chair of the Uniform Legislation and Statute Review Committee has identified a number of factors contributing to the increased use of skeletal legislation:

- pressure to meet Council of Australian Governments (COAG)/National Seamless Economy Intergovernmental Agreement deadlines as well as Commonwealth requirements tied to state grants, regardless of the readiness of the legislation;
- an inability to reach agreement on how to legislate on issues and the hope that it will be resolved at a later time;
- bureaucratic frustration in getting amendment legislation on the government's legislative agenda; and
- a lack of respect for the institution of Parliament due to a belief that parliamentary scrutiny takes too long.[33]

A recent example of skeletal legislation in Western Australia can be seen in the *Workforce Reform Bill 2013*. The highly controversial bill amended multiple acts in order to:

- introduce the requirement for the state Industrial Relations Commission and Salaries and Allowances Tribunal to consider specified Government financial matters, including the Government Public Sector Wages Policy Statement, when making decisions; and
- introduce a scheme to provide a new statutory power for involuntary severance of public sector employees in certain circumstances. The details of the scheme are not provided for in the Bill, but are to be provided for in Regulations and Commissioner's Instructions.[34]

In its inquiry into the bill, the Uniform Legislation and Statute Review Committee noted that the new regulation making powers proposed with respect to a 'registrable employee' and 'registered employee' were broadly drafted. This is evident in the proposed definition of 'registrable employee' at clause 13:

registrable employee means —

a) an employee who is surplus to the requirements of a department or organisation; or

b) an employee whose office, post or position has been abolished; or

c) an employee in a category prescribed by the regulations.[35]

Given that drafting of the proposed regulations had not yet commenced, it was impossible for either the Committee or the Parliament to speculate how broad, or narrow, a provision such as 'an employee in a category prescribed by the regulations' would be manifested over time. Although the Committee attempted to obtain guidance on this point from the Public Sector Commission, the Commissioner made the reasonable observation that regulations would be disallowable instruments and, therefore, subject to parliamentary scrutiny. The response from the Commissioner highlights the worrying attitude of the executive which leaves vitally important policy decisions, such as defining employees who may be made involuntary redundant, to be dealt with by regulation.

The *Occupational Licensing National Law (WA) Bill 2010* is perhaps the most extreme example of skeletal legislation of recent years. So extreme, in fact, the Committee took the unusual step of recommending that the Bill not be passed in the form it was presented to the Committee.[36]

The Bill arose out of COAG signing an Intergovernmental Agreement for a National Licensing System for Specified Occupations, with Victoria being nominated as the host jurisdiction for the legislation. The Bill was passed by the Victorian Parliament in September 2010, with the remaining States and Territories to pass the legislation in their parliaments. The purpose of the national licensing system was to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas.[37]

Having conducted a detailed inquiry into the bill, the Committee's report could not have been more emphatic about its skeletal nature, noting that the Bill is 'so skeletal that the Department of Commerce described its responses to the Committee's attempts to ascertain the purpose and effect of provisions as a "mantra" of "this is to be developed as part of the national regulations".'[38] The skeletal nature of the Bill was further criticised by the Committee:

> The Bill does not introduce national occupational licensing. It proposes a process for developing a national licensing system. Other than that, it largely consists of a list of matters about which regulations may be made. It is not uncommon for uniform legislative schemes to leave detail to regulations. However, the Bill goes beyond this. It requires the substance of the licensing scheme to be in regulations.[39]

The Committee concluded that the Bill was too uncertain to be good law. In its underdeveloped state, the advantages of the proposed licensing system were not sufficiently

clear to warrant the degree to which parliamentary sovereignty would be lost under the Bill.[40] The Committee identified a long list of concerns with the Bill, of which included the following sample:

> - Uncertainty as to when a licence is required as decisions have not been made - lack of clarity as to what activities will be licensed and inconsistent use of terms in the Bill;
> - Uncertainty in exercise of regulation-making power as decisions not made - disclosure of criminal charges and Henry VIII clauses;
> - Uncertainty in exercise of regulation-making power and gaps in legislative framework as interim decisions not reflected in the Bill;[41]

In evidence the Department of Commerce submitted that skeletal type legislation, where more detail would be set out in regulations than normal, is proposed as the new national model for uniform legislation, because it 'is very difficult to get legislation through eight Parliaments in any form of timely manner and very complicated, so that to be efficient and effective and obtain the advantages of a national scheme, it is appropriate to put more detail into regulations than would be normal'.[42] The Committee responded as follows:

> The Committee does not support the view that State Parliaments, and in particular this State Parliament, need to accept the model used in this Bill as the new model for uniform legislation. The model unnecessarily abrogates State Sovereignty, lacks detail and is bad law. To ask a State Parliament to pass legislation in the form of this Bill because the jurisdictions have not been able to sort out their differences and agree to the details of the uniform scheme is absurd. If the Commonwealth and State jurisdictions want to implement uniform legislation they need to work out the detail of the scheme and include this in the Bill before presenting a Uniform Bill to Parliament for adoption.[43]

ADDRESSING THE BALANCE — THE UPPER HOUSE AND ITS COMMITTEES

As we have seen, the design and operation of key elements of Australia's political system makes the balance of institutional power required for accountability difficult to realise.[44] Fortunately, in most Australian jurisdictions there exists powerful upper houses with the potential to act as counterweights to executive dominated lower houses, and ensuring that the vitally important roles of reviewing legislation and holding the executive to account are adequately performed.[45] The advent, in the second half of the twentieth century, of proportional representation in most of Australia's upper houses has resulted in partisan compositions that differ more reliably from that of lower houses.[46] Since the party systems in the Australian upper houses have evolved to make it increasingly unlikely for either major party to achieve a majority, upper houses are less able to be dominated by the executive.[47]

Voting reform combined with democratisation reforms, such as equal universal suffrage, compulsory voting, equal apportionment of electoral districts and regular redistributions, have lead upper houses to become increasingly active and credible in the performance of key parliamentary roles.[48] By comparison with lower houses which sufferer from entrenched executive party dominance, upper houses operate as houses of review considering the detail of legislation and effecting significant legislative revision.[49] Crucially, upper houses have also developed committee systems dedicated to the scrutiny of legislation, both primary and secondary. As a result, as Bruce Stone argues, 'there is little doubt that both the quantity and quality of review and scrutiny are superior in upper than lower houses throughout Australia.'[50] The important role that upper house committees can play in scrutinising legislation and holding the executive to account is evident in the two Western Australian upper house inquiries discussed below.

Legislative Scrutiny

The Legislative Council's Standing Committee on Legislation's inquiry into the *Criminal Investigation Amendment Bill 2009* is a high profile example of a committee having a significant impact on government legislation and policy. The Bill proposed to introduce extreme changes to what are known colloquially as 'stop and search' powers in Western Australia, by removing the requirement for 'reasonable suspicion' on the part of a police officer when undertaking a search of a person. Thus, a police officer would be permitted to 'stop and search' a person who are in a 'prescribed area' without any grounds.[51] The bill provoked tension between maintaining personal liberties and expanding police powers to improve public safety and was characterised as a case of the executive overreaching its mandate for law and order.

The inquiry presented the Committee with difficult issues to consider. These issues included how the Bill would change the law in relation to police stop and search powers; as well as the policy of the Bill put forward by the executive and the justifications for it, drawing from, among other things, the experience of the United Kingdom and, to a lesser extent, Victoria.[52] After considering these issues, a majority of the Committee could find no justification for the Bill, with a minority being of the view that there may be circumstances in which the Bill could be justified. Overall the Committee was of the unanimous view that the Bill ought not to proceed in its current form.[53]

The committee inquiry proved a lightning rod for community and civil society opposition to the Bill, with the majority of submissions and expert evidence provided opposing the Bill. The committee's inquiry was the catalyst for the Government eventually abandoning the Bill and softening its policy on increased police powers. The committee's role in the demise of the Bill demonstrates the importance of a strong upper house committee system as an instrument for the scrutiny of legislation.

Transparency and Accountability

The Legislative Council's Standing Committee on Public Administration's inquiry into the failure of wooden electricity poles demonstrates the committee's ability to hold the executive and Western Power, a government trading enterprise, to account. The Committee's report highlighted a serious lack of action by government and directly led to the resignation of a number of senior officials at Western Power.

The inquiry highlighted an increasing loss of confidence in Western Power's management of its assets and growing concern over the safety and reliability of the wood pole network. The Committee found that the wood pole network had suffered from decades of under-investment. The Committee was disturbed to discover that no single agency of government had a comprehensive oversight role with respect to the performance of publicly owned energy utilities. Nor did any single agency of government have a comprehensive oversight role with respect to the regulatory framework within which energy utilities operate.[54]

In its findings the Committee recommended a number of regulatory changes and reviews within the energy utility sector, the bulk of which the executive agreed to undertake.[55] The Committee's inquiry led directly to a performance audit, carried out by the Auditor General, that was focused on assessing Western Power's progress in addressing the concerns of its regulators and the Committee. The performance audit found that improvement had taken place although challenges still remained.[56] Here we see the an upper house committee playing a crucial role in holding the executive to account.

CONCLUSION

We have seen that constitutional ambiguity at a federal and state level has set a pattern for executive dominance of parliaments in Australia for over 100 years. Australian parliaments with their relatively low number of members, usually possessing single-party majorities in their lower houses, are dominated by political parties that maintain higher levels of discipline than in comparable democratic countries.[57]

It seems extremely unlikely that either of the major parties would contemplate radical reform of the lower house, at either a state or federal level. Instead the existence of strong upper houses seems the most promising avenue for addressing the balance between the executive and the parliament, thus improving the quality of parliamentary democracy in Australia.[58]

ENDNOTES

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