

Holding Oppositions to Account: The Slow Surrender of Parliamentary Democracy

As uncomfortable as it may be for many in this room, a politician's *raison d'être* is the continual accumulation of power. With the increasing centralisation of power from the states to the federal sphere, from the cabinet to the leader's office and their inner circle of advisers, one could be forgiven for thinking that executive governments have wrested power from their Parliaments. What this paper will demonstrate is that in fact governments have not actively seized this power, but Parliaments have ceded it.

As constitutional scholar Greg Taylor wrote, there exists a 'mutual non-aggression pact reflecting a convergence of interests between governments and oppositions. Today's opposition is tomorrow's government'.¹ In knowledge of this, oppositions are reluctant to bind a government in a way that they might one day be bound. Despite reams of Hansard devoted to claims of "secretive and evasive governments", a large share of this blame lies at the feet of oppositions who refuse to fully utilise the mechanisms of Parliament to hold the government to account.

This paper will briefly demonstrate why Parliaments are unquestionably supreme over the Executive government drawn from its benches. It will then proceed to hold opposition parties to account for transforming the Parliament and its committee system from the highest watchdog in the land into a spitting, hissing kitten. Along the way, I will point to a range of measures that legislators should utilise to ensure a healthier and more robust democratic exchange.

Executive Supremacy?

The question as to whether governments or parliaments are supreme can be dealt with through a simple question. Has anyone ever heard of the phrase 'executive supremacy'? The only place one would hear of this doctrine would be in nation states such as Fiji, or perhaps in the protracted battle between Prime Minister Morgan Tsvangirai and President Robert Mugabe in Zimbabwe. In all healthy democracies, of which Australia's federation is blessed to possess, the doctrine of parliamentary supremacy is what is

¹ Greg Taylor *The Constitution of Victoria* Federation Press 2006 at 168.

taught in our classrooms and in our textbooks. Popular culture and mass media do confuse the balance of power between the two, giving the impression that the government is indeed supreme because it spends our hard-earned money. Yet in law, the government's cash flow is solely gifted to the government from the Parliament. As the High Court recently reiterated in *Pape*, any appropriation of money without Parliament's approval is illegal.²

In practice, however the government, in the style of a demanding teenager says 'cough up' while the Parliament, as the compliant parent wanting to avoid a quarrel, but always willing to grumpily complain about it says 'how much?' Any threat to this annual supply by an upper house or disgruntled crossbenchers in a minority government would cause a constitutional crisis - as those of you older than me would have observed in 1975. Since this derogation from Westminster tradition occurred, state constitutions have expressly removed appropriations and taxation powers from its Houses of Review. Obviously, amending the federal constitution is a far more difficult task, so this disqualifying power over the 'ordinary annual services of government'³ is still available to the Senate, but the point should be made that in the States it has been the legislatures confining their powers over supply to its lower houses, and for fair enough reason. This point reinforces my theme, that it is Parliaments who are relinquishing its power, not necessarily governments taking it.

When it comes to one exerting power over the other, the law is clear, the Parliament wins. The High Court's joint judgment in *Re Residential Tenancies Tribunal (NSW)* stated this quite succinctly when they said 'indeed, it is the very nature of executive power in a system of responsible government that it is susceptible to control by the exercise of legislative power by Parliament.'⁴ Legislative power here can have two meanings, firstly the power of the laws made by the legislature which directly regulates executive behaviour. This is what the High Court was concerned with in this intergovernmental immunities case and is relatively straight forward. The second meaning of 'the power of the legislature' concerns the legislature as a body – the Parliament, in which the

² *Pape v The Commissioner of Taxation* (2009) 238 CLR 1.

³ Section 53 of the *Commonwealth Constitution Act 1901*.

⁴ *Re Residential Tenancies Tribunal (NSW); Ex Parte Defence Housing Authority* (1997) 190 CLR 410 at 441.

government members must sit.⁵ The powers of the legislature as a body to control the Ministers in a House are powers for the House alone to define. This is an incredibly vast source of power over the executive. It is made even vaster by the fact that the only aspect in which the courts oversee this power is to examine if the specific power exists in standing orders, legislation or age-old case law and whether the scope of the power correlates with the disputed actions in question. The creation and prosecution of such powers are questions solely for the Parliament. As McHugh J stated in *Egan v Willis*,

‘A house of the...parliament may require a minister of the Crown to answer questions or provide information, and has a power to suspend a member who obstructs its business. It is for the House alone to determine whether its business has been obstructed.’⁶

This power even goes so far as to exempt sections 53 and 54 of the federal constitution from judicial review. These sections establish procedures for bills dealing with appropriation between the Houses. The High Court has twice ruled⁷ that procedures such as proposed laws for taxation or appropriation could originate in the Senate, and perhaps by implication, in Legislative Councils across the country. This is despite express statutory provisions to the contrary because such directions are interpreted simply as a guide to inter-House dispute resolution. If a lower house were to accept a taxation bill, or an amendment to an appropriation bill by an upper house it will have waived its privileges and sanctioned the other House’s action.⁸ The legislation, once proclaimed is of full legal effect. This principle of ‘proposed laws and their procedures’ being the sole dominion of the legislature could even extend so far as to one day render manner and form entrenchment provisions in State Constitutions meaningless. For my part I hope that a state legislature one day decides to ignore these restrictions. A later Parliament should not have to jump over a bar that the enacting Parliament never had to meet.

The powers of the Parliament to control the executive are immensely broad and clearly a one way relationship, so the obvious question arises, why does the executive have so much power that escapes the surveillance and enforcement of the Parliament? To answer

⁵ Putting aside the ability for Ministers to sit outside the Parliament for very limited time periods. For example, section 51 of the Victorian Constitution allows a Minister of the Crown to hold office for three months without sitting in the Parliament.

⁶ (1998) HCA 71 at 424

⁷ *Osbourne v The Commonwealth* (1911) 12 CLR 321 and *Northern Suburbs General Cemetery Reserve Fund v Commonwealth* (1993) 176 CLR 555.

⁸ Peter Hanks, Patrick Keyzer & Jennifer Clarke. *Australian Constitutional Law 7th Edition*. Lexis Nexis at 278.

that question, we must in large part turn towards opposition parties, who set the parameters for how a government will make its decisions and administer its powers.

Opposing an Opposition

As Ian Killey identified in his book on Constitutional Conventions, the concept and phrase of ‘His Majesty’s Opposition’ was originally a derisive title employed by progressive reformers of the British Parliament who saw the main opposition party consistently adopting identical policy positions to “His Majesty’s Government.”⁹ So it is fitting that this critique on oppositions should begin with its semantic origins; of oppositions aligning with governments to water down the risk of Parliament exposing uncomfortable information involving the government of the day.

This proposition runs contrary to the generally agreed purpose of an opposition. To hold a government to account, to discover and prosecute any errors, whether they were committed by accident or malign intent. In truth, the meta-purpose of opposition parties (except for perhaps the Australian Democrats) that overrides this accountability purpose is for the opposition to replace the government. Any strategic conflict between the ‘accountability purpose’ and ‘replacing government purpose’ of an opposition will be resolved invariably in favour of replacing government. A deeply unfortunate consequence of this tension is the weakening of Parliament’s inquisitorial powers.

Structural flaws in Parliament’s current information gathering methods exist in every crevice one seeks to look, whether it be Speakers and Presidents being drawn from government benches, whose duty to be the impartial umpire between the Parliament and the Executive is tarnished *ab initio*. This has flow on consequences that affects the quality of debate, the quality of answers to questions or responses to motions and the petulant manner in which Members often behave. Such appointments should not be made along party lines, but on merit, with a fiduciary-like duty owed to the House as a whole, not just to those who sit on the presiding officer’s right-hand side.

Other shortcomings can be found in Committees, which are the engine rooms of inquiry but suffer from atrophy whenever the majority and Chairs are occupied by government

⁹ Page 58

members. As a result of government control, the terms of inquiry are moulded in their favour and simple procedures can thwart desired outcomes because of something as simple as how witnesses are questioned. A Chair might truncate a dissecting, forensic approach to gathering information, or move onto the next questioner without a satisfactory answer being provided. There is also the well-known problem of government's ignoring timelines for responding to committee reports, recommendations and question on notice deadlines set down in standing orders.

These are all symptoms of a sub-standard culture in which Parliament refuses to flex its muscle to ensure a greater and more efficient flow of information – information creates knowledge which is power. This power over information, in the spirit of the highest constitutional principles must be separated between these two arms of the state. Unfortunately, Members of Parliament prioritise the pleasures of the executive over the primacy of Parliament. When government members are defiant of parliament's will and the Parliament refuses to assert its authority, the Parliament not only sanctions such behaviour, it encourages it. Our current parliamentary culture is a result of all these little defiant acts, like sedimentary layers built on top of each other that have been tolerated by the Parliament. This has become a quasi-breeding ground for executive power all because oppositions don't utilise the full powers available to them for fear that they may one day be used against them in government

This can quickly be summarised by a recent case study of the Standing Committee into Finance and Public Administration's inquiry into the Windsor Hotel that occurred here in Victoria last year. A ministerial adviser accidentally sent a media plan to the ABC which showed how the government would establish a fake consultation process on the development of the Hotel just across the road. The responsible minister refused knowledge of the plan and distanced himself from his adviser, in much the same way the former federal foreign minister did when his staff received a fax regarding AWB's oil for food bribes. The Attorney-General defied the committee's summons to appear on the basis of a convention that staff cannot be questioned under any circumstances. This so called 'convention' is precisely what I refer to as these sedimentary layers of deferral to the executive. Even if such a convention really did exist in the twenty-odd years since adviser positions were created, it does not remove the Parliament's legal power to

compulsory summons any witness it wants, other than a privileged Member of one of Australia's other 12 Houses.

The Committee subsequently agreed with the Attorney-General that staffers could not be questioned and appointed the Ombudsman to question the staff. So the Committee came to the distorted conclusion that the Ombudsman, whose powers derive from Parliament, apparently possesses a power that the Parliament itself does not. As a result, the interviews were conducted in secret instead of in public, the Parliament tacitly reinforced this 'convention' and the opposition that refused to assert the Parliament's power has since become the government. Their decision not to enforce parliament's power of compulsory summons was made with their eye on government and they have been rewarded for their caution.

Since coming into government, the Liberal party voted against a Greens' amendment to have non-government chairs and majorities on committees despite supporting the identical amendment when in opposition four years earlier. To their credit the government have promised reform to the *Freedom of Information Act 1982*. They will hopefully reign in the talismanic properties of 'commercial-in-confidence' which has increasingly allowed governments to contract information out of public disclosure. They have also promised to establish a Parliamentary Budget Office similar to the Federal Parliaments recent reforms which indeed strengthens parliament at the expense of the executive's monopoly on authoritative economic advice. Such reforms are indeed welcome. A final reform which has been a poignant lesson was amending the Assembly's standing orders to make a minister's answers relevant. The amendments have had no effect; the House is as unruly as ever because the leaders of the government and opposition parties have not pushed for a cultural change within their ranks so that parliamentary exchanges are respectful and informative instead of aggressive and empty. Behind any legal change, must be a cultural change, which brings me to my conclusion.

Culture Change

When I first began to write this paper, I believed that many of the problems I identified could not be solved in the 3 unicameral Parliaments because a House of Review was necessary to hold a government accountable. On deeper reflection I realised that

irrespective of the number of Houses and who they are controlled by, empowering a Parliament is only possible if an opposition genuinely craves parliamentary reform, and when forming government, enact those changes in standing orders, legislation and most importantly through Member's behaviour and ministerial practice.

When Odgers, as Clerk of the Senate in 1965 proposed a committee system, based on his research in Washington, the Cabinet Secretary Sir John Bunting advised that such a change would be 'erosive of government authority and responsible government'.¹⁰ The report was shelved. In Opposition, Lionel Murphy managed to convince his party that such a check on government power, with no limit to the information that could be gathered was a reform worth pursuing. Once in government, and with the deciding vote from Liberal Senator Ian Wood who crossed the floor, the Parliament was empowered to extract information from the executive in a way that they had never been able to do before.

This is what inspires hope, because while old habits die hard, all these parliamentary blemishes can be easily remedied so that a government will be more susceptible to having information it wants concealed to be revealed. At a time when governments have become masters at managing information flows, such reforms are crucial – a stronger, more assertive and respectful parliament will enhance a government's performance which ultimately is what we all want. All it takes is a firm commitment by an opposition to seek a cultural change when they form government and the other sides of politics will be forced to comply or be left looking stupid carrying the bad habits of a bygone, weaker era of parliamentary supremacy.

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¹⁰ Harry Evans 'My 40 years of Canberra Joy' in *Crikey* 24 July 2009.