Polls Apart: Reforming the Senate — who wants it and why?

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The role of the Senate has been the subject of much discussion for many years, not least of course having been the target again by John Howard with his recent flirtation with constitutional change.

Unlike his comments in 1987 when as the Opposition Leader he said that the Senate was 'one of the most democratically elected chambers in the world.' As Prime Minister, he has become a staunch Senate critic, just like his predecessor Paul Keating, who famously declared that the Senate was an 'unrepresentative swill'.

By their very nature, however, the changes proposed by governments in the face of economic imperatives, global forces, and threats to security have the potential to infringe upon personal rights and liberties. These are precisely the types of change that require consultation, community support and the careful consideration of parliamentary representatives.

In a rapidly changing environment, the safeguards provided by our Senate as one of the strongest upper houses in the world, may be more important than ever. The Senate and its Committee system provides a constitutional and practical safeguard which ensures that legislation is not passed without proper deliberation.

Mandates and Parliamentary Democracy

There is more to parliamentary democracy than seeking a mandate from the people at periodic elections, although from time to time a government is inclined to believe otherwise. The concept of a mandate is itself a slippery one: governments will readily claim a mandate where none exists, following the simplistic logic that

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winning a majority of lower house seats signifies majority approval for particular measures, or indeed for everything the government proposes.

Parliamentary democracy demands more: that throughout its term in office a government should be responsible for its actions; restrained by the rule of law; open and honest in its dealings; in a word, accountable.

Majority representation in the House — the prerequisite for forming a government — does not necessarily represent a majority of voters. The 1998 federal election provides a case in point. Figures provided by the Australian Electoral Commission reveal that governments are frequently elected with only around 40 percent of the lower house vote. In 1998, the Howard Government won 80 House of Representatives seats with slightly less than 40 percent of the vote. The ALP, with slightly more than 40 percent of the vote, won 16 fewer seats because of the distribution of the vote.

People increasingly differentiate between their votes in the House and their votes in the Senate, establishing the concept of a protective mandate. At the last election nearly 2 million voters chose to cast a different vote for the House of Representatives than they did for the Senate.

Claims of government mandates on particular pieces of legislation are also questionable as most measures do not become the focus of election campaigns, and in any case, measures, which are not canvassed during a campaign, cannot be said to have the automatic support of the people. The current proposals relating to Medicare and on higher education — both of which are being examined in detail by Senate committees are two cases to illustrate this point.

The Prime Minister, at the Liberal Party National Convention last month labelled the Senate a house of obstruction and raised the prospect of determining disagreements on legislation through a joint sitting of both Houses of the Parliament, without resorting to a double dissolution election, as is currently required under section 57 of the Constitution.

The Prime Minister has yet to support his contention that the Senate has become obstructionist. Since 1996, the Senate has dealt with 1,243 bills and has rejected only 24 distinct bills. In other words, the Senate has passed 98 percent of the Howard Government's legislation.

In that time, a further 11 bills (less than 1 percent) have been laid aside by the government in the House after the Senate made amendments the government would not accept, but again some of those measures were later passed in an amended form (eg, the ASIO (Terrorism) Bill 2002).

There is, then in reality, less disagreement than all this talk of the Senate being obstructionist might suggest.

The Prime Minister's proposal represents an extreme form of mandate theory and many commentators have pointed out that it would turn the Senate — and therefore the Parliament — into a rubber stamp for the actions of the executive.

Proper Deliberation

The Senate provides a safeguard, which ensures that laws are not passed without proper deliberation.

The Senate has control over its own proceedings. This is guaranteed under section 50 of the Constitution. Generally speaking, this allows the Senate to provide time for the proper consideration of proposed legislative changes, time rarely allowed in the government-controlled lower house. Through its various committee processes the Senate also ensure properly informed decision-making.

Committees provide convenient vehicles for conducting inquiries and examining issues because of their relatively small size, their ability to meet in a variety of places and the flexibility of their proceedings. They are able to receive written submissions and hear evidence on specified matters, and to examine issues in closer detail than is possible on the floor of the Senate. Because numerous committee inquiries can be undertaken at the same time, many different issues can be examined and quickly reported back to the Senate.

Senate committees are increasingly the vehicles, which bring the federal Parliament to the people. They provide an avenue for participation in the implementation of change. This participation — by the community, by specialist organisations, by experts — is again rarely a feature of the consideration of legislation by the House.

Security Legislation

The Senate between March and June of 2002 considered a package of five bills — I shall refer to them collectively as the Security legislation. Before these bills reached the Senate, the House of Representatives had dealt them with in a perfunctory manner. They were introduced into the House on 12 March. The following day the Government allowed a mere 4 hours of debate before forcing a vote. The bills were, needless to say, passed without amendment. There was no committee inquiry, and no time permitted for the proper consideration of the legislation. Contrast this with the proceedings in the Senate. On 20 March these bills were referred by the Senate to its Legal and Constitutional Legislation Committee for inquiry and report by 3 May. The committee noted that the five inter-related bills 'must rank as some of the most important to come before the Parliament in the last twenty years' [page 2 of the report].

The committee also noted 'strong protest at the totally inadequate consultation period' [Law Council of Australia correspondence; report p. 2] — these are bills, remember, which the government saw fit to force through the House only one day after their introduction.

Notwithstanding the short timeframe of the inquiry, the committee received 431 submissions and took evidence from 67 individuals representing a variety of agencies and associations. [p. 2] After hearing the evidence, this government-dominated committee recognised that there were significant threats to civil liberties contained in the provisions of three of the bills. The committee recommended sweeping amendments to the legislation, for instance in the Attorney-General's power to proscribe organisations, the definition of 'terrorist act' and the application of strict liability to certain offences. [citation: Legal and Constitutional Legislation Committee, Report, Security Legislation (Terrorism) Bill 2002 and 4 related bills, May 2002] The Attorney General was forced to accept these and other amendments.

If not for the powers of the Senate and the operation of its committee system, a package of bills revealed as lacking broad support within the government would have become law, much to the detriment of our civil rights.

Scrutiny of Bills Committee

The Senate also engages directly with the government on its legislation through the Scrutiny of Bills Committee. I have been a member of this Committee since I first arrived in the Senate in 1998 and was recently appointed as its Chair. The Committee examines legislation to determine whether it might infringe upon any of the five criteria referred to in the Committee's terms of reference. These criteria relate to personal rights and liberties and the delegation and exercise of legislative power.

The Committee itself does not determine the fate of these measures — that role is reserved for the Senate as a whole. What the Committee does is seek advice from the Minister responsible for the legislation about the intended operation of the legislation and the rationale or justification for any apparent infringement within the Committee's terms of reference. These findings are reported to the Senate, ensuring that Senators have the best possible information on the impact of legislation on these important issues. This role is now considered crucial to the consideration of legislation in the absence of constitutional guarantees on rights and liberties, for instance in a Bill of Rights.

Without the Senate's Deliberation

The Senate refers about 40 percent of all bills to committees and amends about 30 percent of them. There is a long list of bills, which have been improved by the deliberations of the Senate and its committees. Without the detailed consideration of

legislation by the Senate — if the House of Representatives alone had the final say on legislation — we may well have seen the implementation of the ASIO (Terrorism) legislation in its original form, allowing for instance strip searches of children as young as 10 years old and imposing a draconian detention and questioning regime; the full sale of Telstra, without any compensating improvements to communication services in regional and remote areas, and possibly without the support of the National Party; the application of the GST to food, electricity and water; and the passage of the government's media ownership laws.

It should be noted, of course, that it is not only the Opposition, minor parties and independent senators who use the deliberative processes of the Senate to improve legislation: an examination of statistics on the business of the Senate shows that nearly 60 percent of amendments agreed to in the Senate since 1996 have been proposed by the Government.

The object of the Senate's role in the legislative process is to improve legislative outcomes. The community expects informed decision making. We expect our leaders, in proposing change, to articulate clearly the problems they are addressing and the merits of the solutions they propose.

The Senate processes provide mechanisms to test these issues, to moderate (and occasionally reject) proposals that have only narrow support, to improve the quality of legislation and its acceptance in the community.

If the Prime Minster's proposals succeed and undermine the capacity of the Senate to influence government legislation we risk losing these positive outcomes.

The world is increasingly complex and governments' responses to that complexity merit the proper deliberation of our parliaments. We expect contention. We expect debate. We expect our governments to justify the changes they seek to implement, to seek the support of the people they represent and to engage in fully-informed, participatory decision making. Anything less is an affront to our democracy. ▲