
Australian Bicameralism: Potential and Performance in State Upper Houses*

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Bicameralism is a highly distinctive feature of Australian democracy. While most democracies have bicameral parliaments, Australia is one of only two examples (with Germany) of 'strong bicameralism' among parliamentary democracies, and of these, the only one whose national upper house is filled by direct election.¹ But the Australian Senate is only the most visible and celebrated manifestation of an Australian tradition of strong bicameralism. It is too often overlooked that the institutions of national government devised in the Constitutional Conventions of the 1890s were not built from scratch but were powerfully shaped by Australian colonial constitutionalism, within which strong elective upper houses were a prominent feature.² As a federation, Australia's national institutions of governance include parliaments in the six states as well as the federal

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¹ Arend Lijphart, *Patterns of Democracy*, New Haven, Yale University Press, 1999, p. 212. Lijphart's term 'strong bicameralism' refers to a situation where an upper house is not only constitutionally powerful but also has the political capacity (legitimacy and partisan independence) to operate as a strong check on the lower house.

² Campbell Sharman, 'Australia as a compound republic', *Australian Journal of Political Science*, vol. 25, no. 1, 1990, pp.1-5. In the late 1890s elective upper houses existed in Victoria, South Australia, Tasmania and Western Australia. Those in New South Wales and Queensland, like that in New Zealand, were nominee chambers.

parliament in Canberra. In all but one of these cases³, the parliaments are also strongly bicameral. Among federations, only the United States of America has a similar degree of commitment to bicameralism.

My contention is that the five state Legislative Councils are an important, if little examined, part of the general story of a growing contribution of upper houses to democratic governance in Australia. In the first part of this lecture I will briefly delineate the value of an upper house in settings like those of the Australian states. A major aim of the lecture, taken up in the second part, is to show that the role of the Councils within the political systems of the states has changed significantly over the past half-century. I will argue that the Councils have evolved a greater potential to enhance parliamentary democracy. If so, this prompts us to ask whether their potential is being realised? Are state upper houses actually embracing new possibilities and equipping themselves with the means to perform new tasks or to perform old tasks better? And what sorts of legislative outputs are they producing? In the final part of the lecture I will attempt to answer these questions about performance. Through the lecture I will attempt to elucidate not only shared trends across jurisdictions, but also key differences between jurisdictions.

The value of bicameralism

Unlike the Senate, the state upper houses demonstrate the existence of strong bicameralism in the absence of a federal justification for a strong upper house. Among the world's democracies, there is a strong correlation between the strength of bicameralism and the degree of federalism and governmental decentralisation.⁴ This well-known relationship feeds a widespread perception that strong bicameralism is out of place in settings, like those of the Australian states, where there is no requirement for an upper house to represent the components of a federation. But a number of the most compelling justifications for bicameralism apply as well to such settings as they do to federal parliaments. These can be summarised under four headings: redundancy, delay, separation of powers, and consensus government. I will say a few words about each.

1. **Redundancy** Probably the most widely accepted argument for bicameralism is the idea that, with activities such as law-making, which have serious consequences, or where certainty is demanded and false starts undesirable, it is valuable to have a means of eliminating error before its effects are experienced. A 'second look', through a different set of eyes, at legislation before it is passed is the equivalent in law-making to the deliberate over-engineering of machinery where failure of a mechanism carries the risk of unacceptable consequences, such as harm to persons or loss of vital information.
2. **Delay** The existence of an upper house can improve the legislative process by allowing time for the discursive formation of public opinion. While interest groups may be involved in discussion with government in the pre-legislative phase of policy development, debate in the wider public often begins only when legislation is introduced into parliament. As well as assisting the formation and articulation of public opinion negatively, by lengthening or stalling the legislative process, upper house review can contribute positively, by informing the debate and providing means for public opinion to be brought to bear on the legislative process.

³ The Queensland Legislative Council was abolished in 1922.

⁴ Lijphart, *Patterns of Democracy*, op. cit., pp. 213–215.

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3. **Separation of Powers** In parliamentary democracies, legislatures are typically controlled by disciplined parties, with party leaders determining the composition of the executive. In such systems, there is a well-documented tendency for the legislature to become a tool of the executive—a tendency that has been particularly pronounced in parliaments using majority electoral formulae. Upper houses do not determine the composition of the executive and their control by the executive of the day is not therefore a requisite for continued office-holding by that executive. For this reason, they have a greater prospect of autonomy vis-a-vis the executive than do lower houses. Thus an upper house with substantial power may be almost a necessary condition for significant separation of legislative and executive power—that is, for there to be strong and independent parliamentary functions of review of the executive’s legislative proposals and scrutiny of executive action.⁵
 4. **Consensus Democracy** Arend Lijphart’s notion of consensus democracy, which he contrasts with government by simple majority, refers to design features in representative institutions that make the processes of government as inclusive of the diversity of electoral opinion as possible. Upper houses can make a large contribution to this goal where they are constitutionally powerful, have democratic legitimacy, are not controlled by the party in government, represent electoral opinion differently to the lower house, and empower the various groups comprising the membership of the chamber.⁶

I will have cause to return to these justifications for bicameralism later in the lecture.

The transformation of the state upper houses

The story of the state upper houses in recent decades has partly paralleled that of the Senate; indeed, the example of the Senate has been a major influence on developments in state upper houses. However, unlike the Senate but like many upper houses around the world, state upper houses originated as conservative checks on the zeal of popularly elected lower houses. As a result, they possessed certain undemocratic features, which they retained in some measure far into the twentieth century. This has meant that the history of the state upper houses has followed a somewhat different path to that of the Senate. The key imperative for the state upper houses in the twentieth century has been to justify themselves democratically, whereas the main issue for the Senate, at least for the first half-century of its existence, was its effectiveness. The challenge of finding a role *within*, rather than as a check upon, a system of democratic government is one that a number of upper houses internationally have failed to meet.⁷ The five surviving state

⁵ It is not, however, a sufficient condition: the mere existence of an upper house, even one well clothed with powers, does not guarantee the realisation of this potential. As Lijphart has argued, the achievement of strong bicameralism will tend to depend also upon the democratic legitimacy of the upper house and whether or not its electoral system and other design features produce incongruence in the composition of the two chambers. Arend Lijphart, *Democracies*, New Haven, Yale University Press, 1984, pp. 95–99. On the relevance of the idea of the separation of powers to parliamentary reform in general, see Harry Evans ‘Parliamentary Reform: New Directions and Possibilities for Reform of Parliamentary Processes’, *Papers on Parliament* no. 14, February 1992, pp. 47–60.

⁶ *Ibid.*

⁷ Lawrence D. Longley and David M. Olsen (eds), *Two into one: the politics and processes of national legislative cameral change*. Boulder, Colorado, Westview Press, 1991.

upper houses, in contrast, have been successful in making that transition. Let us now look at what was entailed in their journey to the present.

Through the first half of the twentieth century, the Legislative Councils experienced a gradual extension of the suffrage and a weakening or removal of special qualifications for members. The New South Wales Legislative Council adopted parliamentary election in 1933. But the state upper houses' basic role—to check the will of the lower house majority—continued to be widely and reasonably understood in traditional terms as the restraint of democracy or its 'excesses'.

This perception of their role was underpinned by a set of inherited design characteristics.⁸ The suffrage for the elective chambers continued to be restricted due to property or other special qualifications for electors. Plural voting continued in Western Australia. Voting in the upper house was voluntary in Western Australia and South Australia, while all lower houses had adopted compulsory voting. These characteristics meant that electorates were substantially smaller and wealthier than those for lower houses. The terms of Legislative Councillors were staggered, in some cases quite elaborately,⁹ and much longer than for the lower houses. All popularly elected Legislative Councils had electoral cycles independent of those of the lower houses. Rural electors were over-represented in the elective chambers; and on the mainland, where zoning was also a feature of electoral systems for lower houses, the degree of over-representation was greater for upper houses. Given the property franchise, this meant a substantial over-representation of the interests of rural property owners.

The most salient manifestation of these design principles, particularly the restricted suffrage and malapportionment, was gross under-representation of the Labor Party in the directly elected Councils.¹⁰ But a more fundamental reason for the weakening legitimacy of the Councils in this environment was that their design as non-party houses sat uneasily with the growing dominance of state politics by disciplined parties. Their independent and elongated electoral cycles and the long terms of their members were designed to focus the attention of electors and candidates on the distinctive role of the upper house, to disconnect elections from the intensely partisan contests for government which characterised lower house elections, to weaken members' loyalty to a party once elected and to promote in them a spirit of independence with regard to lower house majorities. The desired result was members who would see themselves not as supporters of one or other of the contestants for government, but as independent scrutinisers of legislation and executive action, standing above the partisan contest for office. As late as the 1950s and 1960s, this image of the upper house retained influence among conservative members of the Councils, especially the Liberals among them who were philosophically opposed to strong partisanship in general. But the image had never been endorsed by the Labor Party. Thoroughly majoritarian in temper and viewing its members of parliament as pledged party delegates, Labor had never embraced either the role of an independent upper house

⁸ This paragraph and the next draw upon information about the Councils provided in S.R. Davis (ed.), *The Government of the Australian States*, Melbourne, Longmans, 1960.

⁹ In Western Australia a third of the Council was replaced every two years and in Tasmania three seats were contested every year and four in the sixth year of the cycle.

¹⁰ In New South Wales, parliamentary election from 1933 meant that partisan balance in the Council tended to reflect, with a delay, the position in the Assembly. Thus, Labor held a majority of seats in the Council between 1949 and 1958 (R.S. Parker, *The Government of New South Wales*, St Lucia, Qld, University of Queensland Press, 1978, p. 214).

or the idea that members had legislative duties independent of service to the party. From the perspective of Labor members of parliament, the reluctant partisanship of upper house conservatives was disingenuous, a smoke screen to cover unjustified over-representation and their routinely partisan behaviour in savaging Labor legislation.

So, as the twentieth century wore on, the traditional model of the state upper house was increasingly strained by strengthening democratic norms and, even more so, by the pervasive influence of disciplined parties on both the practice and the interpretive norms of Australian state politics. Disciplined partisanship had made serious inroads into most upper houses and threatened to strengthen its hold; partisan imbalances in representation were already a long-standing grievance; and restrictions on the suffrage were out of keeping with contemporary democratic norms.

The pattern of change: 1950–2002

Nineteen-fifty was a watershed in the history of the Legislative Councils. The Victorian Legislative Council Reform Act of that year introduced universal suffrage for the first time for an Australian state upper house, heading a series of major electoral changes around Australia over the following half century. As already noted, these developments built upon, or completed, a long history of gradual adaptation by the elective Councils to the norms of democratic politics. Their design as elective bodies made gradual democratisation both possible and probably inevitable. In the case of the New South Wales Legislative Council, with its nominee origins, democratic development was more problematic; the alternative path of abolition was, as illustrated by events elsewhere, equally possible. The key evolutionary events for the New South Wales Council were constitutional entrenchment and the shift to an elective base—albeit a parliamentary rather than a popular one—in the early 1930s. The former change shifted the balance of incentives in favour of survival, by making abolition constitutionally much more difficult and by strengthening its legitimacy; the latter change made further democratic change likely. But while developments from 1950 were evolutionary in nature, their effects on bodies whose rationale, ethos and public image had been bound up with the idea of restraining the democratic component of the legislature, were, I will argue, transformative.

The main changes affecting the Councils had to do with their electoral systems. They were democratisation, harmonisation of electoral cycles, and adoption of proportional representation. These changes were doubly significant in strengthening the Councils. Democratisation enhanced the legitimacy, and hence the authority, of the Councils. Just as importantly, harmonisation of electoral cycles and adoption of proportional representation recast the Councils' faulty mechanisms for producing differently composed chambers. This was important because, in an environment of disciplined parties, the ability of an upper house to exert influence depends heavily on its lack of dominance by the party or parties controlling the lower house.

I will comment on each of the elements of electoral system change I have identified. Democratisation, in the Australian context, may be taken to refer to several developments, in addition to the fundamental one of the introduction of universal suffrage. Compulsory enrolment and voting, which operate to enlarge the effective voter base, should be

included because this has been the norm for state lower houses since 1942.¹¹ Equal apportionment of electorates together with regular redistributions—or achievement of the same effect by establishing a single, state-wide constituency as part of a shift to proportional representation—has more recently also become a benchmark for democratic practice in Australia and is thus a necessary criterion for evaluating upper house electoral systems. Finally, an important signifier of the democratisation of state upper houses, which in several cases were controlled throughout their existence by the conservative parties, is the breaking of this pattern of one-sided dominance. With a couple of qualifications, the five Legislative Councils achieved these benchmarks of democratisation during the second half of the twentieth century.

The next component of electoral system change I referred to was a shift in all states except Tasmania to the holding of upper and lower house elections at the same time. South Australia, Victoria and New South Wales have additionally abolished fixed terms for members of Council by tying the term of the Council to that of the Assembly. Western Australia has maintained fixed terms for Legislative Councillors but assisted the harmonisation of electoral cycles by reducing the complexity of the rotation of Councillors from a third every two years (before 1963) to a half every three years (to 1986), before doing away with rotation altogether. Thus Tasmania is the only state to have retained both fixed terms for Legislative Councillors and a system of rotation, with annual elections over six years, which ensures elections for the two houses are normally held at different times. The importance of the move to conjoint elections is that election of Councillors becomes an adjunct to the contest for government in the lower house and is inevitably strongly influenced by the intense partisanship which characterises lower house elections. Conjoint elections seem to have finally tipped the balance decisively in favour of fully partisan upper houses on the lower house model.¹²

The final major change was the adoption of proportional representation (PR) for upper house elections in South Australia (1973), New South Wales (1978) and Western Australia (1987). Proportional representation has arguably had two main effects. First, it has more than likely reinforced the growth of partisanship. While the forms of PR have varied in their details between states and within states over time, they have almost always given electors a ticket voting option. This has given those voting systems, which have generally been PR-STV (single transferable vote) in form, much of the character of PR-list systems. Over time, the voting systems have largely converged on that utilised by the Senate since 1984.¹³ As Studlar and McAllister have shown for the Senate, such an electoral system tends to produce members of parliament with strongly partisan perceptions of their representational roles.¹⁴

¹¹ Adopted by Queensland in 1915, Victoria in 1926, New South Wales and Tasmania in 1928, Western Australia in 1936 and South Australia in 1942 (I. McAllister et al. *Australian Political Facts*, Melbourne, Longman Cheshire, 1990, p. 60).

¹² Note the observation of Victorian MLC James Guest: 'I had come to believe very strongly that conjoint elections were, and are so far, the biggest single factor in swamping the Council with party politics and rigid party control ...' 'Upper houses—Victorian present and future', in G.S. Reid (ed.), *The Role of Upper Houses Today*, Hobart, University of Tasmania, 1983, p. 64.

¹³ Electoral Council of Australia, *Proportional Representation Voting Systems of Australia's Parliaments*, Melbourne, 1999.

¹⁴ Donley T. Studlar and Ian McAllister, 'Constituency activity and representational roles among Australian legislators', *Journal of Politics*, vol. 58, no. 1, 1996, p. 76.

The other consequence of the shift to proportional representation has been the emergence of minor party representation as a permanent feature of the Councils concerned.¹⁵ Minor party representation played a key role in overturning the permanent hold that the conservative parties had previously exerted over the Councils in Western Australia and South Australia. As I have suggested, this development has been important in enhancing the democratic legitimacy of those Councils. Further, proportional representation has given minor parties the balance of power continuously in all three chambers—since the elections of 1979 in South Australia,¹⁶ 1988 in New South Wales and 1996 in Western Australia.

Proportional representation in the upper house, combined with the alternative vote with single member constituencies in lower houses, is now the major means of producing different partisan majorities in upper and lower houses in the states where it has been adopted. In Western Australia, where rotation of Councillors was abandoned with the adoption of proportional representation in 1987, it is the only such means apart from a small contribution produced by the greater degree of malapportionment in the electoral system of the Council than in that of the Assembly. It is also an undeniably democratic instrument and one which is efficacious, in the context of modern party politics, in enhancing upper house autonomy and enabling a strong upper house check on both conservative and Labor governments.

The Legislative Councils in 2002

The process of democratisation of the state upper houses is now almost complete. There are two exceptions. In Western Australia the Council's electoral system remains heavily malapportioned, albeit within a state context of generalised malapportionment. Secondly, the conservative parties continue their virtually unbroken hold on the Victorian Legislative Council. Given the pattern of alternation in government of Liberal/National and Labor over the past two decades in Victoria, this detracts to an extent from the legitimacy as well as the effectiveness of the Council.

With democratisation has come a new model of bicameralism. The design of state upper houses no longer casts them as conservative checks on the 'people's houses'. They are instead key elements within a more complex, and arguably superior, system of democracy. In all cases except the Victorian, their electoral systems differ from those in their companion lower houses and ensure the representation of different interests or bodies of electoral opinion. In the case of the three upper houses using PR, the range of opinion represented is also broader than that represented in the lower houses, a fact that further enhances their democratic legitimacy. Thus constituted, these upper houses play a major role in making the legislative process more inclusive, in line with the consensus democracy justification of bicameralism. Further, where they are designed to reliably achieve a different partisan balance from that of the lower house (that is, again, outside of Victoria), the contemporary Councils are a fully democratic means of ensuring due deliberation in the legislative process—or, in the terms employed earlier, ensuring

¹⁵ The different electoral systems are more or less friendly to minor parties—with quotas varying from 4.55 per cent in New South Wales, to 8.33 per cent in South Australia, to 12.5 per cent and 16.7 per cent in Western Australia—but the two longest established PR systems have become friendlier over time with the removal before the 1982 South Australian election of the threshold of half a quota and the change in New South Wales before the 1995 election from a 15 to a 21 seat constituency.

¹⁶ A minor party also held the balance of power in South Australia following the 1975 election, but in 1977 the Liberal Party regained its majority.

appropriate redundancy and delay. In these circumstances, the Councils, by enhancing the separation of powers, can also raise the level of justification required by parliament for the actions of executive government.

Different starting points and different patterns of change have resulted in the existence of three distinct types of state upper house in Australia at the beginning of the twenty-first century. The Tasmanian Legislative Council, long the only true embodiment of the old ideal of a non-party chamber, has maintained that model¹⁷ and the elaborate rotation of Councillors and independent electoral cycle that help to sustain it. The Western Australian, South Australian and New South Wales Councils conform in general to the second type, the model for which was the Australian Senate following its adoption of proportional representation in 1948. There is a developing Australian mainland norm that parliamentary systems should comprise a 'house of government' whose electoral system over-represents major parties and frequently manufactures partisan majorities, and a 'house of review' whose electoral system ensures more diverse representation and that lack of a governing party majority necessary for autonomy and a sustained capacity to exert influence. The Victorian Council represents the third type. It has been democratised but its legitimacy is weakened by its continuing domination by one side of the partisan competition for government. However, as the only mechanism now for producing incongruence in composition between the two chambers is rotation of Councillors, there would seem to be no obstacle to a resurgent Labor Party gaining control of the chamber over an extended period in government. Nevertheless, a bicameral legislature promising periods of governing party dominance of its upper house interspersed with opposition dominance appears to be a sub-optimal design.

Procedural development and performance

How, if at all, has the enhanced democratic significance of the state upper houses affected their operation? Is potential being translated into performance? In this part of the lecture I will discuss links between the institutional architecture of the upper houses and innovation and effectiveness in their procedures. The first step is to determine what sorts of procedural changes constitute development or improvement in an upper house. My approach is to draw general criteria for procedural development from the set of justifications for bicameralism set out earlier.

1. **Redundancy/second look** This role will clearly be better performed the more detailed the 'second look' and the more informed about legislation and its likely effects are those doing the looking. These ends can be furthered by procedures or practices ensuring that more bills are examined in detail, encouraging the growth of specialised knowledge among legislators and facilitating feedback from those in the community affected by legislative changes.
2. **Delay** The adoption and enhancement of procedures which involve effective public hearings, leading to the creation of well publicised parliamentary reports appeal as means of adding value to this role.

¹⁷ See R.K. Chapman, 'The Legislative Council' in *The Tasmanian Yearbook* no. 17, 1983, p. 73.

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3. **Separation of Powers** The associated criterion of procedural development is the extent to which parliamentary procedures strengthen the autonomy, or capacity for independent influence, of the upper house.
 4. **Consensus Democracy** Procedural development, related to this justification, occurs where procedures are modified to broaden, deepen and render more certain the participation of parliamentary groupings, especially the smaller ones.

These, then, are the sorts of procedural changes I have been looking for in recent research on the state upper houses. I have also attempted to determine how effectively these chambers are utilizing traditional procedures in the performance of their basic functions of review of legislation and scrutiny of government.

Explaining procedural development: hypotheses

The hypothesis that has guided this research is that the differences I have described between the five Legislative Councils, which structure relationships between upper and lower houses in distinctive ways, should have an impact on procedural development and legislative outputs. The Victorian Council, with its virtually unrelieved non-Labor party majorities, has normally possessed significant autonomy only during periods of Labor government, when there is a tendency for it to become an agent of the opposition. With reasonably frequent alternation of the major parties in government, and hence regular periods of low autonomy, the Victorian Council would seem to have lacked a stimulus to differentiate its role strongly from that of the lower house. One might expect to find a relatively low level of procedural innovation and a lack of procedures institutionalising a significant degree of autonomy for the upper house vis-à-vis the lower house. In the three Councils that have adopted PR, the boost to autonomy provided by the absence of major party majorities as well as the pressure to incorporate the interests of new, minor party actors would seem to be likely stimuli for procedural innovation. Finally, the Tasmanian Council might be expected to have procedures which reflect its autonomy vis-à-vis the lower house, but the likely effect of its independent membership on procedural development seems, *a priori*, uncertain.

Another potential influence on procedural development is size. Australian state parliaments are small and their upper houses especially small. This limits their resources of talent and their capacity to develop an elaborate internal division of labour in organising their tasks. Further, state upper houses differ in size, with the largest (Victoria, 44) nearly three times the size of the smallest (Tasmania, 15), and considerable differences among the others (South Australia 22, Western Australia 34, New South Wales 42). A second hypothesis, then, was that these variations might be expected to create procedural differences, especially with regard to committee system design and effectiveness.

Procedural development in state upper houses: the state of play

What do we find when we examine the current procedures of the state upper houses? In general, the chambers compare favourably with lower houses in the performance of their core functions of legislative review and scrutiny of government. Moreover, there is evidence of procedural development, differing in extent between jurisdictions. But there is naturally room for debate about the quality of the job being done, depending on the yardsticks one adopts for judgement.

With regard to legislative review, the Councils, unlike the lower houses, make considerable use of the committee of the whole, the traditional forum for detailed examination and revision of legislation. Further, the propensity to utilize this mechanism corresponds, with variations between jurisdictions, with a substantial amount of legislative revision. On the other hand, most state upper houses are yet to embrace any form of regular referral of legislation to committees. Thus, their development lags that of the Senate, which has sent legislation to its policy-related committees on a regular basis since the mid 1990s and to its Scrutiny of Bills Committee, to ensure their conformity with basic principles of administrative law, since 1982.

The main exception is the Western Australian Legislative Council. Over the past few years, this chamber has adopted a convention that all significant legislation should go to a standing committee. The Western Australian Council has not followed the Senate in referring legislation to policy-related committees. Instead, it has a specialist Legislation Committee, somewhat similar to the Senate's Scrutiny of Bills Committee, charged with examining principally the non-policy aspects of legislation. Legislation is referred to this committee unless one of the two policy-related committees (Public Administration and Finance, Environment and Public Affairs) is more relevant due to the subject matter of the bill and the form of inquiry desired. Legislation is referred after the second reading debate. The Western Australian Council also has a Uniform Legislation and General Purposes Committee, dealing *inter alia* with legislation that imposes an inter-governmental agreement or a uniform scheme or uniform laws throughout Australia. Relevant bills are automatically referred to this committee after the first reading.

The procedures of the Western Australian Council's standing committees also seem to be a more effective means of linking parliament and public in discussion of legislation—that is, developing the role I have referred to as *delay*—than parliamentary procedures in use elsewhere. Committee inquiries in that Council typically involve public hearings where legislation is a matter of community interest. Moreover, the production of a formal report, available in hard copy as well as electronically on the internet, assists communication with the public, both directly and indirectly via media reports.

The function of scrutiny of government, or administration, is traditionally pursued through parliamentary questions, with follow-through to urgency debates and parliamentary inquiries if necessary. The evolution of state upper houses through the twentieth century, in most cases strengthening their party-house character and linking the fortunes of their members more tightly to the partisan contest in the lower house, has in some ways made them more likely to develop procedures for scrutiny along the lines of lower houses. Question time, for instance, seems to have evolved quite rapidly from a marginal or non-existent practice in upper houses to a prominent one.¹⁸

Nevertheless, the environment in which scrutiny occurs in upper houses remains significantly different to that of lower houses. The upper houses contain proportionately fewer ministers and shadow ministers, they lack the dominating figures of the premier and opposition leader, and they often contain a number of cross-bench members. As a result, they are usually not platforms for set piece confrontation between rival front benches to anything like the extent of the lower houses. This is reflected in forums for

¹⁸ The clearest case is the Tasmanian Council, which had no question time until the late 1990s.

questions without notice in some Councils (particularly those of Western Australia and New South Wales) that are probably the most effective in Australia, in terms of numbers of questions asked and answered. The Western Australian, New South Wales and Victorian Councils are also making heavy use of questions on notice.

Questions remain a major means of acquiring information about, and highlighting deficiencies in, the operation of government. But in modern parliaments a growing contribution to the performance of this function has been made by parliamentary inquiries, undertaken through systems of permanent, or 'standing', committees. It is by now uncontroversial to say that the strength of a parliamentary chamber's committee system is a good indicator of its capacity to scrutinise government.

The development of standing committees is undoubtedly the procedural change of greatest significance in the state upper houses in recent times.¹⁹ Committee systems began to emerge in the 1980s and developed a good deal, albeit unevenly across jurisdictions, through the 1990s and the first years of the new century. One category of committees performs a range of specific scrutiny functions. State upper houses have been particularly active in developing committees to scrutinise delegated legislation, budgetary estimates and semi-autonomous bodies. The other, larger category of permanent committees comprises committees with a broad investigative function related to either policy or portfolio areas.

All upper house have developed committee systems, but there are substantial differences between jurisdictions. The number of committees in each system and the level of activity, in terms of completed inquiries, tend to vary with the size of the house. Partisan balance, important for the independence of the committee vis-a-vis the government, tends to reflect the composition of the chambers, as does the ability of committees to control their own programs of inquiry. The Victorian, Tasmanian and South Australian Councils rely heavily on joint committees, which tend to be controlled by the majority party in the lower house. Most upper houses have modest but apparently satisfactory staff resources to deploy on committees. These have generally grown with the committee systems over recent years. The exception is the Tasmanian Council, which operates largely without staff for committee work. The Councils also differ in the extent to which their permanent committees have succeeded in eliminating the need for upper houses to set up ad hoc select committees. The most recent evidence seems to suggest that the spirit of inquiry in the Western Australia Council and, to a considerable extent, in the New South Wales Council is accommodated by the committee system. In Victoria, South Australia and Tasmania, on the other hand, the constraints imposed by joint committees seem to be producing an ongoing demand for ad hoc committees under the control of the upper house.²⁰

Turning, finally, to the way in which chambers manage their business, a certain amount of procedural change seems to have resulted from the challenge of growing diversity in the Councils that have adopted PR. The cross-bench share of the total membership of the

¹⁹ I am not interested here in their formal origins: some have statutory backing, some are based in standing orders, and a few have more tenuous status. My comments refer to all committees, other than those dealing with matters internal to parliament or select committees established to undertake a particular inquiry.

²⁰ In the Victorian case, the demand is largely confined to periods when the partisan majorities are different in the two houses.

Western Australian, South Australian and New South Wales Councils in 2002 is 24, 27 and 31 per cent. The new partisan groupings bring with them distinctive policy interests and a different orientation to parliament, since they cannot envisage being participants in government and, for the same reason, cannot view themselves as part of an opposition either. Accommodating a substantial cross-bench becomes a greater challenge for a chamber the larger the number of groups involved. In the Western Australian Council there are currently two cross-bench groups, in South Australia there are four, and in New South Wales there are nine. In Victoria, where a majority electoral system has limited the number of partisan groupings, dialogue between the leaders of the government and opposition continues to be viewed by all involved as satisfactory for coping with competing organisational demands. But it is not surprising that changes in the number, weight and kind of groupings have resulted in pressures to adapt business arrangements in the three Councils utilising PR.

But approaches to the problem have differed. The South Australian Council has taken an informal approach. Business continues to be managed by the whips of the major parties, though there is consultation with, and an effort to accommodate, the cross-bench. It may be that, as with the Tasmanian Council whose arrangements are similarly informal, the South Australian Council's small size encourages informality. The Western Australian Council, in contrast, has formalised the influence of its minor parties by including them in a Business Management Committee established in 1998.²¹ In the New South Wales Council, the notable procedural change in this area has been the introduction in mid-1999 of a new rule, establishing a form of lottery, for managing private members business. This formalised equal opportunity for the cross-bench as a whole, allowing more private members business to be dealt with, and also provided a neutral means of allocating opportunities to the various groups on the cross-benches.²²

Inter-jurisdictional differences and their explanation

Interestingly, the five chambers exhibit considerable differences in performance and levels of procedural development. The Tasmanian Council's modest innovations seem consistent with expectations based on its size and the long-term stability of its electoral arrangements. It continues to play an important role in the area of legislative review. However, its investigative committees, relatively limited in extent as might be expected of a very small chamber, suffer from inadequate staff resources. The South Australian Council is active as a chamber of legislative review. But it has a relatively slight record of procedural innovation across the board, which conflicts with my hypothesis about chambers greatly affected by electoral system change. Its committee arrangements share similarities with the Tasmanian Council, but staff support is much better. The Victorian Council has a changeable impact, waxing or waning in effectiveness with changes in the partisan composition of the government. Its procedures, and its not inconsiderable procedural innovations, reflect a chamber dominated by the government-opposition

²¹ The Committee comprises 'the Leader of the House with the Leader of the Opposition and such other Members as the Leader of the House may invite' (Standing Order 125A, adopted June 1998). The deliberately broad phrasing allows flexibility to cope with changes over time in the composition of the cross-bench.

²² The rule establishes a category of 'Items in the Order of Precedence', comprising 12 items selected randomly from three groups of members putting forward notices of motion. An opposition member's name is drawn first, followed by a cross-bench member, followed by a governing party member. Private members' legislation is incorporated in the draw along with other notices of motion. The rule imposes time limits on members' contributions to these debates.

dialectic and unable to develop sufficient autonomy over the long-term vis-à-vis the lower house to permit a strong upper house contribution to scrutiny of government through the committee system. Committee system development in the Victorian Council—as in the Tasmanian and South Australian Councils—is weakened by the predominance of joint committees, which operate, in effect, to undermine bicameralism.

In comparison with the other three cases, the Western Australian and New South Wales Councils seem to represent a higher level of procedural development and performance. The New South Wales Council is comparatively active in the revision of legislation, and has the most extensive and well-resourced machinery for the scrutiny of government. The Western Australian Council has been by far the most innovative in the development of machinery for legislative review. Its arrangements for parliamentary questions, with and without notice, are notably productive. While its committee procedures for scrutiny of government have been developed along different lines to the other Councils, they seem at least as well designed and as effective for the scrutiny of administration (as distinct from policy analysis and development)²³ as any. Both the New South Wales and Western Australian Councils have developed committee systems that enhance the autonomy of these chambers. Both have innovated procedurally in response to the influx of minor parties, produced by the shift to PR.

My hypotheses seem to have substantial explanatory power. The hypothesis about PR, or composition of the chamber, explains the position of the New South Wales and Western Australian Councils at the head of the field, but not that of the South Australian Council in the second group. But the second hypothesis, about size, seems to make sense of the South Australian case and of certain similarities between the Tasmanian and South Australian Councils. The findings for the Victorian Council seem also to accord with the first hypothesis.

Both PR and size appear to be necessary rather than sufficient for procedural development. Moreover, the case of the South Australian Council would seem to indicate that of the two factors considered, size is more fundamental than the composition of the chamber, in the sense that there would seem to be a size beneath which it is extremely difficult for a chamber to equip itself with, and operate, the machinery of a modern house of review and scrutiny. It is a concern, therefore, that there have been pressures in recent times, unfortunately successful in the Tasmanian case, to reduce the size of the two smallest Councils.²⁴

Regarding the first hypothesis, a comment about the nature of the relationship between the composition of the chamber and procedural development and effectiveness might be useful. PR has had two effects: it has, firstly, given minor parties the balance of power in upper houses and, secondly, it has prevented major parties, especially governing parties, from dominating the houses. Which of these two consequences of PR is the more important? There is a case to be made for the first effect. A minor party holding the

²³ Committee systems in Australian parliaments tend to be strongly oriented to the activity of policy development, arguably at some cost to their performance of the more important parliamentary function of scrutiny of administration.

²⁴ See Harry Evans' discussion of the issue of size and his argument that the Tasmanian Parliament, following its contraction in 1998, is too small to sustain both a parliamentary executive and effectiveness in review of legislation and scrutiny of the executive. 'Constitutional safeguards, bicameralism, small jurisdictions and Tasmania,' *Legislative Studies*, vol. 13, no. 2, 1999, pp. 1–6.

balance of power in an upper house over a period of years might be thought to be an especially efficacious promoter of change designed to strengthen the autonomy and effectiveness of the chamber. The reasoning is that such a party, lacking a realistic expectation of representation in the lower house or participation in government, has an interest in creating as influential an upper house as possible as a vehicle for its ambition.²⁵

But there seems to be no evidence from any state jurisdiction to suggest that minor parties holding the balance of power have pushed an agenda of procedural reforms designed to strengthen the capacity of an upper house. Rather it appears that minor party representatives, like their major party colleagues most of the time, are preoccupied with particularistic concerns. Those developments of greatest importance to the core functions of upper houses, such as legislation committees and scrutiny committees of various kinds, seem to be more a product of the absence of governing party majorities than of the presence of minor party balance of power holders. This absence seems to change the political calculus for the major parties: it provides opportunities for opposition parties and may perhaps also weaken the compulsion of governing party representatives to control the agenda of the house.²⁶ Minor parties are important because, where they are established in a balance of power role, they make the absence of a governing party majority a permanent feature of the house. Similarly, they make it less likely that the procedures of the house will be utilized merely to facilitate a cross-house opposition strategy of confrontation with the government. In such an environment, not only is desirable procedural development more likely, but existing procedures are also likely to have a great deal more potency in the service of the core functions of upper houses.

Conclusion

My conclusions can be stated briefly. Strong upper houses are an important and distinctive part of Australia's constitutional heritage. The Senate is only the most visible and celebrated expression of Australian bicameralism, albeit a vital one that has influenced a good deal of the change I have outlined today. The state upper houses, whose contributions to our system of government often continue to be insufficiently understood and appreciated, have undergone a long and largely successful process of evolution to be valuable contemporary supports for parliamentary democracy in their jurisdictions. That evolution continues. Finally, the structures, procedures and outputs of the several Australian cases differ and the study of these differences can yield insights into the conditions for an effective upper house.



Question — I would be interested in your comments on the matter of ministers in upper houses. We do have the interesting example of Tasmania, being a house of Independents, where there is not a suite of ministers as there are in most of the other houses. Do you

²⁵ Campbell Sharman has made this suggestion in relation to the Australian Democrats and the Senate, in 'The representation of small parties and Independents,' *Papers on Parliament* no. 34, December 1999, pp. 149–158.

²⁶ For example, the New South Wales Council's general purpose standing committees, the most significant procedural innovation in the recent history of the New South Wales Parliament, was an Opposition initiative, albeit supported by cross-bench and independent members (Gareth Griffith and Sharath Srinivasan, *State Upper Houses in Australia*, NSW Parliamentary Library Research Service, p. 106).

have any comment on what you have looked at, as to the desirability or otherwise, and the effects, of having ministers in upper houses?

Bruce Stone — Eliminating ministers is close to the top of just about everybody's list of desirable reforms for upper houses. Tasmania has one minister. Most of the other houses seem to have between two and five. Certainly in Western Australia, the Commission on Government argued a few years ago that it would like to see the WA Council go down to something like one minister to represent the government. I think that matters less where the upper houses are large. If you at look, say, South Australia, with 22 members and up to four or five ministers at times, then I think you've got a situation where the flow of talent to the ministry eats very significantly into the resources available to the upper house. It probably matters less in New South Wales and Victoria.

So yes, I think it is probably a desirable change in that it helps to differentiate for all concerned the roles of the two chambers. I don't think it is absolutely vital, but probably desirable. And the strength of that desirability increases as you get down to smaller houses like Tasmania and South Australia—and Western Australia is only a dozen members larger.

Question — The one state of course that doesn't figure in your paper is Queensland, because it doesn't have an upper house. I wonder if you'd care to comment on the implications of a unicameral legislature in terms of the quality and nature of accountability of government. And do you have any data or other evidence that suggests the level of awareness, understanding or interest in upper houses in the other states? I'm prompted to ask this, because as a volunteer guide at Old Parliament House, I'm constantly struck by the number of people who come into the Senate chamber there, and say: 'Is this chamber elected, and who elects it, and what does it do?', despite the higher visibility of that chamber in recent years. How typical is this of the electorate in general?

Bruce Stone — I guess it's unlikely the visitors are all Queenslanders. Unfortunately, we do have a good deal of evidence that our fellow citizens are not as well informed about our system of government as would be desirable. They know quite a lot about some bits of it, usually the bits that involve them—having to vote and how to vote and that sort of thing—but not about other things. Queensland, of course, did have an upper house until 1922. It had a nominee chamber, not an elective one, as did New South Wales, and those chambers were always vulnerable to abolition. Governments can stack them, as they did in Queensland and as they attempted to do in New South Wales, and then use the numbers that they had planted in there as a means of getting rid of the upper house. So yes, Queensland once did have a desirable parliamentary structure, but it chose to abandon that in 1922.

It is sometimes said—and I think it is a bit glib—that there would have been no Fitzgerald Royal Commission, and none of the excesses of the Bjelke-Petersen regime if there had been an upper house. I think that is too easy. I come from a state which generated some celebrated scandals in the 1980s, collectively known as 'WA Inc', perpetrated not necessarily with the connivance of the upper house, but *despite* the existence of the upper house. On the other hand, the upper house in Western Australia, unlike the case in Queensland, contributed to the pressure that led to the calling of the Western Australian Royal Commission—which in turn led to a further enquiry by the Commission on Government. The result was a detailed examination and discussion of our processes of

government in Western Australia over a period of half a decade or more. And those enquiries have made quite a difference to the political culture in Western Australia. There's now a good deal more respect for parliamentary processes and, indeed, upper houses.

When I go to Tasmania, Victoria and New South Wales, I can't believe the outworn clichés about upper houses I occasionally read in the newspapers—cheap journalism at its worst. You never see that in Western Australia now. There is now in the media a good deal of respect for the role an upper house. So, I wouldn't want to draw a watertight connection between upper houses and good government. They are perhaps a necessary but not a sufficient condition for the elimination of abuses in government. That's probably it in a nutshell.

Question — I want to correct your statement that, over time, Labor will presumably win a majority in the Victorian Legislative Council. In fact, it is set up in a way that makes it almost impossible for Labor to win a majority, because they have so many wasted votes in those seats in northern and western Melbourne that the votes in the rest of Melbourne and Victoria are spread too thinly for them to get a majority. They would need to win 55 per cent of the two-party vote at two consecutive elections to win a majority.

Also, you referred to the legitimacy of the Victorian Legislative Council being clouded by the fact that it was always under conservative parties' domination. Can you explain what you mean by legitimacy in that context? Also, in which ways has it not been as innovative as other upper houses?

It seems to me that one of the flaws that upper houses still have at state and federal level is this quite undemocratic system of a 'double turn', so that people are elected for six or eight year terms—and that's a very long time to be unanswerable to the electorate. This is particularly so when combined with their ability to change parties from virtually the moment they are elected, as Richard Jones did in the NSW Legislative Council for example, and we've had three senators desert their parties in the last six years, and a fourth one is waiting to hop. Can you comment on the implications of that and how that could be reformed?

And, if the upper house is a house of review, why don't they have twice as many members as the house of government?

Bruce Stone — On the last question, yes, it seems to me quite reasonable. I remember being told in the United States—which also has a very strong bicameral culture—that one of the western states decided to become unicameral, and they abolished the lower house, rather than the upper house, which I thought was very sensible of them.

Your first point was an information point—people have tried to explain to me why the ALP will never get a majority and I haven't quite cottoned on yet, I obviously need to look more closely at this. Presumably this depends on the appeal of the Labor Party in these areas you are talking about. The Labor Party did quite well in rural Victoria last time, rather than metropolitan Victoria. And the major parties' support bases seem to be more fluid than they were. I suppose what I am saying is that the apportionment process, at least, seems to me to be clean and, if it happens that the Labor Party can't muster

majorities, then that has to do with its appeal from area to area and that's something for the Labor Party to address.

Your second question concerned legitimacy in Victoria. My points about the Victorian upper house are not *only* about legitimacy. But I think that if you have basically a permanent, conservative majority in an upper house while you have alternation—Labor to Coalition, Coalition to Labor—in your lower house, people start asking ‘What’s going on?’ One of the major components of your political system, the Labor Party, is permanently disaffected. It seems to me that they will certainly regard the process as illegitimate and I think that’s unfortunate. An atmosphere of illegitimacy is created when people believe that the system, for whatever reason, is rigged so that only one side in the partisan contest for government is ever likely to control the upper house.

It is also undesirable for oppositions to control the upper house, and I think Victoria illustrates that, as well. The upper house then becomes the official platform for the opposition, a sort of ‘government in exile’ and a means by which they can harry and embarrass and thwart the government to promote their own electoral prospects. The most desirable setup for an upper house is where there is neither government nor opposition majorities, and that’s the genius of proportional representation as it is working in Western Australia, South Australia and New South Wales, depriving the government *and* the opposition of majorities in the upper houses.

So it’s not only a question of legitimacy, it’s also a question of effectiveness, and I will link that to your point about innovation. Where you have an upper house dominated—as I believe is the case, though I might be exaggerating a little bit, in Victoria—by the government-opposition dialectic, then you are unlikely to get innovation. The government, when it has a majority, wants an upper house that is as weak as possible. It had no incentive in the Kennett years, when it controlled both houses, to create a stronger, more vigilant upper house at all. And when the opposition has control, it has all the means that it needs to harry the government. So you’re likely in those circumstances not to get as much desirable innovation as you would where neither the government nor the opposition has a majority.

On the other hand, I wouldn’t want to say that there is no innovation in Victoria. There is in fact a good deal of procedural innovation in the Victorian upper house, but I believe this overlay of the government-opposition dialectic tends to undermine the effectiveness of those procedures.

Regarding the double term—that was part of the original design of most of these houses, that they would have staggered elections. There were also designed so that elections for the upper house didn’t coincide with elections for the lower house. These were intended as means by which the upper house would develop a unique function—so that, when electors went to vote, if elections were held at a different time than for the lower house, they were focussed on the upper house and what the upper house’s role was, and what sorts of people they should be electing to the upper house. Staggered terms were to ensure part of this idea that the political feeling in the community at any one time shouldn’t enable the partisan majority being swept to office in the lower house to also gain a majority in the upper house. So they were part of the design principles intended to underpin autonomy for upper houses. Of course Western Australia has done away with staggered terms—now every four years in Western Australia the whole Legislative

Council is up for election and the only means in Western Australia for ensuring different partisan majorities in the two houses is proportional representation in the upper house. And that's a possible way of designing things.

I don't think that people deserting or abandoning the parties for which they were elected is a huge problem in Australia. Sometimes I think they have good cause to abandon those parties. In other places where this practice is rife and where corruption is involved—and I'm talking about outside Australia—steps have been taken to prevent people from deserting their parties. I don't think we need that in Australia, not at present anyway.

Question — How do you go about the creation of new states? The Constitution quite clearly envisages that there would be a process for this, and that federalism would be a continuing thing, rather than being static, as it seems to have turned out to be. I remember the New England New State Movement in New South Wales, and recently we've had the situation in the Northern Territory. We don't seem to be very good at getting new states up and going. How do we cope with that?

Bruce Stone — This is slightly off my topic. I'd note, to make a connection with my topic, that neither the ACT nor the Northern Territory parliaments have upper houses, and I think the design of political institutions in the Northern Territory has been quite poor. In the ACT you at least partly overcome the problem of not having an upper house by having your unicameral chamber elected by proportional representation. I think that's a minimum. If you don't have an upper house in a parliamentary system, I think you need to have proportional representation for your lower house. This is what the New Zealanders have now done, of course.

I wouldn't mind seeing a few new states, but I don't see any prospect of that coming about in the near future—except for the case of the Northern Territory when it gains a sufficient number of people. People have speculated at times in Western Australia about hiving off bits of the north and perhaps linking them with other parts of northern Australia. Yes, I'd be happy to see a few more states, but clearly it's not on anyone's agenda at the moment.

Question — Regarding your point about proportional representation and the consequence in upper houses that you prefer—that neither the government nor the opposition be in control—I wonder whether you could elaborate on the potential for either the government or the opposition in the upper house using special interest groups or minor parties to get the same effect of having a preponderance. And the likelihood that special interest groups may in fact have a 'less than properly proportional' influence on policy.

Bruce Stone — I'm not sure I'd call them 'special interest' groups—they are elected members of parties represented in upper houses. And, yes, party alliances do form. These need to be negotiated between the parties, and of course this is a continuing process—usually driven by the government in the lower house trying to stitch together coalitions in the upper house in order to get its legislation through. But I think it is part of the genius of the system that, through those negotiations, the minor party representatives are enabled, to an extent, to look after the interests of the people who elect them—though of course they have to compromise, as does the government.

This brings me to the second part of your question. It is a frequent allegation directed toward minor parties that they exert a disproportionate influence. Again, I wouldn't want to deny that it can be very handy to be strategically located between two blocs, both bidding for your support. No question, that is an advantageous position to be in. But that's what you tend to get where you have 20-odd per cent of people supporting minor parties and the rest supporting two big blocs. If the electorate were more fragmented, then the alliances would be more complex, so in some ways it's an artefact of the distribution of political support in the system. Minor parties don't get any more representation than their vote entitles them to, it's just that they have been fortunate—in the case of the Senate and in some of the state upper houses—to be nicely located between two major blocs which gives them an advantage in the negotiating process. This situation is partly a product of proportional representation and partly of other components of our electoral arrangements, especially for mainland lower houses, which favour the consolidation of two major party blocs. But I see the consequences for our system of government as largely positive and certainly not as questioning, or qualifying, the democratic character of our parliaments.