

The Executive versus the Legislative Council: A Case Study from the South Australian Parliament

Dr Jordan Bastonj

University of Adelaide

This paper examines the nature of conflict and tensions between the Government of South Australia, and the upper house of that state's parliament, the Legislative Council. The paper outlines the current balance of power between these two bodies, and explains how the nature of the Legislative Council leaves it in a position to cause frustration for the government of the day. The paper then moves to consider a case study, which involves the conflict that occurred between the Government and the Legislative Council over committees of the Council that had the potential to cause embarrassment to the Government in the lead up to an election. The paper demonstrates the strategies, centred around the early prorogation of parliament, employed by the Government to successfully undermine the work of the committees, and considers what this means for the balance of power between the Government, and the house that is supposed to act as a check on it.

Introduction

This paper will consider the nature of the relationship between the Government of South Australia, and the upper house of the South Australian parliament, the Legislative Council, and show how the Government attempts to maintain supremacy over the Council. The conflicts that can occur between the Government and the Legislative Council will be examined through a case study of the Legislative Council's attempt to apply scrutiny to a prominent government minister.

The case study will demonstrate the Government successfully using the powers that it possesses to stymie legitimate, though potentially politically embarrassing, parliamentary committees, and so will demonstrate the ways in which the Government deploys the powers that it possesses, as well as rhetoric and perception management, in its conflicts with the Legislative Council. The Rann Government provides a good example of the ways in which governments can attempt to delegitimise political institutions that frustrate and oppose them.

Westminster parliaments are dominated by the executive (Lijphart 1984, 6). This is especially true of Australian parliaments. While all Westminster derived parliamentary systems are noted for their high level of party cohesion, the Australian parliaments are the exemplars of strong party cohesion and discipline. It is highly unusual for members of one major party to 'cross the floor' and vote with members of the opposing major party (Jaensch 1986, 32-45). This places a great degree of power in the hands of the government of the day.

The government in parliament is powerful. In order to stay in office it needs to maintain a majority in the lower house. Thanks to the high degree of party cohesion detailed above, it is generally easy for a government to be sure of maintaining a majority on the floor of the lower house, leaving it unfettered to act as it will in that chamber, subject to the standing orders and public opinion. Even when the government is in a minority position, it still tends to dominate this chamber. Because of that, lower houses are often reduced to chambers in which rhetoric and theatrical displays flourish, but that nevertheless can offer no substantial impediment to government action.

This is where upper houses step in. In the Australian parliamentary system, upper houses are generally constituted through proportional representation. This enables a greater diversity of parties to be represented, which leads to a chamber that is generally not controlled by the government of the day, and is therefore more independent. Even in cases where the government of the day does find itself possessed of a majority in the upper house, it can still find a more independent spirit amongst its members. This greater degree of independence allows upper houses to act as a check on government in a way from which lower houses are generally constrained. The executive can be checked both in a policy sense, by having their legislation exposed to parliamentary debate and examination in a chamber with a greater diversity of representation, and therefore opinions, and by a more general scrutiny of their actions in carrying out the tasks of government and the use of their powers (Prasser, Nethercote and Aroney 2008, 3-4).

Why specifically study the Legislative Council to determine the nature and types of parliamentary conflict that occur in South Australia? Though the House of Assembly has been host to two minority governments out of the last four governments, and has regularly seen the return of minority governments, I still maintain that the conflict that occurs in this chamber is best characterised as theatre. To maintain their hold on the treasury benches, the government of the day needs to keep an iron grip on the numbers in the House. The first Rann Government, in which the ALP's one seat deficit was solidified with the promotion of an independent and a National Party member to the ministry, and two independents, in succession, to the Speakership, provides possibly the finest example in recent Australian history of how a government can turn a minority position in a lower house into a strong, stable government (Jaensch 2006, 198-199).

The South Australian Legislative Council, since the introduction of proportional representation in 1973, has never been controlled by the government of the day. The balance of power has always been in the hands of a crossbench of varying size. This has rendered it a chamber more independent from the executive than the House of Assembly is, and a chamber that is friendlier to the work of minor parties and the Opposition. For example, each sitting Wednesday is dedicated first to private members business (Standing Orders – Legislative Council of South Australia, s.64). The greater degree of independence possessed by the Legislative Council casts it as the true source of institutionalised opposition in the South Australian parliament. It is also this greater degree of independence that can lead the Legislative Council to cause frustration to the government of the day.

The Rann Government has shown that it is generally a fairly unenthusiastic defender of the place of parliament in South Australia's system of government. Indeed, the Government has developed a

reputation of treating parliament and the parliamentary process with a degree of disdain (Bastoni and Macintyre 2010). One member of the Opposition who was involved in the work of committees noted that the Government had always seemed somewhat hostile to the investigations of Legislative Council committees, and would often seek to cause inconvenience to the work of the committees where they could. For example, if one non-government member, of a five-member committee, could not attend a committee session, the two government members would absent themselves, preventing a quorum and thus preventing the committee from meeting (Lucas 2011).

It is my aim in this paper to show the strategies the Government has engaged in to undercut the legitimacy of the Legislative Council, when the Legislative Council has exercised the independence that it enjoys to scrutinise the Government in ways the Government would prefer it did not.

The Legislative Council committees in the lead up to the 2006 Election

In this section of the paper I will consider the conflict that raged around the former Attorney-General, Michael Atkinson, in the lead up to the 2006 election. Atkinson was a senior member of the right faction of the South Australian branch of the ALP, and was one of the Premier Rann's key ministers. He was also a strong parliamentary performer, and was frequently successful at embarrassing members of the Opposition in parliament. For these reasons, when allegations that he had authorised a former government staffer to offer a series of inducements to a disgruntled former Labor Party candidate in order to have him drop an unfair dismissal claim, surfaced, the Opposition and crossbench members of parliament were quick to turn their focus to them. These allegations were the subject of several investigations, including a formal police inquiry, and ultimately Atkinson was cleared of wrong doing. This section of the paper will, however, focus on the Legislative Council select committee that was established by the Opposition and minor party members to investigate this matter.

The Atkinson-Ashbourne-Clarke affair came to light when the Attorney-General, Michael Atkinson, resigned his portfolios on 30 June 2003, after the Opposition alleged that inducements had been offered to former Labor MP Ralph Clarke in order for Clarke to drop a defamation suit against Atkinson (Parkin 2003, 602). In 1997 assault charges were brought against Clarke, then still an MP, and though the DPP dropped the charges in February 1999, Clarke lost his preselection. Some months later, Atkinson made some comments on a radio program that prompted Clarke to launch a defamation action against Atkinson (Parkin 2003, 602). In response, Atkinson counter sued. In November 2002 it was announced that both parties had agreed to discontinue their actions. The Opposition, possibly through a leak by factional enemies of Atkinson, later alleged that Clarke had dropped the action after having been offered positions on government boards by the senior policy advisor to the Premier, Randall Ashbourne (Parkin 2003, 602). A Government instigated investigation cleared Atkinson of any wrongdoing, but Ashbourne was later charged with abuse of public office (Manning 2004, 288). Ashbourne was later acquitted of any wrongdoing after a short trial. Rann then proposed a close judicial inquiry would be established to investigate the matter. The Opposition and members of the crossbenches asserted that any investigation should be open so that the public could be made aware. When Rann refused the call for an open inquiry, the Opposition and crossbench MLCs convened a select committee of the Legislative Council to investigate the affair (Manning 2005, 609-610).

The other potentially embarrassing committee involving Atkinson was popularly termed the 'Stashed Cash' committee. This committee was convened after a public argument between Atkinson and the former head of the Justice Department, Kate Lennon. In October 2004, after the tabling of the Auditor-General's annual report, it was revealed that creative accounting had been used by the Department to retain \$5.9 million of unspent funds that would otherwise have had to be returned (Parkin 2005, 304). After this was revealed, whilst debates were still raging about its legality, Lennon, who had moved to become the CEO of the Department for Families and Communities, resigned this position. Scrutiny then turned to Atkinson, and he was questioned over what he knew regarding this matter. Atkinson denied any knowledge of the matter, and was supported in this denial by the Auditor-General, of who has been observed: "Auditor-General MacPherson...has played a role in this political drama unusually prominent and opinionated for somebody occupying his stalwartly nonpartisan office" (Parkin 2005, 305). This is an opinion shared by the then shadow treasurer, Rob Lucas, who felt that MacPherson's actions painted him as being too close to the Government (Lucas 2011). Atkinson and Lennon proceeded to engage in a public argument about where responsibility should lie (Parkin 2005, 306). A Government dominated House of Assembly select committee into the matter cleared Atkinson of wrongdoing (Manning 2006, 321), but a Legislative Council select committee continued its inquiries (Lucas 2011).

The attempts to constrain the work of the committees

On the morning of the day that Ralph Clarke was to appear before the Atkinson-Ashbourne-Clarke committee, Rann announced that he would move to have a referendum held, concurrent with the election due in 2010, on the future of the Legislative Council. Characterising the Council as a 'relic of a time in our democratic history that is long gone,' and stating that it was 'passed its used by date', he said that voters would have the option to retain the Legislative Council with no change, reduce it in size to 16 members and reduce the term length of members from eight years to four, or to abolish the Council entirely (AAP Australian National News Wire, 24 November 2005). Rann made it clear that abolition was his preferred option. He further said: "[n]ow, people want to use the chamber as some form of smear machine...It has become a petty, partisan circus." (Rann, cited in Kelton 2005)

It would seem reasonable to conclude that this was an announcement borne partly from frustration with a chamber of parliament that was not controlled by the Government demonstrating its independence (Macintyre and Williams 2008, 223). Equally, it seems the announcement was intended, initially at least, to serve as a smokescreen to distract attention from the work of the Council. By attacking the Council as an undemocratic relic, Rann was also attacking the legitimacy of the work being engaged in by the Council's committees.

However, the more determined attempt to stop the committees came several weeks later. The South Australian parliament had adopted fixed terms, and the date for the 2006 election had been long known to be 18 March 2006. The South Australian Parliament was prorogued on 8 December 2005, more than three months before the election was due. The Government was attacked by the Opposition and minor parties, and by commentators in the media, who viewed this early prorogation of parliament as an attempt to avoid scrutiny that could derail its re-election attempt (see for example Parliamentary Debates – Legislative Council, 1 Dec 2005, *Advertiser* Editorial 14 November 2005). These allegations

were given added weight when the Government argued that after parliament was prorogued, all parliamentary committees, including those committees inquiring into the Atkinson-Ashbourne-Clarke and Stashed Cash' affairs, could no longer rely upon the protection of parliamentary privilege, even though the Legislative Council had successfully passed a motion allowing the committees to continue to sit (Davis 2010, 1-2). On the Legislative Council's last sitting day, the Leader of the Government, Paul Holloway, stated:

[T]he privileges which attach to Committee proceedings, unless provided by Statute, cease to exist upon Prorogation. Thus, members who purport to comprise a Committee that sits after the Prorogation put themselves at risk of being sued for defamation. By all means, if the Leader of the Opposition wants to pass this motion he could have all the committees that he likes, but what he will not be able to do, I would suggest – or he will be at great risk by doing, if he does, is to invite people to come and make defamatory comments that we have seen in the past, because they may lack the protection. I just put that warning! (Parliamentary Debates – Legislative Council, 1 Dec 2005)

In a letter to the Clerk of the Legislative Council, Jan Davis, Holloway stated the following:

- (a) A select committee of the Legislative Council is not entitled to sit after prorogation...
- (b) Committees appointed by standing order or by resolution of a House, or of both Houses, for the life of the Parliament may not meet after prorogation but may meet again in the new session of the same Parliament;
- (c) Statutory committees...continue in business and may meet and transact business...
- (d) All other committees, such as select committees, appointed by resolution of a House cease to exist upon prorogation.
- (e) The privileges which attach to committee proceedings, unless provided by statute, cease to exist upon prorogation (Holloway, cited in Davis 2010, 2).

The letter concluded by asking for a copy of the letter to be tabled at select committee sessions held after the prorogation, and for its contents to be made clear to potential witnesses at the select committees (Davis 2010, 2).

It is not the purpose of this paper to determine the validity or otherwise of the position that the Government took with respect to prorogation, the important point for this paper is the effect that the declaration of the Government had on the work of the committees that were meeting at the time. However, I would like to note in passing that the observance of the Government's position over prorogation has not been consistent, as the prorogation of the parliament in 2008 did not seem to interfere with the work of committees, or of the willingness of witnesses to appear before them (Davis 2010, 10).

The committees did convene meetings during the period after parliament was prorogued. The Government members of the committees chose not to attend the sessions, however, both Opposition and crossbench members continued to attend. The effectiveness of the committees was negatively

impacted though by the Government's comments on the legality of the hearings. Some of the witnesses, including senior public servants and officials, that the committees wanted to call refused to attend the hearings, citing the lack of parliamentary privilege as their reason for refusing to attend (Lucas 2011). Some of the committees also found department heads refusing to tender advice to the committees until they were reconstituted after the election (Lucas 2011).

Whilst the Government was attacked for shutting parliament down so early, these attacks on the motives of the Government did not seem to be effective. The Government had been enjoying a commanding opinion poll lead in the months leading up to the election, a lead that it managed to preserve until polling day, when it won an overwhelming two party preferred vote of nearly 57%, turning its minority position in the House of Assembly to a solid majority position. Interestingly though, this record vote level did not translate into the Legislative Council, where the Independent MLC Nick Xenophon won re-election with 20.5% of the vote, enough to fill two and a half quotas (Jaensch 2006, 204-205). This divergence in votes suggests that at least a significant subsection of voters still respects the different roles of the two houses of the South Australian parliament, and plans their votes accordingly.

The Government's prorogation of parliament was effective in granting them the clear air that they required before the election campaign. While it suffered some negative commentary in the media, the committees were constrained in the work that they were able to do. While both the committees were re-established following the 2006 election, the time when their work would have been most effective and recognised had passed, and the attention of the media and the public had moved to different issues.

The role of upper houses and the challenges presented by Government power

Upper houses are frequently given the descriptor 'House of Review', to render them distinct from lower houses, which are given the title 'House of Government.' The designation 'House of Review' has been analysed and defined by many scholars, and I will here present a synthesis of several of these pieces (Russell 2001, Uhr 2001, Aroney 2008, Mulgan 1996), to better elucidate the role that an upper house is expected to perform.

Upper houses are expected to perform two broad functions – scrutiny and accountability. The scrutiny function involves the detailed examination of legislation that comes before the upper house, and the proposal of amendments to constructively improve legislative outcomes, and the occasional veto of legislation that is poorly drafted, or would not enjoy public support. The scrutiny role also extends to the actions of members of the Government, and also of public officials. This scrutiny of Government encompasses both issues of administration, as well as issues of probity and competence.

Accountability flows from the latter aspect of the scrutiny function, and is best defined as the means by which the executive can be made answerable to the people. This owes much to the view of Harry Evans, who stated "Governments should be accountable to Parliament, that is, obliged to give accounts of their actions to Parliament, and through Parliament to the public. Governments are then responsible to the electorate at election time" (Evans 1999). This answerability is achieved in part by ensuring probity of

action amongst the members of the executive, and it is in achieving this goal that the South Australian Legislative Council Select Committees play a role.

The important point to remember about bicameralism, especially as it pertains to the upper house acting as a house of review, is that it, much like the other checks and balances that exist in Westminster style parliamentary democracies, relies upon the division of power against power (Evans 2008, 67-68). The reason that upper houses are able to act as houses of review is that they are not controlled by the government of the day, and thus governments are unable to control the actions taken by upper houses. That governments are not in a position to control the scrutiny functions of upper houses can be an intensely frustrating experience, especially when they feel that the scrutiny being undertaken could be politically damaging. But, as Harry Evans stated in relation to the Senate, though equally applicable to the South Australian Legislative Council:

It is often said dismissively that Senate inquiries are based on party politics. Indeed they are. Free states work through party politics. Subjecting the rulers to the scrutiny of their rivals and opponents is what the safeguard is all about. (Evans 2008, 77).

If Governments feel aggrieved by something that is alleged in a committee of the Legislative Council, they have many forums available to them in which they can present their side of the story and attempt to correct the record. However, the actions of the South Australian Government in proroguing the parliament show a flaw in the House of Review model detailed above. While the Government was powerless from stopping the committees from being formed, it was able to undermine their work through its powers to control the sessions of parliament. This is a flaw that needs to be remedied if the Legislative Council is, in the future, going to be able to properly exercise its scrutiny function as intended.

To offer a provocative suggestion – the South Australian Constitution could be amended to remove the unilateral power to prorogue parliament currently possessed by the executive. Given the fixed terms employed in South Australia, the parliament could be scheduled to be automatically prorogued a fixed period prior to the election, say four to six weeks, and for a similar amount of time around the end of each calendar year. Any other prorogation would have to be approved by way of an absolute majority vote in each house. In this way, the houses of the South Australian parliament would gain a little more control over their organisation, and the balance of power between the executive and the parliament might progress a little closer to equality. This could be an amendment that all sides of politics could benefit from supporting. The tides of political fortune always turn, and the Labor Party will again find itself on the Opposition benches. When that occurs, they will not want any precedent that they may have established regarding the prorogation of parliament to be turned against them.

Conclusion

This paper has shown the ways in which conflict can arise between the Legislative Council and the executive government, and has also demonstrated the unequal balance of power that exists between these two institutions.

In the case of the committee inquiries in the lead up to the 2006 election, the conflict between the Opposition and the other non-Government members of the Legislative Council, seeking to embarrass the Attorney-General and the Premier and implicate them in corrupt practices, and the Government, seeking to avoid a potentially embarrassing inquiry that could have distracted from the message that it was seeking to propagate in the lead up to an election, revealed the scope of the power that the Government could deploy when wishing to delegitimise the Legislative Council and its work. The Government sought to stifle the committee inquiry on two fronts. It tried to undermine the legitimacy of the Legislative Council as an institution by suggesting that it had passed its use-by-date, raising the suggestion that it be abolished, or at least reduced in size. This attack on the Legislative Council was paired with the early prorogation of parliament, which the Government claimed made the committee legally unable to sit. The Government emphasised this by withdrawing its members from the committee hearings that occurred after the parliament was prorogued. The committee met a few more times, but its legitimacy had been weakened, and, given that it decided not to use its powers to compel witnesses to attend, it is arguable that the effectiveness of the remaining investigation was weakened. The dominance of the Premier in the media, and the ability for the Government to unilaterally determine when parliament will be prorogued, clearly gave it the upper hand in the conflict between it and the Legislative Council. As detailed above, it would seem sensible, to help balance the scales in the latter case, to make prorogation subject to a parliamentary vote, allowing the parliament itself to have the final say on when it ceases to sit.

References

Advertiser Editorial. 24 November 2005

Anderson G. and A Parkin. 2006. "Political Chronicles: South Australia – July to December 2005." *Australian Journal of Politics and History*, 52(2):316-322

Aroney N. 2008. 'Bicameralism and representations of democracy.' In Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Bastoni J. and C. Macintyre. 2010. "What's In It for Us? Why Governments Need Well Resourced Parliaments." *Australasian Parliamentary Review*, 25(1): 177-183

Davis J. 2010. "Matters Concerning the Effect of Prorogation: An Argument of Convenience." *Paper presented to the 41st Conference of Presiding Officers and Clerks*.

Evans H. 1999. "The Senate and Parliamentary Accountability." *ANU Graduate Program in Public Policy Discussion Paper* 65.

Evans H. 2008. "The case for bicameralism." In Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Jaensch D. 1986. *Getting our Houses in Order. Australia's Parliament: how it works and the need for reform*. Ringwood: Penguin Books.

Jaensch D. 2006. "The 2006 South Australian Election." *Australasian Parliamentary Review*, 21(2): 198-207

Kelton G. 2005. "Rann to call referendum for 2010; abolish the upper house." *Advertiser*, 24 November 2005.

Lijphart A. 1984. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. New Haven: Yale University Press.

Lucas R. Interview with the author, conducted 1 September 2011.

Macintyre C. and J. Williams. 2008. "The embattled South Australian Legislative Council." In Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Manning H. 2004. "Political Chronicles: South Australia – July to December 2003." *Australian Journal of Politics and History*, 50(2):287-294

Manning H. 2005. "Political Chronicles: South Australia – January to June 2005." *Australian Journal of Politics and History*, 51(4):606-612

Manning H. 2006. "Political Chronicles: South Australia – July to December 2005." *Australian Journal of Politics and History*, 52(2): 316-322

Mulgan R. 1996. 'The Australian Senate as a 'House of Review.' *Australian Journal of Political Science*, 31(2): 191-204

Parliament of South Australia. 1999. *The Standing Orders of the Legislative Council*.

Parliamentary Debates – Legislative Council, 1 December 2005

Parkin A. 2003. "Political Chronicles: South Australia – January to June 2003." *Australian Journal of Politics and History*, 49(4): 597-603

Prasser S., J.R. Nethercote and N. Aroney. 2008. "Upper houses and the problems of elective dictatorship." In Aroney N., S. Prasser and J.R. Nethercote (eds) *Restraining Elective Dictatorship: The Upper House Solution?* Crawley: UWA Press.

Russell M. 2001. 'What are Second Chambers For?' *Parliamentary Affairs*, 54: 442-458

Uhr J. 2001. 'What is a House of Review?' *Constitution Commission of Victoria Opening Address*, 16 August 2001