
Room for Improvement: The Quality of Debate in Upper Houses in Australia*

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'Policy, belief, courage and vision are essential elements in ensuring Australia's future and its role as global citizen. All these depend on our mastery of evidence and our capacity to define and debate. Without this, Australia will remain lost in a dark alley'.¹

INTRODUCTION

This article focuses on the quality of debate in Australian Parliaments. While much significant negotiating and persuasion happens outside of the Parliaments, the subject and method of debate within the chambers remains an important barometer of the health of parliamentary democracy in Australia. Is our democracy in rude health, or has it become another symptom of the 'crisis in democracy' engulfing much of the world?

The article begins with a brief review of the perceived state of democracy in the world and in our own Parliaments in Australia. The rest of the article is divided into two sections. The first discusses the current level of debate in Parliaments across Australia, particularly in upper houses during second reading debates and Committee of the Whole. I chose these forums because upper house second reading debates and Committee of the Whole stages are most likely to reveal Members' understanding of policy issues and legislation through testing their knowledge and ability to explain their views; and because they allow independent Members to be persuaded as to the merits of the legislation that major parties wish to pass. They are where interaction between

¹ B. Jones, 'The Death of Political Debate'. *The Saturday Paper*, 30 March 2019.

Members most reveals the quality of debate. The last section of the article considers several possible structural changes proposed to elicit discussion about improving the standard of Australian parliamentary debate. These proposals should be treated as catalysts for discussion, rather a blueprint for concrete reforms.

The article draws primarily on the views and experiences of five state upper house Clerks across Australia, as well as one current upper house crossbencher, Fiona Patten, the head of the Reason Party in Victoria's Legislative Council.² Their views were collected via face-to-face and telephone interviews throughout April 2019. This approach was taken because I wanted to gather insights from the professionals who work closely with elected representatives. I also wanted to test their reactions to hypothetical changes, as their answers would be instructive in revealing both the current strengths of our Parliaments and the worth of potential improvements.

Of course, quality is a subjective concept. For this paper, the quality of debate is measured using the experience of the professional observers. This includes their views on whether parliamentarians have the ability to display one or, ideally, more of the four following traits:

- Clearly expressing a thorough understanding of issues so as to argue their position coherently
- Interacting with each other in a way that proves comprehension of others' views
- Persuading and being persuaded by others
- Staying relevant to the topic.

The evidence I gathered shows that it is high time we had a debate about parliamentary debate if we are to improve trust in our democratic system.

² Patten is a particularly active Independent Member and strong presence in Victoria's Legislative Council, which may partly explain the attention she receives from the Victorian Government. Her views are her own and should not be taken as representative of other Independent Members in upper houses.

FINDING FAULT WITH DEMOCRACY

There is currently genuine concern about the health of contemporary democracy, to the extent that it is often said to be in ‘worldwide crisis’.³ In Australia, a survey carried out in mid-2018 found that less than half of Australians were satisfied with the way democracy works, down from 86 percent in 2007.⁴ Around the same time in the United States of America, two respected pollsters, Jeremy Rosner and Brian Paler, provided the alarming warning that democracy ‘may be heading toward a cliff’.⁵ Or consider this assessment of UK politics, from *Guardian* columnist Suzanne Moore: ‘Politics is broken, we all know that. We are completely stuck. The two-party system strangles any innovation at birth. It has calcified in the last few years into total crisis. Representative democracy is not working in any meaningful way’.⁶

Yet a closer look at this ‘total crisis’ reveals that the public’s dissatisfaction is not with democracy per se. For example, Rosner and Paler state that ‘although there has been no fall-off in recent years in the public’s overwhelming support for the *idea of democracy*, the level of dissatisfaction with our democracy’s performance is alarming’.⁷ Further, in an article about the recent rise in populism, Peter C. Baker, a contributing editor at *Pacific Standard* magazine, argues that this rise is in part driven by structural weaknesses in democracy across the West. He writes of ‘the abyss between the shining ideals of equality and responsive government implied by our talk about democracy and the tarnished reality of life on the ground’.⁸ Or as the historian Barbara Tuchman put it: ‘When the gap between ideal and real becomes too wide, the system breaks down’.⁹

³ Max Boot, ‘Democracy is in Crisis Around the World. Why?’ *Washington Post*, 21 November 2018. Accessed at: https://www.washingtonpost.com/opinions/global-opinions/democracy-is-in-crisis-around-the-world-why/2018/11/21/ccb6423c-ecf4-11e8-8679-934a2b33be52_story.html?utm_term=.83ea3747cfe0.

⁴ Mark Evans, Gerry Stoker and Max Halupka, ‘Australians’ Trust in Politicians and Democracy Hits an All-Time Low: New Research’. *The Conversation*, 5 December 2018. Accessed at: <http://theconversation.com/australians-trust-in-politicians-and-democracy-hits-an-all-time-low-new-research-108161>.

⁵ Quoted in Karlyn Bowman, ‘Democracy in Crisis’. *Forbes*, 15 August 2018. Accessed at: <https://www.forbes.com/sites/bowmanmarsico/2018/08/15/democracy-in-crisis/#324aaac55c6>.

⁶ Suzanne Moore, ‘A Dose of Hard and Necessary Truth for Labour’. *The Guardian*, 18 February 2019. Accessed at: <https://www.theguardian.com/commentisfree/2019/feb/18/split-labour-writers-verdict-independent-group>.

⁷ Quoted in Bowman, ‘Democracy in Crisis’.

⁸ ‘“We the People”: The Battle to Define Populism’. *The Guardian*, 10 January 2019. Accessed at: <https://www.theguardian.com/news/2019/jan/10/we-the-people-the-battle-to-define-populism>.

⁹ Quoted in Patrick J. Deneen, *Why Liberalism Failed*. New Haven: Yale University Press, 2019, p. vi.

It seems that one source of the crisis is the institution built to deliver democracy: Parliament. It is true that how Parliaments and parliamentarians perform is only one of many ways of measuring the health of democracy and Parliaments vary widely. Yet I would argue that how they perform is vital because Parliament is the democratic edifice most visible to the electorate.

The foundation of this structure is the clash of ideas in Parliamentary debate. While words in Australian Parliaments may initially seem trivial in comparison with the ongoing chaotic actions of the United States and the United Kingdom, the vast majority of time in our Parliaments is devoted to debate. This article shows that there is both room for improvement in the current state of debate in Australian politics and a great appetite for that improvement to happen.

GREAT EXPECTATIONS

It is important here to remind ourselves exactly how we expect Parliaments in Australia to operate. At the 2012 ANZACATT conference, David Blunt listed what he saw as the five ‘great principles’ of the Westminster parliamentary system:

1. Public business shall be conducted in a decent and orderly manner
2. The minority is protected
3. Every member is able to fully and freely express their opinion
4. Full opportunity is provided for the consideration of every measure
5. Heedless or impulsive legislative action is prevented.¹⁰

In a majoritarian Parliament, the right of the government of the day (the majority) to legislate its agenda is balanced by the responsibility of non-government Members (the minority) to hold the government to account in a context in which they genuinely have their voices heard. Steven Reynolds describes bicameral Parliaments as ‘a struggle between the “executive” model which focuses on facilitating the passing of the

¹⁰ D. Blunt, Parliamentary Traditions, Innovation and ‘The Great Principles’ of English Parliamentary Law. Paper presented at ‘Parliamentary Traditions and Procedural Innovation: What Works for Parliamentarians as Legislators in the 21st Century?’, a professional development seminar of the Australian and New Zealand Association of Clerks-at-the-Table (ANZACATT), Canberra, 22-24 January 2012.

government's legislative agenda, and the "liberal" model which emphasises the role of Parliament to scrutinise the performance of government'.¹¹

In this way, Parliaments 'are capable of creating exceptional forums in which to conduct in-depth examination of major social issues'.¹² Baker refers to the idea of 'agnostic pluralism', which he defines as 'a state in which opposition and disagreement are accepted as the norm, and in which people maintain the capacity to disagree intensely without demonising each other, or descending into war'.¹³

Ideally, Blunt's five principles are highly visible when Parliaments, and in particular upper houses where governments increasingly lack a majority, engage in high-quality debate. We avoid descending into war through a dialectical use of words in parliamentary chambers.¹⁴ Conversely, those principles fade when an antagonistic upper house does not hold governments to account through reason and constructive debate but rather simply tries to paint the government as incompetent through negative language.¹⁵

Debate is a key measure of democracy's performance in Westminster systems. We view Parliament, in part, as a battle of ideas, a place where our elected Members use oratory and their skills of persuasion to elicit the support of other Members and the wider public. However, as Blunt notes, the Australian style of deliberative democracy does not preclude a clash of ideas in order to enable consensus, as the majority must eventually prevail. Rather, Blunt quotes John Uhr in stating that governments must openly debate and defend their ideas while delivering 'equality of opportunity so that all representatives can contribute to public debate and to the collective determination of legislative proposals'.¹⁶

¹¹ S. Reynolds, 'Making Honey in the Bear Pit: Parliament and its Impact on Policymaking'. *Australasian Parliamentary Review* 31(2) 2016, p. 183.

¹² Jacques Carl Morin, 'The Importance of Debating Major Social Issues in Parliament: The Example of Quebec's Act Respecting End-of-Life Care'. *Canadian Parliamentary Review* 37(3) 2014, p. 1.

¹³ Baker, "'We the People'".

¹⁴ Clausewitz famously described war as the continuation of politics by other means. Carl Von Clausewitz, *On War*, edited and translated by Michael Howard and Peter Paret. New Jersey: Princeton University Press, 1976, p. 605.

¹⁵ Constitution Commission Victoria, *A House of Review: The Role of the Victorian Legislative Council. Issues and Options for the Victorian Community*. Melbourne: Constitution Commission of Victoria, 2001, p. 24.

¹⁶ D. Blunt, Parliamentary Speech and the Locations of Decision Making. Paper presented at the Australasian Study of Parliament Group 2014 National Conference, Sydney, 2 October 2014.

In a parliamentary democracy, Uhr's idea can be observed in action when minority groups in an upper house propose and debate amendments that improve a Bill, rather than merely opposing it, and those amendments are either agreed to by the government or defeated using well-reasoned argument. Such inclusive deliberation is seen by some as a 'central pillar' of democracy, one that improves decision-making and legitimates the democratic system.¹⁷

It is not difficult, then, to understand why our buildings are (metaphorically) beginning to shake, such is the standing of Parliament among the electorate. It would be hard to contain the length of this paper should it include just a small portion of the negative views politics currently elicits, so the following will have to suffice.

For example, in an article in *The Conversation*, Professor John Dryzek refers to Edmund Burke's description of Parliament as a 'deliberative assembly'. Yet according to Dryzek, politics in Australia is currently being damaged by politicians who are disciplined enough to justify their parties' beliefs and policies, while being poor at reflecting on and being persuaded by others' arguments.¹⁸

Former Australian Federal Minister Barry Jones is just one of many retired parliamentarians to express a critical view of the current standard of parliamentary debate in Australia. Those politicians unlucky enough to have found themselves on the wrong side of Jones during his parliamentary career will recognise the biting tone of his summation:

There is policy paralysis. A significant failure of nerve by those who purport to be leaders, largely because they have little or no grasp of how to frame a debate. The last serious debate in parliament on the republic was in 1998, on human rights in 2001, on the environment in 2009 Many MPs rely on a page of dot points they have been handed, with no understanding of or interest in a contrary point of view. They simply declaim the material

¹⁷ N. Kersting, A. Reiberg and P. Hocks, 'Discourse Quality in Times of Populism: An Analysis of German Parliamentary Debates on Immigration Policy', *Communication & Society* 31(3) 2018, pp. 77, 80.

¹⁸ J. Dryzek, 'The Proposed Senate Voting Changes Will Hurt Australian Democracy'. *The Conversation*, 25 February 2016. Accessed at: <https://theconversation.com/the-proposed-senate-voting-change-will-hurt-australian-democracy-55297>

they have been given, ‘staying on message’ and repeating mantra after mantra ad nauseam.¹⁹

STATE UPPER HOUSES: THE CURRENT STATE OF PLAY

We need, then, to negate the constricting effects of party discipline and the curse of dot point ‘debates’ if we are to improve standards of debate in Australian democracy. The ideal place for this improvement is the upper house.

The ongoing evolution and increasing diversity of upper houses across Australia has lead one Clerk interviewed for this research to state: ‘The upper house is not a known beast’. Yet the upper house remains the best place to debate complex long-term issues that lead to policy and legislative reform. Ideally, all upper houses recognise that governments are required to implement their election policies (their specific mandate) and to govern (their general mandate). Constitution Commission Victoria, a temporary body set up in 2001 to investigate ways of improving governance in Victoria, viewed these mandates as vital components of effective government that must be respected by upper houses while they review the policies and performance of governments.²⁰

As one Clerk noted, ‘The public elects parliaments not governments’.²¹ The view that electorates elect Parliaments and not governments is interesting. Modern voting patterns suggest that if the electorate considered upper houses inherently recalcitrant, the vote for major parties in upper houses would be increasing not decreasing. The fact is that state electoral systems and the results of elections prove that the public wants government policies tempered by strong upper houses.²² As one Clerk put it: ‘The upper house has a mandate from the same democratic system as the lower house’.

¹⁹ B. Jones, ‘The Death of Political Debate’, *The Saturday Paper*, 30 March 2019.

²⁰ Constitution Commission Victoria, *A House of Review: The role of the Victorian Legislative Council. Issues and options for the Victorian Community*, Melbourne: Constitution Commission of Victoria, 2001: 7-8; 29.

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²² A view exists among some commentators that having a Minister in upper houses prevents Members of the Minister’s party from speaking freely. However, the Clerks rejected this idea, all believing that party discipline would still control what Members said. Patten also noted: ‘Ministers don’t inhibit speech, parties do’.

This is not to negate the point made above regarding a government's mandate to enact its legislative agenda. Indeed, all those consulted for the research reported in this paper pointed out that the vast majority of legislation does in fact pass upper houses with very little comment or disagreement. Instead, it reminds us of the idea of deliberative democracy, which suggests that democracy works best when political arguments are won by ideas and debate—with attention focused on both content and tone²³—rather than simple majoritarian political power. This is particularly important in increasingly fragmented societies whose citizens want a range of views to be not just heard but acknowledged.²⁴

The varied political make-up of modern upper houses in Australia, therefore, makes the quality of debate particularly important. One of the most common criticisms of debate is the amount of time Members spend speaking on issues that do not need lengthy commentary. The curse of speaking points leads to dull repetition from Members who are only filling time.

Such filibustering happens when Members simply run out of things to say. They are filling time because the time is there to fill. It is also easier to fall back on antagonism that provokes further negativity than summon the intellectual intent required to be constructive. Equally guilty are governments taunting oppositions during general business and oppositions who believe their only job is to oppose.²⁵

One Clerk interviewed for this research raised the United Kingdom as a positive example. Westminster has a comparatively large number of Members without the same amount of time to speak on subjects as Australian Members. The result is that when they do, their contributions tend to be more thoughtful. In contrast, the Clerk believed, many Australian Parliaments have too few Members with too much time to fill, hence the prevalence of repetition and language that aims simply to aggravate.

Another Clerk provided an example of a Member speaking for 22 hours on a recent Bill. 'This doesn't happen so much anymore, though,' they said. 'Family friendly hours and a greater diversity of Members have seen a genuine cultural change. And major parties

²³ L. Cobb, 'Adding Value to an Arena Legislature? A Preliminary Examination of Topical Debates in the British House of Commons'. *The Journal of Legislative Studies* 15(4) 2009, p. 536.

²⁴ Blunt, Parliamentary Speech and the Locations of Decision Making.

²⁵ This view can be traced back to Edward Stanley, who in 1841 told the House of Commons that the Opposition was responsible for nothing more than 'to oppose everything and propose nothing'.

are increasingly agreeing that they don't need the same speaking points read out repeatedly'.

There has been some hope that the increase in crossbench numbers in upper houses would moderate behaviour in the chamber. Major parties would have to respect and respond to the views of minor parties and independents to ensure their legislation is passed. Yet every Clerk agreed that this has not occurred to the extent expected. This is in part because minor parties and Independents lack the resources of major parties that enable their representatives either to understand the large number of bills that cross their desks or at least construct a uniform position.

The turnover of Independents at each election also causes a loss of corporate knowledge of how to debate well in the chamber. Members are lacking, initially at least, what one Clerk summed up as 'the time, opportunity and inclination' to debate well.²⁶ Another Clerk thought that in many ways quality comes down to good fortune: that is, we just have to hope that political parties, particularly major parties, offer the electorate talented people to vote for and then mentor them accordingly.²⁷

Hope seems a good word. As one Clerk observed:

The quality of debate depends on the individuals. Fewer people are joining political parties. As well, fewer people want to become politicians because media intrusion in private lives now goes beyond serving the public interest. There simply aren't as many people to choose from as in the past.

This declining level of debate undoubtedly contributes to the electorate turning away from Parliament and creating the feeling of a 'crisis in democracy'. Politicians shouting during Question Time or second reading debates inspires nothing more than that frequently heard condemnation: 'I'm not interested in politics because they're all the same'.

²⁶ Despite this, many upper house crossbenchers have been shown to be fast learners. One Clerk was of the opinion that while upper houses may not display the same intellectual rigour as in the past, there is a wider breadth of knowledge on show as more issues are being debated. Another made the point that as society becomes more complex, so too does the legislation that Members of Parliament must consider.

²⁷ A further line of research here might focus on the comparative ability of different chambers to self-regulate their behaviour, particularly in the expectations they proffer to new Members.

DECISION-MAKING INSIDE AND OUTSIDE THE CHAMBER

Before discussing the possibilities for improving debate in upper houses, this paper must address the quality of decision-making that occurs outside the chamber both and while legislation is debated within the chamber. In Franz Kafka's novel *The Trial*, the painter Titorelli tells Josef K that the Court is impervious to proof presented in the Courtroom itself. It is, however, very much open to being persuaded outside the Court, in consulting rooms, lobbies and, indeed, Titorelli's own studio. Describing the current state of parliamentary democracy in Australia as Kafkaesque may—or may not, depending on one's experiences—be a stretch, but there is a point here. Politicians constantly negotiate outside the chamber prior to legislation being introduced, with those negotiations sometimes continuing while debate happens on the floor. Blunt gives the New South Wales example of the Police Death and Disability Bill 2011, which saw a two-week period between the Bill being introduced and debate resuming. He writes:

During the intervening period there was clearly a great deal of activity, lobbying and negotiations, particularly involving the Police Association. Indeed throughout the final sitting week of the year, a negotiating team from the Police Association were frequently seen in the parliamentary cafeteria between meetings with cross bench members and government officials.²⁸

The upper house Clerks consulted as part of investigations for this paper reported similar experiences. One said: 'Everyone has nailed their colours to the mast before the debate, so we mostly know what to expect'. The word 'mostly' is telling, though. It is true that very little persuasion happens inside the chamber in terms of whether crossbenchers whose numbers are needed will support or oppose legislation,²⁹ but crossbenchers may reserve judgement on specific amendments until they have heard arguments for and against within or outside the chamber. As such, they are willing and able to be persuaded by the quality of the debate.

²⁸ Blunt, Parliamentary Speech and the Locations of Decision Making.

²⁹ Although, during sittings of the current Legislative Council in Victoria, the President has remarked more than once on the raucous 'meeting room' that the 11 member strong crossbench area becomes when voting on a Bill is imminent.

In Victoria, the Leader of the Government in the Legislative Council, Gavin Jennings, began the 59th Parliament with a wish to work more with non-government Members outside the chamber. Jennings stated that the old way of debating legislation had failed, producing only disharmony and that a 'new paradigm' was needed:

I am interested in sessional orders that may change the way in which this chamber may work in light of being bipartisan or allowing for views to be shared ... I am happy to discuss with opposition parties, discuss with you, discuss with the crossbench the intentions of the government before they are introduced into the Parliament so in fact no-one is surprised and something does not actually turn up on the notice paper one day and is debated the next. Ultimately that is an old paradigm of doing work I actually think it is an inefficient way of doing work. It leads to conflict and division and apprehension across the Parliament, and that is a very old-fashioned way.³⁰

This approach accords with former New South Wales and Federal Independent MP Rob Oakeshott's conclusion that governments achieve more if they negotiate with Members prior to introducing legislation into the chamber. He said: 'You can have a formal agreement that looks bipartisan, but the real politics is happening somewhere else'.³¹

Therefore, it could be argued that what happens in the chamber during, for example, the second reading is not actually debate. In fact, it may be more accurate to rename this procedure 'second reading statements'. It could even be considered a form of ongoing electioneering. Proponents of legislation must explain what a Bill is trying to achieve and opponents must explain why they disagree. As one Clerk interviewed for this study stated: 'It's important for elected members to have accountability to their electorates and the wider public. The community has to know what parties believe and they learn this from what is said in Parliament'.

Terminology aside, there is no denying the potential importance of second reading debate in the chamber in terms of accountability and persuasion. Blunt provides an example of the latter, referring to crossbenchers in the New South Wales 51st

³⁰ Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Council, 20 February 2019, p. 258.

³¹ Quoted in B. Prosser and R. Denniss, 'Minority Government: Non-Ministerial Members Speak about Governing and Democracy'. *Australasian Parliamentary Review* 31(1) 2016, p. 92.

Parliament from 1995-1999 who had been influenced by the ‘persuasive efforts of the great orators in the Legislative Council at that time’.³² The importance of persuasion is, as Blunt states, implied by second reading conventions:

[C]onventions, such as that prior to speaking in debate members should be in the chamber to listen to the contribution of the preceding speaker, so as to be able to respond to that speech, and the following speaker, so as to listen to any responses to their speech, are premised upon parliamentary debate being dynamic and deliberative rather than a series of set piece contributions.³³

Another persuasive element of second readings is that Members speaking later in a debate respond to previous speakers. This is especially relevant for Ministers, who take the opportunity to address the concerns of other Members when summing up the second reading.

IMPROVING UPPER HOUSE DEBATES

The quality of debate around legislation depends on factors as varied as the way Parliament is structured and the capability of elected Members. Short of requiring Members to pass an entrance exam before they are allowed to take their seats, we are forced to look elsewhere for ways to improve outcomes whenever politicians engage with each other. This paper turns to procedural and structural changes to address debate in our upper houses. It looks at two features of our upper houses where a high standard of debate often occurs—parliamentary committees and Committee of the Whole—and asks whether these processes can be used more frequently or in different ways. It then discusses hypothetical structural changes to how upper houses are constructed and the electoral methods used to choose representatives in these chambers.

³² Blunt, *Parliamentary Speech and the Locations of Decision Making*.

³³ Blunt, *Parliamentary Speech and the Locations of Decision Making*.

THE POWER OF COMMITTEES

Parliamentary committees have a long and distinguished history in Westminster systems. They are widely acknowledged as forums for constructive debate where multilateral agreement is regularly—and relatively peacefully—achieved. In Westminster itself, select committees currently review all Bills before they are introduced and scrutinise government departments, a process Cobb considers a ‘deeply ingrained and successful feature’ of parliamentary democracy in the United Kingdom.³⁴

Committees both hold the executive to account and offer Members an opportunity to investigate issues away from the heat of the chamber. They are a transparent mechanism for Members ‘to receive evidence together and engage in a collective process of reasoning in the light of that evidence’.³⁵ Independent MP Rob Oakeshott reflected that he ‘got deeply involved in any committee I could get my hands on [as a result of which] I knew more about what was going on than most’.³⁶

Committees are also forums where Members can be persuaded to change their minds by evidence-informed debate. In Victoria, Cesar Melhem, a Member of the Legislative Council’s Legal and Social Issues Committee in the 58th Parliament, spoke about the impact that Committee’s inquiry into legalising assisted dying had on his own view. Speaking in the Legislative Council, he said:

When the inquiry started I had one view in relation to this subject—I was in the ‘No’ camp. I was in the camp of, ‘No, we don’t need to look at euthanasia or assisted dying in this state’. That was my view. But then on the evidence and from hearing the arguments of various people, and great people—we heard from a lot of individuals in the state of Victoria and a lot of professionals and organisations, and we also visited various jurisdictions around the world—my view was actually changed. My view now is that I

³⁴ Cobb, ‘Adding Value to an Arena Legislature?’, p. 536. In Australia, select committees are becoming increasingly important for Independent and minor party parliamentarians who are unable to be represented on as many standing committees as parliamentarians from the major parties.

³⁵ Blunt, *Parliamentary Speech and the Locations of Decision Making*.

³⁶ Quoted in Prosser and Denniss, ‘Minority Government’, p. 84.

support the majority report on the inquiry to provide Victorians with self-determination.³⁷

Constitution Commission Victoria stated that

... when public hearings by committees reveal weaknesses in proposed legislation, even those committed to their party's stance have changed their minds, and modified their party's policy before the final debate in the House.³⁸

This can lead to modified legislation returning to the lower house where it is accepted by the government. One Clerk said: 'Legislation committees can have a big influence on Bills. Even if the government has a majority, they can accept opposition amendments that improve what the legislation is trying to achieve'.³⁹

One question that naturally follows from these positive views of committees is whether sitting weeks could be altered to allow Members to spend more time in committee meetings and holding public hearings and less time in the comparatively less effective chamber debates.

Support for such a change already exists. For example, many submissions to Victoria's Constitutional review in the early 2000s described the benefit of allowing Legislative Council Members to spend more time on committees and less in the chamber.⁴⁰ Federally, the Senate by leave can allow committees to meet while the Senate is sitting, albeit with safeguards in place to ensure all Members agree to meet.⁴¹ In Tasmania, the upper house is able to adjourn debate on the motion of a Member in order to receive a government briefing on the legislation being debated. This leads to a more informed debate for the Members.⁴²

³⁷ Parliament of Victoria, *Parliamentary Debates (Hansard)*, Legislative Council, 9 June 2016, p. 2827.

³⁸ Constitution Commission Victoria, *A House of Review*, p. 18.

³⁹ Amendments to a bill should still be debated in the chamber because different groups of crossbenchers may not be members of the committee looking at that legislation. The Senate is able to adopt recommended amendments from Committee reports. However, this has not happened since the early 1990s

⁴⁰ Constitution Commission Victoria, *A House of Review*, p. 51.

⁴¹ It can also be logistically problematic when there many inquiries occur at one time.

⁴² This happened 26 times in 2017/18.

The views of the Clerks consulted for this paper were mixed on this question. One agreed it was a good idea, even suggesting that the upper house, by leave, could allocate several hours each sitting day to committee work. Any concerns about Members missing divisions would be eased by dedicating a set time at the end of each sitting week to vote on divisions collated during the week, rather than as and when they arise. However, a Clerk from a jurisdiction that does allow committees to meet while the house is sitting described the process as ‘difficult [because] not many Members actually like it or want it to happen’.

One Clerk argued that even though committees undoubtedly do very good work, it would be difficult to convince the public of the merit of altering sitting weeks in such a way. He believed many people would think that Members are working less because they are not physically in the chamber. Another Clerk countered this with the suggestion of broadcasting public hearings and committee meetings:

It would help to show in public what happens in private. Committees actually function exactly how the public expects politicians to be working when they see Members in the chamber. I think showing the type of informed debate that leads to Members forming and altering their views would be very helpful.

COMMITTEE OF THE WHOLE: A HIGHER LEVEL

Another feature of upper houses that facilitates a high level of debate is Committee of the Whole. This would seem to be because the process is structured to allow a ‘to and fro’ between Members and the Ministers responsible for the legislation being discussed. Members can focus on legislation with an often forensic focus on clauses that they want to see refined and improved.

The standard in one upper house is such that its Clerk said:

Committee of the Whole is where debate in this chamber is most effective. It’s not unusual for a government to amend legislation based on the contributions of other Members, so it’s a great way of achieving what the chamber wants.

All Clerks were open to the idea of allocating more time in their respective chambers to Committee of the Whole. On the other hand, they all agreed that time limits, for example on questions, were important, to avoid filibustering by Members, with the proviso that standing orders should be able to be suspended to allow Members with genuinely complicated amendments more time to speak (as happens in Tasmania). Those Clerks operating without time limits referred to an important convention of

Chairs ‘encouraging’ Members whose thoughts may be meandering slightly to refocus their contributions.

Time limits on questions keep Members from abusing the process by making statements or repeating second reading debate contributions.⁴³ It is also worth considering whether the Committee of the Whole process in upper houses would be improved by allowing the responsible minister from the lower house to enter the chamber to answer questions. This possibility is based on the valid point that ministers would be attending as members of the executive, not as Members of the lower house, thereby not breaching the convention of comity.⁴⁴ However, nobody consulted for this paper thought that this practice would be adopted soon.

Another Clerk suggested that the Committee of the Whole process would be streamlined by allowing ministerial advisers to sit at the table, as occurs in Tasmania. Ministers could currently walk to the edge of the chamber for advice in their house but a Tasmanian style system of ‘allowing advisers at the table would improve the process’.

A MATTER OF CONSCIENCE

Those Clerks consulted for this paper were also asked to imagine the impact of making every vote in the upper house a free (or conscience) vote. Obviously, it would be impossible to police such a system without reading each Member’s mind to ensure they were acting freely. However, if such clairvoyance were available to us, would free votes improve the quality of debate in our upper houses?

Blunt quotes Griffith’s positive view on free votes, stating that they produce

... a more open, interesting and vigorous deliberation which is less formulaic and partisan in character. With free votes there is more occasion and inclination to listen to the views of others, to acknowledge and even accommodate arguments which a member may not agree with at first.⁴⁵

⁴³ Preventing filibustering without discouraging debate is a difficult balancing act.

⁴⁴ In Tasmania, Ministers who are Members of the Legislative Council house have the freedom to attend question time in the Assembly in order to answer questions.

⁴⁵ Blunt, Parliamentary Speech and the Locations of Decision Making.

The Clerks were unsure whether free votes would improve the quality of debate in their chambers. One thought that it may lead to party backbenchers developing contributions that are more erudite, perhaps even introducing views that had not cleared party rooms. However, they did include the caveat: ‘Only the courageous would exercise that freedom’.

Generally, the free votes that the Clerks had witnessed during their parliamentary careers were described as involving a higher level of debate than those preceding ‘whipped’ votes. It was thought this was mainly because the topics traditionally linked with free votes are in themselves more sensitive and complex than most other topics. They invite more nuanced contributions, closely linked with Members’ personal beliefs and ethics.

The reality is that most legislation is technical and difficult to comprehend for a non-expert. This, combined with the large volume of legislation passed in any Parliament, means that Members often lack the ‘time, opportunity and inclination’ mentioned above to make strong contributions to debates. Having a free vote would not change this reality.

One Clerk did wonder whether taking away the power of upper houses to defeat bills would encourage more constructive debate. This would essentially make them an ‘opinion house’, with government Members able to debate more freely and suggest more amendments than at present. The Clerk said:

The lower house would then be able to ignore or accept the amendments. They can do this anyway, to a certain extent, of course, but this way the amendments would have come from a wider range of Members, be less ‘political’ and may therefore attract more public support.

MECHANISMS TO GUARANTEE MORE VOICES

The diverse membership of upper houses is one of their main strengths. Is there a way of guaranteeing this diversity through viable electoral reform?

One way of doing this would be allocating 50 percent of upper house seats to major parties and 50 percent to minor parties and independents. Weeks writes that in the 18th and 19th Centuries parties were viewed as negative influences on democracy that placed their own interests ahead of the nation’s. An Independent Member, by contrast, was considered ‘the highest state of being for any true democrat; it implied that a politician could make a decision based on his own personal judgement, free of

pressure from any external influence'.⁴⁶ It is a relatively recent trend, Weeks argues, for strict party control to be so closely aligned with the idea of stable government.⁴⁷

The proposal for an even split in the upper house is practically problematic, not least because defining the meaning of 'minor party' would be an unresolvable debate. Nonetheless, the proposal elicited some interesting thoughts. Fiona Patten, whose Reason Party is one of eight parties currently occupying the crossbenches in Victoria's Legislative Council, believes the wide range of views these parties represent naturally creates a wide range of amendments that improve legislation: 'Diversity changes debate, as you hear views that you wouldn't otherwise hear. It's important for governments to be exposed to these views'.

Clerks consulted for this paper were mostly of the view that a predetermined 50/50 split would increase the government's workload, either in having to prosecute their case more effectively in the house or in writing legislation in a more consultative manner before it reaches the house.⁴⁸ One Clerk added: 'Having a large number of independents in the upper house is a good outcome from an election, not the least because the major parties no longer have the power of majority to throw around. Everyone has to cooperate'.

Several Clerks raised the concern that beyond the issue of debate, there would be an increased risk of governments not getting legislation passed. Resulting delays would then reflect badly on the public's perception of the efficiency of government and the obstreperous nature of upper houses and, in turn, parliamentary democracy.

One Clerk said:

There would be a risk of fringe politics damaging the credibility of the upper house. You do not want upper houses with a sense of entitlement to undo the government's agenda. It's legitimate to put the government under pressure to justify its legislation, but we still need a functioning government for the public to keep faith in our system.

⁴⁶ L. Weeks, 'Parliaments without Parties'. *Australasian Parliamentary Review* 30(1) 2015, p. 63.

⁴⁷ Weeks, 'Parliaments without Parties', p. 64.

⁴⁸ Several Clerks observed that the declining support for major parties meant that most upper houses are naturally heading in that direction.

An alternative approach to a 50/50 quota would be to consider whether a move to mixed member proportional (MMP) representation voting to elect upper houses would change their make-up and, therefore, the quality of parliamentary debate.⁴⁹ The proportional representation (PR) systems used to elect upper houses in Australia are regularly refined, raising the possibility that introducing a slightly different method would be an improvement.

The Clerks consulted for this paper were unanimous in their belief that while MMP works well in unicameral Parliaments such as New Zealand, where it is seen as effective in ensuring diversity in elected Members, it would not have a noticeable effect on upper houses in bicameral Parliaments. This is because the current PR systems are felt to work well in Australia.⁵⁰ Any change to MMP would not improve debate. As one Clerk put it: 'Proportional representation provides a majority that gives legitimacy to the passing of legislation'.⁵¹

CONCLUSION: CAUSE FOR OPTIMISM?

Towards the end of 2018, Katharine Murphy wrote several articles on the philosophies of Australia's two major parties. In them, she quotes Labor NSW MHR Anthony Albanese and Liberal Senator for Victoria Scott Ryan. They both stated that if faith in Australia's political structure is to be restored, politicians must improve their skills of persuasion and make good use of debating time in the chamber rather than simply

⁴⁹ In mixed member proportional systems, voters cast two ballots, one for a preferred individual to represent their district and one for the party list they prefer more generally. The two ballots ensure local representation as well as an overall result that proportionally reflects levels of party support. For the New Zealand example, see New Zealand Electoral Commission, 'What is MMP?'. Accessed at: https://elections.nz/democracy-in-nz/what-is-mmp?gclid=EAlalQobChMivMrW3ae_6QIVA7eWCh20YQwaEAAYASAAEgIVyD_BwE

⁵⁰ Strong proponents of PR in Australia can be traced back over a century. For example, Catherine Helen Spence, who in 1897 became Australia's first female political candidate, believed that PR guaranteed that the voices of minorities would be heard in a way that tempers the power of strong parties without blocking the will of the majority.

⁵¹ There has been a great deal of comment over recent years about candidates 'gaming' the PR system in order to be elected with a miniscule number of votes. The system is designed to provide diversity of representation in the upper house without being dominated by single-issue candidates. If the quota is too high, diversity suffers; too low and there is a risk of electing candidates who focus on issues of little or no concern to the wider community. The recent changes to the Senate voting system designed to prevent this 'gaming' are being reviewed with interest. See, for example, Dryzek, 'The Proposed Senate Voting Changes Will Hurt Australian Democracy'.

relying on the power of a majority.⁵² It is important for a culture to exist where politicians are willing to be persuaded by their colleagues on both sides of the house and, just as importantly, that a mature electorate allows such a culture to exist.

Australia's present parliamentary system predates the rise of tightly structured and disciplined political parties. As Australia becomes less homogenous, many voters identify more with special interest groups—focused on the environment or human rights, for example—than with the major parties.⁵³ This fracturing of the electorate may in fact simply be the electorate coming full circle in expecting elected Members to debate with more freedom and to a higher standard than party discipline currently allows.

Some of the ideas about the role and quality of debate in our upper houses presented in this paper may be no more than interesting thought bubbles. As Judith Brett points out, however, the rest of the world has often cast an envious eye at Australian parliamentary democracy. She writes that Australia is a country of 'incremental innovation' because we are not afraid of being a 'laboratory for new ideas about democracy, and new methods of achieving them'.⁵⁴ The willingness of politicians and parliamentary staff across Australia to discuss even hypothetical questions in great depth proves that the appetite for innovation remains strong. Hope can also be found in the fact that both Albanese—in reference to the Hawke-Keating economic reforms—and Ryan—in reference to the Howard-Fischer gun law reforms—acknowledge the importance of engaging with others and being willing to compromise and negotiate. In the words of Oakeshott, 'Compromise and negotiation in politics is a strength, not a weakness'.⁵⁵ Perhaps, then, there is cause for optimism. Perhaps Australians can create and support a political culture in which politicians know both how to talk and how to listen.

⁵² 'Progressive Side of Politics Must Not Retreat into Comfort Zone, Albanese Warns', *The Guardian*, 15 November 2018; 'Why Parliament Still Tolerates Thuggery not Acceptable in Broader Society', *The Guardian*, 28 November 2018.

⁵³ Constitution Commission Victoria, *A House of Review: The role of the Victorian Legislative Council*, pp. 8-9.

⁵⁴ J. Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting*. Melbourne: The Text Publishing Company, 2019, pp. 8, 176.

⁵⁵ Quoted in Prosser and Denniss, 'Minority Government', p. 92.