

Unrepresentative swill? An unabashed defence of the Australian Senate

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Abstract

This paper argues against the abolition of the Australian Senate. The Senate has endured decades of harsh criticism, exemplified by Paul Keating's label of 'unrepresentative swill'. Yet the institution continues to serve a number of useful purposes. Firstly, it enforces the strict horizontal separation of powers enshrined in the Constitution. Secondly, it serves as a state's house. That is, the Senate protects the rights of less populous states from the tyranny of the majority. In doing so, the chamber upholds Australia's federalist system. Finally, the Senate functions as a house of review to scrutinise hurried or reckless legislation in an auxiliary capacity. This paper concedes that the Senate in its current form is a flawed institution. As such, two packages of reforms are proposed. Firstly, senatorial terms may be reformed in order to reduce the incidence of rubber-stamping of legislation. Secondly, new states may be formed to reduce the population inequalities of Senate electorates while upholding the federalist system.

Introduction

The Senate is Australia's most disdained political institution. Paul Keating famously labelled the upper house as 'unrepresentative swill'.¹ Calls for reform are incessant.² In March 2016, Malcolm Turnbull succeeded in passing Senate electoral reforms designed to curb the electability of micro-party candidates.³

¹ Kieran Ricketts, 'The Collected Insults of Former PM Paul Keating', *ABC News* (online), 14 November 2014 <www.abc.net.au/news/2013-11-12/the-collected-insults-of-paul-keating/5071412>.

² See, eg. Terry Sweetman, 'We Need Senate Reform, Now More Than Ever', *The Courier Mail* (online), 15 November 2018 <myaccount.news.com.au/sites/couriermail/subscribe.html?sourceCode=CMWEB_WRE170_a_GGL&mode=premium&dest=https://www.couriermail.com.au/rendezview/we-need-senate-reform-now-more-than-ever/news-story/19320875da870f211cc47f2df4fbf21d&memtype=anonymous>.

³ Eliza Borrello, 'Senate Reform: Electoral Laws Passed After Marathon Parliament Sitting', *ABC News* (online), 18 March 2016 <www.abc.net.au/news/2016-03-18/senate-electoral-reform-laws-passed/7258212>.

Recent research, however, predicts that minor parties will continue to hold a disproportionate influence over the Senate for the foreseeable future.⁴ In retrospect, Turnbull's reforms appear largely ineffectual. The immense difficulty of reform begs the question: should the Senate simply be abolished? This paper argues that Australia's bicameral legislature should remain intact and that the Senate is a worthwhile institution, withstanding the shortcomings of the chamber. The first section of this paper shows that the Senate maintains a strict horizontal separation of powers. The second section asserts that the upper house protects the rights of states while upholding the federalist system. The third discusses the Senate's role as a house of review. Accordingly, the fourth section recommends several key reforms to restore integrity to the Senate in light of the shortcomings.

Horizontal separation of powers

A crucial argument for the retention of the Australian Senate is that a strict horizontal separation of powers should be preserved. Under the Australian convention of responsible government, the party with a majority in the House of Representatives forms the government.⁵ The prime minister then advises the Governor-General to appoint ministers from those elected to parliament.⁶ These ministers then implement laws, and by doing so effectively form the executive branch.⁷ Thus, ministers simultaneously serve as members of the legislative and executive branches: they simply wear different hats. This contrasts with the political system of the United States, for example. The American president and his cabinet are elected separately from the members of congress.⁸ Ergo, the distinction between the legislative and executive branches of government in the United States is clearer than that in Australia. Since the Commonwealth Constitution allots all states the same number of senators regardless of population,⁹ the partisan makeup of the Senate

⁴ Bill Browne, 'Get Used To It' *Senate Projections, Autumn 2018* (The Australia Institute, 2018).

⁵ Harry Evans (ed), *Odgers' Australian Senate Practice* (Australian Government Publishing Service, 7th ed, 1991) 11.

⁶ Sir Percy Ernest Joske, *Australian Federal Government* (Butterworths, 3rd ed, 1976) 96.

⁷ George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 352.

⁸ Sir John A Cockburn, *Australian Federation* (Horace Marshall & Son, 1901) 45.

⁹ *Australian Constitution* s 7.

can be and often is substantially different to that of the House of Representatives, and thus to the government of the day.¹⁰

Critically, the Senate demarcates the legislative and executive branches to prevent the rise of an autocratic regime. It does so by checking the power of the party in government.¹¹ Sir Percy Joske writes

[t]he purpose of the upper house is to act as a curb, a brake or a stabilizer upon the lower house ... which in absence of the upper chamber might wield despotic power.¹²

In addition, the Senate can hold the government to account by exercising its power to censure ministers.¹³ This power is formidable, as it has led to ministerial resignations.¹⁴ Consequently, the Senate's power to censure further segregates the legislative and the executive branches. This segregation maintains a strict horizontal separation of powers, and for this reason the Senate should not be abolished.

Although some have criticised the notion that the Constitution affirms a strict separation of powers, the Australian founding fathers expressly structured the Constitution to enunciate that affirmation. An example of this criticism may be found in *Dignan's Case*.¹⁵ In that case, the Honourable Justice Evatt doubted the practicality of a strict separation of powers as it applies to delegated legislation. He stated:

the full theory of 'Separation of Powers' cannot apply under our Constitution. Take the case of an enactment of the Commonwealth Parliament which gives to a subordinate authority other than the Executive, a power to make by-laws. To such an instance the theory of a hard and fast division and sub-division of powers between and among the three authorities of government cannot apply without absurd results.¹⁶

Denise Meyerson counters this argument by asserting that under the Constitution, the executive does not hold: 'the unfettered power to make law. One of the reasons why the framers of the Constitution vested

¹⁰ See, eg, David Solomon, *Inside the Australian Parliament* (George Allen & Unwin, 1978) 183; Elaine Thompson, 'The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation' (2001) 24(3) *University of New South Wales Law Journal* 657, [8].

¹¹ Evans, above n 5, 13.

¹² Joske, above n 6, 73.

¹³ Thompson, above n 10, [38].

¹⁴ Thompson, above n 10, [39]–[40].

¹⁵ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* ('*Dignan's Case*') (1931) 46 CLR 73.

¹⁶ *Ibid* 119.

legislative, executive and judicial power in separate organs of government is that certain organs are more suitable for the performance of different governmental tasks.¹⁷ This is a crucial point.

While the drafters of the Constitution may not have foreseen legal problems arising from delegated legislation, they expressly formatted the Constitution to emphasise a strict horizontal separation of powers. The first three chapters of the Constitution are labelled ‘The Parliament’, ‘The Executive Government’, and ‘The Judicature’.¹⁸ Thus, from a constitutionalist perspective, this strict separation of powers should be preserved. The Senate occupies a unique position to examine delegated legislation ‘not ... enjoyed by the House of Representatives ... because it is dominated by a disciplined majority supporting the government.’¹⁹ Indeed, it has been primarily in the Senate that the executive government’s use of delegated legislation has been effectively scrutinised.²⁰ This application of scrutiny further partitions the legislative and executive branches. Accordingly, the Senate should be retained in order to maintain the horizontal separation of powers.

A state’s house

The Australian Senate should remain intact so that the rights of the states are protected and the federalist system is upheld. The Australian colonies would not have federated if it were not for the establishment of the Senate by the Constitution.²¹ This is because the Senate advocates for the rights of individual states and the states as a whole under the Commonwealth.²² Section 7 of the Constitution allots an equal number of senators to each state. Accordingly, the Senate protects the interests of the less populous states from being subjected to those of the populous states, whose representatives dominate the lower house.²³ In other words, the Senate acts as a bulwark against the tyranny of the majority. It is the only legislative body that gives a voice to the states, and therefore it is *the* keystone of Australian federalism. To abolish the Senate would be to topple the federalist system. In the words of Sir John Cockburn:

¹⁷ Denise Meyerson, ‘Rethinking the Constitutionality of Delegated Legislation’ (2003) 11 *Australian Journal of Administrative Law* 45.

¹⁸ *Australian Constitution* s 9.

¹⁹ Evans, above n 5, 13.

²⁰ Evans, above n 5, 13.

²¹ Joske, above n 6, 75.

²² Joske, above n 6, 76.

²³ Evans, above n 5.

[t]he whole principle of federation is to recognize the co-ordinate power of the population and of the States. There can be no federation if you give all the powers to the popular assembly.²⁴

The argument of whether to abolish the Senate can be thought of as an argument over the advantages and disadvantages of replacing the federalist system with a more democratic unitary system. Critics of the Senate argue that since s 7 of the Constitution allots an equal number of senators to each state, electors from less populous states have a disproportionate influence over the upper house.²⁵ Elaine Thompson writes:

because the Constitution gives equal representation to the States, and because the ... States have different population[s], the Senate does not embody the notion of 'one vote, one value'. If that notion is seen as central to representative democracy, the Senate fails.²⁶

The High Court in the *First Territory Senators Case*²⁷ demonstrated a preference for the ideological concept of representative democracy over the ideological concept of federalism.²⁸ However, is it true that the House of Representatives embodies the notion of 'one vote, one value'? In *McKinlay's Case*,²⁹ the High Court ruled that the Constitution does not mandate adherence to the notion of 'one vote, one value' when it comes to determining the number of electors in the electorates of the House of Representatives.³⁰ If these electorates are not required to be of equal population by the Constitution, it is difficult to argue that the House of Representatives embodies the notion. It is yet more difficult to argue that the Senate should be abolished for the reason that the chamber does not embody the notion of 'one vote, one value' and is therefore incompatible with the concept of representative democracy.

Even if one were to accept that the Senate is incompatible with representative democracy, there is a strong argument that the Constitution places more emphasis on federalism than representative democracy, despite the ruling in *First Territory Senators Case*. The High Court majority in *McGinty v Western Australia*³¹ reaffirmed *McKinlay's Case*³² and dismissed the argument that voter equality is implied in the

²⁴ *Australasian Federal Convention Debates*, Sydney, 16 March 1891, 383 (John A Cockburn).

²⁵ David Wood, 'The Senate, Federalism and Democracy' (1989) 17(2) *Melbourne University Law Review* 292, 294.

²⁶ Thompson, above n 10, [11].

²⁷ *Western Australia v Commonwealth ('First Territory Senators Case')* (1975) 134 CLR 201.

²⁸ Williams, Brennan and Lynch, above n 7, 694.

²⁹ *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

³⁰ Williams, Brennan and Lynch, above n 7, 677.

³¹ (1996) 186 CLR 140.

³² *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

Constitution.³³ More importantly, the majority held that such implications must be sourced from the text or structure of the Constitution and not from an amorphous concept such as representative democracy.³⁴ As per the Honourable Chief Justice Brennan: '[n]o implications can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure'.³⁵ Chapters V and VI are labelled 'The States' and 'New States' respectively, and s 7 provides for the establishment of the Senate as a states' house. Furthermore, the preamble to the Constitution states that the people of the colonies agreed to 'unite in one indissoluble Federal Commonwealth'. Indeed, the Constitution is replete with yet more references to federalism and federalist concepts.³⁶ Therefore, the concept of federalism is *clearly* endorsed by both the text and structure of the Constitution. The same cannot be said, however, for the concept of representative democracy.

Although after the turn of the century, the High Court has been willing to imply a qualified right to vote from the words 'directly chosen by the people' in ss 7 and 24 of the Constitution,³⁷ this implication of representative democracy is not as hardwired into the Constitution as federalism is. From a constitutional perspective, it is difficult to criticise the Senate for being insufficiently democratic. Accordingly, the Senate should not be abolished as a response to the criticism that the institution is incompatible with representative democracy.

A house of review

The Senate should be retained in order to serve as a house of review. A useful purpose of the Senate is the application of an additional layer of scrutiny over the legislative process.³⁸ This secondary opinion acts to prevent the assent of hurried or reckless legislation passed by the House of Representatives.³⁹ As discussed previously, the Senate occupies a unique position to monitor the executive government's use of delegated

³³ Williams, Brennan and Lynch, above n 7, 684.

³⁴ *McGinty v Western Australia* (1996) 186 CLR 140.

³⁵ *Ibid* [11].

³⁶ See, eg, *Australian Constitution* ss 73, 75, 92, 96, 100, and 101. See generally Bradley Selway, 'The Federation – What Makes It Work and What Should We Be Thinking About for the Future' (2001) 60(4) *Australian Journal of Public Administration* 116.

³⁷ *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

³⁸ Evans, above n 5.

³⁹ Joske, above n 6, 31.

legislation.⁴⁰ This argument assumes a greater level of salience in the wake of the recent revival of federalism in the jurisprudence of the High Court in the *Pape*⁴¹ and *Williams*⁴² decisions. For example, in *Williams*,⁴³ the majority expressed concern that if an appropriation Act by itself would be sufficient to authorise expenditure by the executive, then senatorial scrutiny would be circumscribed.⁴⁴ This is because⁴⁵ appropriation Bills cannot be amended in the Senate.⁴⁶ In summary, the Constitution entrusts the Senate with the crucial role of acting as a legislative overseer. Accordingly, it should not be abolished.

While one may criticise the Senate's effectiveness as a house of review by asserting that it has become a 'party house', an obstructionist Senate may be thwarted by a double-dissolution election. Joske elucidates the 'party house' argument:

when the government has a majority in the Senate ... [it] functions as a house of review to little or no extent; and when opposition has the majority there, the Senate tends from a government point of view, to become obstructionist rather than to act as a body of review.⁴⁷

The Constitution provides a mechanism for the Governor-General, on advice from the prime minister, to simultaneously dissolve the Senate and the House of Representatives in the event of a disagreement between the houses.⁴⁸ Therefore, voters can decide through election whether to return the government with a more favourable partisan composition of the Senate or conversely to vote the opposition into government. This clears parliamentary gridlock. Furthermore, it empowers the Australian people to decide whether the Senate has been unduly obstructing legislation or the government has hubristically passed pernicious legislation. Thus, the operation of s 57 solves the problem of a stonewalling, opposition-controlled Senate. However, it does not solve the problem of a government-controlled Senate rubber-stamping legislation. A solution to this problem, however, will be outlined in the following proposed reforms for the Australian Senate.

⁴⁰ Evans, above n 5, 12–13.

⁴¹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

⁴² *Williams v Commonwealth of Australia* (2012) 248 CLR 156; *Williams v Commonwealth of Australia* [No 2] (2014) 252 CLR 416.

⁴³ *Williams v Commonwealth of Australia* (2012) 248 CLR 156.

⁴⁴ Shipra Chordia, Andrew Lynch and George Williams, 'Williams v the Commonwealth: Commonwealth Executive Power and Australian Federalism' (2013) 37(1) *Melbourne University Law Review* 189, 205.

⁴⁵ *Williams v Commonwealth of Australia* (2012) 248 CLR 156, 433 [60] (French CJ).

⁴⁶ *Australian Constitution* s 53.

⁴⁷ Joske, above n 6, 77.

⁴⁸ *Australian Constitution* s 57.

Proposals for reform

Reforms on terms

In regards to the problem of a government-controlled Senate rubber-stamping legislation, Senate reforms could be modelled on the proposed House of Lords Reform Bill 2011. This proposed bill provided, among other things, that elected members of the House of Lords would serve a single, non-renewable term of 15 years.⁴⁹ As these members would not be re-electable, threats issued by party leadership to reprimand them would be ineffectual.⁵⁰ Therefore, they would be politically unconstrained and at liberty to honestly scrutinise legislation.⁵¹ If the Senate adopted these reforms, senators could refuse to rubber-stamp legislation without fear of repercussion from the government.

New states

Regarding the argument that the Senate gives disproportionate political power to the less populated states, new states could be formed as prescribed by s 124 of the Constitution. Populous states could be dissected, and less popular states could amalgamate by union. For example, Queensland could be split into two states: Northern Queensland and Southern Queensland.⁵² The formation of new states could balance the population inequalities of the Senate electorates without toppling Australia's federalist system.

In addition, senators from smaller states would likely be more in touch with the specific needs of their constituents. Returning to the example of dividing Queensland into North and South, a hypothetical senator from Northern Queensland could focus on the issues affecting their largely rural constituents: namely balancing the competing interests of the cattle-grazing and coal-mining industries. Similarly, a hypothetical senator from Southern Queensland could focus on issues affecting their largely urbane constituents, such as improving transportation infrastructure between Brisbane and the Gold Coast.

Conclusion

The Australian Senate should not be abolished because it serves a number of useful purposes. It maintains a strict horizontal separation of powers. It is a State's house that upholds the federalist system. Furthermore,

⁴⁹ Joff Lelliott, 'What Australia Needs is a Genuine House of Review', *ABC News* (online), 3 January 2014 <www.abc.net.au/news/2014-01-03/lelliott-getting-rid-of-the-senate/5183256>.

⁵⁰ Lelliott, above n 49.

⁵¹ Lelliott, above n 49.

⁵² See, eg, Chris Berg, 'The democratic case for splitting Queensland in two', *ABC News* (online), 29 March 2016 <www.abc.net.au/news/2016-03-29/berg-the-democratic-case-for-splitting-queensland-in-two/7280330>.

it functions as a house of review. If reforms on term limits are implemented and new states are formed, problems plaguing the Senate can be remedied.

In the opinion of the author, the contemporary assault on the Senate is prompted by the difficulty that governments (both Labor and Liberal) face in advancing their legislative agendas. Additionally, the author speculates that intertwined veins of anti-Americanism and Anglophilia that flow through the Australian body politic promote hostility to federalism and affinity for a unitary system of government. The author humbly advises caution in tearing down constitutional checks and balances for the sake of political expediency and legislative convenience. History is replete with examples of this practice being accompanied with the rise of totalitarian regimes. Accordingly, we Australians should not be hasty in making fundamental changes to our constitutional structure. In the words of Friedrich Nietzsche: '[b]e careful, lest in casting out your demon you exorcise the best thing in you'.⁵³

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⁵³ Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book for Everyone and No One* (RJ Hollingdale trans, Penguin Books, 1961) [trans of: *Also sprach Zarathustra: Ein Buch für Alle und Keinen* (first published 1883–85)].

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