

## Should Parliament be Abolished?

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I am indebted to Professor Campbell Sharman for the title of this paper, which is extracted from a Senate Occasional Lecture he delivered in December 1998, called 'The Senate and good government'. He gave an impressive catalogue of the intellectual scams used to attack the role of the Senate whenever it gets in the way of a government proposal, and which support the notion of an elected dictatorship, or an executive government untrammelled by parliamentary interference in the legislative process.

While not directly addressing the issue of proportional representation (PR), Sharman's paper dealt with attacks on the Senate that flow from the powerful role the Senate has developed, made possible by the effect of proportional representation on the party balance in that chamber. This effect, combined with the increase in the number of senators from each state to 12, and the increasing support for minor-party candidates in elections (or the decreasing support for the major parties, as you will), has meant that governments will seldom command a Senate majority.

One argument against Senate intransigence (so-called) is that 'the Government is elected to govern'. What Sharman said about this, in part, is as follows:

### **The government is elected to govern**

...This sounds so obviously true that it is impossible to dispute, but it is often used in a context which smuggles in several more meanings than the ostensible one. When the Senate is considering amendments to government legislation or proposes to send a measure to a committee for scrutiny, the phrase 'the government is elected to govern' is used as a way of attacking the Senate's action. The phrase becomes shorthand for the view that, the government may not always be correct, but it has the right to have its legislation passed without undue interference from Parliament.

A stronger version is that the country needs a government that can take action without having to go through the paraphernalia of parliamentary scrutiny and amendment.

The plausibility of the phrase is based on a confusion over the role of executive government. Of course the government is elected to govern in the sense that, once the ministry is commissioned, the government can use the vast range of legislation on the statute book and deploy all the resources of the public service to pursue its policies. It does not mean that the government can make any new law it wants by the stroke of the Prime Minister's pen. Governing is not the same as legislating and, while the role of government includes making proposals for legislation, the only body that can make laws is the Parliament. So, even though it is true that governments are elected to govern, it is not true that they are elected to have passed any law they fancy. In fact, the whole point of parliamentary democracy is that governments are forced to submit proposals for new legislation to a representative assembly to gain consent for them. While party discipline may ensure that this consent can be taken for granted in the lower house of parliament, this is hardly something to be celebrated unless, of course, you are the government and don't want your legislation scrutinised by anyone who is not of your partisan persuasion.

So, the reply to the statement that 'the government is elected to govern' is to ask whether this means that parliament should be abolished. The response will be a startled 'of course not' but, from that point, the discussion should begin to move in a more substantive and fruitful direction, focussing on the merits of particular policies and the plausibility of objections to government legislation.

It must always be kept in mind that the whole point of aphorisms like 'the government is elected to govern' is to pre-empt discussion of the merits of a particular government policy by appealing to a generality which is supposed to foreclose any further discussion or make opposition to the government's policy appear illegitimate.<sup>1</sup>

Sharman is correct in his judgment that the response to the question, 'Should parliament be abolished?', will be, 'Of course not'. Unfortunately, arguments about the Senate and the exercise of its powers will not generally be seen in that context. Instead, attitudes to the Senate, what decisions it should make and even how it should be constituted are much more coloured by immediate responses to specific issues in political contention at a given point in time. This is seldom, if ever, accompanied by any assessment of the desirability of ensuring a spread of powers in our democracy, including an effective scrutiny of government actions and a legislative function that is not totally under the heel of the executive government. This reflects the simple reality that practical issues loom larger in voters' minds than theories about the separation of powers.

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<sup>1</sup> Campbell Sharman, 'The Senate and good government', published in *Papers on Parliament* no. 33, May 1999, pp. 152–170.

It is indicative of the problem of having a serious debate about institutional issues that I did not hear of Sharman's paper until he wrote to me about an article I had published in the *Australian* on 29 December, but which I wrote, coincidentally, on 11 December, 1998, on the day he was delivering his paper. My article was something of a cry from the heart, and started as follows:

This is a fascinating period in Australian politics. Where are the defenders of the institutions which protect our democracy? Australians who label themselves as conservatives seem to have abandoned the role.

Fundamental issues, such as the importance of the rule of law, its sister issues of the independence of the judiciary and the separation of powers, seem to be slipping out of public debate and perhaps public consciousness. The role of the Senate, a conservative keystone of our Constitution, is denigrated even by some serving senators.

I was a member of the Senate from 1974 to 1990, and was Opposition Leader in the Senate from 1983 to 1990. After one term in the House of Representatives, I did not contest the 1993 election and assumed the more comfortable role of an active private citizen. After the (to me) welcome election of the Liberal and National Coalition government in 1996, I took no more than a layman's interest in what was happening in Canberra, happy to leave it to those who have undertaken the arduous and, in my view, noble task of political life.

As a citizen, however, I experienced an increasing sense of discomfort at what I saw as the blurring of some important principles. My concerns arose in a number of areas. I have never had any difficulty in accepting the right to criticise the decisions of judges. The decisions of appeal courts are, after all, a constant reminder that judges do get things wrong. It puzzled me, however, that little distinction seemed to be made between defence of individual decisions and defence of the role of the courts and the importance of the rule of law and of legal institutions.

Other incidents caused me alarm. For example, I heard an ABC Radio interview with Senator Helen Coonan, who seemed to be advancing propositions that would lead to a significant reduction in the ability of the Senate to challenge the measures of the government of the day. From distant memory, I think it was a variation to the method of election of senators, the imposition of some minimum quota of first-preference votes before a person could be eligible for election. I remember being disturbed enough to ring the ABC in an endeavour to speak to the journalist who had conducted the interview in what I thought was an incompetent manner. It is perhaps fortunate that I was listening to the program from Western Australia so that the interviewer had long gone by the time I rang, but I thought there were at least half a dozen questions that any person with a reasonable knowledge of political history would have asked a Liberal Party senator advancing the views put by Coonan.

So, a series of incidents left me with the question buzzing around in my head, 'Where are the defenders of our conservative institutions?' As I wrote in the *Australian* last year,<sup>2</sup> our Constitution contains intentionally conservative elements. The staggered

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<sup>2</sup> The text here follows substantially my article in the *Australian*, 29 December 1998.

election of senators is one of those elements. The Senate is not meant to reflect the most recent electoral changes in the House of Representatives. Short of a double dissolution, the Constitution has designed the Senate to have half of its membership one election behind. Yet government senators rail against the Senate exercising its role as a brake on the impetuosity of the House of Representatives. They demand the execution of the mandate of the most recent House of Representatives election. Their contempt for their own mandate is puzzling.

As Opposition Whip during the 1975 confrontation between the Senate and House of Representatives, I saw at close quarters the ultimate exercise of Senate authority when it denied the Whitlam government supply. It did this on the basis of a fiddled blocking majority produced by the shenanigans of the state governments in New South Wales and Queensland. The appointment of Albert Patrick Field to the Senate vacancy caused by the death of a Labor senator, Bertie Milliner, did not deter the conservative forces of 1975 from the view that the Senate had a right, not only to amend government legislation, but to bring a government down.

It will serve Australia badly if the pursuit of short-term political objectives clouds the importance of fundamental institutions to maintaining our free and democratic society, and a parliament that does not merely support an elected dictatorship.

What of the rule of law? Few Australians would want a dispute they had with the government of the day, with the taxation office, with the police force, or indeed with their neighbours, to be determined on the whim of a bureaucrat or still less a politician. The fundamental protection we all enjoy is that if we disagree with powerful forces in the community we are entitled to the protection of our legal rights through an independent judiciary which acts in accordance with law without fear or favour. The theory is that we cannot be oppressed by the illegal conduct of others because independent courts are there to protect us.

There is much that is wrong with the courts, and their processes. The courts themselves are vigorously debating these matters, including the affordability of justice. Whatever the problems with the judicial system, the ability of unfettered governments and wealthy corporations to oppress us is so obvious that there must be some independent restraint.

A current controversy is the role of the Attorney-General in the defence of the courts. What has not been made clear is that there is a distinction between debate, discussion and criticism about and of particular judgments of the courts, and the need to defend the institutional arrangements that make the courts independent of the executive government. If the current federal Attorney-General's view is correct, then it still seems to me incumbent on him and indeed the whole government, to explain and defend the role of the courts as a fundamental part of our constitutional structure and a fundamental element of our freedom. It would be good to hear that explanation from government and opposition alike.

The Senate is given almost co-extensive powers with the House of Representatives under the Constitution. At the same time its composition and method of election ensure that it more truly represents the voting of the people of Australia than does the outcome of the single member electorates in the House of Representatives. Those

people who like to see governments with unfettered power to create whatever their vision of the moment dictates will see Senate power as a restraint on efficiency. True conservatives, who think that the error might have been too much legislation in the past rather than too little, conservatives who can see that the fashions of the moment are often not the fashions of tomorrow and indeed are often sadly wrong, would see restraints on legislative and executive power as of great value. Where are the proponents of these conservative views today?

I have had experience in the Senate as a member of a government majority, as a member of an opposition with a blocking majority, and as a member of a government with the opposition having the numbers. By the time I left the parliament in 1993, it was my firm conviction that good government was served by the government of the day not having control of the Senate. That view may have been coloured by the fact that by then I had been in opposition for 12 years, but governments of all persuasions are arrogant in their belief that they know best. An upper house not controlled by government is now my preference.

The public cannot afford to rely on politicians' arguments alone in these matters. Politicians necessarily use the arguments available to justify what they want today. A good recent example comes from Western Australia. For the whole history of that state, until 1997, conservative forces enjoyed a majority in the Legislative Council. Until that change, conservative politicians argued that the powerful Legislative Council was an appropriate fetter on the potentially damaging wilfulness of the lower house. Now that there is a Coalition government and Labor and small parties have the majority of the Legislative Council, there is a change of tune.

This is, of course, a change of tune based on political convenience. The question that needs to be considered is whether there is a good, solid argument in the public interest for maintaining a circumstance where governments are subject to checks.

In the current political climate much is made of the fact that a single senator may be determining the fate of government legislation. That argument is, of course, fallacious. No single senator has any power to affect the outcome of the legislative program unless he or she is taking a position that is in common with enough of the rest of the Senate to make a majority. Senators Brian Harradine and Mal Colston have a critical role only when the ALP, Greens and Democrats are united in their opposition to a government measure. The united opposition group in such circumstances represents a democratically elected majority against the government measure. In the current controversy over the goods-and-services tax, it is clear that both Colston and Harradine will have no influence at all if the government is successful in achieving a rapprochement with the Democrats. The government will then have achieved majority support, and Harradine and Colston will be irrelevant.

The thing to remember is that any single Liberal, National or Labor senator could be pivotal in the case of a close vote. In the 1970s, when senators on the conservative side were less bound by party discipline, they often used their power across the floor to achieve the same apparent dominance in the decision making process as Colston and Harradine. There seems to me nothing undemocratic or indeed undesirable in that circumstance.

Nothing that has occurred since I wrote the above has lessened my concerns; indeed, they have heightened. I referred in the article to the position in Western Australia with respect to its upper house of parliament. Recently, in an interview published in the *Australian* on 29 June 1999, the Deputy Leader of the Liberal Party in Western Australia, Colin Barnett, was quoted as saying that he wanted to abolish the Western Australian upper house. His reported view was that two houses of parliament were probably a luxury the state parliament could not afford in the context of growing financial pressures and increasing battles with the federal government. Coming from a member of the state parliament in Western Australia who has my respect, this is a sobering reminder of how the exigencies of day-to-day politics and changes of political fortune can affect judgments about institutions.

This report in turn reminded me of another Western Australian example of how structural issues are construed in straight political terms. In my pre-parliamentary days, I remember discussing what I saw as the gross gerrymander of the Legislative Council with one of the Western Australian Liberal Party members I most respected, subsequently a fine state Attorney-General. I asked, 'How do you justify these electoral arrangements?' The reply, seriously delivered and I am sure seriously meant, was, 'Fred, it stops socialism.' I suppose the unspoken text was 'whether the people want it or not.'

If you are trying to find out what sort of institutional structures best serve the national interest, to whom do you listen? Do you listen to someone who at one point claims that a constitutional amendment to require simultaneous elections for the Senate and House of Representatives would make the Senate 'a rubber stamp' of a socialist, centralistic Labor government<sup>3</sup> and less than three years later supports the same amendment as central to good government? I suspect not.

Would you take any notice of someone who in 1974 supported the proposition that the real effect of such an amendment was to juggle with the terms of office of the senators in order to make the Senate a rubber-stamp of the House of Representatives? Someone who suggested that such a dangerous law would vitally affect the parliamentary system, cut out the constitutional independence of the Senate, and open the way for progressive reduction of its powers,<sup>4</sup> yet who claimed, after three short years, that such a change was 'a simple matter of commonsense'?<sup>5</sup> You would probably treat that person's views with caution.

And would you be satisfied with an explanation that included saying 'if we all are to be men of absolute consistency it seems to me that we will never make progress with constitutional change and reform?'<sup>6</sup> Probably not.

If I have correctly judged your response to my rhetorical questions, there is no point in my proceeding further, as the person I am referring to is me. I am one of the majority of Liberal and National senators and members of the House of

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<sup>3</sup> The Case for No, Constitution Alteration (Simultaneous Elections) 1974, p. 5.

<sup>4</sup> *ibid.*, p. 6.

<sup>5</sup> The Case for Yes, 1977, p. 3.

<sup>6</sup> *Commonwealth Parliamentary Debates (CPD)*, 24 February 1977, p. 426.

Representatives who, between 1974 and 1977, performed that backflip. As the late Senator Ian Wood put it in 1977, ‘I have come to the conclusion that there must be sufficient acrobats on the Government side of the chamber today to make a really first class circus.’<sup>7</sup> This description of my own gyrations on a significant constitutional issue illustrates the central problem in this debate about proportional representation. The arguments of those actually undertaking the critical and difficult task of providing good government are arguments of time and circumstance. In their proper anxiety to achieve currently perceived good ends, any institutional constraint seems an obstruction of good government—their good government.

This reality clouds any debate about institutional structures and places a special responsibility on non-participants in the political side of the parliamentary process to separate out the permanent issues from the issues of the day. It also suggests that there are techniques and tools beyond immediate partisan political debate that must be used in the pursuit of truth. In the case of my own cited inconsistency, and that of most of my colleagues of that time, the Constitutional Convention that operated in the interval between 1974 and 1977 enabled the examination of issues away from the immediate hurly burly of adversarial politics, and produced a cross-party recommendation against our 1974 position. That Convention reflected the judgment of my morally upright older sister who, in response to my attempt to explain my change of advocacy, told me not to bother as she had always thought my 1974 position was wrong. One can only conclude that while serving politicians deserve our respect, if not our gratitude, we should maintain a healthy scepticism about their immediate views on issues of constitutional and institutional reform.

Further examples abound. In the endlessly contentious area of the Senate’s role in dealing with money bills, there are striking examples of shifting political judgments. As Opposition Whip in the Senate when the Senate delayed the Appropriation bills in 1975 and brought about the dismissal of the Whitlam government, I was aware of how wickedly unprincipled and even unconstitutional many Labor Party supporters thought that Senate action to be. For me, that period in the Senate ranks with the confrontation between the Western Australian state government and the Aboriginal people at Noonkanbah in the late 1970s as the time of greatest social soul-searching and examination of principle. Yet what were the precedents set by those who were most offended by our actions? The answer to that question can be found in *Odgers’ Australian Senate Practice*, which records that:

... on 18 June 1970 (SD, p. 2647) the then Leader of the Opposition in the Senate (Senator Lionel Murphy, QC, Australian Labor Party) said:

The Senate is entitled and expected to exercise resolutely but with discretion its power to refuse its concurrence to any financial measure, including a tax bill. There are no limitations on the Senate in the use of its constitutional powers, except the limitations imposed by discretion and reason. The Australian Labor Party has acted consistently in accordance with the tradition that we will oppose in the Senate any tax or money bill or other financial measure whenever necessary to carry out our principles and policies. The Opposition has done this over the years, and, in order to

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<sup>7</sup> CPD, 24 February 1977, p. 414.

illustrate the tradition which has been established, with the concurrence of honourable senators I shall incorporate in Hansard at the end of my speech a list of the measures of an economic or financial nature, including taxation and appropriation bills, which have been opposed by this Opposition in whole or in part by a vote in the Senate since 1950.

Addressing himself to the Appropriation Bill (No. 1) 1970–71, the then Leader of the Opposition in the House of Representatives, Mr E.G. Whitlam, QC, said on 25 August 1970:

Let me make it clear at the outset that our opposition to the Budget is no mere formality. We intend to press our opposition by all available means on all related measures in both Houses. If the motion is defeated, we will vote against the bills here and in the Senate. Our purpose is to destroy this Budget and to destroy the Government which has sponsored it. (HRD, p.463.)

As foreshadowed by Mr Whitlam, the Australian Labor Party in the Senate voted against the third reading of Appropriation Bill (No. 1) 1970–71 and also against the third reading of the Appropriation Bill (No. 2) 1970–71; the voting on the first bill was 25 Ayes and 23 Noes and on the second bill 24 Ayes and 23 Noes.<sup>8</sup>

My final example of the shifting sands of partisan politics on constitutional issues comes from the Victorian treatment of its Auditor-General. It is well known that because of the changes instituted by the Kennett government, the office of Auditor-General ‘is vastly diminished, stripped of its capacity to conduct its own audits’.<sup>9</sup> Yet the Auditor-General had played an important role in exposing the financial mismanagement of the Cain and Kirner governments. After winning the 1992 election, Jeff Kennett said: ‘Mr Baragwanath and his officers deserve the full support of the parliament and public of Victoria for having the courage to carry out their jobs without bending to pressure.’

So, where does all this leave us? Clearly proportional representation in the Senate is not an absolutely essential element of Australian democracy. We had a democracy before it was introduced. Whether we keep proportional representation requires a judgment about whether we have a better functioning democracy with or without it.

No-one is likely to advocate the return to a virtual winner-takes-all approach. The real issue for today is whether we ought to change the system to restore a legislative duopoly to the Coalition and the Australian Labor Party. The danger is that the traditional duopoly of the political system will use its numbers to legislate away the more diverse representation of Australian viewpoints in the Senate that proportional representation allows. The major parties have the power to do it, and the drift of the latter part of my paper is that, in their own short-term interest, they might combine to do so.

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<sup>8</sup> *Odgers’ Australian Senate Practice*, 8<sup>th</sup> edition, Canberra, AGPS, 1997, p. 96.

<sup>9</sup> Peter Barber, *West Australian*, 31 July 1999, p. 16.



They will get plenty of support from the constitutionally illiterate if they do. The response of the Australian Chamber of Commerce and Industry (ACCI) to the amendment of the goods-and-services tax legislation is one recent example of the short-termism of most of the participants in the debate. The *Australian Financial Review* reported the ACCI as saying:

‘Senate reform is something on our agenda, we are looking for constructive suggestions ... and we are doing some in-house work,’ ACCI chief executive Mr Mark Paterson said. He said the fact that a major party could be elected on a specific reform platform then find itself unable to implement the measure means ‘we need to re-examine our processes of government.’

‘If everyone can claim equal and opposite mandates, there is no incentive for a major party to go to an election telling the truth about plans for reform,’ Mr Paterson said.

‘The Democrats haven’t been a check or a balance, they have fundamentally altered the policy the Government took to the election and as a result we have a second best outcome.’<sup>10</sup>

The icon economy in this new globalised world is, of course, that of the United States. Perhaps the ACCI should ponder on how the United States can succeed in this fast-moving world economy when the legislature is completely independent of the executive government and executive gridlock is often a fact of life.

The saviour of the more democratic Senate, that is, a Senate which is more representative of how Australians actually vote than the House of Representatives, may be the shortness of what is short term for the major parties. Labor in opposition knows that until the next election at least it can be a real player in the legislative process rather than a mere carping critic in the present Senate alignment. A coalition in opposition would know the same. Any opposition, therefore, might decide to maintain support for the status quo along with the minor parties, which can be expected to do so as it is in their interest.

The continued support from a significant proportion of voters for a Senate that is not controlled by a government also suggests there may be a backlash at any attempt to reduce the value of votes cast against a government legislation hegemony. Lots of Australians want to see both John Howard and Kim Beazley, and indeed any prime minister, subject to legislative checks and real parliamentary scrutiny beyond the tired theatre of question time.

Perhaps more of the media will follow the lead of Perth’s daily newspaper, the *West Australian* and argue, ‘It is not our parliamentary institutions or voting systems that need to change, but the behaviour and attitudes of politicians.’<sup>11</sup>

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<sup>10</sup> *Australian Financial Review*, 8 June 1998, p. 5.

<sup>11</sup> Editorial, *West Australian*, 7 July 1999.

In the end, what senators do with their power will probably determine how vulnerable the present Senate is to gerrymander. A Senate that appears to struggle with the moral basis of tax measures; to struggle with the impact of taxes on families under pressure; that tries to come to grips with the difficult balance between environmental values and economic growth; that offers opportunities for citizen participation in the legislative process; and that offers remedies for those maligned under privilege may well command regard, if not affection, in an otherwise loveless political landscape. With such regard, 'reforms' that are a gerrymander may well be too expensive in terms of electoral support for even the most self-justifying major party.

These comments should not be construed as an attack on political parties. Parties are not an unfortunate graft on to our system of government. The Westminster system depends on a stable party-based majority to form government. In addition, the fundamental democratic element of being able not only to sack a government, but to install a new government, also based on a stable majority, means that unless and until we move to an elected non-parliamentary executive we need reasonably disciplined parties to maintain both the stability of government and the capacity to get rid of a government. These are features of our democracy of which we are properly proud. The electoral disdain for disunity within parties further emphasises the party unity that makes the House of Representatives increasingly irrelevant as a legislative chamber and a chamber that calls government to account.

The Senate's relevance as a legislative and checking body does not arise from the moral superiority of senators over members of the House of Representatives. An examination of the origins of senators would disclose that a large proportion of them are what a critic might call 'party hacks'. Many, including me, entered the Senate after long periods of service to their party organisations. Out of individual dross comes parliamentary gold simply because of the different party structure proportional representation gives the Senate. Change the voting system and we risk having two versions of the House of Representatives, which does not seem an advantage to our democracy.

I conclude this paper with another personal example of how quite proper rules relating to the operation of the Westminster system can inhibit sensible parliamentary action that is in the public interest and in the interests of a free society. It is my final reminder of what we gain by Senate independence—an independence best bolstered by proportional representation. After three years in the Senate in the mid-1970s, I formed the view that there was a generational shift. Older senators, of whom Sir Reginald Wright was an example, read through complex legislation and identified matters needing the Senator's attention. It appeared to me that the new generation of senators was less inclined to this aspect of our work. In a speech in February 1978, then in a formal motion later in the same year, I suggested that we should use the example of the long established Regulations and Ordinances Committee to produce a similar Senate mechanism for examining substantive legislation against a checklist of criteria. A Senate committee undertook consideration of the proposal. Shortly after the committee commenced its consideration, I was appointed to the ministry and as a result left the committee and its deliberations to others. In due course, it reported in favour of my proposition. I then sat in the Fraser Cabinet room as a non-Cabinet minister and participated in the discussions of the proposition that we have this committee. I was put in the embarrassing position of having to go into the Senate to

defend the government's position against the committee I had advocated, on the grounds that it would slow down the legislative process. I was pleased to find that senators were not terribly impressed by the executive government's decision. They took it into their own hands to establish the committee, and did so, not at the behest of, or with the approval of, the executive government, but against its objection. I regard my role in the matter as perfectly honourable, but to any onlooker rather ludicrous. Without Senate independence, such silliness would prevail.

An interesting aspect of the defence of proportional representation is that its maintenance is really dependent not only on the minor parties that benefit from it, but also on support from at least one of the major parties. To adopt Don Chipp's parlance, this is a circumstance where only the bastards can keep the bastards honest. I hope that they will do so, and that a system of proportional representation that permits the diversity of political viewpoints within the Australian community to be adequately represented will be maintained.