

# The Senate's new role in protecting our democracy

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The Senate – with its unique powers and proportional voting system – could be key to restoring the electorate's apparently diminishing faith in our democracy. In the face of reported long-term loss of trust in government and fears of an increasing appetite for secrecy and executive power, the Senate remains the best hope for a saviour of our democracy.

## Summary

At first blush, Australians are confused over even basic questions about the Senate. The Australia Institute research reveals they see distinctions between the Senate and the House of Representatives that are not there, wrongly answering that ministers must come from the House, that senators and members of parliament (MPs) are paid differently and that question time is not held in the Senate. Only 3 in 10 identified that the House is green and the Senate red.

The public's shaky understanding of the Senate is in spite of its importance to democracy. Unlike some upper houses in other Westminster-style democracies, the Australian Senate is active, powerful and representative of the public.

As well as a legislature in its own right, the Senate is a house of review—of bills, regulations, government administration and policy. It also exercises accountability functions, like ordering the production of documents by the government and conducting the estimates process where ministers and senior public servants are questioned.

The founders wrote into the Australian Constitution a Senate, not a states' house, with almost co-equal powers to the lower house. Unlike conservative upper houses in other jurisdictions, the Senate has always been elected, and with the same franchise as the House of Representatives. Since proportional representation in 1949, the Senate has been more willing to exercise the powers bestowed upon it by the Constitution.

Proportional representation makes the Senate a diverse and representative body. The first 2 Indigenous Australians elected to the Australian Parliament – Neville Bonner and Aden Ridgeway – were senators. Senator Bonner was appointed in 1971 and won election in his own right in 1972, 38 years before an Indigenous Australian – former minister Ken Wyatt – would be elected to the House of Representatives.

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In the Australian Parliament, the first Indian-Australian, the Asian-Australian and the youngest woman were all senators.

Senator Bob Brown was the first openly gay man elected to the Australian Parliament, and the first openly gay party leader, and Senator Penny Wong was the first openly gay woman and the first Asian-Australian woman elected to the Australian Parliament and the first openly gay member of cabinet. The election of Senator Fatima Payman in 2022 has contributed another milestone, the first woman to wear Muslim headwear.

While women were simultaneously elected to the Senate and the House of Representatives in 1943, the first female party leader, the first woman to administer a federal department and the first woman in cabinet with portfolio responsibilities were all senators. To this day, the Senate much better reflects Australia's gender balance than the House does. As of July 2022, women held 57% of Senate seats, but only 38% of seats in the House of Representatives.

The Senate is also more prepared to stand up to the executive arm of government than the House of Representatives. The most visible example is the crossbench, which has held the balance of power for most of the period since 1955. But party lines are also more fluid in the Senate. As a senator, Barnaby Joyce crossed the floor 28 times. Liberal senators Reg Wright and Ian Wood have him beat, having crossed the floor 280 times between them.

The Senate also serves as an important 'ideas bank', developing and advocating policies that will, in time, be taken up by governments. The legislation for same-sex marriage began in the Senate, as has much progressive climate legislation. The Hawke Government saved the Franklin River from being dammed, but only after the Democrats introduced and passed legislation in the Senate. Hawke would later adopt the legislation as his own. Looking further back, Australia owes its compulsory voting to a private senators' bill in 1924.

With trust in government declining, the Senate is more important than ever. However, it needs to find its feet to fight back against efforts to stymie its powers. Answers to the legitimate questions of senators in estimates have become more evasive and derisory. Recent governments' interpretations of public interest immunity bare little resemblance to the Senate's. Orders for the production of documents were disregarded. Bills originating in the Senate were ignored in the House of Representatives, even though they would have passed if brought on for debate.

The Senate has the tools it needs to remedy the situation. Foremost among them is one that is fundamental to its status as a co-equal legislature – the Senate can block the government's legislative agenda until the government accounts for itself.

The Senate has used this power with success. For example, when the government wanted to implement an ethanol subsidy scheme in 2003, the Senate did not pass the relevant bills until the government provided documents relevant to the scheme. However, it is rare that executive intransigence is challenged. Every remedy at the Senate's disposal depends on its strength of will, and the Senate has often baulked.

One comfort for the Senate is the evidence, in the Australia Institute polling released for the lecture in February 2022 that preceded this paper, that the Australian people back the Senate. Six in 10 Australians agreed that when the Senate and the government disagree on

whether the government has to hand over information, the Senate should insist on its interpretation.<sup>1</sup>

Australians may be confused about the details of how the Senate operates, but they expect it to be a vigorous, powerful chamber that holds the government to account. Seeing the Senate hold the government to account would give the community renewed confidence in the body. Indeed a stronger Senate could help renew confidence in democracy itself.

## Public understanding and opinions on the Senate

In July 2020, the Australia Institute polled a nationally representative sample of 1,600 Australians on their knowledge of and attitudes towards the Senate. The results show that understanding of the Senate is relatively poor, underscoring the importance of lifelong civics education on the role of the Senate in our democracy.<sup>2</sup>

Australians assumed that the 2 chambers were more distinct than they actually were.

When asked if government ministers must come from the House of Representatives, 39% of Australians incorrectly said that was true, with only 24% correctly saying that was false. Thirty-seven per cent chose 'don't know/not sure'.

Australians are also unclear on whether senators or members of the House of Representatives are paid more, or if they are paid equally. Forty-five per cent did not know, 23% said senators are paid more and 17% said members were. Only 16% gave the correct answer, that they are paid equally.

Only 25% of Australians correctly identified that question time is held in both chambers, with 34% thinking it was held in the House of Representatives only, 11% the Senate only and 1% saying question time is held in neither chamber.

There was also general confusion about how long the terms of senators for the states run. For this question respondents could not choose a 'don't know/not sure' option, but instead were told to give their best guess. Only 15% gave the correct answer, of 6 years. Five per cent selected 'none of the above'. Twenty-seven per cent chose 'until the next election', and 53% chose a year length that was wrong.

Only 30% correctly answered that the Senate is coloured red. Half of respondents knew that they did not know, and about 20% confidently chose a wrong answer.

Finally, the Australia Institute tested people's knowledge of the balance of power in the Senate by asking 'does the coalition government currently have a majority in the Senate?'

Respondents have been asked this question 3 times between 2018 and 2022.

In 2018, 50% correctly answered that it does not, which fell to 36% in 2020 and to 34% when asked again in January 2022. The shrinking size of the Senate crossbench might contribute to confusion here.

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<sup>1</sup> The Australia Institute, [Polling: majority want greater Senate scrutiny of secret contracts](#), 5 March 2022.

<sup>2</sup> For full details and results, see Bill Browne and Ben Oquist, [Representative, still: the role of the Senate in our democracy](#), 9 March 2021.

Overall, the results paint a concerning picture of the limits of the public's knowledge of the Senate. The Australia Institute heard from many people that their political education was limited to primary and high school. Civics education targeted at adults is clearly needed, not just as a refresher but also because it is when someone gets the right to vote that information on how our democracy works is most salient.

There were 2 silver linings in the polling research.

The first is that despite the confusion about how long senators serve, there is little sense that the Senate's electoral system is unfair. In 2020, the Australia Institute asked respondents which system they thought was fairer – the one used to elect to the House of Representatives or the one used to elect the Senate. The most popular response was that the systems are equally fair, selected by 37%. A further 35% chose 'don't know', leaving 19% who thought the House system was fairer and 10% who thought the Senate system was fairer.

In January 2022, the Australia Institute conducted a new poll asking Australians a related but more provocative question – whether the House of Representatives should adopt proportional representation.<sup>3</sup>

One in 3 (34%) preferred the proposition that in the House of Representatives a party should win seats proportional to the overall number of votes that it receives. More Australians (44%) prefer the status quo – that a party should win a seat for each electorate where it receives a majority of the vote.

In the absence of a concerted push for proportional representation in the lower house, these numbers are striking. On the face of it, one in 3 Australians prefer proportional representation to the status quo. Of course, how that support would translate to enduring policy reform remains to be seen.

The second silver lining is that while Australians are confused about the Senate, they recognise its power and importance. The Australia Institute presented Australians with 8 powers that the Senate may or may not have, and asked them whether each was a power that the Senate actually had.<sup>4</sup>

A majority (56% to 59%) correctly identified that the Senate can pass, reject or delay legislation from the lower house, whether it is a private members' bill or a government bill. More answered correctly than incorrectly that the Senate can propose new legislation and set up its own inquiries.

Where Australians went astray was with 3 powers that the Senate does not have – to confirm or reject treaties, to confirm or reject government appointments and to introduce tax and spending legislation. More Australians thought the Senate had these powers, than that it did not have these powers.

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<sup>3</sup> The Australia Institute, [Polling: majority want greater Senate scrutiny of secret contracts](#), 5 March 2022.

<sup>4</sup> Bill Browne and Ben Oquist, [Representative, still: the role of the Senate in our democracy](#), 9 March 2021.

## Importance of the Senate

Australians' confusion about the Senate would be less concerning if the Senate were not an important part of democracy. But the Senate is important, in 2 key ways – it is a co-equal legislature, with substantial if too-rarely used powers, and its election via proportional representation means it represents people that the House of Representatives fails to represent.

### Power

The Senate's powers have remained mostly unchanged since federation and the Australian Constitution.

Unlike many upper houses, the Senate has almost as extensive legislative powers as the House of Representatives. It is a good thing too, since the Senate is close to being 'effectively the sole legislature' in the words of David Hamer.<sup>5</sup>

References to 'reserve powers' usually mean those of the Governor-General. But the House of Representatives and the Senate have unwritten powers as well, thanks to section 49 of the Constitution. It provides:

*The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.*<sup>6</sup>

It is from these reserve powers that the 2 chambers can trace parliamentary privilege, orders for the production of documents and the tremendous, though rarely used, power to fine and imprison those in contempt of parliament. What would it take for the Senate to use these powers more often, or more penetratingly?

And while government is formed on the floor of the House of Representatives, the Senate – through its power to block supply – proved in 1974 and 1975 that it has a kind of veto over the government, the power to force a premature election.<sup>7</sup> The fallout from the Dismissal demonstrates that this power should rarely, if ever, be exercised, and it is unlikely to be used again. However, this ultimate sanction protects and preserves the Senate's status and power.

That the Senate has this robust role in our Commonwealth was the intention of the founders, who at the time of drafting had the United Kingdom (UK) House of Lords, the United States (US) Senate and the Canadian Senate to draw on for their models. Alfred Deakin, a future prime minister, called the 2 chambers the irresistible force and the immovable object.<sup>8</sup>

<sup>5</sup> David Hamer, [Can responsible government survive in Australia?](#), 2nd edition, Department of the Senate, Canberra, 2004, p. 301.

<sup>6</sup> *Australian Constitution* s 49.

<sup>7</sup> David Hamer, [Can responsible government survive in Australia?](#), 2nd edition, Department of the Senate, Canberra, 2004, p. 368.

<sup>8</sup> Stanley Bach, [Platypus and parliament: the Australian Senate in theory and practice](#), Department of the Senate, Canberra, 2003, p. i.

Nor was the Senate ever intended to limit its scrutiny to state issues. The name 'states' house' was considered in the Constitutional Conventions but the more general Senate preferred,<sup>9</sup> and the founders would have known from the US that senators have never limited themselves to protecting states' rights.

## The case for upper houses

That upper houses have a continued, important role to play in Australian politics is demonstrated by the renewed calls for upper houses to be introduced in parliaments that do not have them.

There are 3 unicameral legislatures in Australia – the parliaments of the Australian Capital Territory (ACT), Northern Territory (NT) and Queensland. The territories have never had upper houses, on the grounds that their populations are too small to justify the expense of a second chamber.

The Queensland Legislative Council operated between 1860 and 1922, until it was abolished by a vote of parliament. It did not cover itself in glory, with political scientist Justin Harding writing 'Queensland's Council invited destruction through sheer bloody-mindedness and brinksmanship'.<sup>10</sup> The Legislative Council was formed of members appointed for life by the Governor on the advice of the governments of the day, which allowed for its abolition after the Theodore Labor Government advised the Governor to appoint new members who had pledged to vote for its abolition.<sup>11</sup>

Queensland's lack of a second chamber has been identified as a recurring problem for good government. Independents, the Greens, Family First and One Nation have called for the upper house to be restored in one form or another (independent Peter Wellington arguing for it to include mayors, Greens senator Larissa Waters saying it should be elected proportionally).<sup>12</sup> In 2014, the community action group Lock the Gate made restoring Queensland's upper house a key plank of their Queensland People's Bill.<sup>13</sup>

The *Canberra Times* argued that an upper house may have checked the power of the Bjelke-Petersen Government and moderated the Newman Government.<sup>14</sup> A 2021 petition calling for a referendum on re-establishing the Legislative Council was rejected by Premier Annastacia Palaszczuk.<sup>15</sup>

In 2020, the Institute of Public Affairs (IPA) published a report that argued for a reinstated upper house for Queensland on the grounds 'it will lead to more accountability, better

<sup>9</sup> See, for example, Official Record of the Debates of the Australasian Federal Convention (Andrew Inglis Clark), [11 March 1891](#), Acting Government Printer, 1891.

<sup>10</sup> Justin Harding, 'Ideology or expediency? The abolition of the Queensland Legislative Council 1915-22', *Labour History*, no. 79, November 2000, pp. 162–178.

<sup>11</sup> Queensland Parliament, [Abolition of the Legislative Council](#), March 2022 (accessed 19 May 2023).

<sup>12</sup> Apn Newsdesk, '[Campbell Newman dismisses Wellington's call for upper house](#)', *The Courier Mail*, 25 November 2013; Cameron Atfield, '[Minor parties unite in calls for Queensland upper house](#)', *Brisbane Times*, 13 December 2015; Amy Remeikis, '[Queensland needs an upper house: independent MPs](#)', *Brisbane Times*, 23 November 2013.

<sup>13</sup> '[CSG group banned from Qld parliament](#)', *SBS News*, 8 October 2014.

<sup>14</sup> '[Queensland election 2015: northern politics prove the value of upper houses](#)', *The Canberra Times*, 23 April 2018.

<sup>15</sup> Melanie Whiting, 'Qld Premier Annastacia Palaszczuk rejects call for referendum on Qld upper house', *Daily Mercury*, 13 June 2021.

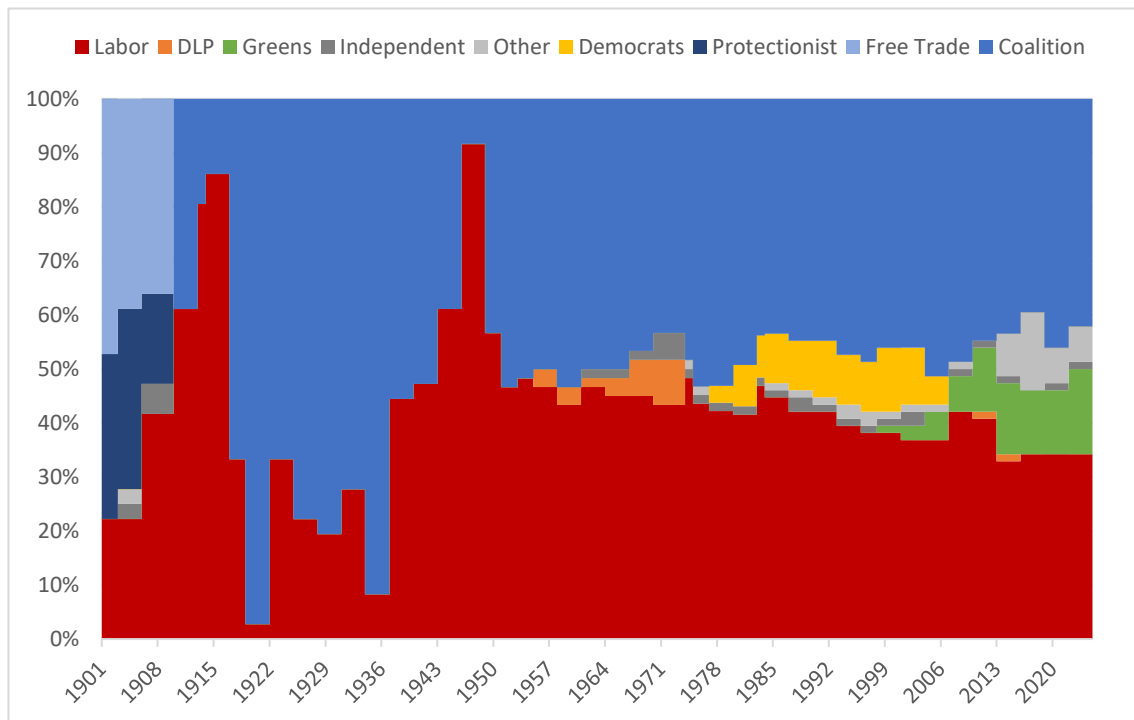
democratic representation, and a greater say for regional Queenslanders'. The IPA identifies 3 potential models, 2 of which would provide proportional representation.<sup>16</sup>

The absence of an upper house in the ACT has been used as an argument for limiting its legislative discretion. Then Liberal Senator Zed Seselja argued that the 'unchecked power' of the ACT Legislative Assembly in the absence of an upper house meant it could not be trusted with the power to legislate for voluntary assisted dying.<sup>17</sup> Queensland MP Terry Young made a similar argument when debating the Restoring Territory Rights Bill 2022, saying 'I just don't believe the territories have the levers and the systems; they're not set up. In other words, they don't have a Senate to debate this properly and handle issues like this'.<sup>18</sup> Then ACT Deputy Liberal Leader Giulia Jones raised the idea of an upper house for the ACT at an Australia Institute event in 2021.<sup>19</sup>

## Proportionality

Though the Senate's powers are pretty much the same as they were in 1901, its use of those powers has waxed and waned over the decades. As shown in Figure 1, the winner-takes-all electoral systems in the Senate before proportional representation led to dramatic swings, with the government or the opposition in control of the Senate in most instances.<sup>20</sup>

Figure 1: Senators by party, 1901 to 2022



<sup>16</sup> Morgan Begg and Daniel Wild, *New research proposes models for a Queensland upper house*, 23 October 2020.

<sup>17</sup> Lucy Bladen and Dan Jarvis-Bardy, 'ACT would pass "most extreme" euthanasia laws if given chance: Zed Seselja', *The Canberra Times*, 21 July 2021.

<sup>18</sup> Mr Terry Young MP, *House of Representatives Hansard*, 1 August 2022, p. 312.

<sup>19</sup> The Australia Institute, 'The battle for Territory rights', *YouTube*, 14 August 2021, sec. 54:30.

<sup>20</sup> John Uhr, 'Why we chose proportional representation', *Papers on Parliament*, No. 34, Department of the Senate, December 1999, pp. 13–56.

Knowing that a loss in the upcoming election was likely, the Chifley Government legislated proportional representation ahead of the 1949 election. While preserving its numbers in the Senate was a motivation for the Chifley Government, this manoeuvre also fulfilled the promise of the Constitutional Conventions and the expectations of the founders, and was a reform that both Labor and non-Labor politicians had argued for over the decades.<sup>21</sup>

Within 6 years of proportional representation a consistent minor party presence emerged in the Senate thanks to the Democratic Labor Party, followed by the Australian Democrats and now the Australian Greens.

### **The Senate has as much of a claim on the title 'people's house' as the House of Representatives**

People still persist with the claim that the House of Representatives is the 'people's house' and the Senate the 'states' house. Until the Senate is elected on the principle of one vote, one value, the House of Representatives will have a powerful claim to that title.

However, the mechanism of proportional representation means that in many ways the Senate is more representative of the popular will than the House of Representatives. John Howard observed as much in 1987, when there were Democrats on the crossbench amenable to opposition proposals. He said:

*... the Australian Senate [is] one of the most democratically elected chambers in the world – a body which at present more faithfully represents the popular will of the total Australian people at the last election than does the House of Representatives; that is a fact in terms of the proportional representation system ...*<sup>22</sup>

It remains true today, with then Senate President Scott Ryan observing in 2019 that:

*... the current Senate is actually very reflective of the national vote despite the differences in state populations.*<sup>23</sup>

This popular representation gives the Senate a vigour and authority lacking from appointed or – even worse – hereditary upper houses. In 1873, well ahead of the Constitutional Conventions, Walter Bagehot observed of the UK House of Lords that '[b]eing only a section of the nation, it is afraid of the nation'.<sup>24</sup>

While mathematically it is possible for senators from the smaller states to control the legislature, in practice it is impossible. Senators are tied to their parties and to broader policy interests, not their states.

The moral authority that comes from proportional representation is unlikely to abate in this term of government. In the House of Representatives, almost as many Australians cast a

<sup>21</sup> John Uhr, '[Why we chose proportional representation](#)', *Papers on Parliament*, No. 34, Department of the Senate, December 1999, pp. 13–56.

<sup>22</sup> The Hon John Howard MP, [House of Representatives Hansard](#), 8 October 1987, p. 1023.

<sup>23</sup> The Hon Senator Scott Ryan, '[The Senate in an age of disruption](#)' (Speech, Institute for Government, London, 4 October 2019).

<sup>24</sup> Walter Bagehot, *The English Constitution*, Fontana Press, London, 1993, p. 146.



primary vote for a minor party or independent (31.7%) as for a Labor candidate (32.6%).<sup>25</sup> Despite this, Labor has a majority in the House of Representatives. As described below, the Senate better reflects this split with minor parties and an independent in the balance of power – giving it a real claim to being more representative than the House of Representatives.

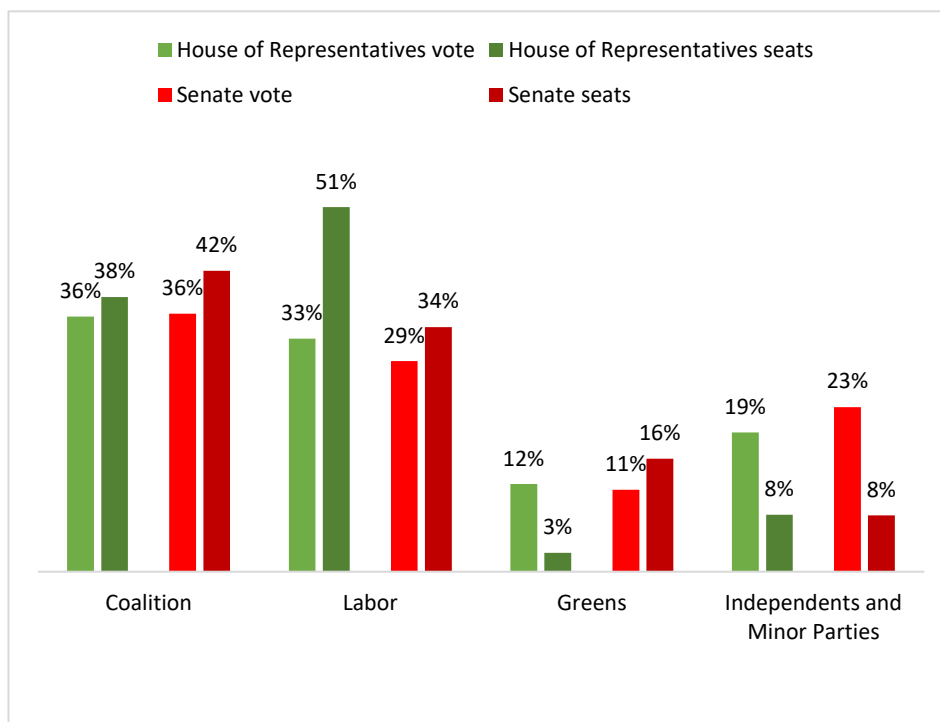
### Measuring proportionality

The 'winner-takes-all' approach used in House of Representatives elections means that larger parties tend to win a greater share of seats than their share of the vote. Figure 2 compares the primary vote share that parties received in the House of Representatives (2022 election) and the Senate (2019 and 2022 elections) with the number of seats that they won.

In the most recent House of Representatives election, the Coalition and Labor together received 68% of the primary vote but 89% of the seats. The Greens received 12% of the primary vote but 3% of the seats, and independents and minor parties received 19% of the primary vote and 8% of the seats.

By contrast, the Coalition and Labor received 68% of the vote across the last 2 Senate elections, but hold 76% of the seats in the Senate. The Greens received 11% of the vote but hold 16% of the seats, and other minor parties and independents received 23% of the vote but hold 8% of the seats. These results are not as proportional as they could be – for example if the Senate were larger – but are still more representative of minor parties (including the Greens) and independents than the House of Representatives is.

**Figure 2: House of Representatives (2022 election) and Senate (2019 and 2022 elections) disproportionality**



Source: Author's calculations

<sup>25</sup> Antony Green, 'Party totals', ABC News, 2022.

Another way of looking at proportionality is to identify typical Senate vote compositions, and what portion of the population gave their first preference vote to parties participating in that vote.

For example, at the start of the 47th Parliament, Labor and Greens senators and David Pocock together accounted for 39 votes, enough to pass legislation. These parties received 41% of the popular vote. The Coalition, One Nation, United Australia Party, Jacqui Lambie Network senators, and independent David Pocock, together accounted for 38 votes, enough to block legislation. Together, these parties received 44% of the vote over the 2019 and 2022 elections.

If it seems unreasonable that senators receiving 44% of the vote can block legislation, keep in mind that Labor MPs received 33% of the primary vote in the House of Representatives; from this they won a majority of the seats and formed government.

**Table 1: Example Senate voting blocks**

Vote composition	Votes (2019 and 2022)	Seats	Vote share	Seat share
Labor + Greens + Pocock	12,182,147	39	41%	51%
Labor + Greens + JLN	12,184,327	40	41%	53%
Coalition + ON + UAP + JLN + Pocock	13,117,828	38	44%	50%
Labor + Coalition	19,426,081	58	66%	76%

*Note: ON stands for Pauline Hanson's One Nation, UAP for United Australia Party and JLN for Jacqui Lambie Network. This table is based on the approach used by the University of New South Wales Council for Civil Liberties in a 2003 submission.<sup>26</sup>*

Academic Michael Gallagher developed the Gallagher Index, or 'least squares measure', as a measure of the disproportionality of an election.<sup>27</sup> The advantage of the Gallagher Index is that it can be used to compare election proportionality over time or between countries. However, it gives different results depending on how parties are grouped together, meaning that decisions must be made about whether to treat different coalition parties as one party or several, and whether to group the Greens with minor parties and independents.

Applying the Gallagher Index to the 2022 House of Representatives and 2019 and 2022 Senate results shows that the Senate is at least as proportional as the House of Representatives. Results vary depending on how parties are counted (for example, whether the different coalition parties are counted together or separately), but overall the Senate has a Gallagher Index of 11 to 15 (with 0 being a perfect score) and the House of Representatives has a Gallagher Index of 17 using either approach.<sup>28</sup>

<sup>26</sup> University of New South Wales Council for Civil Liberties, '[Submission in response to the Prime Minister's discussion paper – resolving deadlocks: A discussion paper on Section 57 of the Australian Constitution](#)', 31 December 2003, p. 12.

<sup>27</sup> Michael Gallagher, *Electoral systems*, 18 January 2023, (accessed 3 May 2023); Michael Gallagher, 'Proportionality, disproportionality and electoral systems', *Electoral Studies*, vol. 10, issue. 1, March 1999, pp. 33–51.

<sup>28</sup> For a detailed discussion of the limitations of the Gallagher Index, please see Bill Browne and Ben Oquist, [Representative, still: the role of the Senate in our democracy](#), 9 March 2021.

## Diversity

The Senate's proportionality means it is more representative of class, cultural and gender interests. Women were simultaneously elected to the House of Representatives and the Senate in 1943, but as of 1 July 2022 women make up 57% of the Senate but just 38% of the House of Representatives.<sup>29</sup>

And while the party system means that for the most part a major party senator's vote does not vary no matter what state they come from, independent and micro-party senators are often more explicitly representative of their state's interests – for example, Brian Harradine and Jacqui Lambie from Tasmania and Nick Xenophon and affiliates from South Australia.<sup>30</sup>

The Senate has been a source of diversity, even though there are half as many senators as there are members. An explanation for this might be given by a profile of Penny Wong in the *Sydney Morning Herald*, which said:

*When [Penny] Wong won preselection for the Senate before the 2001 election ... the joke went around that she would never have been able to contest a lower house seat, being not only a woman, but Asian and gay to boot.*<sup>31</sup>

Hopefully, if that were ever the case, it is no longer true – and indeed there have been people of diverse backgrounds elected to the House of Representatives. But it is true that proportionality means that a significant minority that is distributed across the country can be appealed to in the Senate in a way that wouldn't necessarily work in the House.

Diversity milestones set in the Senate include the:

- first Chinese speaker and child of a Chinese person elected to the Australian Parliament: Thomas Bakhap – elected in 1913 for the Liberal Party. Bakhap was the adopted child of a Chinese immigrant and an advocate for the Chinese community in the face of the White Australia Policy
- first 2 Indigenous Australians elected to the Australian Parliament: Neville Bonner and Aden Ridgeway
- youngest woman elected to the Australian Parliament: Sarah Hanson-Young (although the youngest person was Wyatt Roy, in the House of Representatives)
- first Asian-Australians elected to the Australian Parliament: Bill O'Chee and Tsebin Tchen
- first openly gay man elected to the Australian Parliament, and the first openly gay party leader: Bob Brown
- first openly gay woman and the first Asian-Australian woman elected to the Australian Parliament and the first openly gay member of cabinet: Penny Wong
- first member of the Australian Parliament with a partner who is transgender: Louise Pratt
- first female party leader: Janine Haines
- first woman to administer a federal department: Annabelle Rankin

<sup>29</sup> Lisa Visentin and Katina Curtis, '[Record number of women in the 47th Parliament, as female voters shun Liberals](#)', *The Sydney Morning Herald*, 31 May 2022.

<sup>30</sup> The observation comes from Sharman, although his paper predates Lambie and Xenophon's elections. See Campbell Sharman, '[The representation of small parties and independents](#)', *Papers on Parliament*, No. 34, Department of the Senate, December 1999.

<sup>31</sup> '[Freakish powers of a formidable operator](#)', *The Sydney Morning Herald*, 8 December 2007.

- first woman in cabinet with portfolio responsibilities: Margaret Guilfoyle
- first person of black African descent: Lucy Gichuhi
- first person of Indian heritage: Lisa Singh
- first woman to wear Muslim headwear: Fatima Payman.<sup>32</sup>

## The Senate's use of its powers

### Orders for the production of documents and estimates

A powerful demonstration of the reinvigorated Senate is in orders for the production of documents.

This broad power comes from the ancient privileges of the House of Commons, and it extends to the creation of documents that do not yet exist, not just the publishing of documents already created. In this way, as well as scope and timeliness, it distinguishes itself from freedom of information (FOI) requests.

Orders for the production of documents are also a quantitative measure of the Senate's activity as a house of accountability. The first Senate was a prolific user of this power, but after the non-Labor parties combined into the Liberal Party in 1909, its use dropped off until the 1970s. It wasn't until the 1990s that the rate of orders for the production of documents returned to that of 1901 to 1906.<sup>33</sup> By contrast, the number of bills considered each year had increased 10 times over during the same period.<sup>34</sup>

A 1999 report by the Department of the Senate provides a window on some of the documents that the first Senate, 1901 to 1906, was particularly interested in:

- statistics on the death rates of white people compared to Pacific Island workers in Queensland
- the Governor-General's expenses
- any papers relating to the statement from the General Officer (that is, Chief of Army) that Japan and China were 'casting longing eyes upon the northern portions of Australia'.<sup>35</sup>

Times may change, but the Governor-General's expenses remain of interest. In Senate estimates a few years ago they were going over a tender for the Government House kitchens. Labor Senator for Queensland Joe Ludwig admitted he did not know what a

<sup>32</sup> Australian Electoral Commission, Electoral milestones for Indigenous Australians, 12 November 2020; Scott Brenton, '[Minority government: is the House of Representatives finally catching up with the Senate?](#)', *Papers on Parliament*, No. 55, Department of the Senate, February 2011, p. 121; Hamish Hastie, '[The story of Australia's first hijab-wearing Muslim senator – and why she's looking forward to meeting Pauline Hanson](#)', *Western Australia Today*, 23 June 2022; Patricia Karvelas, '[Labor's new gay senator Louise Pratt calls for same-sex marriage](#)', *The Australian*, 29 August 2008; Department of the Senate, [Senate Brief No. 3: Women in the Senate](#), 2023; Marian Sawer, '[Overview: institutional design and the role of the Senate](#)', *Papers on Parliament*, No. 34, Department of the Senate, December 1999.

<sup>33</sup> Australian Senate, [Orders for the production of documents](#), May 2023; Department of the Senate, '[Business of the Senate 1901–1906](#)', 1999.

<sup>34</sup> Department of the Senate, '[Business of the Senate 1901–1906](#)', 1999, p. v.

<sup>35</sup> Department of the Senate, '[Business of the Senate 1901–1906](#)', 1999, pp. 18–19, 40–41, 62–63, 79–80, 103–104, 125–127.

'Thermomix' was. Committee Chair Cory Bernardi asked him where he had been. Ludwig replied, 'Queensland'.<sup>36</sup>

There are now almost 20 orders for documents with continuing effect, among them:

- the Harradine motion requiring departments and agencies table a list of files, making FOI requests easier
- the Murray motion requiring departments and agencies to disclose high-value contracts they have entered into
- the motion requiring Australia's National Greenhouse Gas Inventory to be published quarterly, in a timely manner
- monthly reporting of vaccination statistics.<sup>37</sup>

There has been innovation in the form of orders for the production of documents, which may in part be a response to growing government recalcitrance in complying with orders. Since 2000, Senate orders have sometimes included a requirement that if a minister fails to produce documents they must front the chamber and explain why they did not meet the deadline.<sup>38</sup>

This requirement has been increasingly commonplace since 2017, and in the *Democracy Agenda for the 47th Parliament (Democracy Agenda)* the Australia Institute recommended consistently adding this requirement to orders for the production of documents.<sup>39</sup>

In 2020, the Senate contemplated, but ultimately decided against, a further penalty for non-compliance – for the Leader of the Government in the Senate to be barred from representing the Prime Minister during question time and in committees, and be prevented from sitting at the central table in the chamber.<sup>40</sup> The *Democracy Agenda* also recommended that if the government continues to refuse reasonable orders for the production of documents, this remedy should be revisited.<sup>41</sup>

The Australia Institute is proposing a new standing order for the production of documents, following our research into the growing use of private consultants to do government work. The proposed order would, firstly, require tenders and contracts with consultancies to include information about the purpose and scope of the work and, secondly, require the government to table the final reports and written advice received from a consultancy. With such an order, the public would be able to see what research, advice and recommendations consultants are giving government, and check consultants' reports for themselves to see if they make a convincing case for any actions the government ends up taking.<sup>42</sup>

<sup>36</sup> Australian Associated Press, "What is a Thermomix?" MP Joe Ludwig blends oversight with food faux pas', *The Guardian*, 24 February 2015.

<sup>37</sup> Australian Senate, *Orders for the production of documents*, May 2023.

<sup>38</sup> Harry Evans, *Odggers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, p. 588.

<sup>39</sup> Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022, p. 15.

<sup>40</sup> *Journals of the Senate*, No. 41, 12 February 2020, p. 1344.

<sup>41</sup> Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022, p. 15.

<sup>42</sup> Bill Browne, *Talk isn't cheap – making consultants' reports publicly available via Senate order*, 4 October 2021.

## Senate-driven reform

The Senate has also been the parliament's 'ideas bank'; introducing good ideas, sensible policies and effective reforms years or decades before they are picked up by the government and the House of Representatives.

To give just a few examples:

- Same-sex marriage legislation and progressive climate legislation had their origins in the Senate.<sup>43</sup>
- The legislation introduced by the Australian Democrats to stop the Franklin River from being dammed – which passed the Senate. The incoming Hawke Government would end up adopting the legislation as its own.<sup>44</sup>
- An end to mandatory jail sentences for petty theft in the Northern Territory.<sup>45</sup>

Examples of the Senate's forward thinking can be found earlier than this.

The original Australian electoral legislation was initiated in the Senate—most notably giving women the right not only to vote but also to stand for election. The Senate's bill extended suffrage to Aboriginal and Torres Strait Islander Australians – but the House of Representatives struck that part out. It was not until 1962 that that grievous wrong was righted.<sup>46</sup>

Likewise, Australia owes compulsory voting to a private senators' bill from a Nationalist senator, Herbert Payne, in 1924. Payne also advocated, with less or delayed success, for proportional representation in the Senate, printing party name under the candidate's name on ballots and the use of circular ballots to mitigate for the donkey vote.<sup>47</sup>

Of course, in politics the credit goes to those who get reforms done, regardless of who started them. But Australians can still treasure the Senate for its role as an ideas bank, proposing reforms that are treated as heresy until they become cornerstones of our system.

## Further Senate reforms

The Australia Institute's *Democracy Agenda* proposes other reforms that could strengthen the Senate:

- A Senate Committee for the Scrutiny of Grants, and provisions allowing either house of parliament to disallow a grant.
- Robson Rotation, as the ACT and Tasmania use in their Hare–Clarke elections. This would disrupt the order of candidates as dictated by parties thereby encouraging voters to choose their preferred candidates within parties as well as their preferred

<sup>43</sup> Mary Anne Neilsen, [Marriage Amendment \(Definition and Religious Freedoms\) Bill 2017](#), *Bills Digest No. 54*, 2017–2018, Parliamentary Library, Canberra, 24 November 2017.

<sup>44</sup> Lyn Allison, ['Democrats' role in saving the wilderness has been sold down the river](#), *The Sydney Morning Herald*, 31 December 2002.

<sup>45</sup> Australian Law Reform Commission, [Incarceration rates of Aboriginal and Torres Strait Islander Peoples: discussion paper 84](#), July 2017, pp. 76–77.

<sup>46</sup> John Uhr, ['The power of one'](#), *Papers on Parliament*, No. 41, Department of the Senate, June 2004.

<sup>47</sup> Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting*, Text Publishing, Melbourne, 2019; Michael Roe, [Payne, Herbert James Mockford \(1866–1944\)](#), *The Biographical Dictionary of the Australian Senate* (Online Edition), Department of the Senate, Canberra, 2004.

party. Senators could be emboldened to defy the party line once the position the party gives them on the ballot paper ceases to be definitive.<sup>48</sup>

- Making it standard practice to use the fairer 'recount' method for assigning Senate seats after a double dissolution election over the 'order of election' approach. As observed by Malcolm Mackerras, the defeat of Kristina Keneally in Fowler can ultimately be traced to the Coalition–Labor agreement in 2016 which assigned 3 of 4 Labor senators 6-year terms, which meant one would be placed in an unwinnable position in 2 elections time.<sup>49</sup>
- The House of Representatives to commit to debating and voting on private members' bills.

The *Democracy Agenda* identifies areas the House of Representatives could learn from the Senate – how the upper house handles the suspension of standing orders, pairing arrangements, the 'cut-off' period for votes on legislation, and supplementary questions in question time.<sup>50</sup>

The *Democracy Agenda* also argues for fixed 3-year terms, which would make blocking supply a 'much less attractive option', in the analysis of David Hamer of the fixed-term provisions in Victoria and South Australia:

*It must be assumed that any future government would adopt the Whitlam 'toughing it out' tactics, but it could not be assumed that a governor would act like Sir John Kerr. As the state drifted towards administrative chaos, the opposition would have to bear the political odium, which would be compounded if the only way there could be an election was for the government to pass a vote of no confidence in itself.*<sup>51</sup>

## The Senate is its own worst enemy

Popular authority, thanks to being democratically elected through proportional representation, gives the Senate the confidence to act even in defiance of the government. However, there are many times when the Senate's will falters, on matters of whether to censure ministers, question the government's claims of privilege, hold senior public servants in contempt for defying orders for the production of documents, or disrupt the government legislative agenda.

In a 2018 speech, then Senator Rex Patrick contrasted the Senate to the House of Commons. When a software company refused to hand over documents relating to Facebook at the request of a House of Commons parliamentary committee, the Serjeant at Arms was dispatched to bring the owner of the company before the UK Parliament, where it was

<sup>48</sup> The rare exception to the rule that senators are elected in the order they appear on the party list is Lisa Singh, albeit at a double dissolution where the threshold for election is much lower. See Ben Raue, 'How Lisa Singh and Richard Colbeck used personal appeal against party rankings', *The Guardian*, 9 July 2016.

<sup>49</sup> Mackerras was writing before the election, but he describes the arrangement in 2016 that led to Keneally contesting Fowler. See Malcolm Mackerras, *Kristina Keneally's candidacy for Fowler represents broader issue in Australian elections*, 8 October 2021.

<sup>50</sup> Bill Browne, *Democracy Agenda for the 47th Parliament of Australia*, 31 March 2022.

<sup>51</sup> David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, p. 109.

explained that he faced fines and imprisonment. When Thales was similarly in risk of being in contempt of the Senate, no such measures were deployed.<sup>52</sup>

Earlier this year, senior public servants were identified by Senator Katy Gallagher as having 'misled' a Senate committee.<sup>53</sup>

The Australia Institute has some reassuring evidence for the Senate. In preparation for the authors' February 2022 lecture to the Senate, the Australia Institute polled a representative sample of Australians on what they think of propositions about the Senate's power and independence.<sup>54</sup>

- Seven in 10 Australians (71%) agree that the Senate should use its powers to make reports written for the government by private consultants public. Only 12% disagree.
- Six in 10 Australians (63%) agree that when the Senate and the government disagree on whether the government has to hand over information, the Senate should insist on its interpretation, compared to 14% who disagree.
- Forty-six per cent of Australians agree that the Senate should refuse to hold a vote on bills that the House of Representatives passes if the House of Representatives is refusing to hold a vote on a bill that the Senate passed, while 27% disagree.

The final proposition has the most potential. Senate enthusiasts talk willingly about the chamber's power to fine and imprison those in contempt, but these measures would be polarising and fraught if actually exercised – although as reserve powers they remain important. The Senate's power to hold up government business, on the other hand, not only has strong precedent, but also is clearly proportionate.

The Senate used its legislative powers to impose procedural penalties on the government in 2003 to 2004, when the government wanted to implement an ethanol subsidy scheme. The Senate had ordered the production of documents related to the scheme – which the government had advised multiple times that it would do. The Senate refused to pass the bills until the documents were tabled. In a subsequent sitting, the government tabled some, though not all, of the documents – and the legislation passed.<sup>55</sup>

*Odgers' Australian Senate Practice* tells us that something similar happened in 2009, when the Senate ordered information about the National Broadband Network. The legislation only passed after the government produced a summary business plan.<sup>56</sup>

Similarly, the former member and Senator David Hamer proposed in *Can responsible government survive in Australia?*, finalised in 2001 and published posthumously in 2004, that responsible ministers should front Senate legislative committees, even if they were from the House of Representatives. If the minister did not comply, in Senator Hamer's words 'the

<sup>52</sup> Senator Rex Patrick, *Senate Hansard*, 28 November 2018, pp. 8940–8941.

<sup>53</sup> Jackson Graham, '[Senator claims public servants 'misled' committee over contract's purpose](#)', *The Mandarin*, 17 February 2022.

<sup>54</sup> The Australia Institute, [Polling: majority want greater Senate scrutiny of secret contracts](#), 5 March 2022.

<sup>55</sup> Senator Lyn Allison, *Senate Hansard*, 1 April 2004, p. 22572; Harry Evans, *Odgers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, pp. 393–394; Senator Kerry O'Brien, *Senate Hansard*, 1 April 2004, pp. 22569–22570.

<sup>56</sup> Harry Evans, *Odgers' Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, p. 672.



answer of the Senate would be simple. The bill will not be proceeded with until the responsible minister has given evidence'.<sup>57</sup>

In the first months of the 47th Parliament, senators contemplated this 'simple answer' in regards to a different dispute – the decision by Prime Minister Anthony Albanese to cut crossbencher advisers from 4 per parliamentarian to one. Senators Jacqui Lambie and David Pocock warned that without staff to help senators go through legislation, they would struggle to pass the government's legislative agenda, and a One Nation spokesperson said:

*If you're not adequately staffed that means this government expects legislation to be rammed through without proper consideration.*

*If we don't have time [to properly consider bills], the default position that should be taken by every independent and minor party should be to reject government legislation.<sup>58</sup>*

As well as support for the Senate acting as an institution, there is public support for direct action by individual senators.

In 2021, Senator Rex Patrick named and criticised a senior public servant who made an FOI decision in defiance of the findings of the Administrative Appeals Tribunal.

Andrew Podger, a retired senior public servant and former Public Service Commissioner, has said that Senator Patrick's language went too far, but that the senator was justified in naming the public servant, the public servant's decision was almost certainly not justified, and the decision demonstrates the loss of expertise in and increased political pressure on the public service.<sup>59</sup>

The *Canberra Times*' weekly survey asked its readers whether they thought Senator Patrick's naming and shaming was fair and reasonable. As the municipal paper of a public service town, one might suspect their sympathies would be with the public servant. As it turns out, almost half of readers (47%) thought Senator Patrick was fair and reasonable. Only 36% thought he was not.<sup>60</sup>

## Conclusion

The Australia Institute's polling finding Australians have a limited understanding of the Senate may not surprise, but it should make us concerned. It is a powerful argument for civics education, not just for school students, but in the form of lifelong education for adults as well. Australia's tradition of compulsory voting makes it even more important that every citizen knows what they are voting for, and why.

<sup>57</sup> David Hamer, *Can responsible government survive in Australia?*, 2nd edition, Department of the Senate, Canberra, 2004, pp. 298-302.

<sup>58</sup> Katina Curtis, '[Crossbench fury as government cuts staffers from four to one](#)', *The Sydney Morning Herald*, 24 June 2022; James Massola, '[Furious crossbench senators threaten to vote against Labor legislation after staff cuts](#)', *The Sydney Morning Herald*, 26 June 2022.

<sup>59</sup> Andrew Podger, '[PM&C is damaging the integrity and reputation of the public service](#)', *John Menadue*, 22 December 2022.

<sup>60</sup> John-Paul Moloney, 'Editorial poll', *The Canberra Times*, 8 December 2021.

The Senate is a neglected, but vitally important accountability institution. Its constitutionally guaranteed co-equal legislative status is the source of much of its power, but it is the Senate's election by proportional representation that gives it legitimacy and authority. The Senate has been the source of many of parliamentary diversity milestones, not to mention the diverse movements, interests and constituencies that have been represented in the Senate thanks to its proportionality.

The Senate has been an ideas-bank, the birthplace of much legislation and policy that has – eventually – been taken up by the government.

Unfortunately, the Senate is often its own worst enemy – when it fails to use the powers it has been given to hold the government to account. The Australia Institute polling research shows Australians are more likely to back the Senate than to oppose it when the Senate faces off against the government. That should strengthen its will.

## Research context

The Australia Institute is one of the country's most influential public policy think tanks, with an interest in democracy and accountability since it was founded in Canberra in 1994. In recent years, the Australia Institute collaborated with anti-corruption campaigner Tony Fitzgerald to put his 4 'Fitzgerald principles' to politicians in the 2015 Queensland election, made the case for truth in political advertising laws nationally and saw them legislated in the ACT in 2020, and founded the Democracy and Accountability Program in 2021 to research the solutions to Australia's democratic deficit and develop the political strategies to put them into practice.

The program's first major paper was *Representative, still*, a collaboration between Ben Oquist and Bill Browne.<sup>61</sup> The paper finds that the Senate is a unique, powerful legislative body, but Australians are confused about key details of its powers and operation. The paper was launched by Scott Ryan, then President of the Senate and Senator for Victoria and a champion of the role and power of that chamber, on the institute's webinar series.<sup>62</sup>

Based on the *Representative, still* paper, Oquist and Browne delivered the Senate occasional lecture 'The Senate's new role in protecting our democracy' in February 2022.<sup>63</sup>

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<sup>61</sup> Bill Browne and Ben Oquist, [Representative, still: the role of the Senate in our democracy](#), 9 March 2021.

<sup>62</sup> The Hon Scott Ryan and Ben Oquist, 'The Role of the Senate in Our Democracy', [YouTube](#), 8 March 2021.

<sup>63</sup> Department of the Senate, [Senate Lecture Series](#) (accessed 13 June 2023).