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The Trajectory of the Australian Republic Debate*

John Warhurst

Introduction

The trajectory of the Australian republic debate since the 1999 referendum has been generally flat with occasional spikes and dips.[1] That has continued despite the election of the republican Rudd Labor Government in November 2007. Monarchist critics of the proposed constitutional change can point out that there has not yet, a decade later, been a repeat of the unsuccessful 1999 referendum and that support for an Australian republic may be now below its peak levels. Supporters can point out that despite a barren period during which a long-serving prime minister made no secret of his personal opposition and was determined not to allow the issue to thrive, republicans still outnumber monarchists by about three to two in Australia. Republicans can also point out the failure of monarchists to gain any ground with the younger generation and to a new emphasis on the future of the monarchy post-Elizabeth II.

The debate has changed in character since 1999 despite the continued presence of some key elements, such as the comparative merits of tradition versus constitutional change, monarchy versus republicanism and the relevance or otherwise of the British monarchy to Australia's needs in the twenty-first century. There have been important

1 I. McAllister, 'Election without Cues: the 1999 Australian Republic Referendum', *Australian Journal of Political Science*, vol. 36, no. 2, 2001, pp. 247–69; J. Warhurst, 'From Constitutional Convention to Republic Referendum: a Guide to the Processes, the Issues and the Participants', Parliamentary Library Research Paper No. 25, 29 June 1999; J. Warhurst and M. Mackerras (eds), *Constitutional Politics: the Republic Referendum and the Future*. St Lucia, Qld, University of Queensland Press, 2002.

new developments in the way the issues are argued. These include the emphasis on a plebiscite-driven process prior to a referendum, new and greater emphasis on the role of the Governor-General vis-à-vis the monarch, increasing attention given to Prince Charles as future King of Australia, and tying the timing of change to the passing of Queen Elizabeth II.

The debate has also largely not been conducted by those who took centre stage in 1998–99, though John Howard's opposition has framed the debate until recently, Malcolm Turnbull's identification with the republican cause remains, and some politicians active in 1999, like Senator Nick Minchin, have continued to express their views. Most of the delegates to the Constitutional Convention in 1998, on all sides, have moved on to other questions and some key figures, such as Donald Horne, Richard McGarvie, Clem Jones, and George Winterton have since died.

Debate is both specialized and popular, being about both constitutional law and appeals to public sentiment. It is conducted in the community, in the popular media, in specialized magazines and in parliaments as well as at functions arranged by the protagonists. The contours of the debate can be difficult to track as there is also a subterranean element that rarely sees the light of day.

The overall contention of this lecture is that the Crown in all its non-constitutional aspects is in continuing decline in Australia in terms of public attention, public affection and its reflection in Australian symbols. Furthermore, the arguments used by defenders of the status quo in public debate against moving to a republic, involving deliberately diminishing the role of the Queen, contribute to hastening this decline by switching emphasis away from the monarchy in Australia.

However, despite the continuing decline of the monarchy in Australia the odds are against Australia moving to a republic in the short to medium term. A republican Australia remains possible but certainly not inevitable. It may happen within the next twenty years but the odds are that it will not. Australians remain republican in spirit but an increasing number of young Australians are disengaged from the issue. Furthermore many leading Australians who are republicans have a timid approach to the question for a variety of reasons. By the time change occurs, if it does, the majority of those voters who take part in the referendum may have had little or no experience of meaningful monarchy in Australia.

Relevant developments since 1999

The spikes and dips in interest have followed a very mixed bag of issues and events. They include broader political events, specific community and parliamentary efforts to lead republican debates and relevant and irrelevant aspects of the life of the British Royal family.

First, John Howard won the next two elections after the referendum to consolidate the Coalition government in office. This inhibited public debate. From July 2005 the Coalition also controlled the Senate, putting further Senate efforts by Labor, the Democrats and the Greens to popularize the republic off the agenda, particularly as the Liberal Senate leadership (Nick Minchin and Eric Abetz) were determinedly monarchist. However at that same 2004 election that gave the Howard Government

control of the Senate the republican leader in 1999, Malcolm Turnbull, entered Parliament and raised the hopes of republicans that he would contribute to reinforcing republican numbers and voices within the Liberal Party.

In 2007 Howard was defeated and left the Parliament, followed shortly afterwards by another prominent monarchist, Alexander Downer. While Howard's initial successor, Dr Brendan Nelson was also a royalist-cum-monarchist, Turnbull eventually defeated Nelson to become Liberal leader in September 2008.

The arrival of the Rudd Government raised republican hopes given Labor policy, but there has been little or no action. However, indirectly, the 2020 Summit in April 2008 did give a vote of confidence to a republic with overwhelming support among delegates, both in the Governance stream and in the summit at large.[2]

Prior to this the appointment by the Howard Government of Archbishop Peter Hollingworth as Governor-General in 2001 eventually brought the position into disrepute through his forced resignation which highlighted to the public the method of appointment by the Queen on the recommendation of the Prime Minister. The appointment of an Anglican Archbishop as Governor-General also led to critical discussion of church–state relations involving the implications for Australia of the British Monarch's role as head of the Church of England.

Secondly, there were peaks of activity and publicity to keep the issue alive associated with specifically republican community and parliamentary activities. An important theme since 2001 has been discussions of the best process by which the question might be moved forward.

During that year Senator Natasha Stott Despoja on behalf of the Australian Democrats moved a bill to hold a plebiscite on the question. Later that year in December a large community conference was organized in the town of Corowa by former Victorian Governor Richard McGarvie, the proponent of the Council of Elders type republic at the 1998 Constitutional Convention. This big experiment in community engagement drew together many established republican leaders and new ones such as Tim Fischer. The so-called Royal Hotel Resolution brought together these republican spokespersons behind an agreed process, including plebiscites.[3]

Then in 2003–2004 a Senate inquiry by the Legal and Constitutional References Committee was chaired by Senator Nick Bolkus with Democrat and Liberal support. This non-partisan public inquiry maintained republican momentum but, not unexpectedly, brought no government reaction at all. It recommended constitutional education and plebiscites as the best way forward.[4]

A little later, in December 2005, republican MPs from all parties launched Parliamentarians for an Australian Head of State in the federal Parliament as yet another way of building consensus and trust across party lines.

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2 Australian 2020 Summit, Initial Summit Report, April 2008, pp. 32–3.

3 For discussion of the Corowa conference see Senate Legal and Constitutional References Committee, *The Road to a Republic*, August 2004.

4 Ibid.

In 2008/09 a Greens Bill calling for a plebiscite at the next federal election has led to another Senate inquiry which is currently under way, having taken submissions. Public hearings will follow shortly.[5]

Throughout this time regular debates about issues like the Queen's Birthday holiday and Australian national identity generally have helped keep the focus on the republic. Liberal Senator Guy Barnett, for instance, has argued that the Queen's Birthday is an inappropriate day on which to present Australian Honours awards.

Earlier this year Australia Day debate initiated by new Australian of the Year Mick Dodson suggests that Republic Day has considerable support as a new public holiday if Australia Day is ever moved from 26 January.

Thirdly, the major development in Britain has been the marriage of Prince Charles and Camilla Parker Bowles in April 2005 and subsequent public acceptance of their relationship, which focused attention on the succession process in which Australia can play no part. Well-publicised surveys have demonstrated the relative unpopularity among Australians of Charles as future King of Australia compared to his mother and thus generated further republican/monarchist debates.[6]

There were also the regular shenanigans of the next generation of the British Royal Family, William and Harry, to amuse the Australian tabloids and to demand responses from republicans and monarchist representatives alike. Such media debates rarely advanced sensible debate but they could not be avoided.

It should not be forgotten, however, that for every republican spike there has been a 'crowding out' effect of other issues like reconciliation, refugees, climate change, a bill of rights, and an apology to the stolen generation on the one hand, and global financial crisis, the Iraq War, and the war against terror on the other hand. In this context republicans become distracted and/or apologetic about raising the issue. Monarchists confidently play 'the time is not right' card and regularly compare purported costs of constitutional referenda with popular social services and other government spending possibilities.

Finally it should be noted there has been no other attempt to achieve constitutional change through the referendum method over the past decade (In fact there has not been a successful referendum since 1977). The republic is not alone if it is on the back burner.

The interested groups

5 The Senate Standing Committee on Finance and Public Administration's report, *Inquiry into the Plebiscite for an Australian Republic Bill 2008*, was tabled on 15 June 2009.

6 See footnotes below.

The contribution of interest groups to the debate must be put in context. They are smallish groups rather than large social movements. This means that debate is conducted in the media and in specialized forums by a relatively few individuals rather than through large public events. Republicans have never had the large numbers or the campaigning style to march or demonstrate for their cause in the same way, for instance, as the reconciliation, anti-war or environmental movements. This has always been the case except for a short period in 1999 when the Yes and No sides received government funding producing a campaign atmosphere. The British media, in particular, continue to be bemused by this, seeking something that is just not there. Many of the main protagonists are also ageing and organizational regeneration will soon become a major dilemma on both sides of the debate if it is not already.

The two main specialist groups remain the Australian Republican Movement (ARM), based in Canberra, and Australians for Constitutional Monarchy (ACM) based in Sydney. Both are non-government organizations without any government funding.

ARM, now chaired by Major-General Michael Keating, has moved forward with a new democratic emphasis, considerable generational change, and, recently a new green and gold image. It is robust, but a smaller organization than it was at its peak in 1999. It has no tax deductibility to encourage financial support. Since early this century it has concentrated its efforts on a plebiscite-driven process and a facilitation role in public debate. It is open to any responsible model supported by the Australian people and is not at all committed to the defeated 1999 model.

ACM remains a vocal organisation with Professor David Flint its indefatigable hard-line public voice. Its biggest achievement, with tax deductible status, is the creation of Constitutional Education Fund-Australia (CEFA) with Kerry Jones, the leader of the No campaign in 1999, in a new role as its CEO.

There are other smaller organizations on both sides that play a part in media-generated debates. The spokesman for the Monarchist League, Philip Benwell, is a regular, gentler participant in media debate and has been known to disagree publicly with the views of the ACM.

Among republicans the Clem Jones team, now led by David Muir, has inherited a large bequest from Mr Jones that will be used, on behalf of direct election, in any future republican campaign. Women for an Australian Republic is a thoughtful contributor to parliamentary enquiries and to the gendered aspects of republican debate within the women's movement in particular. The Democracy First group led by stockbroker Jim Bain has good political connections. Many of these republican groups have demonstrated their desire for unity by participating in regular conferences under the banner of the Republican Gathering since August 2005. But republicans remain divided on key issues. The Republican Party of Australia remains a determinedly idiosyncratic outlier.

But a number of republican bodies active in 1999 have all but ceased to exist in any real operational sense despite attempts to engage them in debates. These include Conservatives for an Australian Head of State, organized at the time by the present Liberal shadow minister Andrew Robb, and A Just Republic, committed in 1999 to a Yes vote with an eye on a subsequent move to a directly elected President. They

represent important segments of republicanism and may revive should another referendum be held.

The number of other interest groups that participate in the debate is patchy and limited. Should there be a second referendum it will be important how some of them decide to jump and with what energy and resources. The biggest groups, like the business community and the trade union movement scarcely raise their heads on this issue.

The Returned Services League has exhibited a diminishing interest. Get Up, the grass roots organization, has not yet taken the issue on board in a serious way. But debates occur elsewhere. The government-funded National Schools Constitutional Convention, for instance, considered the issue last year in a referendum-style format and narrowly supported a republic.

For many leaders in public life the issue is too difficult or too complex for them to make a public contribution. Some are deterred by the protocols of their public role as corporate heads, public servants, judges or military officers. Some would like a more radical edge to the debate, incorporating broader issues such as the national flag or Indigenous reconciliation, while others are worried by any support for popular election.

The political parties

Ultimately debate has to be led by the political parties. Interest groups can encourage a groundswell and strive to speak for the popular view, but it is governments who can take action.

But political activists overwhelmingly give priority to their political party allegiances over issue concerns. To date this has benefited monarchists. One of the tasks of republicans is to change that so that party leaders come to recognise the positive electoral benefits rather than the potential risks of backing constitutional change.

Labor has continued to advocate a republic with an Australian head of state as a matter of party policy.[7] Their enthusiasm is sporadic. State Labor leaders prominent as republicans in 1998–1999 have been all talk but no action once in office. There is internal division within the party over the most appropriate type of republic. Most significantly of all, despite the contribution of MPs like Bob Debus and Mark Dreyfus, Labor has failed to produce a true champion of republicanism from within its ranks as there have been champions of other issues.

Liberals are divided broadly between conservatives and liberals on the question, although there are exceptions to this general rule. The party membership is probably more monarchist in inclination than the federal parliamentary party, which puts pressure on republican MPs. There have been bravely outspoken Liberal republicans over the past decade nevertheless, such as Senators Marise Payne and Amanda Vanstone.

[7] Australian Labor Party, National Platform and Constitution 2007, chapter 11 ‘Reforming Government’, sections 17–25 ‘Constitutional Reform’.

Notably, there has been a decisive change in the balance at the senior levels of the parliamentary party recently. Of the five candidates for leadership after the 2007 defeat, for instance, only one, Nelson was not a republican. The others were Turnbull, Julie Bishop, Christopher Pyne and Robb. To that latter leadership group can be now be added another republican in Joe Hockey, the Shadow Treasurer. This is a significant development in internal Liberal politics, although whether it is a trend or just cyclical is hard to predict.

The Nationals, an officially monarchist party, are an enigma in this debate with the formal position masking some quiet republican support among its leaders and members. Since 1999 one former leader, Tim Fischer, has enthusiastically advocated a republic, in the spirit of other former leaders Ian Sinclair and Doug Anthony, but the party has not altered its position.

Both the Australian Democrats and the Greens have played a more considerable role in the debate beyond what their numbers might suggest. They have moved bills at critical stages and often urged the major parties to get moving. As the Democrats, who have had more active republicans in their parliamentary ranks than any other party, went into decline from 2004 onwards the emerging Greens took up the slack.

Federal elections and prime ministerial opinions

Generally the republic has not been a major issue in any of the three federal elections since 1999, despite the efforts of minor parties. It was up to the Labor Party to put it there and that they have not done so says a lot about how the question has been framed. The issue was perceived to be a potential liability. Each Labor leader, reflecting party policy, has promised a plebiscite followed, if successful, by a referendum. Nevertheless there have been nuances in the approach of the three Labor leaders who have taken the party to an election during this period.

In 2001 it was probably too early to expect too much urgency from Kim Beazley. In 2004 Mark Latham thought speed was of the essence and promised a referendum within his first term. He also presented the republic question attractively as part of a larger story about new politics. In 2007 Kevin Rudd emphasized his personal republican beliefs and his party's policy but tried to hose down enthusiasm by declaring the republic to be a second-order issue.

Since his election Rudd has always spoken cautiously even at times such as the 2020 Summit when other Labor ministers like Debus called for a plebiscite in 2010. A typical example of Rudd's stance came in April 2008 in London, when he told BBC One: 'Our position as a party is clear—we are committed to an Australian republic. I am a republican and that is what we will work towards over time, but it is not a top-order issue just now.'[8]

On the day Turnbull was elected Liberal leader Rudd offered him a bipartisan approach to the republic, suggesting the Government would work with the Opposition

[8] Australian Associated Press, 6 April 2008.

on a timetable.[9] But, if it was a genuine offer it was a clumsy one that appears not to have been followed up yet.

Public opinion and social surveys

The purpose of the debate is to win the support of the public at large. But among the public there is one segment among which a clear majority has emerged. Australians holding senior office in the public and private sectors are very strong in their support for a republic. Any random selection would confirm this. The 2020 Summit was neither rigged nor unrepresentative in this regard (though 98.5 per cent support for a republic in the governance section was a remarkably high figure). Such summits are drawn from professionals, higher income earners and the better educated and support for a republic grows stronger as income and education increase.

What of the public at large, the ones who ultimately matter? There has been no shortage of opinion polls and social surveys since 1999; that in itself is an indication that the question is seen to be a live one. The polls generate debate and commentary, often placing republicans on the defensive whenever public support appears to have fallen. But the question is complex, and there is little or no agreement as to how the survey question should be phrased. The polls differ and generate different responses as a consequence.

For instance, three polls taken in April–May 2008 around the time of the 2020 Summit showed contradictory results and the contradictions were glossed over in media reporting.

A Morgan Poll reported that 'Now only 45 per cent of Australians want a republic with an Elected President (Down 6 per cent since 2001)'. This generated media headlines such as 'Republic support lowest in 15 years'. Forty-two per cent supported the monarchy. Notably, support for the monarchy fell 10 per cent to only 32 per cent should ever Prince Charles become King.[10]

The *Sun-Herald*/Taverner Poll about the same time reported that 49 per cent favour Australia breaking ties with Britain and becoming a republic *now* compared to 42 per cent support for the status quo. This generated media headlines such as 'The last of the Royals'. Notably again, in this poll support for the status quo fell 16 per cent to only 26 per cent once the Queen's reign ends.[11]

An *Advertiser* Poll reported 51 per cent of South Australians supported a republic while 40 per cent opposed change. At the same time 81 per cent believed a republic is inevitable. The *Advertiser* headline was 'Voters want to dump the Queen.'[12]

Now consider two large surveys. The Australian Election Survey has studied the issue at each election since 1987. The investigators at the Australian National University conclude that support for a republic has remained at about 60 per cent over the past

9 *The Australian*, 16 September 2008.

10 AAP, *The Australian*, 7 May 2008; Morgan Poll Finding No 4290, 7 May 2008.

11 *Sydney Morning Herald*, 13 April 2008.

12 *Advertiser* (Adelaide), 9 May 2008.

ten years, since before the referendum.[13] That was the figure in 2007. The question asked is: 'Do you think that Australia should become a republic with an Australian head of state or should the Queen be retained as head of state?' In the same survey 64 per cent thought that the Queen and the Royal Family are not very important to Australia. Only 11 per cent thought they were very important (presumably the same people as the 10 per cent who strongly favour the monarchy).[14]

UMR Research reported in November 2008 that, in answer to the simple question: 'Do you support or oppose Australia becoming a republic?', 50 per cent said Yes and 28 per cent said No. Men favoured a republic by 58 per cent to 24 per cent, while women (43 per cent to 32 per cent) were not as convinced. That gender difference has long been the case.[15]

Overall all polls show more republicans than monarchists (a plurality) and most polls show a republican majority of the whole population. Republicans have strong support and should win a general plebiscite. But realistically they need to increase that support to be confident of achieving a double majority in a referendum.

One continuing weakness of republicans has been the relatively low intensity with which a republic is supported. To take the AES survey, for instance, only 31 per cent of respondents *strongly* support a republic, about half of all republicans. On the other hand only 10 per cent of respondents strongly favour retaining the Queen, which is only about a quarter of all monarchists.[16]

Another continuing weakness of republicans is internal disagreement about the type of republic, one of the key problems in 1999. In the AES survey 80 per cent favour election of the head of state by voters (50 per cent strongly favour so-called direct election).[17] In the UMR survey exactly the same figure (80 per cent) want the president elected by the people.[18] These figures send a strong message.

Another way of measuring the trajectory of public opinion is to investigate the opinions of younger people, who didn't vote in 1999. Here opinion is divided. The Morgan Poll mentioned above reckoned that younger Australians favoured the monarchy rather than the republic, but that is not the general view.[19] UMR Research reported that those under 30 favoured the republic most clearly (49 per cent to 18 per cent),[20] but, as other polls like Newspoll have also reported, not because they were more republican than the rest of the community, but because of two other factors. The first is that younger Australians are less monarchist than older age groups and the

13 I. McAllister and J. Clarke, Trends in Australian Public Opinion: Results from the Australian Election Study 1987–2007, Australian National University, 2008; *Herald Sun* (Melbourne), 6 September 2008.

14 Australian Election Study 2007.

15 UMR Research, Australians Want a Republic, Quantitative and Qualitative Findings, November 2008.

16 Australian Election Study 2007.

17 Australian Election Study 2007.

18 UMR Research 2007.

19 Morgan Poll, 7 May 2008.

20 UMR Research 2007.

second is that a much larger percentage of the younger electorate is undecided either way. In a January 2006 Newspoll 29 per cent of younger Australians were undecided.[21] There is no joy here for monarchists. At the same time there is plenty of work for republicans to do in connecting with those under 30.

Media coverage

The coverage has been patchy, but, not surprisingly there has generally been less than during the 1999 campaign. Perhaps the media was bruised by that experience. The debate is hampered by the apparent lack of new developments to report. But there is still a great deal of coverage, often stimulated by the publication of opinion polls or by the various developments discussed earlier, including the 2020 Summit. Major speeches by protagonists such as Senator Nick Minchin or Alexander Downer are reported as are the speeches of those in high office when they choose to declare their hand as republicans, such as the South Australian Governor, Kevin Scarce or Justice Robert French then of the Federal Court, now Chief Justice of the High Court.[22]

A lot of the debate which does occur takes the form of 'cheap' media beat ups, usually relating to members of the British Royal family other than the Queen. Both monarchists and republicans are trotted out by the media for meaningless rituals which only obscure the important aspects of the debate. But they are opportunities that neither ACM nor ARM can refuse because they are valuable chances to address the bigger picture.

Changing emphases and strategic moves

The debate has changed in character since 1999. Certain approaches to the question still have bite, including general arguments for or against monarchy/republic as well as the nationalist appeal of a republic in Australia and the cost to the public purse of constitutional change. But there are a number of new developments that have altered the character of the debate over the past decade.

Before addressing these new issues there is one thing that republicans and monarchists alike do agree upon. That is the prevailing ignorance within the Australian community about constitutional matters, such as those in question here, that hamper any debates. That has long been the case and was to be addressed by the Civics Expert/Education Group in the 1990s. It called into question the depth of the debate during the referendum. Addressing this issue was a major element of *The Road to a Republic*, the 2004 report of the Legal and Constitutional References Committee of the Senate. In order to build 'increased awareness and understanding within the community of our constitutional system' the committee called for a Parliamentary Joint Standing Committee on Constitutional Education and Awareness.[23]

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21 Newspoll January 2006; J. Warhurst 'Younger people and the republic', *Canberra Times*, 7 April 2006; R. Huntley, 'Trust Matters: Politics, Trust and the Republican Cause', Democratic Audit of Australia Discussion Paper 36/06, December 2006 (National Republican Lecture, 29 November 2006).

22 N. Minchin, Queen's Birthday speech to Australian Monarchist League 13 June 2008; R. French, 'Dreams of a new republic', Sir Ronald Wilson Lecture, Law Society of Western Australia, 8 May 2008.

23 Op. cit.

Just last month the National Civics Assessment Report on civics and citizenship in Years 6 and 10 reported disturbing results about the continuing lack of basic knowledge among Year 10 students. Only 34 per cent could identify the correct answer ('The framework for the ways Australia is governed') from four alternatives to the basic question: 'What is the Australian Constitution?' There remains a great need for community education as identified by the Senate Report for the debate about a republic to be better informed.[24] It is the obvious place for any government to start.

The inevitable first new aspect of the debate has been about the meaning of the 1999 referendum result. An important thread of monarchist argument, often picked up in popular contributions to debate like letters to the editor, has been that the matter has been decided because the people have spoken. Republicans have had their chance and should cease the debate (or as Kerry Jones once put it, the republicans had their chance and they blew it).[25]

This argument has no substance at all other than as a debating point. The referendum was won by a coalition of monarchists and direct election republicans. The No Committee was constructed in this way with the participation and support of key republicans including Ted Mack, Phil Cleary and Clem Jones. The slogan was: 'Say No to this Republic', implying a further referendum if/when this one was defeated. Furthermore the most comprehensive study of the referendum demonstrates conclusively that republicans actually carried the No vote over the line. Indeed, even a majority of the 55 per cent No voters declared themselves to be republicans.[26] Whether or not a second referendum can be carried is another matter.

Secondly, both the ARM and the Labor Party have switched from supporting a particular type of republic in 1999 to a plebiscite-driven process by which Australians themselves would choose which type of presidential selection process would be included in the referendum. This is a change from a top down to a bottom up approach. There would be two plebiscites, one asking a general Yes/No question and the second asking a choice between types of republic such as parliamentary appointment or popular election.

Monarchists have attacked the plebiscite approach on various grounds. These attacks have included questioning the constitutional propriety and/or cost of the exercise and daring the ARM to declare its preferred model. But this method of ascertaining public opinion is quite a respectable one and has been used in Australia previously in the matter of the choice of the new National Anthem to replace God Save the Queen.

There has been a considerable hardening of the position of ACM that the Governor-General is the Head of State of Australia. The burden of this argument has been

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24 *The Australian*, 18 February 2009; CEFA E-Newsletter, 2, 2009; the other three incorrect answers were: the rules about how the major Australian political parties are run; the policies of the Australian federal government; and all the laws that Australian citizens must obey.

25 K. Jones, 'Why Australians Voted No in the 1999 Republican Referendum', in Warhurst and Mackerras 2002, op. cit., p. 47.

26 McAllister 2001, op. cit.; J. Kelley et al, 'Public opinion on Britain, a Directly Elected President and an Australian Republic' in Warhurst and Mackerras 2002, op. cit.

provided by Sir David Smith, former Official Secretary to various Governors-General, but taken up enthusiastically by others in the ACM and its supporters. In a recent speech, Senator Nick Minchin claimed that it was a 'lie' to describe the Queen as the Australian Head of State.[27]

This strategy followed a period when monarchists began to argue that head of state was not a constitutional term, therefore it was inappropriate to use it at all in the republican debate. The new position is an arcane argument that moves away from the more sensible position adopted by the No case in 1999 that the Queen is the official Head of State, while the Governor-General is a de facto Head of State carrying out the role as the Queen's representative in her absence. This new strategy has probably been a short-term winner for monarchists in muddying the waters about the central republican claim that only a republic will give Australia its own head of state. But it is a longer term dead end for monarchists as it reduces the Queen to the much vaguer position of sovereign reigning over Australians. This vastly underestimates the continuing social and cultural role of the Queen and her successors in Australian public life. It will only accelerate the eventual disappearance of the Queen from Australian life.

The most recent development in the debate, though it has a long history, is the suggestion that Australians should wait for the Queen to die before pursuing the issue further. Former prime minister Bob Hawke was of this view. Now it is gaining more general currency. Another former prime minister Gough Whitlam has apparently recently become an adherent. Public opinion polls suggest an electoral logic for this view, given that Prince Charles is far less popular than the Queen.

Malcolm Turnbull, leader of the Yes case in 1999, now holds this view too.[28] This sincerely held belief enables him to reconcile for the time being his republican sentiments and his uncomfortable position within the Liberal Party which remains divided on the question. But no one who holds this position, including Turnbull, has fleshed out what it might mean in practice in Australia.

It is an ill-thought-out soft option that should be unacceptable public policy, certainly to republicans and even to monarchists. Does it mean the end of public discussion about monarchy/republic until the death of the Queen, whenever that might occur? Does it mean that the necessary public consultation, including perhaps a general plebiscite on the question, so that the nation should be in a state of readiness, should not proceed? We await answers.

Conclusion: The trajectory

My overall conclusion is that the odds favour the status quo. Republicans have a reasonable chance of success, perhaps one in three, but the odds are not in their favour. A republic is certainly not inevitable. Republicans need to take their chances,

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27 Sir David Smith, *Head of State: the Governor-General, the Monarchy, the Republic and the Dismissal*. Paddington, NSW, Macleay Press, 2005; Minchin, op. cit., 2008.

28 ABC News, 28 January 2008; *The Age* (Melbourne), 22 April 2008.

which is all any movement or group seeking change can expect. The same could be said of many other proposals for reform.

The visibility of the monarchy in Australia is, nevertheless, likely to continue to diminish in many non-constitutional aspects of Australian life whatever the fate of the movement for an Australian Republic. This outcome may be small comfort to republicans. In large part this development has been encouraged by the defensive strategy of monarchists to downplay the role of the monarchy. While some monarchists may be happy with such an outcome if it preserves the constitutional status, those who would like the British monarchy in Australia to play anything like the broader social role that it does in Britain will be disappointed. It will ensure a hollow constitutional monarchy in Australia.

In the short term it is more likely than not that the Rudd Government will choose not to act even should it win a second term. In this first term other issues, like the Bill of Rights consultation, have been placed ahead of the republic in the government's crowded pecking order. But a statement of intent during the 2010 election campaign remains possible.

The medium term, five to ten years, is harder to predict. But should Turnbull become prime minister prior to the end of the reign of the present monarch it is more likely than not that he too will choose not to act. It is an intriguing question, however, whether a future republican Liberal PM like Turnbull might be more likely to forge a non-partisan republican consensus than a Labor PM like Rudd.

There is, however, a great deal of unpredictability in any scenario about the future trajectory of the debate. Within Australia the major unpredictability is the future path of party politics in terms of leadership and election outcomes. Outside Australia there is the uncertain longevity of Queen Elizabeth II. There may be other triggers but triggers, like the Bicentenary in 1988 and the Centenary of Federation in 2001, have not proved enough in the past. They have limited power.

Should Australia not become a republic over the next twenty years or so then it may be because of lack of interest rather than active and informed support for the status quo. Lack of interest is enough for a monarchist status quo to prevail. The necessary clear majority of the population, while republican in principle, may not believe that the constitutional change required is worth the effort. The task of republicans is to convince them that it is, while the hope of monarchists is that the limited appeal of the status quo will prevail.

The task of republicans is to turn the majority support that undoubtedly exists among leading Australians (known dismissively as elites) into the sort of popular majority that would carry a referendum. The task of defenders of the status quo is to prevent that or to hope that it doesn't happen.

Is there more that the republican movement can do? Some republicans certainly have advocated that a change in strategy is in order. The movement does have at least two strategic options that have been raised in debates over the past decade.

The first is to broaden the agenda of constitutional change. The suggestions have included linking the republic to Indigenous Reconciliation.[29] The second is to revert to supporting a model, but on this occasion to support direct election rather than parliamentary appointment. Research suggests that this may be the second preference of many monarchists anyway and it is extremely popular in the wider community.[30]

My personal view is that the movement should not be tempted by either option at this stage. The single issue of the republic is big enough on its own. And the best role for the Australian Republican Movement is to be an umbrella under which all republicans can be comfortable and from which position ARM can facilitate rather than determine the choice of the community. But the longer the debate continues it is likely that strategic options like these will be given considerable attention.

Question — I must admit to being a little disappointed by your speech. I think it was short on a few facts. My question particularly in relation to ties with Britain and the Queen. My question is, what is your definition of the Crown?

John Warhurst — My definition of the Crown is the monarchy, as represented in Australia at the moment by Queen Elizabeth II.

Question — I wonder if you would comment further on the nature of the plebiscite process because it seems to me that a two-stage plebiscite is rather a foolish option. I would much prefer to have a single preferential plebiscite, with all the options on the table. I think there are many people who would put the idea of representative democracy in the form we have, two houses of Parliament etc, ahead of whether we have some form of republic. I think there is a subterranean scare campaign that really is all about introducing an American system that most people don't want. I would prefer to see all those options explicitly in a single plebiscite that would make it rather hard for monarchists to engage in a dishonest campaign against having a republic because they would allege it would be in a form that people didn't want. I think if you did that and you had a period of about a year or so to really educate people on the major options you could have a sensible vote, and one particular option (presuming it was a republic one or a monarchist one) would come out ahead. I think many republicans and monarchists would be reconciled by the preferential process. Could you comment on that suggestion?

John Warhurst — Firstly, one of the points you made was about an American-style republic. That's certainly not favoured by the Australian Republican Movement; we have made that quite clear for some time and make it clear again in our submission to the current Senate inquiry.

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29 M. McKenna, 'The Republic' in R. Manne (ed.) *Dear Mr Rudd: Ideas for a Better Australia.* Melbourne, Black Inc. Agenda, 2008; and *This Country: a Reconciled Republic.* Sydney, UNSW Press, 2004.

30 J. Pyke, 'The republic: has Labor got the perfect wedge?', *IPA Review*, May 2008, pp. 40–1.

There has been a lot of debate about how the plebiscite process should be approached. If it was to go ahead, that decision would be made by the government of the day and hopefully, by discussion with the opposition of the day. Yes, you want people to be absolutely reconciled, or sure that a first general plebiscite would be followed by another opportunity to give their preference, and some people would argue that you should have them together and do it at once. Others argue that this is too expensive a process not to have them both at once and that cost would become an issue. On the other hand a measured discussion of the process in the community might be the best way to go ahead.

Ultimately it will be for the government and Parliament to decide the best sort of community discussion to have, and whether it should be held in an election climate or between elections; and if there are two plebiscites whether they be held both at the same time or with a year or eighteen months between them.

Question — I'm speaking as the founding convener in 1992 of the ACT Branch of the Republican Movement, of which I am no longer a member, although I still support its basic principals. I have to express my disappointment that the Movement is not taking a position on the question of direct election. It seems to me that at the present time in the debate it desperately needs a catalyst to refocus and revive interest that we all agree has waned. To my mind there is one sure way that would achieve that catalyst and that is that you change your mind and also the mind of the Republican Movement and get in the saddle and ride that horse for a direct election as policy of the Australian Republican Movement. I will be interested in your comments.

John Warhurst — As I said in my talk, that is something that is being talked about and it may be one of the options that we consider in the future. In terms of the media, there is no doubt that if the ARM was to adopt a direct election model, it would be an enormous spike in media attention. You and I share a desire for the best way forward in the long term, and at the moment there are different views as to whether that is the best way or not. My view is that republicans are of different persuasions; frustration has to be endured in keeping all those republicans discussing the issues across the parties and across the different views in the community, and despite your wishing to get me up there in that saddle, I think that's the best way to proceed. Rest assured there are plenty of republicans who are arguing for that position with vigour and persuasion not just yourself. John Pyke, who I footnote in the written version of this paper, has written a couple of very interesting papers, one published in *Institute of Public Affairs Review*, urging just this position.

Question — My question follows the last speaker. I notice that there are people we need at the top of society, prime ministers, leaders of the opposition, who seem to be frozen, and people at the bottom: grass roots. What can we do to open up? The feeling for me is that people want a republic. The thing is to bring it up. What can we do at the grass roots level to start this? I know that we need a prime minister like Paul Keating who actively went to it and opened up everybody else at the bottom. We need that help. At the moment how can we overcome that abysmal ignorance of the Australian population about the present system and the republic?

John Warhurst — I think there are two questions there. I take the last one first. I think both sides of the debate should be in favour of greater education and public

awareness and I think that both sides are in favour of that. Ultimately, that is a matter for parliaments and governments and education systems, mainly because of the amount of money that is involved in mounting any substantial campaign as far as public awareness is concerned. They really are enormously expensive activities. In 1999, even for that very short period, each side was given seven and a half million dollars by the government and then there were lots of critics of the quality of the public awareness material which was produced during that stage.

My view is that you will get to a certain level of constitutional awareness and beyond that there will be no more. People's lives naturally are not wrapped up in the Constitution, they are wrapped up in their own families and careers and homes, and that's how it will be. I don't think that necessarily means that there won't be constitutional change; after all, we run very successful election campaigns and we produce governments and parliamentarians and you would be equally shocked if you looked at the figures on what very well-educated people know about the electoral process, and their local member and their senators, and how Parliament works. It is not just the Constitution that is unknown in the community, it is the whole process, so I think constitutional change and constitutional defence is a fair thing to be involved in. We can raise the level of awareness perhaps by 10 or 20 per cent but if it gets to 50 or 55 per cent I don't think we are going to get further than that and we are going to have to live with that.

There is no magic bullet as everyone involved in politics says. There are ways of trying to get involved in politics and both sides in this debate are doing those. I suppose there are mainly two ways: there is the grass roots approach, which involves not just local activities but local MPs and local communities, and to the best of your ability generating debate, whether it is street stalls or whether it is bumper stickers or whatever … both sides on any issue are engaged in this sort of thing. And secondly, there's the parliamentary lobbying process, which I know republicans are actively engaged in, and I am sure monarchists are actively engaged in as well. That is, you take your opportunity with parliamentary committees, you try and buttonhole members of Parliament and ministers and shadow ministers, you work the field and everyone is involved. You're trying to build some sort of a consensus. And ultimately, the magic of achieving a political objective I think is bringing those two together. All the political science in the world won't tell you how to ultimately do that: it will either happen or it won't; there may be a trigger there or maybe not; there may be a conjunction of political forces along with the appropriate social and economic circumstances.

That's a disappointing message for anyone involved in politics; you just keep battling away. You win some and you loose some and ultimately because you believe in a cause you are willing to put a lot of time and effort into it and only time will tell, and no one can give a more concrete answer about the trajectory of a monarchy/republic debate. I have tried to speculate but ultimately none of us know in 10 or 20 years time, even in five years time, what will happen with this particular issue, because things do change quickly.

Question — Professor Warhurst, in your address you concentrated on what I think one would call the minimalist approach to a republic. Could you develop a little further why you apparently wouldn't see such a significant change to the

Constitution? Also, how would you address what I and others see as two of the other great issues: some form of recognition of indigenous people, and some way of identifying in the Constitution that the source of sovereignty is the people. Whether it's a ringing declaration: 'We the people', or some other form of recognising where the source of sovereignty is.

John Warhurst — I certainly didn't mean to concentrate on a minimalist approach to achieving a republic. What I did say was that I favoured a single-minded, single issue approach to achieving a republic. Constitutional change, as you know, is very difficult to achieve, as the referendum record shows in Australia. Watching similar attempts in Canada, for instance, to achieve constitutional change, I have come to the view, although I can see both sides, that focusing your attempt at constitutional change may be the better way to achieve it. I think maybe there was too much caution in 1999, and that was one of the reasons why it failed: the aspirations weren't large enough.

For the time being, it gets back to the second of the strategic issues that I posed at the end, and that is: should republicans go for a broader attempt at constitutional change? The positive would be that it would certainly bring more energy to the campaign because there are some aspects: preamble, sovereignty to the people, indigenous reconciliation, that would add enormous energy to a republican campaign. But it would ultimately run the risk of being divisive. In any campaign where you have two or three objectives, you have to get people on side with all of them. One of the things about the last ten years of debate is that there are always attempts to divert the single-minded republican from that position by saying: 'Oh yes, you also believe in this, or you also believe in that, or you also want to change that', and the fact is for most republicans their focus is the republic and that's what they want to change. They may also have other views, but the single-minded focus is what brings them to the cause.

Question — I'm wondering if you can tell us how many members of the Liberal Party are registered members of or supporters of the Australian Republican Movement? The reason I ask this question is that you read in the paper that certain people are described as republican. For example: the premier of Western Australia has been described as a republican. Now the Leader of the Opposition in Tasmania is described as being republican, although his father is the most monarchist person you could find; you only need to get a letter from him to see that he is a monarchist. It seems to me that if you adopted a direct election model, you would more or less guarantee that you would lose all of these Liberal Party people that you have at the moment. I'm just wondering how many do you actually have?

John Warhurst — That is one of the issues that people raise in terms of moving to supporting a particular model: what are you going to do about parliamentarians who support another model, are you just going to leave them out in the cold? The idea would be that in the long run, if you did choose a direct election model for instance, while it may lose you ground in the short run, with people in those positions, in the long run given 80 per cent public support for such a move that they would come on board anyway. Getting back to your question, I'm not going to tell you how many are actually members of the ARM; my view has always been that 40 to 45 per cent of the Liberal parliamentary MPs are probably republican. Not half, but a good solid close to half. I can tell you with certainty that the Tasmanian opposition leader is, because he has been a member of the ARM and a very active one. He was actually on the branch

council in Tasmania for quite some time and he has talked about the amazing dinner table conversations he has with his father over the question of monarchy/republic. He said at the time that he thought that everyone in the Tasmanian Liberal Party in Parliament was a republican apart from his father, so that's an interesting dynamic. I can't say about Colin Barnett in Western Australia, but I think he is on the record of saying he is a republican. Within the parliamentary Liberal Party there are a number of ARM members; there are other republican Liberals who would prefer to go their own way and not have a Liberal Party affiliation, but whenever we try to identify supporters of republicanism among the federal Liberal Party, we target about half of the membership on our count. That's where it stands at the moment and I think that is one of the things that hasn't changed very much since 1999. I talked about the dynamics of the leadership which I think have changed, but I think the balance of Liberals is about the same.

Question — I must confess that I too was disappointed in your talk. It is the most entertaining political speculations that you have given us on questions of law, on which you are a professor. The question of the fact that at federation, the Constitution was a compact among the states, you made very passing reference to in your talk. A Commonwealth republic with monarchist states, because they have their own governors and their own links with the crown, I find that a nonsense. Would you care to comment?

John Warhurst — This was an issue that was raised in 1999, and it was an issue that was taken up at premiers' conferences in 1999. You're quite right; each of the states is a constitutional monarchy in its own right and they have their own links with the crown. That certainly is an issue which would have to be addressed. We can assume that if a referendum passed that at least four states would have voted in favour of a republic. In some states there may have to be a second referendum to ascertain that view in that particular state, but probably not. I don't think in 1999 there were any particular worries. I think ultimately the opinion of the Australian people would prevail if the referendum process delivered an Australian republic and Australian constitutional change. If it wasn't six-nil and there were one or two states who voted no, then sure, the premiers of those states would have to debate the issue within their own state. I suspect that if that occurred, just as in the cast of imperial honours in Australia, in the end there would be pressure both from within Australia and from Buckingham Palace to make an end to it all and to ensure that a national decision by an Australian electorate was the end of the matter. I'm quite confident that would be the case.

Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State*

Anne Twomey

The question of whether Australia should become a republic will no doubt, sooner or later, come to the forefront of public debate again. It is *not* an issue which I intend to address today. Instead, I have been asked to speak about the constitutional issues concerning transformation to a republic.

Many of these issues were thrashed out earlier, prior to the 1999 republic referendum. However, the loss of that referendum pushed the public debate towards consideration of a directly elected head of state. Opinion polls consistently show that of all republican models, Australians would prefer a directly elected head of state.[1] The Labor Party's Platform states that Labor will conduct plebiscites to establish support for an Australian head of state and the preferences of the Australian people for different forms of a republic.[2] All these factors suggest that when the republic next rises up the political agenda, it will be some form of direct election model that will be on the table. This means that new and much broader constitutional issues will need to be grappled with, and it is these that I propose to discuss today.

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1 John Warhurst, 'Trajectory of the Australian Republic Debate', Senate Occasional Lecture, 6 March 2009, published in this volume at p. 1.

2 ALP National Platform and Constitution 2007, Chapter 11, para 23: http://www.alp.org.au/platform/chapter_11.php#11constitutional_reform.

A directly elected head of state

Personally, while I understand the attraction in having a say in who is our head of state, I cannot see the value of directly electing the head of state. First of all, the types of people who would make a good head of state are extremely unlikely to stand for election. Secondly, it is likely that only political parties or the very rich will have the money to run a national election campaign—reducing the choice for head of state. Thirdly, one really must wonder on what basis candidates would campaign. 'Vote for me because I behave well at funerals'? 'Vote for me because I know which knife and fork to use at dinner parties and I can negotiate a cocktail party without spilling food down my shirt'? 'Vote for me because I have special ribbon-cutting skills and don't fall asleep while watching handkerchief-dancing or listening to interminable speeches'?

I have recently been reading the private letters of Sir Philip Game, who was Governor of New South Wales in the 1930s. After being in the job for 6 months he wrote to his mother-in-law that the two great skills needed to be Governor were the ability to give a speech at the drop of a hat on a subject about which you know absolutely nothing, and the ability to eat enormous meal after meal at official functions at all hours. He claimed that he had become an expert at leaving food on his plate without making it too apparent and said 'I have not yet had to put any scraps in my pockets but one never knows what it may come to.'[3] So perhaps the best claim to be head of state would be having the gift of the gab and the gob.

As Sir Philip Game later discovered, in some cases a Governor needs other skills, such as the knowledge and the experience to deal with a constitutional crisis. Engulfed in the global financial crisis of the Great Depression and faced with an unorthodox and intransigent Premier in Jack Lang, Game lamented in his letters home that he was not an economist or a constitutional lawyer and did not have the necessary knowledge or experience to perform his role adequately. Perhaps today we would see candidates for head of state claiming that they have the answer to our economic woes or superior knowledge about the reserve powers. A new niche market for constitutional lawyers and economists? Somehow, I doubt it.

It seems to me inevitable that those campaigning to be elected head of state would instead focus on political matters. Perhaps they would claim to be the champion of the underdog—to represent the views of rural Australians or indigenous Australians or battlers. It is likely that some candidates would go further, campaigning on particular issues—nuclear energy, climate change, a bill of rights or the end to Australian involvement in a war—and use their popular mandate to pressure the Government to adopt the policy. Some may even go as far as promising to refuse assent to a particularly controversial Bill or to direct the armed forces not to fight in an unpopular war, or even to dismiss an unpopular government.

Ultimately it would be irresponsible to set up a directly elected head of state with a popular mandate as a rival to the Prime Minister. It would be a recipe for future constitutional crises. That is why any proposal for a directly elected head of state

[3] Letter by Sir Philip Game to Mrs Eleanor Hughes-Gibb, 17 September 1930: Mitchell Library Manuscript 2166/5.

would require the imposition of significant limitations on the powers of the head of state.

Codification

One way of dealing with this problem is by codifying the reserve powers of the head of state. This would remove the head of state's discretion and set down rules by which his or her powers would have to be exercised. Attempts at codifying the reserve powers were made by the Constitutional Conventions of the 1970s and the Constitutional Commission's Advisory Committee on Executive Power in 1987, although an absolute consensus remained elusive. The Republic Advisory Committee also addressed the subject in some detail in 1993, but the matter went no further.[4]

The problem with complete codification, however, is that while it gives certainty it also imposes inflexibility. It is impossible now to imagine every circumstance that might arise in the future where flexibility is needed. The risk with complete codification is that the rules it imposes might prove not only inappropriate but damaging in future circumstances. The genius of our current system is that it has allowed the executive to grow from being a dependent colonial administration to the government of an independent nation without the need for formal constitutional change. Uncertainty about the rules has the benefit that few have been prepared to provoke conflicts and push the rules to their limits as nobody knows what those limits might be. It is therefore wise to continue to permit some flexibility and discretion to allow for unforeseen circumstances and future growth.

Limiting the circumstances in which discretion might arise

There is, however, an alternative way of approaching the problem. Back in the 1980s when the *Australia Acts* were being negotiated, the States found that they were having difficulty in convincing the Queen that she should be advised directly by State Ministers with respect to State matters. Her Majesty was concerned that she would receive conflicting advice from different sets of Ministers. Instead of trying to codify the question of who advised the Queen on particular issues, the States decided that it would be more sensible to remove or delegate most of the Queen's powers so that the question of who advised her would only arise in two very limited cases—namely the appointment and removal of a State Governor.[5] Powers with respect to granting assent to reserved bills and disallowance were terminated so that no question of conflicting advice could arise, and other powers formerly exercised by the Queen were delegated to the Governor, except when the Queen was personally present in the State.[6] By reducing the field of potential conflict, concerns over how the remaining powers were exercised were also reduced. The Queen was eventually satisfied and the *Australia Acts* 1986 were passed.

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4 Republic Advisory Committee, *An Australian Republic—the Options.* Canberra, AGPS, 1993, pp. 88–116.

5 See further: A. Twomey, *The Chameleon Crown—the Queen and Her Australian Governors.* Sydney, The Federation Press, 2006, Ch 19.

6 *Australia Acts 1986* (UK) and (Cth), ss 7–9.

A similar approach could be taken with respect to the powers of the head of state. By eliminating many of the most controversial circumstances in which those powers might otherwise be exercised, the powers of the head of state would be much more confined, but a degree of flexibility could still be retained to deal with unforeseen circumstances. Examples of this approach can be found in a number of Australian States where the Governor has much more limited discretion than the Governor-General.

Dissolutions and dismissals

The greatest controversies concerning the exercise of discretionary power by vice-regal representatives in Australia have concerned the grant or refusal of a dissolution and the dismissal of a government, followed by a dissolution. The dismissal of the Lang Government in 1932 and the Whitlam Government in 1975 come most readily to mind, but there are other cases where a Governor has demanded the resignation of a Premier, such as that in Victoria in 1952. There are also numerous examples of vice-regal representatives refusing a Premier's advice to grant a dissolution when a Government has lost the confidence of the lower House or could not obtain supply, including three at the Commonwealth level in 1904, 1905 and 1909, and in the States at least[7] seven in New South Wales, one in Queensland, two in South Australia, four in Tasmania, one in Western Australia and a grand total of ten instances in Victoria, the most recent being in 1952.[8] Most of those cases arose before the political party system became stable, when there were shifting majorities and governments not infrequently lost power through no confidence motions. However, the discretion to refuse an early dissolution remains.[9]

In New South Wales, South Australia and Victoria, however, the powers of the Governor with respect to dissolutions and dismissals have been significantly limited in scope because of the introduction of fixed four year terms. In these States the election date is now fixed by the Constitution.[10] This largely eliminates the

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7 Accurate figures are not possible because there may have been instances in which dissolutions were refused which were not made public.

8 On the various crises, see: Charles Parkinson, 'The 1875 Constitutional Crisis in Victoria', *Journal of Australian Colonial History*, vol. 3, no. 2, 2001, p. 81; E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth.* Toronto, OUP, 1968; J.B. Paul, 'Governors and Politicians: the Australian States principally in the 1940s and 1950s' in D.A. Low (ed.), *Constitutional Heads and Political Crises.* Basingstoke, Eng., Macmillan, 1988, pp. 37–56; J. Fajgenbaum and P. Hanks, *Australian Constitutional Law.* Sydney, Butterworths, 1972, pp. 84–5; R.S. Parker, *The Government of New South Wales.* St Lucia, Qld, Queensland University Press, 1978, p. 178; and A. Twomey, *The Constitution of New South Wales.* Sydney, The Federation Press, 2004, pp. 646–9. On examples of the blocking of supply, see: J. Waugh, 'Deadlocks in State Parliaments', in G. Winterton (ed.), *State Constitutional Landmarks.* Sydney, The Federation Press, 2006, pp. 198–210.

9 *Bignold v Dickson* (1991) 23 NSWLR 683, 686 (Kirby P).

10 *Constitution Act 1902* (NSW), ss 24 and 24A; *Constitution Act 1934* (SA), ss 28 and 28A; *Constitution Act 1975* (Vic), ss 38 and 38A. See also the Northern Territory where the election date is now fixed by legislation: *Electoral Act 2004* (NT), ss 23–26A; and Australian Capital Territory which has fixed terms set by s 100 of the *Electoral Act 1992* (ACT), with the exceptions set out in ss 16 and 48 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). See further the UK Institute for Public Policy Research's proposed Constitution for the UK which provides for fixed four year terms but early elections if there is a vote of no confidence in the Government. In this case the monarch is required to dissolve the House of Commons within seven

Governor's discretion to grant or refuse a dissolution. Specific exceptions are provided for, so there is a mechanism for changing the date where it clashes with another event or it is not possible to hold an election because of a natural disaster or for some other reason.[11] More importantly, if a vote of no confidence in the Government is passed by the Assembly, and within a specified period there has been no vote of confidence in the Government, then the Assembly may be dissolved by the Governor before the four year term expires.[12]

The Governor cannot dissolve the Assembly on this ground unless the precise terms of the exception are met, but if they are met, then the Governor appears to retain a discretion as to whether or not to grant a dissolution.[13] It may be the case that a new Government can be commissioned and govern until the next scheduled election. In New South Wales, some direction is given to the Governor as to the matters that he or she must take into account in exercising this discretion, such as whether the Legislative Assembly has expressed confidence in an alternative government.[14]

In NSW there is an additional ground that may trigger a dissolution, being the rejection or delay of the grant of supply by the Legislative Assembly.[15] Neither the South Australian nor Victorian Constitution contains such an exception, but presumably if the Assembly were prepared to reject supply, which would amount to an implied vote of no confidence, it would be prepared to pass an express vote of no confidence in the Government.

The Victorian and South Australian Constitutions contain further exceptions that permit the Governor to dissolve the Assembly before its four year term expires, where there are deadlocked Bills.[16] South Australia has two such exceptions. The first deals with Bills that are declared by the House of Assembly to be 'Bills of special importance'. If they are not passed within two months by the Legislative Council, then they become triggers for an early election. However, they cannot be stockpiled and the trigger only lasts for one month. If it is not exercised, it expires.[17] The other South Australian exception is its double dissolution procedure, which involves a Bill being passed by the Assembly and rejected by the Council in two successive Parliaments. Outside these express exceptions, the Victorian and South Australian Governors have no power to dissolve the Legislative Assembly.

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days—there is no allowance for a change of government without an election: Institute for Public Policy Research, *A Written Constitution for the United Kingdom*, London, Mansell, 1991, p. 73.

11 *Constitution Act 1902* (NSW), s 24B(4); *Constitution Act 1934* (SA), s 28(3); *Constitution Act 1975* (Vic), s 38A(2).

12 *Constitution Act 1902* (NSW), s 24B(2); *Constitution Act 1934* (SA), s 28A; *Constitution Act 1975* (Vic), s 8A. Note that the South Australian provision does not expressly set out a period for the reversal of the vote.

13 *Constitution Act 1902* (NSW), s 24B(1); *Constitution Act 1934* (SA), s 28A(1); *Constitution Act 1975* (Vic), s 8(2).

14 *Constitution Act 1902* (NSW), s 24B(6).

15 *Constitution Act 1902* (NSW), s 24B(3)—this includes failure to pass supply by the time that the Governor considers that it is needed. See also the equivalent Northern Territory provision: *Electoral Act 2004* (NT), s 25.

16 *Constitution Act 1934* (SA), s 28A and s 41; and *Constitution Act 1975* (Vic), s 65E.

17 See, in contrast, the deadlock provision in s 57 of the Commonwealth Constitution, under which deadlocked bills have in practice been stockpiled for use in a later double dissolution.

In New South Wales deadlocked Bills may be dealt with by holding a referendum on the Bills concerned, rather than an early election as in Victoria and South Australia.[18] However, in New South Wales there is also an inadequate constitutional provision that attempts to preserve some of the Governor's reserve powers.[19] Section 24B(5) of the NSW Constitution provides that the Governor is not prohibited from dissolving the Legislative Assembly in circumstances other than those mentioned, despite any advice of the Premier or Executive Council, 'if the Governor could do so in accordance with established constitutional conventions'. The problem here is that the Governor has never had a power to dissolve the Legislative Assembly without advice. If, for example, the Governor decided to dismiss the Government, as Sir Philip Game did in 1932, he or she would withdraw the commission of the existing Premier (which has the automatic effect of dismissing all Ministers) and then commission a new Premier on the condition that the new Premier advise the Governor to dissolve the Legislative Assembly so that an election could be held. There is no 'established constitutional convention' of the Governor dissolving the Legislative Assembly without the advice of the Premier. Hence, the NSW provision is ineffective. This may be why no other jurisdiction has emulated it.

If the Governor of Victoria, South Australia or New South Wales decided to dismiss a Government by withdrawing the commission of the Premier and appointing a new Premier (who did not hold the confidence of the Assembly), then the Governor could not dissolve the Assembly on the advice of that new Premier. The only option would be for the Assembly to pass a vote of no confidence in the new Government, which would then permit the Governor to dissolve the Assembly and hold an election.[20]

So these provisions do not work perfectly, but they show that there are ways in which a Constitution can regulate events so that they do not result in circumstances where the head of state is placed in the position of having to contemplate the exercise of reserve powers. If the Commonwealth Constitution provided for fixed four year terms with exceptions for an early election in the case of (a) a successful vote in the House of Representatives of no confidence in the Government; (b) a deadlocked Bill giving rise to a double dissolution; or (c) the dismissal of the Government by the head of state in accordance with established constitutional conventions, then the discretion of the head of state would be significantly limited, although not completely terminated, as there would still be a capacity to dismiss a Government that persisted in illegality or that refused to resign after losing an election.

The blocking of supply

For such provisions to operate effectively, one must also deal with the still sensitive issue of the power of the Senate to block supply. It needs to be recognised that in five

18 *Constitution Act 1902* (NSW), s 5B.

19 *Constitution Act 1902* (NSW), s 24B(5).

20 As Selway and Taylor have both pointed out, this procedure is likely to extend rather than diminish the controversy: B. Selway, *The Constitution of South Australia.* Sydney, The Federation Press, 1997, p. 60; and G. Taylor, *The Constitution of Victoria.* Sydney, The Federation Press, 2006, p. 135.

of the eight State and Territory legislatures, there is no possibility of supply being blocked by an upper House. This is because in Queensland, the Northern Territory and the Australian Capital Territory, there is no upper House and in NSW and Victoria the Legislative Council cannot effectively block supply. While in NSW and Victoria the Legislative Council still has the *power* to reject or suggest amendments to any Bill appropriating revenue or moneys for the ordinary annual services of Government, the Legislative Assembly may present the Bill to the Governor for assent without the Legislative Council's agreement.[21]

If one looks back to the constitutional crises that have occurred in the last two centuries in Australia, many have involved a failure to obtain supply or problems with deadlocked Bills that the upper House has refused to pass. Workable deadlock provisions and limits on the powers of the upper House to block or unduly delay supply are key factors in avoiding circumstances in which the head of state might otherwise be called on to exercise reserve powers. We need to move beyond the rights or the wrongs of what happened in 1975 to consider adopting a system that currently operates uncontroversially at the State level.

This does not mean that the Senate need be neutered or lose its effectiveness. Despite its loss of the power to block supply in 1933, the NSW Legislative Council has proved to be one of the most powerful, and dare I say, aggressive Houses of any Parliament in the country. There are more ways to bring a government to account than threatening to block supply. Consideration could be given to strengthening some of the Senate's powers to bring governments to account as a trade-off for the loss of the power to block or delay supply.

It is true that the combination of fixed term Parliaments and the loss of the Senate's power to block supply would mean that there would be very limited grounds upon which there could be a change of government in between elections. In NSW there have been many recent complaints about being stuck with the Government until the next election in 2011. This has resulted in 'fixed four year terms' receiving some distinctly bad press. However, even if the term is not fixed, an unpopular government is rarely inclined to commit hara-kiri by going to the polls early, just as it is unlikely to cause an early election under the fixed term system by voting no confidence in itself (or more realistically, as occurred in Germany in 2005, abstaining from voting when a vote of no confidence is held, in order to permit an early election).[22] Nor does the vice regal representative have the power to dismiss a government just because it is no longer popular or might be considered incompetent,[23] regardless of whether there

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21 *Constitution Act 1902* (NSW), s 5A; *Constitution Act 1975* (Vic), s 65.

22 The German Federal Constitutional Court has twice upheld the validity of an early election by this means, but Taylor has argued that the manufacturing of a vote of no confidence would be grounds for the Governor to refuse a dissolution: G. Taylor, *The Constitution of Victoria.* Sydney, The Federation Press, 2006, pp. 125–6. The UK Institute for Public Policy Research has proposed, as a means of discouraging such acts, that the term of the newly elected Parliament be the remainder of the term of the previous Parliament: Institute for Public Policy Research, *A Written Constitution for the United Kingdom,* op. cit., p. 73 (cl 60.4).

23 Note, however, the anomaly in the ACT where the Governor-General may dismiss the Assembly early if it is incapable of effectively performing its functions or is conducting its affairs in a grossly improper manner: *Australian Capital Territory (Self-Government) Act 1988* (Cth). Presumably the Governor-General would act on the advice of Commonwealth ministers in doing so.

are fixed or flexible terms. Hence the current debate on this subject seems to be misconceived.

Indeed, there remains a strong trend towards fixed four year terms in Australia. The Northern Territory has just introduced fixed four year terms in its *Electoral Act*, adopting the NSW approach.[24] The Western Australian[25] and Tasmanian Governments have also recently committed to fixed four year terms and are in the process of consulting on the proposed terms of such a change. This would leave only Queensland and the Commonwealth with flexible three year terms.

If at the Commonwealth level, the Senate could not block supply, preventing a repetition of a 1975-style crisis, and there were fixed electoral terms, with provision for an early election in the case of deadlocked bills or successful motions of no confidence in the House of Representatives, this would eliminate much of the discretion that the head of state might otherwise be able to exercise.

Appointment of the prime minister

Apart from dissolutions and dismissal, the main other area in which a level of discretion is exercised by vice-regal representatives is in choosing who to appoint as the Prime Minister or Premier.

The convention is that the vice-regal representative appoints as head of government the person who holds the confidence of the lower House of Parliament. Usually the identification of this person is simple and there is therefore no need for any exercise of discretion. However, where there is a hung Parliament or a governing coalition breaks up or a governing party splits, or the head of government dies, or a party loses confidence in its own leader, then difficult questions sometimes arise. In Australia there have been examples of all these occurrences.

For example, in 1916 when the Labor Party split over conscription, the Labor Premier of NSW, William Holman, was abandoned by his Party, which elected a new Labor leader and moved a vote of no confidence in the Government. The Opposition leader, Charles Wade, moved an amendment deferring the resolution of the motion of no confidence because of the war. The Governor, Sir Gerald Strickland, concluded that Holman did not have the confidence of the Legislative Assembly and sought his resignation. On that fateful date of 11 November (this time in 1916), the newspapers declared 'Sensational Political Development—Governor dismisses Premier'. Holman objected that the Governor had no grounds to require his resignation as the vote of no confidence had not been passed. The Governor argued that Holman had been elected as a Labor Premier and no longer had the support of the Labor party and should therefore resign. Holman argued that until he was defeated on the floor of the Legislative Assembly, he was not obliged to resign, and the British Government

24 *Electoral Amendment Act 2009* (NT).

25 The Western Australian Legislative Council already has fixed terms, but the Legislative Assembly does not (although in practice the desire for simultaneous elections imposes practical limits on the flexibility of elections for the Legislative Assembly).

agreed. The Governor was forced to back down and Holman and Wade formed a Ministry that continued to govern.[26]

Sometimes coalitions break down, leading to difficult decisions for vice regal representatives. For example, in Victoria in 1935 the United Australia Party and the Country Party campaigned as a coalition and won the election. However, before Parliament sat, the Country Party was convinced by the Labor Party to withdraw from the coalition. The Governor commissioned the leader of the United Australia Party, Sir Stanley Argyle, to form a Government, but as soon as Parliament sat, the Government was defeated on a confidence motion by the Country Party with Labor Party support. Blainey has described the Governor as being so surprised by what had occurred that he delayed a few days before requesting the leader of the Country Party, Albert Dunstan, to form a Government.[27] The Governor only acted after having received in writing from the Labor Party a commitment to support the Country Party in government.

Other difficulties have arisen for vice-regal representatives when Premiers or Prime Ministers have died suddenly in office. For example, at the Commonwealth level Lyons, Curtin and Holt all died in office, leaving the Governor-General with the dilemma of who to appoint Prime Minister until the relevant party could elect a new leader. This choice can be controversial if it is seen as giving an advantage to a person who intends to seek the leadership. Thus in 1967 after Harold Holt's disappearance, the Governor-General appointed John McEwen, the leader of the National Party, as Prime Minister, rather than William McMahon, who was the deputy leader of the Liberal Party, pending an election for leadership of the Liberal Party.

Sometimes a Premier or Prime Minister may lose the support of his or her own Cabinet or party. In November 1987, Joh Bjelke-Petersen tried to sack five members of his Cabinet as he struggled to retain its support. He proposed resigning and being recommissioned so that he could reform his Cabinet, but the Governor warned Bjelke-Petersen that he might not be recommissioned unless the Governor was satisfied that he could form a Ministry which retained the confidence of Parliament.[28] Bjelke-Petersen was later deposed as party leader but initially refused to resign as Premier, saying that it should be a matter for Parliament to decide. Soon after, he resigned from office without any need for vice-regal intervention.

More recently, in 2008 Morris Iemma lost the support of caucus. He resigned as Premier. What would have happened if he had resigned as Premier and advised the Governor to recommission him with a new Cabinet? Should the Governor had done so and waited to see if Iemma was defeated on the floor of the Legislative Assembly, or should she have commissioned someone else who had the support of the party and therefore a majority on the floor of the Parliament? The same dilemma arose in New

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26 See A. Twomey, 2006, op. cit., pp. 58–9.

27 G. Blainey, *A History of Victoria*. Port Melbourne, Vic., Cambridge University Press, 2006, p. 198.

28 See: G. Winterton, 'The Constitutional Position of Australian State Governors' in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*. North Ryde, NSW, Law Book Co, 1992, p. 303; and B. Galligan, 'Australia', in D. Butler and D.A. Low, *Sovereigns and Surrogate.* London, Macmillan, 1991, pp. 85–92 .

South Wales in May 1927. The Premier, Jack Lang, sought a dissolution, but when the matter was brought to a full meeting of the Executive Council, the rest of the Executive Council overruled Lang and voted against it. The Governor, Sir Dudley de Chair, asked Lang to resign his commission and then commissioned him to form a new government on the condition that it act as a caretaker government and an election be held as soon as possible. This occurred and Lang lost the election.

In the case of a hung Parliament, leaders have sometimes advised the vice-regal representative to let them test their support on the floor of the lower House first, before appointing someone else to govern. This occurred in 1968 in South Australia where the balance of power was held by an independent who had announced his support for the Opposition. The Governor agreed to wait until Parliament was recalled to test confidence. The Government was defeated on the Assembly floor and the Opposition Leader then appointed Premier.[29] Similarly, in Tasmania in 1989, after an election produced a hung Parliament, the opposition parties reached an accord that would have given them a majority in the Legislative Assembly. The incumbent Premier, Robin Gray, advised the Governor that he should continue in office, forming a minority government. The Governor accepted his advice and swore in a new Gray ministry. As soon as Parliament met, a constructive vote of no confidence in the Government was passed, with the House of Assembly declaring that it had confidence in the Opposition Leader, Michael Field. Once the Governor was satisfied that Field could form a government, he told Gray of his conclusions. Gray then resigned and advised that Field be appointed as Premier.[30]

This use of the legislature to resolve the question of whom to appoint as head of government is one way of limiting the circumstances in which a republican head of state might face exercising discretion. This method has already been adopted in the Australian Capital Territory where the Assembly, rather than a vice-regal representative, determines who becomes the Chief Minister. Section 40 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) states that at the first meeting of the Assembly after an election, the Members shall choose one of their own to be the Chief Minister. If there is a vacancy in the office of Chief Minister while the Assembly is not sitting, the Presiding Officer is required to call a sitting of the Assembly as soon as practicable so that a Chief Minister can be chosen. If a motion of no confidence in the Chief Minister is passed, then the Assembly must choose a new Chief Minister. This, in effect, demands a constructive motion of no confidence, which declares no confidence in the existing Chief Minister and confidence in another person as Chief Minister.

The British Institute for Public Policy Research, in proposing a written Constitution for the United Kingdom, also suggested that the Prime Minister be elected by the House of Commons and appointed by the monarch on the report of the Speaker as to

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29 See further: J. Fajgenbaum and P. Hanks, *Australian Constitutional Law*, op. cit., pp. 71–4.

30 For a detailed account, see: G. Winterton, 'The Constitutional Position of Australian State Governors' in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*, op. cit., pp. 304–14; and B. Galligan, 'Australia', in D. Butler and D.A. Low, *Sovereigns and Surrogates.* op. cit., pp. 92–7. See also a similar occurrence in Ontario: R. Brazier, *Constitutional Practice.* 3rd ed., OUP, 2001, pp. 49–50.

the outcome of the election.[31] Failure to appoint a Prime Minister, according to that draft Constitution, would amount to a trigger for an early election, if there were a fixed four year term system of government.[32]

Such provisions ensure that the leader of the Government is the person who holds the confidence of the lower House. If a similar provision were included in the Commonwealth Constitution, it would have the effect of ensuring that the identity of the Prime Minister was determined by Members of the House of Representatives, rather than by party members. This could be significant where there is a minority Government, allowing Members from other parties potentially to dictate the identity of Prime Minister against the wishes of his or her own party. It would also affect those political parties that prefer grass-roots members to have a say in choosing their leader.

A third consequence would be that clear-cut elections would not give rise to an immediate change of government—there would be a delay while counting was finalised before Parliament could be called to determine the new Prime Minister. While there would be some disadvantages in such a delay (and a need for strong caretaker-government conventions to apply in the interim) there might also be some advantages. United States elections take place over two months before the formal change in administration, giving new leaders time to catch their breath, plan, form a cabinet, be briefed, employ staff and prepare for government. Having a chance to switch gears from campaigning to governing and commencing to govern when refreshed and prepared, may not be a bad thing.

Summoning and proroguing the Parliament

If such a provision were to be adopted, it would also be necessary to have a mechanism to ensure that that Parliament could be summoned and recalled so that a change in Prime Minister could not be avoided by the incumbent Prime Minister delaying Parliament from meeting. At the moment, s 5 of the Commonwealth Constitution places in the Governor-General's hands the power to appoint the times for holding sessions of Parliament. This power is normally exercised on the Prime Minister's advice. It also provides, however, that after any general election, the Parliament shall be summoned to meet not later than thirty days after the return of the writs. If the appointment of the Prime Minister were to be determined by the House of Representatives, it would be advisable to summon the Parliament earlier. In the ACT, the Assembly is required to meet within 7 days of the results of a general election.[33]

Another critical issue is prorogation. Currently, s 5 of the Constitution provides that the Governor-General may prorogue Parliament. There is no limit on the length of prorogation, except for the fact that Parliament must sit at least once every twelve months, so that prorogation could not validly exceed 12 months in duration.[34] The Governor-General prorogues Parliament upon the advice of the Prime Minister. However, there may be discretion in the Governor-General to refuse to prorogue the

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31 Institute for Public Policy Research, *A Written Constitution for the United Kingdom.* op. cit., pp. 55 and 58 (clauses 36.1 and 41.1).

32 Ibid, p. 73 (cl 60.2).

33 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 17.

34 Commonwealth Constitution, s 6.

Parliament if the purpose of prorogation is the avoidance of a motion of no confidence.[35]

This situation recently arose in Canada. The Conservative Party had formed a minority government with Stephen Harper as Prime Minister after the general election in October 2008. It introduced budgetary measures which none of the other parties were prepared to accept. The Liberal Party and the New Democratic Party reached an agreement to bring down the Conservative Government by a vote of no confidence, with the intention of forming their own minority government, which would be supported on issues of confidence by the Bloc Québécois. On 4 December 2008, before Parliament was scheduled to meet, the Prime Minister, Stephen Harper, asked the Governor-General to prorogue Parliament until 26 January 2009. To this, she controversially agreed. It prevented Harper from facing a no confidence motion in the interim. By the time Parliament resumed in late January, the Liberal Party had a new leader, new budget measures were introduced by the Conservative Party that satisfied the concerns of the Liberal Party, and Harper's Conservative Government survived.

Although Canadian commentators had claimed there was no precedent for such matters throughout the Commonwealth, there have been some precedents in Australia concerning discretion about prorogation. In New South Wales in 1911, the McGowan Labor Government lost its majority through the resignation of Members. The Acting Premier, William Holman, advised the Lieutenant-Governor to prorogue the Parliament until by-elections were held. The Lieutenant-Governor refused and the Government resigned. The Governor called on the Opposition Leader Charles Wade to form a government. He agreed, but on the condition that he would be granted a dissolution. This was also refused by the Lieutenant-Governor, who then had to reinstate the previous Labor Government and prorogue Parliament as originally advised.[36]

In October 1971, the Western Australian Governor was faced with a similar dilemma. The Speaker of the Legislative Assembly had died, leaving the Labor Government with 25 seats and the Opposition with 25 seats. Once Labor appointed a replacement Speaker, it would have lost its majority and the Opposition threatened to hold a motion of no confidence in the Government, in the hope that it might lead to a general election. The Western Australian Premier, John Tonkin, advised the Governor, Sir Douglas Kendrew, to prorogue the Parliament until after the by-election was held. The Governor did so, but sought advice from the British Foreign Secretary as to whether he had acted appropriately. The Foreign Secretary replied that the Governor had acted within his powers, but was not prepared to comment on the merits of his action.[37]

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35 H. Evans (ed), *Odgers' Australian Senate Practice* 11th ed, Canberra, Department of the Senate, 2004, p. 499; G. Taylor, *The Constitution of Victoria*. Sydney, The Federation Press, 2006, pp. 131–2.

36 See also: A. Twomey, *The Constitution of New South Wales.* Sydney, The Federation Press, 2004, p. 465; and Michael Hogan, 'The 1913 Election' in M. Hogan and D. Clune (eds), *The People's Choice.* Sydney, Parliament of NSW, 2001, vol. 1, pp. 121–2.

37 See A. Twomey, 2006, op. cit., p. 78.

If the appointment of the Prime Minister is to be determined by the House of Representatives, rather than the head of state, then there needs to be a mechanism by which a majority of the House of Representatives can require its recall from an adjournment or summons for a new session when the House is prorogued, in order to deal with the issue of confidence in the Prime Minister. In the Australian Capital Territory the Assembly must meet within 7 days of a request by a specified number of Members.[38] Such a provision would need to be inserted in the Constitution if the head of state's discretion were to be removed.

Other powers

Apart from the established reserve powers of vice-regal representatives concerning appointments, dissolutions and dismissals, the real risk of a directly elected head of state with a perceived 'mandate' is that he or she will exercise discretion with respect to other powers such as royal assent to Bills, the command of the armed forces, the decision as to whether to put a Bill to a referendum, and the like.

Winterton has rejected the notion that the power to give royal assent is a reserve power,[39] although some have suggested that it may be. The main argument here is that the vice-regal representative, as the last bastion of constitutional protection, should be entitled to refuse assent to a Bill that extended the life of the Parliament or abolished Opposition parties or otherwise irreparably undermined the democratic system.[40] While this may be a relevant argument in places where there is no entrenched Constitution, it is not relevant at the Commonwealth level in Australia where any attempt to change the term of the Parliament would require a referendum and any legislation that breached the express and implied constitutional requirements of responsible and representative government would be held invalid by the courts.

While there may still be arguments as to whether a vice-regal representative should refuse assent to a Bill if so advised by Ministers (as opposed to acting solely on the advice of the Houses of Parliament),[41] no question should arise as to whether he or she has a personal discretion to refuse assent simply because he or she objects to a Bill.[42] Section 58 of the Constitution currently states that when presented with a Bill for assent, the Governor-General 'shall declare, according to his discretion, but subject to this Constitution, that he assents...,' withholds assent or reserves the Bill for the

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38 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 17. See also Standing Order No 54 of the NSW Legislative Assembly, which requires the Speaker to recall the House during an adjournment upon the petition of an absolute majority.

39 G. Winterton, 'The Constitutional Position of Australian State Governors' in H.P. Lee and G. Winterton, *Australian Constitutional Perspectives*, op. cit., p. 293.

40 V. Bogdanor, *The Monarchy and the Constitution.* Oxford, Clarendon Press, 1995, pp. 120–35; R. Brazier, 'The Monarchy' in V. Bogdanor (ed.) *The British Constitution in the Twentieth Century.* New York, Oxford University Press, 2003, pp. 81–3; and F.A.R. Bennion, 'Modern Royal Assent Procedure at Westminster' (1981) 2 *Statute Law Review* 135, at 138.

41 See further: A. Twomey, 'The Refusal or Deferral of Royal Assent' (2006) *Public Law* 580; P. Boyce, *The Queen's Other Realms.* Sydney, The Federation Press, 2008, p. 55; Andrew Heard, *Canadian Constitutional Conventions.* Toronto, OUP, 1991, p. 37.

42 Note that Canadian Lieutenant-Governors have occasionally reserved or refused assent to bills to which they have personally objected. See further: Andrew Heard, ibid, pp. 35–9; and J.T. Saywell, *The Office of Lieutenant-Governor.* Toronto, Copp Clark Pitman, 1986, p. 222.

Queen's pleasure. It would therefore be important to clarify in the Constitution that when a republican head of state receives a Bill for assent he or she must act either on the advice of the two Houses of Parliament (with relevant variations for referendum bills and bills arising from joint sittings) or upon ministerial advice, but that no personal discretion is involved.

Section 58 also contains a clause that permits the Governor-General to return a Bill to Parliament, transmitting with it 'any amendment which he may recommend'. This is intended to accommodate circumstances in which an error is discovered in a Bill so that it can be corrected before assent. By convention, this power is only ever exercised upon ministerial advice, but this would need to be made clear in a republican Constitution, lest a directly elected head of state started using it to suggest his or her own proposed amendments.[43]

Finally, a provision ought to be included to make it clear that apart from the extremely rare circumstances in which reserve powers may be exercised, the head of state is obliged to act in all matters on the advice of his or her responsible ministers.[44]

Conclusion

If we are to have a directly elected head of state, then part and parcel of that change ought to be a broader constitutional change that has the effect of limiting the circumstances in which that head of state could ever exercise discretionary powers. Hence proposals for a directly elected head of state should also be addressing matters such as fixed four year terms, the Senate's power to block supply, the election of the Prime Minister by Parliament and the removal of any discretion with respect to assent to Bills.

As you could no doubt tell by my opening, I am not keen on the idea of a directly elected head of state. However, I am strongly of the view that if this is a likely outcome, then there is an obligation upon constitutional lawyers, such as myself, to contribute ideas to ensure the best possible form for our future Constitution. In that spirit, today's address is part of my contribution to the forthcoming debate.

Question — Thank you Anne. I particularly enjoyed all the examples of the use of the reserve powers at the state level, many of which I was unaware of, and I think many

43 Such a provision has been used more freely in British Columbia where Heard notes that 88 bills have been returned with recommended amendments: Andrew Heard, op. cit., p. 36; and J.T. Saywell, op. cit., p. 221.

44 See the *Constitution Alteration (Establishment of Republic) 1999* which if passed would have included in s 59 of the Constitution a statement that 'The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.' Such a provision would need to be refined if there were to be a directly elected head of state and the circumstances in which the reserve powers could be exercised were to be curtailed.

people are unaware of just how prevalent these exercises are. I have two questions. With regard to altering the power of the Senate to block supply at the federal level and the potential of dismissing a government on that basis, I wonder if there is a different or perhaps a better way and that is to retain the power of the Senate to block supply but prevent any dismissal on that basis. This is the American system where you can have a blockage of supply and you have a political crisis, but without any potential for dismissal resulting from that, and it resolves itself in the US through political means, but without having any potential impact upon the powers of the upper house.

The second question comes to your end point where you talk about direct election. I wonder whether you see your model of limiting the powers rather than full codification as being sufficient for a direct election model. Whether you think that goes far enough to reign in, limit, circumscribe, the powers of a directly elected head of state, or whether in fact you would need to go a bit further and deal with some of the residue that is left. It was just a little unclear as to whether you think this was it if we ended up with a debate of that kind.

Anne Twomey — They are good questions. Yes, if you have got fixed term elections then you need somehow to deal with the issue of what happens if supply is blocked in the upper house. As you say, the examples I was drawing from were existing examples in the states, which is why I was referring to what happens in New South Wales and Victoria. South Australia, interestingly, and it's a little bit strange in their constitution, but as best as I can tell its upper house still has power to block supply, and does have a fixed four year term. I was asking a South Australian colleague how then you deal with those potential problems with an upper house blocking supply and whether that would lead to difficulties or not. I don't think they have ever really sorted that out in South Australia, although I suspect that it might partly be resolved by those bills of special importance. If you made your bill for the ordinary annual services of government a bill of special importance, then you could trigger an early election if the upper house blocked supply, if that's what you want to do. So that's another was another way of dealing with it. But I think you are right. You could specifically have something in there saying that the head of state can't dismiss the prime minister on grounds of a failure to pass supply by the upper house and leave it to a political answer, a political conclusion. Taking out that one element of risk in the game, and both sides knowing that they really need to reach an agreement or otherwise they themselves will become unpopular once people are not receiving their pay cheques; that itself is another possible option, so I think that's certainly another one on the table.

As to whether all of this is sufficient or if you need more, well it was all I could think of, so it probably is, in my view, sufficient, although maybe if I sat and thought about it more I might think of something else. Really I was just trying to add another perspective to the debate on this by drawing on what had already been done in state constitutions, to add different ideas to the notion of full codification. I think it is very important if you went the direct election route to have a provision that makes clear that the constitutional provisions that could otherwise be seen as giving the head of state very broad powers in relation to the armed services and assent to bills and all those sorts of things are subject to convention, that they need to be acted upon, on advice. In the future, under a different constitution, with a directly elected head of state who says 'I have a mandate, I have been elected by the people on this basis',

those sorts of conventions could be seen to be no longer relevant, because it is a new system. So you need to tie down those conventions one way or another, either by some form of codification, by saying you have to take advice on these points, or by removing the risk of discretion being used. Someone pointed out to me that a couple of the other constitutions, the one of Trinidad and Tobago and the one of Jamaica, have a fair bit of codification of the reserve powers in them. It is interesting to see that even those constitutions where they allegedly completely codify do still have elements of discretion there, and I think you ultimately need some element of discretion underneath it all, just to deal with bizarre emergencies that might happen in the future.

Question — Thank you. How do they deal with the situation in Ireland?

Anne Twomey — Good question. The three constitutions that were raised with me were Trinidad and Tobago, Jamaica and Ireland, and I read the first two and I didn't get much time to look at the third one, Ireland. It is the most obvious one. They did a fair bit of codification there, too, in Ireland. From recollection, there are provisions that expressly say that you have to act on advice on doing X, Y and Z, and again, the idea is to remove the more discretionary elements with respect to their head of state.

Question —Is this a Scots or an English question?

Anne Twomey — In the United Kingdom there are all sorts of fascinating issues with respect to devolution in relation to Scotland and Wales and Northern Ireland. What's known as the 'English question' there is whether England itself should have its own separate legislature or whether in the United Kingdom Parliament, when voting with respect to matters that concern English things, like education and the like, where education issues have already been devolved in Scotland, members of the United Kingdom Parliament who come from Scotland should be able to vote on English matters. That would lead to all sorts of difficulties if they couldn't because you have a Scottish Prime Minister, Gordon Brown, who then wouldn't be able to vote on most of the things that his government does in England, which would cause all sorts of problems.

The United Kingdom has all sorts of interesting issues with regard to Scottish questions and English questions. Today however I was addressing Australian questions, but if you want to know more about the Scottish question and the English question and how it would fit in to a similar type of written constitution, I would recommend that book called: *A Written Constitution for the United Kingdom* which was published by the Institute for Public Policy Research in the United Kingdom, which does deal with all those issues, in a similar vein to the way I was describing them today.

Question — Well I understood we were following the Westminster system but it's nothing like it is it? Why do we have so much government in this country, why don't we get rid of the states and have bigger local government areas? It seems to me that that is a question that should be looked at in the Constitution entirely. What's your opinion about having less government?

Anne Twomey — One of the benefits of federalism is that we can learn and see from examples, in this case, constitutional examples of the states when we are adopting

things at a national level. Looking at things like fixed 4 year terms, you see them starting off in one parliament and see which bits work and which bits don't then, then move over to South Australia and to Victoria and look at their variations. Some people might say that 'the Victorians have actually done it better, maybe we should adopt their version', and that's one of the benefits of federalism.

To give you the longer answer, there is actually going to be a public debate on this in Sydney in May. It is being run by the IQ^2 organization, and I am actually one of the people in the debate. I am on the side of retaining the states. If you want to come, or listen, it's going to be held in Angel Place sometime in May.

The Australian Citizens' Parliament: A World First*

John Dryzek

I will start with a quote from one of the most famous statements about democracy, from Pericles' 'Funeral Oration for the War Dead of Athens':

> We do not copy the laws and ways of other states. Actually, we are the pattern to others. Our administration places power in the hands of the many instead of the few: this is why it is called a democracy. … Class considerations are not allowed to interfere with merit. Nor does poverty bar the way—if a man is able to serve the state, he is not hindered by the obscurity of his condition.

In ancient Athens, citizens could serve the state by being selected by lot. They were representatives—but not elected representatives. The Australian Citizens' Parliament is a world first, but in a way it takes us back to this very old conception of democracy, which pre-dates elections.

I will return to Pericles at the end, but before I begin in earnest I would like to acknowledge all the people who put so much time and energy into making it happen—close to 200 people worked on the project, along with our 150 citizen participants. First and foremost is Luca Belgiorno-Nettis, who founded and funded the New Democracy Foundation, which made the Citizens' Parliament possible. Next come my co-investigators on the Australian Research Council Grant that also provided funding: Janette Hartz-Karp, who put so much energy into organizing the process, Lyn Carson, whose idea it was to begin with (in a conversation with Luca),

Simon Niemeyer, who organized a lot of the research around the project, Ron Lubensky, our webmaster, and Ian Marsh. It would take me too long to list all the others, but they know who they are. I should also point out that this lecture represents some of my personal views, which are not necessarily shared by others who worked on the project.

So what is the Citizens' Parliament, and why is it a world first?

The Citizens' Parliament was an assembly of 150 citizens, one from each federal electorate, selected at random from the electoral roll. Our youngest participant was 18, our oldest 90. We began by sending out letters to around 9 000 people randomly selected asking if they'd be interested in participating if they were selected. Almost 30 per cent said they would be. This is an astonishingly high positive response rate, especially given the demands we would make on their time, and gives the lie to everyone who says ordinary people aren't interested in participating in politics—provided they are given some decent politics to participate in, which they usually aren't. From this 30 per cent we did a further more or less random selection to get the 150. I say 'more or less' because we had to adjust to make sure we got several indigenous participants, and a good spread on the basis of age, gender, and education (technically, we used stratified random sampling).

We then invited the selected 150 to a series of one-day meetings (mostly in capital cities) that explained the process, and got them to start thinking about the basic charge of the CP: *How can Australia's political system be strengthened to serve us better?* The main meeting of the CP was over four days in February at Old Parliament House, Canberra, but there was plenty for them to do in the months leading up to the main meeting. One of these was our 'Online Parliament'—which we also opened to those who wanted to participate but didn't make the final cut. Groups of citizens organized online to develop some proposals and justifications for them, which helped provide the agenda for the Canberra meeting. The main meeting was co-chaired by Lowitja O'Donoghue and Fred Chaney.

When they arrived in Canberra we worked the citizens really hard over four days. We also demanded a lot of them for research purposes (we were after all funded as a research exercise by the Australian Research Council), with interviews and questionnaires. We generated a mountain of research data, enough for at least ten PhD theses.

The timing turned out to be as bad as it could be for the Canberra meeting: it coincided with the weekend of the bushfires in Victoria, and it was horribly hot in Canberra Our citizens were housed in student accommodation with no air conditioning.

The particular process we used was mostly based on the 'Twenty-First Century Town Meeting' model developed by our US colleague Carolyn Lukensmeyer and her America*Speaks* Foundation. This involves ingenious use of communications technology to synthesize the deliberations of large numbers of participants—150 in our case (though it can work for larger numbers). Our participants were divided into 24 tables in the Members' Dining Room of Old Parliament House, each with a volunteer facilitator. Participants would periodically move between tables. They

deliberated particular proposals, and could introduce new proposals or synthesize existing ones. Toward the end of the process they could vote on the proposals that had been tabled—the voting involved allocating an imaginary 100 points to the proposals the individual favored in whatever proportion he or she chose. This is how the final list of recommendations was generated, and this is what the top six looks like:

- Reduce duplication between levels of government by harmonizing laws across State boundaries
- Empower citizens to participate in politics through education
- Accountability regarding political promises and procedure for redress
- Empower citizens to participate in politics through community engagement
- Change the electoral system to Optional Preferential Voting
- Youth engagement in politics

The recommendations were presented by several of our citizens in the House Chamber, and were received by the Prime Minister's Parliamentary Secretary Anthony Byrne, representing the Prime Minister. While the content of the prioritized proposals is important, what is equally important is the demonstration of the sophistication with which ordinary citizens can, if given the opportunity, handle complex political questions.

So far I haven't said anything about why this was an exercise in *deliberative* democracy. Deliberation is a particular kind of communication that ideally induces reflection about preferences, beliefs, and values in a non-coercive fashion, and that connects particular interests to more general principles. One of its key virtues is reciprocity: communicating in terms that others who do not share one's point of view or framework can accept. Deliberation is different from adversarial debate. The initial aim is not to win, but to understand. Deliberation allows that people are open to changing their minds. The Citizens' Parliament was designed to enable this kind of communication, and the facilitators were there to encourage that.

After the Citizens' Parliament concluded I found it very hard to listen to parliamentary debates. The deliberative quality in these debates is low compared to what our citizens achieved. We can actually test this impression through a 'discourse quality index' developed by Swiss colleagues at the University of Bern, some of whom were here for the Citizens' Parliament. For that we need a transcript of discussions. We recorded all the citizens' discussions, and so can convert into transcripts and compare with transcripts of parliamentary debates and (ideally) committee discussions. This variation in deliberative quality is perhaps not surprising given that the Citizens' Parliament was designed with deliberation in mind, whereas parliaments in Westminster systems most certainly are not. Parliaments in more consensual systems are not quite so bad in these terms (as our Swiss colleagues have demonstrated).

Preliminary results indicate that our citizen participants shifted their views quite substantially during the course of their deliberations. For example, we find that one particular point of view—C on the graph—increased substantially from beginning to end of the process. This point of view represents a positive appraisal of the Australian political system and their place in it. The moral I'd draw from that is that if you give

people the opportunity to deliberate, they see the political system as something that is theirs and worthwhile. Factor D on the graph represents a strong belief in participatory empowerment—again it increased during the process. B is a more disaffected view, which rose and then fell.

The subtitle of this lecture is 'A World First'. This is not the first deliberative forum composed of randomly selected citizens. Other examples include citizens' juries, citizens' assemblies, deliberative polls, consensus conferences, and planning cells, developed in different parts of the world. The model closest to ours is the citizens' assembly. The first one of these was held in British Columbia about three years ago, set up by the provincial government to recommend a new electoral system for the province. Citizens' Assemblies have subsequently been held in Ontario and (with a somewhat dubious design) the Netherlands. Our citizens' parliament is a world pioneer, first because it is national and based on one person from each electorate, second because of the 'Online Parliament' component, third—and most important—because we put agenda creation in the hands of the citizens themselves. We did of course give them a broad charge: 'How can Australia's system of government be strengthened to serve us better?', but within this, they were free to craft options of their own. And they did.

What did our citizen participants think about everything that happened? For almost all of them it was a profound experience, for some of them life-changing.

Our oldest participant, Nola, wrote:

> So much to gain and learn all meeting with many ideas coming together from every part of AUSTRALIA. History in the making and I am a very proud participant.

One of our indigenous participants wrote:

> … for a rare moment in my life I actually felt a part of the majority and not minority. I would love to participate and learn further from this process and hope that it hasn't finished with one gathering. I think that everyone has so much more to give.

Though we didn't ask them to do anything by way of follow-up, many of the participants did things like contacting their local member to communicate the recommendations of the Citizens' Parliament, giving talks to community groups and schools, or contacting their local newspaper to run a story on what had happened. Some even wanted to organize local versions of the process.

We eventually received a written response to the Citizens' Parliament Final Report from the Office of the Prime Minister which said:

> The Prime Minister appreciates the commitment made by the selected citizens and many volunteers who helped make the event such a success. The report represents a constructive contribution to the ongoing debate

> about our system of government and how it can serve Australia and its people better.

Well, yes it does! But we were hoping for a bit more in the way of response than that.

I promised at the outset I would return to Pericles, so here he is again. I'd like to emphasize the beginning of that quote: 'We do not copy the laws and ways of other states. Actually, we are the pattern to others.' When it comes to democracy, that quote actually applies quite well to Australia. Historically, Australia pioneered among other things votes for women and the secret ballot. For a long time in the United States, secret voting was known as the 'Australian Ballot'. Australia can now be at the forefront of democratic innovation, and the Citizens' Parliament is just one example. So where do we go next?

First, we might think about a formal role for institutions like the Citizens' Parliament. One possibility suggested by Ethan Leib in the United States in a book called *Deliberative Democracy in America* is that assemblies like this should constitute a fourth 'popular' branch of government, both scrutinizing policies developed in the other branches, and generating proposals for them. The problem is the severe constitutional inertia that characterizes the United States. Several years ago in the context of debates about reform of the House of Lords in the United Kingdom, the Demos think tank produced a paper suggesting the Lords be replaced by an assembly of randomly selected citizens. To me it is perfectly obvious that such an assembly would do a much better deliberative job than hereditary aristocrats (who have now gone) or the party hacks appointed for life (who have replaced them).

Applying this idea to Australia, it would be a bit churlish to use a Senate lecture to call for the replacement of the Senate. However Queensland is currently lacking an upper house, and so I commend this idea to Queensland (as well as Nebraska and New Zealand, similarly lacking). To me, it is crystal clear that we need to create space for more deliberation in our politics. What we've worked on suggests one way—but not the only way. My colleague John Uhr has written an excellent book on how to make parliament itself more deliberative. And a citizens' parliament could only ever be just one component of a broader deliberative system; it is not a deliberative democracy in itself.

Now I think it is time to start thinking about a Global Citizens' Parliament. A lot of political authority is now exercised at the global level; but there is a huge democratic deficit there that a Global Citizens' Parliament could help reduce. A Global Citizens' Parliament organized by random selection would actually be much more feasible than one organized by election. Random selection is much cheaper. Also my guess is that China would never agree to elections, but could agree to a number of its citizens selected at random.

Deliberative democracy has actually begun to make inroads in China, even as electoral democracy seems blocked (at the national level). Li Junru, Deputy Director of the Chinese Communist Party School, recently called for the expansion of deliberative experiments in China. And before anyone can allege a communist plot, let me point out that one of the ancestors of deliberative democracy is Edmund Burke, the founder of conservatism, who over two hundred years ago characterized

parliament as ideally a ‘deliberative assembly’. I have a feeling he would be very disappointed in contemporary parliaments in these terms—especially Westminster-style systems.

The other key actors in establishing a Global Citizens’ Parliament would be the United Nations and the United States. The UN would not be a problem. And things look promising in the United States. The Deliberative Democracy Consortium in the United States now has access to the Obama White House. At the moment they are only discussing ways to invigorate deliberative citizen participation in the United States; but I also hope my American colleagues might be interested in going global.

So for all of you who remain skeptical concerning what I’ve said about the prospects for institutionalizing deliberative democracy, I conclude by saying:

YES WE CAN!

And if you would like more information, visit www.citizensparliament.org.au

Question — Thank you very much, I really enjoyed that. It’s good to know that you’re not alone, there are others. Didn’t the Democrats do something towards this when they were in power, like citizens’ initiative referendum (CIR)?

John Dryzek — CIR’s are a bit different. I only gave you the top six of the proposals that came up from the conclusion of the Citizens’ Parliament, but actually citizens’ initiated referenda were discussed as one possible proposal and it didn’t make the top six but I think it made about number 11 or 12 if I remember rightly. The citizens’ initiated referenda are a bit different. I used to live in the state of Oregon in the United States where we did have CIR and they had been around for close on 100 years I think. Every two years on the ballot, you could vote on probably around 20 to 25 particular measures ranging from closing the nuclear power plant in the state to tax limitation.

The thing about CIR is that they’re not necessarily deliberative. In the Oregon case, if you wanted to get a matter on the ballot, all you had to do was collect signatures. I think it was something like six per cent of people who had voted at the last gubernatorial election had to sign. So the way you did that was you paid people to collect signatures. You could then conduct advertising once you got the measure on the ballot, and there wasn’t necessarily anything in the way of deliberation.

I think what would be more interesting, if you are into CIR, would be to try and figure out a way to make that process more deliberative. The first thing you would do is ban paid signature collectors so you would really have to convince people to sign, and to devote their own unpaid energy to get signatures rather than having somebody paid to get signatures. That would be the first thing. The second thing you might want to do is actually have something like a citizens’ parliament which deliberated the measure in

advance of the election; have it publicized, have it televised, which would then give the broader citizenry something to go on rather than just advertising campaigns.

Question — Wouldn't one of the arguments against having this fairer debate be, if you put the theory into practice, you would be so long debating fairly and squarely that after a year you might get few laws passed.

John Dryzek — I'm not sure that is necessarily right. If you look at what we did in the Citizens' Parliament, we actually went to the other extreme. We got too much passed in those few days. The deliberative quality we had was fine, but it would have been still better if we had focused on a smaller number of proposals. We still managed to get closure at the end of it. Of course it was done by voting. If you are waiting for consensus, that may take a long, long time. You can have deliberation without necessarily seeking consensus.

Question — So it's your wish, obviously, to get this through. I can hear people saying: 'Well, so what?'

John Dryzek — What do you mean 'So what?' The way that I would justify it, I would say that there are at least two kinds of justification. One would be just intrinsic democratic values. This is one way of making the system more democratic, more inclusive, a different kind of way for citizens to make their voices felt. But I actually think that there is an argument that can be made that this would actually produce better decisions. You would get things thoroughly deliberated rather than just being the topic above the adversarial debate. This is why I think it will be interesting to have a deliberative assembly like this as a house of review. It wouldn't necessarily be charged with decision-making itself, but it would be able to review proposals that had been debated in adversarial fashion elsewhere in the system and could actually provide a new angle on them, a new insight into them. And so I think that's where its value might lie. You might not want to do it for everything, for every policy measure, but you could do it for some. So I think that's what its value would be.

Question — This is a comment, then a question. I actually happen to be one of the 150 guinea pigs; there may be others here, I don't know. I think I was the member for Canberra in the Citizens' Parliament. Just of the CIR proposal that came to the Citizens' Parliament, I think one of the very interesting things is that it came with quite a lot of force from a group that was working on it through the online parliament. It was heavily delegated and modified during the four days to put into the proposal particularly what you mentioned, a deliberative process so that you could guard against maybe highly technical matters getting through on a sort of populist wave, which I think is the risk that a lot of people see in those processes. I think it was a very interesting example of how things worked in that deliberative Citizens' Parliament that the CIR issue itself was heavily deliberated and significantly modified to make it a more deliberative proposal.

My question is: there is a bunch of us who were involved in the process that are now communicating on a continuing basis online, and I know that there is still a heck of a lot of enthusiasm for the event and for seeing some sort of continuation. One of the proposals that came forward was linked to the six you had up there: to have some sort of continuing body or agency to promote citizens' engagement. Maybe that could be a

creature of the state in some form or another, but maybe it would be better to be a citizens' commission of some sort, a continuing citizens' commission for citizens' engagement that could look at the citizens' engagement processes that we have in this country, comment on them, take complaints about them when they didn't do what they were supposed to be doing, and make proposals to governments, federal and state, about how to improve engagement processes and indeed maybe even initiate and manage further citizens' parliaments at national and state levels. What do you think of that?

John Dryzek — I think that's a great idea. I guess it's illustrative of a kind of creativity that was unleashed amongst our 150 citizens, because I must say that I think about democracy a lot and I never actually thought about that one, but I think that would be a terrific idea. Actually I should have mentioned in terms of follow up, in terms of what the citizens were doing after the event, that there is this ongoing online interaction. Thanks for reminding me about that.

Question — I was wondering when you gave the example of Queensland why you hadn't also mentioned the Northern Territory and the ACT, particularly the latter, because there's probably more chance of it happening here. Could you give some indication of just how you would mesh that into an existing parliamentary system? I personally think that it's an excellent idea because I have always thought that an element of randomness into the system would do no harm. I would be interested in how you would mesh that into a working political system, such as one of the ones we have here in the states or territories.

John Dryzek — First, you are dead right, I should have mentioned the Northern Territory and the ACT. I think the reason I didn't is that Queensland was in my mind because there was a media story recently where there was somebody sitting in the empty Senate chamber of Queensland, of the Queensland legislature, and I thought, hmmm, I know how we could fill that. And that's what prompted that. Of course the ACT and the Northern Territory would be ideal candidates as well.

How do we mesh it in? That depends on a number of things. First of all, if there is an existing upper house then meshing it in would be perhaps slightly trickier; then you would need to call it something else, maybe call it a Citizens' Commission. I'm not sure what the name would be. Then presumably, you could have selected issues that would be referred to that, not necessarily all issues, but selected issues. But on what basis would you select, and who would do the selection? Those would be big questions, because presumably if the government knew what was being proposed was controversial but could get it through using its legislative majority, then it probably wouldn't want that to be deliberated. So you would need somebody independent of the government of the day who would decide which legislation, which policies, would get deliberated by the citizens' chamber.

How would you constitute that body? I'm not entirely sure, that needs thinking through. But I think there is room for deliberation about this question, about how exactly to make all this fit into the constitutional architecture. I think you can see solutions and ways to do it, like that independent body that I just suggested, and the only question there is that we need to think through exactly how that body itself would be constituted.

Question — My question is a follow-up to the point about a citizens' engagement commission. It sounds like a great idea, but it's not entirely consistent with position A, namely inclusive republicanism; that is, civic engagement, which it declined after the assembly's process. This suggests there is a bit of diffidence about the engagement of the whole community. The one barrier that is obvious is politicians' disinclination to have competition in their forums, but in the late 90s the government actually commissioned a lot of work on what is citizenship, and this was very broadly based, not just schools but adults too. It seems to me two results of your work would be: one, that our democracy is unhealthy at the moment and needs some change; and two, that the broader notion of citizenship, not just gaining a right to vote for example, but having a larger set of duties and responsibilities as well as rights, needs another push like it was getting in the 90s but which just expired.

John Dryzek — If there is a problem with engagement, I suppose it could conceivably be from two directions: one could be that the politicians don't actually want it, and the second could be that the citizens don't want it. Now, when it comes to the politicians, I think it is telling that this Citizens' Parliament was of course not initiated by government; it was initiated from the outside. In some of the other examples I talked about, like the British Columbia Citizens' Assembly, like consensus conferences as they began in Denmark, those things were actually initiated by government itself. So governments sometimes do it, but then sometimes they are not interested. I gave the example of Obama, whose Whitehouse does now seem to be interested in innovative ways of engaging citizens. Another example would be Gordon Brown in the UK. When he became Prime Minister, he actually talked up things like this, and he talked about initiating a whole range of citizens' juries on particular policy questions, on controversial policy issues. This would be another answer to the question, how do we build this into politics? The problem with that is that if it's not constitutionalised you're relying on just the enthusiasm of a particular prime minister, and of course once he is gone, and actually in Brown's case, enthusiasm didn't really last, but at least for a while it was there. So he talked about citizens' juries. He also talked about holding a national citizens' summit which would deliberate core values of the British political system, although it would not have been my advice to do that. That's what he was talking up, but that hasn't actually been held. So occasionally you do get politicians who do want to do something along these lines and who are quite serious about it.

In terms of the attitudes of citizens, would they want to participate? There is a lot of work that has been done on citizen participation by political scientists on the degree to which people do want to participate in politics. I don't want to enter into all the debates about that. But my own feeling is that if you give people the chance to participate in a particular kind of politics, of the kind that we offered them in this Citizens' Parliament, then they are interested. I will go back to the 30 per cent figure of people have said, yes, they would like to participate, out of the 9 000 people we contacted to begin with. That's really a quite high number given what we were demanding of them. So that's my conclusion, is that people aren't necessarily apathetic, it's just that you have to give them the right kind of opportunity to participate and they will in many cases jump at the chance.

Question — There are some that would say, first of all, your random selection actually flushes out busybodies who want to meddle in everything and you get people of a particular strain of views not representative of the country; and secondly, whether unwittingly or not, the organisers and the facilitators guide people in a particular direction. Have you got any comment on those two objections that have been made in the past?

John Dryzek — That's right, the random selection gives you a particular picture of the citizenry. It is very different from most forms of public consultation which attract people who are sometimes disparaged as the usual suspects; I think that's a bit unfair. Lyn Carson, who was one of the organisers of the Citizens' Parliament, refers to the incensed and the articulate, and those are people who will show up at public consultations. In a process like this, the Citizens' Parliament, we still get some people like that, but most people are not like that. We get a truer representation of the citizenry than those ordinary mechanisms of public consultation. There is a role for activism and for the 'incensed and articulate' in the deliberative system but what we give is a different kind of picture.

Do the organisers guide the process and what happens in it? We did our best not to. That doesn't mean that we were necessarily always successful. The very fact that we were conducting a deliberative assembly implies that we believe in deliberation, and there is no getting away from that. But it doesn't mean that if you came to the citizens' assembly you necessarily had to share in any critique of the Australian political system. Luca Belgiorno-Nettis really started the New Democracy foundation because he was unhappy with the way the two-party system worked and he was interested in creative supplements to it, so that was really his motive force for starting all this. If we look at what the citizens actually came up with at the end, I think it would be very hard to find any trace of the New Democracy agenda in there. They actually turned out to be happier with the two-party system at the end of the process then when it began. Certainly there is no trace of the New Democracy agenda in there.

So all I can say is that we did our best to stop our own point of view conditioning what the citizens deliberated about. But in terms of the style of the interaction, well there is no getting away from it that we were promoting deliberative interaction and not adversarial debate, but we were up front about that with the citizens. I suppose they could have objected and said no, we would rather have debate, but to my knowledge, none of them did.

Question — Congratulations on giving the Swiss the prominence they deserve. It seems to me the Swiss have given us a system that we can put in and it will achieve every part of the point you have made. Would you care to comment on that?

John Dryzek — The ideal person to comment on it would have been Andre Bachtiger who has actually here from Switzerland for the Citizens' Parliament so of course knows a great deal about the Swiss political system. I have mentioned the experience of citizen initiated referendum in the US but it was really the Swiss who pioneered the use of referenda. They have referenda on all kinds of things at both the national and the local cantonal level as well. It was the existence of the initiative which lead to a consensual party system because what they found was that after they had instituted the initiative and the possibility of a referenda on all kind of policy questions, when a

minority party in government lost a vote in parliament, all it could do would be to send the measure to the citizens for a vote, and often it might overturn what the government had decided. So that was when they decided, there must be a better way of doing this, so we need to bring all parties into government. And of course that is what they do in Switzerland. All parties are represented in government; there is not a government and opposition. That makes the system more consensual, they have to work by consensus rather than just majority vote. That in turn improves the quality of deliberation in the Swiss Parliament so we actually can trace, in this case, the direct cause or link from referenda to a more deliberative political system. That perhaps is one lesson from Switzerland, but Switzerland is a very unique place and we need to think long and hard before saying, OK, just because it works in Switzerland it could work here. Well at least it did there and it's something to think about.

Question — Thank you. I have two suggestions. Number one, you mentioned earlier that it might be possible to do this on a global level. Would you consider doing that with senior children in school? If we are looking at 16 to 18 year olds, in 20 years those folk will be the world's leaders and it could be very interesting to get this sort of a thing globally through that group. Then as a dead opposite, what would be the reaction if you did the same sort of thing with jail inmates? They are people who have fallen foul of the existing system, many of them as you know, highly intelligent, and it could be a very interesting alternative.

John Dryzek — Two interesting ideas. Children at school, that would be a great idea, that might be a way of pioneering it, and because you could frame it as a sort of educational exercise that might be a way of getting past some of the political objections that you might otherwise get. So that would be a very interesting thing to do, nationally, as well as globally. Jail inmates, I hadn't thought of that one. The thing that that brings to mind is that there was a deliberative poll held a few years ago in Britain. Deliberative polls are a bit different from our design, but they basically work by random selection of the citizenry to recruit participants. I think the topic was criminal justice policy and just as a result of random selection they did have one or two participants who had actually spent time in prison and so they could give their own insights into what punishment was like and what it did for people. Obviously what you're talking about is one that would be entirely composed of prison inmates. I think it might be an interesting process to do that, possibly as part of rehabilitation and reintegrating people into society once they had left prison.

The Role of Parliament under an Australian Charter of Human Rights*

George Williams

Background

Australia is now the only democratic nation without a national Bill or Charter of Rights. Some form of protection for basic rights is seen as an essential component of modern democratic governance around the world. No democratic nation has ever done away with its Bill or Charter of Rights, and over time they have assumed bipartisan support.

Bringing about a national human rights law has been federal ALP policy since 1969, though the first attempt to bring about such a law anywhere in Australia was not by the ALP, but by the Nicklin Country Party Government in Queensland in 1959. This shows how the issue crosses party lines, and indeed some of the strongest supporters of the reform today fall with the Coalition ranks.

While such a law has now been achieved in the ACT in 2004 and Victoria in 2006, every attempt to achieve the reform at the national level has failed. Now there is again a once in a generation opportunity to achieve this reform.

The Rudd Government announced a National Human Rights Consultation on the 60th anniversary of the Universal Declaration of Human Rights on 10 December last year. It comprises Father Frank Brennan (Chairperson), Mary Kostakidis, Mick Palmer, Tammy Williams and Philip Flood (as an alternate when Mick Palmer is unavailable).

The deadline for submissions is 15 June 2009. It must report to the Australian Government by 31 August 2009.

I am confident that the process will lead to strong community support for a national human rights law, based upon:

Underlying popular support

- A survey published in 1997 of 1505 citizens indicated 72 per cent support.
- In 2006 Amnesty International Australia commissioned a nationwide poll of 1001 voters by Roy Morgan Research. Sixty-nine percent said that they were very likely or likely to support a national Bill or Charter of Rights.

Experience in places like Victoria

- Eighty-five per cent across all political divides wanted human rights to be better protected by the law. They did not want radical change, but reform to strengthen democracy.
- Some wanted their human rights better protected to shield themselves and their families from the potential misuse of government power.
- For even more people, the desire for change reflects their aspiration to live in a society that reflects common values and responsibilities. People want to live in a community based on equality, justice and the idea of a 'fair go' for all.

Does Parliament need a Charter of Human Rights?

I welcome the chance to look beyond the arguments over the pros and cons of Bills of Rights, and to focus on the role of Parliament. Indeed, my starting point is that I support a Charter of Human Rights for Australia not because I seek to transfer power to the courts (although I do see better checks and balances in this area as being desirable), but because I see it as a means to improve the workings of Parliament and its deliberations, and especially its scrutiny of executive action.

I believe that we need legal reform that drives parliamentary change when it comes to human rights, and especially the rights of people in Australia who are most marginalised and disadvantaged and whose voices are heard too rarely within Parliament.

My own thinking has changed significantly on this issue. It began when I walked into the High Court building in Canberra in early 1992. I had come straight from law school and was lucky to arrive at the beginning of the most interesting and active year in the court's history. That year the Mabo case and early free-speech cases marked the peak of the Mason court's impact on Australian law and government. It was a year when the court demonstrated it could play a major role in shaping Australian democracy. As a young graduate, it seemed to me that the court had all the answers and arguments for a leading judicial role.

I no longer believe this, and indeed see the judiciary as having an often minor, largely supporting role, under an Australian Charter of Rights. Parliament, and also the executive, needs to play the more important role. Why?

- The key aim is to prevent human rights violations occurring in the first place, not merely to provide remedies for their breach (hence, must get laws and policies right at first instance).
- To make the greatest difference to human rights protection, the real game is not in the few cases that are reported in the media and might go to court, but in service delivery and day to day decision-making by the executive.
- Difficult pathways of partisan politics must be navigated to achieve lasting results (for example, native title was a momentous achievement, but this foundered as new judges were appointed. The court alone could not forge a lasting political settlement.) Lasting reform can often only be won by democratic engagement and political leadership.

That said, does Parliament really need reform when it comes to protecting human rights? Yes, the evidence shows:

Processes

- Inadequate scrutiny, especially when one side of politics controls both houses.
- Human rights are not considered in a systemic and effective way. Under Senate Standing Order 24 the Senate Standing Committee for the Scrutiny of Bills is charged with reporting whether Bills and Acts: 'trespass unduly on personal rights and liberties'. Nothing lists the extent to which government can trespass upon our core rights or what these rights are. This is ignored anyway in many key debates, eg, anti-terror laws.
- Human rights arguments can lack legitimacy. In the absence of a Charter, human rights language and concepts can lack political and legal legitimacy in parliaments and the community. As a consequence, Australia is an example of a country where people and parliaments do not always take human rights as seriously as they should.
- Problems with the speed and volume at which new laws made. One of the most contentious laws of recent times is the 2007 NT intervention legislation, which, for example, suspended the Racial Discrimination Act. It required a robust debate to get the law right (a prime function of Parliament). But when the Northern Territory National Emergency Response Bill was introduced into the House of Representatives on 7 August 2007 (a package of five bills of 480 pages first viewed on that day), debate on the bill commenced at 9:02pm, and the bill passed at 9:15pm. Scrutiny was better, but not adequate, in the Senate, where debate amounted to 19 *Hansard* pages.

Outcomes

- Detention of children seeking asylum.
- Suspension of the *Racial Discrimination Act* twice in the last decade.
- Anti-terror laws—44 (1 every 7 weeks). Consider for example, that:
    - The Attorney-General can issue a certificate to close a court from public view and restrict evidence a defendant can see.
    - The detention of non-suspects by ASIO for intelligence gathering, with up to five years jail if they do not co-operate and a ban on publishing information about the detention for two years (including for torture).

These can be fixed by Parliament (for example, children in detention) but often only years after the event, and after people have been damaged, or sometimes not fixed at all. A key part of the problem is the lack of a proper check and balance for democratic rights. The only check may be our trust in parliamentarians' wisdom and common sense. This leads to human rights often not being given proper consideration, rights being undermined in a hasty and ill-considered way and the situation being made worse at times of national fear or crisis or when one party controls both houses.

Parliament or the courts as rights protector?

The reform debate is often reduced to: who best protects rights, parliaments or the courts? For me, the answer is 'both'. Neither by itself is sufficient.

Hence, aspirational standards for Parliament, such as the Qld *Legislative Standards Act 1992*, are not acceptable. They do not work. After more than 17 years, this Act has had little impact. Unsurprisingly, self-enforcement by Parliament of human rights standards is not effective.

I have three reasons why the judiciary and Parliament need to be involved in the protection of human rights under a national Charter of Rights.

1. The effective protection of human rights requires that a body besides Parliament be involved. Parliament, as has often been the case in Australia, has proved unable or unwilling to protect some of the most basic rights and freedoms of members of the Australian community. The record is clear. The number of contemporary human rights concerns that have arisen due to new laws passed by the federal Parliament is, unfortunately, very long indeed. Such examples demonstrate how Parliament, by itself, can prove ineffective in protecting not only the rights of minorities but also some basic political freedoms. The election of the Parliament every three years is no cure for this, especially when the rights of non-voters, such as children, are considered.

   At a time of community fear either of terrorism or invasion from outside, there are strong currents that can be taken advantage of that undermine human rights. This is always the case in democratic systems, but a system without a Charter of Rights involving a role for the judiciary is especially vulnerable.

   The problem is magnified when a government gains control of both houses of Parliament. The only significant limit that may now come into play is the integrity and good sense of our elected representatives, something that manifests itself in the occasional person crossing the floor or backbench government revolt. At this and other times, more checks and balances are needed.

2. Even when Parliament plays an effective deliberative and scrutiny role, this does not negate the need for judicial involvement. Parliament has many strengths as a deliberative chamber, including its capacity to bring an authoritative resolution to division within the community and through deliberation to enact carefully tailored laws to meet pressing social problems. However, it also has weaknesses. For example, Parliament can lack the

rationality and analytical capacity that judges, especially judges of appeal, can bring to questions of law. Judges also have a particular advantage that parliamentarians do not. Judges usually look at a problem not in the heat of the moment but sometime afterwards and can analyse an issue in light not only of the underlying policy need but also with the benefit of hindsight given how the law has actually operated. Judges are also able to analyse how the law has impacted on a person at a very specific level, something that can easily be lost in the generalities of lawmaking in Parliament.

My argument is not that the court should replace Parliament (or in any way better), only that the courts have something to offer that Parliament does not. It is also not an argument that the courts should have a final say. My view is that the role of the courts can be complementary to that of Parliament and that when we are dealing with questions of human rights there is a role for a dispassionate, independent, rational decision-maker who with the benefit of hindsight is able to examine how a law operates on the rights of an individual.

3. Third, the courts must have a role to bring out the best in Parliament. A lack of any judicial involvement affects the parliamentary process. Self-enforcement by Parliament of human rights is not effective. Or, to put it another way, the presence of an external check and balance can have a positive effect on Parliament. If there is no capacity for human rights principles to be raised in the courts through a Charter or other means, they can fail to receive examination by Parliament. Politicians are pragmatic, and often deal only with issues that are pressing and need attention. Hence, political debate and committee inquiry processes in the federal Parliament are often sparked by concern that legislation may be declared unconstitutional.

   Without the possibility of post-enactment scrutiny by the judiciary on human rights grounds, there may not be an incentive for pre-enactment scrutiny to occur within the legislative process. Hence, a significant advantage of a Charter of Rights is not so much the dialogue that may follow a judicial decision, but the deliberation that begins within the legislative body before any such decision.

The parliamentary rights model

I support a national Charter of Human Rights in the form of a parliamentary rights model, to use the term coined by Canadian Professor Janet Hiebert and others. This would be based on the NZ *Bill of Rights Act 1990*, UK *Human Rights Act 1998*, ACT *Human Rights Act 1994* and finally the Victorian Charter of Human Rights and Responsibilities 2006.

The newly enacted Victorian Charter reflects how human rights can be protected by simultaneously providing the judiciary with an important, but limited, function and also retaining parliament sovereignty. The Charter is not modelled on the United States Bill of Rights. It does not give the final say to the courts, nor does it set down unchangeable rights in the Victorian Constitution. Instead, it is an ordinary Act that can be changed over time by Parliament.

The Charter protects those rights that are the most important to an open and free Victorian democracy, such as the rights to expression, to association, to the protection of families and to vote. The rights in the Charter are not absolute and can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society. Elected representatives in Victoria continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime, and distribute limited funds amongst competing demands. The Charter even recognises the power of the Victorian Parliament not just to balance such interests but to override the rights listed in the Charter where this is needed for the benefit of the community as a whole.

An important aim of the Charter of Human Rights and Responsibilities is to create a new discussion on human rights between the community and government. A key innovation of the Charter is that rights and responsibilities are taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place. The key aspects of this model are:

- Public servants will take the human rights in the Charter into account in developing new policies.
- Public authorities like government departments are required to comply with the Charter. If they fail to do so, a person who has been adversely affected by a government decision, as is possible now under Victorian law, will be able to have the decision examined in court. There is no right to damages.
- Government departments and other public authorities can undertake audits of their programs and policies to check that they comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet are accompanied by a Human Rights Impact Statement.
- When a Bill is introduced into the Victorian Parliament, it is accompanied by a Statement of Compatibility made by the person introducing the Bill, setting out, with reasons, whether the bill complies with the Charter. This enhances scrutiny of the executive. Parliament will be able to pass the bill whether or not it is thought to comply with the Charter.
- Parliament's Scrutiny of Acts and Regulations Committee has a special role in examining these Statements of Compatibility. It advises Parliament on the human rights implications of a bill.
- Victorian courts and tribunals are required to interpret all legislation, 'so far as it is possible to do so consistently with their purpose' in a way that is compatible with human rights.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court may make a Declaration of Inconsistent Interpretation. This refers the law back to Parliament, but does not strike it down. Parliament can decide to amend the law or to leave it as is.
- Where the circumstances justify it, Parliament can pass a law that overrides the rights in the Charter. This prevents a Declaration of Inconsistent Interpretation being made for five years. The override can be renewed.

What does the record show in the United Kingdom and Victoria?

A lawyers' picnic?

United Kingdom. Impact of the UK law on the courts is monitored by the Human Rights Unit of the Department for Constitutional Affairs. It has been found that the Act has not produced a significant increase in litigation or a 'litigation culture' (an increase of less than half of one per cent). Not only did few cases involve questions of human rights law, but where such issues were raised they were, in general, 'as additional points to existing cases' that could have been lodged 'even if the Act had not been in force'.

In Scotland, a study found that human rights arguments were raised in 'a little over a quarter of one per cent of the total criminal courts caseload over the period of the study'. Overall, the authors concluded that 'it seems clear that human rights legislation has had little effect on the volume of business in the courts.'

Victoria. Attorney General Rob Hulls said: 'There have been a very small number of Charter arguments raised in Victorian courts. I think about seven. I think each and every one of those has either been withdrawn or dismissed.'

There has now been one successful case invoking Charter. The Victorian Civil and Administrative Tribunal handed down its decision in *Kracke v Mental Health Review Board* in April 2009. The Tribunal found that a mentally ill man's human rights had been breached. He had been forced to undergo drug treatment by the state, but his case had been ignored for years and his human right to a fair hearing had been breached by a 'deplorable' and 'inexcusable' system failure which denied him reviews of his medical treatment in a reasonable time.

Every case litigated under the Charter was also brought on non-Charter grounds. The myth that Charters of Rights create a 'lawyers' picnic' is unsubstantiated. In any event, with almost no exceptions, Charter cases for disadvantaged Victorians are run *pro bono*.

Does it undermine parliamentary sovereignty?

United Kingdom. Far from it. The Human Rights Act has invigorated debate and scrutiny on human rights issues, especially due to the work of the UK Joint Committee on Human Rights (for example, in relation to anti-terror laws). I have spent time in the UK observing the work of that committee, and have spoken to UK parliamentarians and read their debates. The Act has been positive in enhancing both debate on new laws and the scrutiny function of Parliament when it comes to the work of the executive.

Victoria. The Charter of Rights has not shifted power to the judiciary. Contentious social policy issues continue to be determined by Parliament. Far from threatening democracy, the Victorian Charter entrenches and enhances democratic values.

Has it made a difference to people's lives?

United Kingdom. Yes. The November 2008 report from the British Institute of Human Rights on the impact of the UK law, marking ten years of the UK Human

Rights Act, found: 'that the Human Rights Act is protecting vulnerable people from abuse and poor treatment in public services.'

Victoria. Yes. In individual cases:

- The Charter prevented the eviction of a single mother and her children from public housing into homelessness.
- A 19-year-old woman with cerebral palsy relied on the Charter to obtain support services and case management.
- Children with autism were deemed eligible for disability support services after their advocates invoked the Charter. This lead to an additional $2.75 million in support by the Community Services Minister who said: 'this will make a major difference to the lives of many Victorian families facing the challenge of raising a child with an autism spectrum disorder.'
- Assisted an elderly woman with brain injury to access critical medical assistance. The woman required urgent therapy to treat severe contractures of her left hand. They caused considerable pain and suffering and resulted in deterioration of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority because she was aged over 50. If medical services were not provided, radical surgery could have been be required, such as severing the tendons in her fingers or even amputation of the hand. Using the Charter, her advocates were able to argue for and gain her medical treatment.

None of these cases went to court.

In terms of system change, the Victorian Department of Human Services (largest state government department that covers Health, Mental Health, Senior Victorians, Community Services and Housing and directly employs more than 13 000 people and funds organisations such as hospitals, aged care facilities, ambulance services and community service agencies that collectively employ more than 80 000 people) is:

- Revising law and policies on involuntary detention for mental illness in the *Mental Health Act 1986* to give a person more of a say in their own treatment.
- Changes to disability housing to change models and culture from directive to participation and personal decision making.

Conclusion

I support reform in Australia to bring about a national Charter of Rights. I support this because human rights need better protection in Australia, especially the rights of the marginalised and disadvantaged for whom the existing political process can fail to work.

I also support the change for reasons of institutional design. I believe that a Charter, like that enacted in the UK and Victoria, can provide an important but limited new role for the judiciary while also improving the performance of Parliament. Indeed, without such a Charter, Parliament is less likely to fulfil its promise.

Question — My two questions to the panel are: why hasn't Australia signed the United Nations Convention on Human Rights? And in recent days we have seen the family law courts violating some kind of parents' rights, like fathers' rights, and the children are becoming alienated or estranged from their fathers or main parents. This discriminatory practice of violation of the child's rights or the father's rights is very prominent. What are you going to do about it?

George Williams — Well the first question was asking why Australia hasn't signed some of these international human rights conventions, and the answer is we have. In fact Australia is one of the very best at international citizenry when it comes to signing up to international human rights conventions. Better even than the United States and many other countries. When we signed those conventions we adopted an obligation to make those conventions part of our law which we never did. We are in breach of international law and this tells a bit of a story about Australia. Internationally we have, with some past disturbing exceptions, a justifiably good reputation on the international stage. Don't forget that H.V. Evatt, an Australian, was one of the leading drafters of the Universal Declaration of Human Rights. I think we should be very proud of that. What we shouldn't be proud of is that every other democratic nation has recognised the value in taking those international standards and putting them into law. We haven't. There's something that is wrong there between the dichotomy of what we do internationally and what we do at home that perhaps is only explained by a level of complacency about our human rights problems that I think we need to acknowledge.

The other question was about issues of child protection and the like. I would say that in Victoria and elsewhere child protection is one of those areas where charters and human rights standards have a lot of work to do. They are very difficult issues; policing is another example as well where they have a lot of work to do. I think the value of a Charter is not that it directs the outcomes in what can be very difficult, often traumatic cases, but it does ensure that when decisions are made they are made with the benefit of understanding of the rights of fathers, of mothers, of children, of others, and that decisions are made in the most respectful and just way possible. But it doesn't direct the outcomes. It can't. There needs to be room for individual discretion, but exercised according to what are just and fair criteria.

Question — I am interested in questions of enforcement and remedies and I wasn't clear in your model how it works. On the one hand you said that if one is successful in a court, the judges will send the legislation back for review, so that's the remedy. On the other hand, in the other extreme you have the situation where individual clients are getting outcomes without ever going to court. I guess my question is: is there a role for an individual litigant to go to court and get a remedy enforced in their favour?

George Williams — Yes. Most of these don't go to court because a good law operates in the way that the standards are clear and you don't need to litigate. So I think a good model says keep it out of court as much as possible, it's too expensive, access to justice is too difficult and indeed I would say that if we start getting large

volumes of litigation in the court then there is something wrong with the way that it's operating. The court needs to be there though, because in the end you have to have a remedy and sometimes governments do make decisions in a really bloody-minded way that I think there does need to be a remedy for.

In Victoria you have the remedy of having statutes interpreted where possible to be consistent with your rights, and if that can't be done, sent back to Parliament to be looked at again. But also, and I didn't get to develop this in my talk, a range of remedies around administrative law. Which means that if a government agency, for example in aged care, is breaching a basic right you might seek an injunction to prevent that incurring. You might also seek a decision to be reviewed and remade and this just fits within the existing system. You don't invent extra courts or tribunals. Bodies like the Administrative Appeals Tribunal do what they are already doing but can also use human rights standards in review. And that's the UK experience, where most of that sort of action is in the administrative realm, just fitting in to that realm rather than getting into court. In Victoria, the right to damages is specifically excluded, so you can't get any money out of it. It is available in the UK, and that's one of the questions that should be on the table. I think that damages should be available because I think that if it's demonstrated that somebody suffered a harm for which damages is the only adequate remedy then I think that it's appropriate that that is recognised.

Question — I have a question about the role of the courts and in particular the dialogue between courts and Parliament. In the instance where the courts have said that the law isn't consistent with the Charter, I wondered what the experience of overseas jurisdictions is, or what is the evidence of overseas jurisdictions of parliaments responding. In particular, in that example you gave of the tenancy where the court interpreted in favoured of same sex couples, did the legislature turn around, and this is maybe a cynical view, but did they turn around and say, no, we actually did mean just man and wife, contrary to what the court said?

George Williams — The UK experience is that no, in cases like that, where you are dealing with what could often be a fundamental injustice, they don't make those changes. If you are dealing with a same sex couple that, say, have been living together in public housing for 50 years, and an elderly couple, and one of them is about to be evicted because they don't fit within the definition, it would be unlikely a Parliament would intervene in that case, because I think in this day and age people can see that there is an injustice being done. Parliament lets it be in those interpretive cases. What happens with the inconsistent declarations, where it is sent back to Parliament when you can't fix it by interpretation, in the UK in every one of those cases Parliament has responded.

Parliament responds in its own way. The courts identify a problem and it's up to Parliament to work out the solution and that's where you retain the sovereignty. A court says: the mental health system is not working, there is not adequate review. Parliament in a sophisticated way has a debate, it goes through committees, and they work out a new legislative scheme with the benefit of the court decision. In the UK it has worked very well I think, cause the courts have identified it, but then it has very quickly moved into the political world, where it should be, and which works out what the solution is. That's why in the UK the system is really described as one that is very

consistent with the separation of powers. It recognises the limits of those functions, recognises also what they can do and not do and actually does do that in a way that leads to demonstrably better outcomes when it comes to human rights protection, especially in those areas of service delivery and vulnerable people, which is where it should be directed.

Question — I have been living here in Australia since 1966. I notice you talked a lot about the UK, and you may hear that I am originally from the UK. Health, in checks and balances, health services, terminal sedation for a terminal illness, is quite high profile talk among people, but we don't have the power to do anything about it. As you know, the Northern Territory did bring a law about it but the federal government was able to override it. It's the same for the territory here, the ACT, we can't make anything in that area, and I know that 75 to 80 per cent of people would like terminal sedation in a terminal illness. It is euthanasia I suppose to a point, but it's not that big one where you say: 'I'm tired of life and I'm going to commit suicide.' And if people are going to commit suicide, who's going to stop them anyway? You don't need a law for that. I do believe that normally when you get to a certain age you could need this assistance, and I have had that with my husband who had a very bad stroke and was on the bed with just his heart beating. I did manage to get him morphine; the doctors are quite good for that, but they really want it down in black and white.

George Williams — I can deal with that issue and that does often come up in these contexts: the issue of voluntary euthanasia. It is a question of drafting more that anything else and this is why we encourage people to get involved in the national process that's going on at the moment because we have an open slate as to what it might cover.

I think you have got a couple of choices. One is, you could have a Charter that does deal with those issues; you could put something in there about the right to life, or the right to die as it's referred to in the United States, and you could include it in a way that recognises it. I would say under my model that even if you put it in, Parliament will still have the final say; this isn't a strike-down mechanism. If Parliament says that we want to ban voluntary euthanasia, a Charter can't stop that. If they say this is the way we want to go, well they will win on that, and I'm happy to live with that consequence because I think that's the nature of the model that I'm talking about. I think though what is more likely in Australia is that probably we will end up with a Charter (if we get a Charter as I hope we do), that will deal with rights that have very broad and general acceptance in the community, maybe a level of over 90 per cent. That is what we did in Victoria. That's why Victoria excluded abortion-related rights, for the reason that that was left solely to Parliament without any work for the Charter to do in that area. I think a government might say, if we go down this path, that they will simply excise areas like euthanasia and abortion and the like, and focus on free speech and the like, and that may be for political considerations perhaps or it may be that you just stick to those issues that have support. All of those options are open. I would simply say, if you care about these issues send something in. This is a process to give people a chance to say what the want in or not in.

Question — You do need a framework of checks and balances, there's no doubt about it, so that you can stop abuse. But the big word is choice. If you have been

given a choice, and if you have the right checks and balances and you're seriously ill, and you're not going to get any better, it's much better to free up a hospital bed.

George Williams — Let me give you one quick example which I think illustrates that choice. In the UK there was a couple in a nursing home. They had been together for many many years, and one of them developed a disability for which he needed a new bed. The nursing home said they would give them a new bed, but only a single bed, as that was all their guidelines allowed. She said: 'I have the money, I can pay for a double bed, because I want to continue sleeping with my husband, and we have been together for many years.' They said no, their guidelines only would allow for a single bed. And she was given a single bed and they were separated for 18 months. It is one of those basic indignities that have such a big impact on our quality of life. She finally got some advice from a welfare rights centre there in the UK; they went and talked to the nursing home and said: 'She has a number of rights here about family life and a number of other things.' The nursing home said within three hours that they would get them the double bed. That is how these things work, and it is how they should work. It was a simple thing in the end, and you think that's stupid, it should have always worked that way, but on too many occasions it doesn't work that way without something to give you a little lift in how you actually deal with agencies.

Is There Life After Parliament? Reflections of a Former Senator*

Margaret Reynolds

When I was asked to give this lecture I realised it would be almost … to the day … just ten years since I left the Senate in June 1999.

During those years many changes have occurred in Australian politics … new governments and policies, new ideas and technology. However for all that has changed it is remarkable how many debates remain the same. As I read news reports I often have a sense of déjà vu … Didn't I contribute to this call for policy reform one, two or more decades ago?

Recently I addressed a group of young women unionists actively campaigning for universal access to paid maternity leave. In preparing my speech I sighed and recalled the detail of so many campaigns that women of my generation had run for the last 40 years. I wondered why we had been so patient, so tolerant of those various economic arguments that insisted that Australia could not afford policies that have long been in place in other OECD countries. At last it seems our voices have been heard!

One of the questions facing those of us who have been involved in public policy debate over several decades is how can we pass on that historic knowledge of past practice? It is very depressing to watch another generation … simply reinvent the wheel … and make the same mistakes that resulted in policy change a decade ago! On one hand it is essential to leave younger people to bring forward fresh ideas for new circumstances, but it is also important to incorporate the lessons learned from the past.

In the 1960s when working with a welfare organisation I was given food vouchers to help Aboriginal families eat better quality food. At the time I was highly embarrassed to accompany women and small children to the shop where a censorious shopkeeper dictated which food could be purchased. In those years I often bought a packet of sweet biscuits, ice cream or lollies that were denied under the voucher scheme. Forty years on I am appalled that modern policy-makers have re-introduced this updated version of paternalism to quarantine part of the pension to be spent appropriately. I wonder how this policy requirement would work here in the national capital if a proportion of public sector salaries were quarantined to protect people from making unhealthy decisions. Or is it only the poor who need guidance?

This lecture gives me the chance to reflect on the direction I have taken in the last ten years and also to comment on the role former parliamentarians have in Australian communities and beyond.

When I left the Senate I had some clear plans about how I was going to move back into private life. I had a part-time position at the University of Queensland and was continuing some of my international work with both the Commonwealth and the United Nations. I was also packing up after 30 years in the tropics to move back to Tasmania.

I was unprepared for the shock of realising just how divorced many Australians are from their democracy. I had forgotten what it was like to be on the outside looking in to the political world of decision-making. I began to realise just how much information I had personally absorbed about government and its influence on the community. Yet I was dismayed to learn how little people understood about their democracy.

As a nation we pride ourselves on our long standing system of governance yet we are less committed to communicating just how this system functions and how citizens can actively participate in this process.

I found that after years of closely monitoring and debating public policy I now lived in a world where it was almost irrelevant! Many people are either not interested in or distrusting of the political process while others have totally unrealistic expectations of how quickly reform could be achieved. It seems many Australians are either dismissive of the political process or totally mystified about how the system actually works and how they can contribute to debate.

As a former teacher I have always been interested in the link between education and active citizenship. While in Parliament I used to visit schools to introduce children of all ages to the basics of democracy. Instead of lecturing on the facts and figures, I learned to transform the classroom into ‘Question Time’ complete with volunteer ministers and opposition members. This method was popular because the children chose local topics and identified issues of direct relevance to them … the environment, road safety, health, food, sport and music were always on the agenda.

In my post-parliamentary life I worked in East Timor, Fiji and Africa where I extended this model to give women an understanding of decision-making at local, national and international level. In Dili I worked on a pre-election education campaign

as women prepared for their first experience of the democratic process whether as voters, workers or candidates. We role-played a range of situations including how women candidates might respond to pressures from family, church and male colleagues.

In Africa I worked with women from around the Commonwealth as we planned to feminise the Commonwealth Heads of Government Meeting and in Fiji women from around the South Pacific developed their own system of government complete with a Women's Cabinet in which I played the role of the token male! Back in Australia I focussed on young people in schools and university encouraging them to get involved and be less cynical about the political process.

In 1999 I organised in the Queensland Parliament a Youth Reconciliation Parliament where 50 teenagers were selected from around the state on the basis of their submitted speeches to participate in this memorable event. Listening to their insights into Australian race relations I could not but wish that their views were echoed in the corridors of power in Canberra at the time. Their knowledge, wisdom and passion put many of us to shame as they reached out for real solutions to historic failure.

As preparations were underway to mark the Centenary of Federation in 2001, I wondered how relevant many Australians would see this democratic landmark. How could local communities be engaged in such a remote event?

My answer came in the form of 26 youth parliaments to be held in each Tasmanian local government area. At the time only a few councils seriously engaged with young people and I wanted to bring young people into a project that combined understanding of the democratic process with the reality of life in local communities. I talked with councils about each sponsoring a May Youth Parliament in their chambers to coincide with the celebrations in Melbourne.

It was not an easy task and timing changed in different areas of the state. However I was greatly assisted by the Tasmanian Speaker of the Legislative Assembly who agreed to invite representatives of each Youth Parliament to a special session of the Tasmanian Parliament later that year. This encouraged all councils to get involved so by October each council had two youth representatives who travelled to Hobart for the grand occasion when four teenagers, elected by their peers from each geographic region of the state, addressed the Tasmanian Parliament.

Standing orders had been suspended only once before on the occasion of a formal parliamentary apology when Aboriginal elders had addressed the Parliament. Government and Opposition members listened for an hour as student speakers outlined their concerns for the future. In a follow up ceremony 52 representatives from around the state presented then Premier Jim Bacon with their submissions and each received a formal response detailing government policy. This model is probably unique and its impact translated into many more Tasmanians being aware and interested in the Centenary of Federation because it involved their young people talking about local issues and being proactive in presenting them to the government.

Once I became focussed on this linkage between the democratic process and active citizenship, I could see so many opportunities to engage my students and local communities in better understanding of their place in local democracy.

In my human rights classes we role-played United Nations forums and tribunals and to coincide with the Commonwealth Heads of Government Meeting held a model CHOGM which was an open forum attended by a number of senior school students. Tertiary students planned the event and adopted a country to represent. Some dressed up for the occasion, which included a colourful parade and opening ceremony.

During this period I was President of the United Nations Association of Australia at a time when Australia's reputation was under close scrutiny for its arbitrary detention policies. I encouraged many refugee advocates to put forward the traumatic experience of detainees and under the UNAA banner three reports were presented to the United Nations Human Rights Commission in Geneva over the period 2002–2004.

I well remember the reaction of delegates from many nations who did not understand why a country like Australia could not manage to accommodate comparatively small numbers of asylum seekers without resorting to punitive policies in isolated desert camps. One year a group of students accompanied me to Geneva where they spoke to delegates and learned first-hand just how damaging the arbitrary detention of asylum seekers was to Australia's international reputation as a responsible global citizen.

In 2004 I accepted a position in Tasmania with National Disability Services, Australia's peak organisation representing disability service providers. My role was to work with non-government disability service providers and the state government to ensure that people with disabilities were able to exercise their rights as citizens.

I worked in a small office with limited resources and high expectations of what needed to change in getting a fair go for Tasmanians with disabilities. Having grown up in Tasmania, a very small and friendly state, I knew many people now in influential positions. As a youngster I had played beach cricket with the Governor, had a teenage date with a prominent member of the Liberal Opposition, and I knew most members of the Labor Government by their first names.

I was not sure this local knowledge would necessarily assist me but it was certainly a good start in finding my way around a system very much in need of reform. The situation at state level suggested that many reforms associated with federal government initiatives in the 1980s and 90s had started to be taken for granted without the specific injection of resources or updating of policy locally.

While Tasmania was the first state to close its mental institution and offer intellectually disabled people the opportunity to live in the community, there had been limited thought given to the impact this would have on available revenue. Dollars saved in closing the institution went back into consolidated revenue and could not be traced for use in new service provision. Waiting lists continued to grow and service providers were under considerable pressure to respond in situations of continual crisis management. In the last twelve months Tasmania has moved towards a new model of reform and integrated disability access planning across all government departments.

Many of the strategies I have used to assist bring about these changes have been adapted from my experience in the Senate. I focussed on budgetary decisions including attending the annual Budget lock up, attending Estimates and preparing Disability Impact Statements on the State Budget. One year we even challenged funding processes by appealing to the Auditor-General, a decision which was not well received but was essential in trying to track just how the disability dollar was spent to increase the availability of services for people so in need. At the same time I was working to build a tri-partisan network of support in the Parliament to put disability rights firmly on the political agenda.

Many Australians assume that their former elected representatives fade into their communities and have no specific responsibility once they leave public life. But is this true? Should we exile those who have so contributed to a period of public policy debate as no longer having an ongoing role to contribute aspects of their knowledge and experience?

Former prime ministers continue to have access to an office, staff and travel and it is assumed they will continue to contribute to public debate based on their experience as leaders. Some state premiers and former ministers take on paid or voluntary positions which enable them to focus on specific areas of public policy. Some former parliamentarians use their contacts and knowledge of the political process to become lobbyists while others look for positions of influence on public and private sector boards of management. Increasingly, a number of former parliamentarians are offered positions in academia. Some move to the international arena and some take on new challenges that bear no resemblance to their former careers in public policy. A few write their memoirs or contribute to public debate through lecturing and writing.

Should the Australian community have any specific expectations of their former elected representatives? Is it reasonable to expect that the public investment in the democratic process may extend beyond those years when individuals are paid to actually represent the Australian people?

These days parliamentary life may only occupy a small proportion of working life. The average age of sitting parliamentarians is much lower than in the days when mainly men were elected in middle age and retired late in life. Today's parliamentarians are younger and may have two or three careers ahead of them when they depart the political stage. Parliamentary superannuation even under the new guidelines is generous.

Those who are defeated in election are often disadvantaged in the workplace because they are seen as no longer having the influence they once enjoyed. This is especially true if there is a change of government. Australian parliamentarians are by definition 'party animals' so their partisan loyalties may not necessarily assist in finding a new career. Those who retire from Parliament by choice may already have lined up new careers taking advantage of in-house contacts and opportunities. Others may specifically choose positions in the corporate sector where their political insights may be of particular value. Should there be any limits to taking the knowledge and benefits of parliamentary experience into the market place to be sold off to the highest bidder?

It is a standard refrain of many parliamentarians that they have 'retired to spend more time with their families.' But I have never heard anyone declare they intend to spend more time with their community! Yet elected representatives have learnt so much about their community and have spent a great deal of time working to enhance community life. How can this experience be utilised when an individual returns to life as a private citizen?

When I was leaving the Senate in 1999 I did wonder how I would adjust to a very different lifestyle. I had been in public life for 20 years and expected to actively participate in a range of current social debates. I was used to being asked my opinion and commenting in the media. I expected to be invited to numerous official functions as I had become an expert at cutting ribbons and unveiling plaques! I had detailed itineraries planned months in advance and was used to travelling across the continent and overseas. I could make impromptu speeches on almost any topic and kept an anecdote book to lighten some of the prepared speeches that I had to deliver! How would I respond to a quieter life in regional Tasmania? Would I suffer from the condition Gareth Evans described when the Government became Opposition in 1996 … that is, the Relevance Deprivation Syndrome?

My first challenge in leaving the Senate was to keep in check my partisan view of political issues. After spending all those years asserting the philosophy and policies of the Australian Labor Party I found myself lecturing students at the University of Queensland where I knew I had a responsibility to present a balanced perspective and encourage open debate. I was teaching human rights and international politics so thought I would not necessarily stray into Australian politics. However I soon found myself praising the Howard Government's initiatives in East Timor and explaining my own party's failure over 20 years to protect the East Timorese.

Working in a university after life in Parliament highlighted the gulf that exists between these two institutions. When as a parliamentarian I was involved in public policy development there was limited referral to those whose focussed research may have enhanced practical policy implementation. Yet within academia itself I found there was equal lack of interest or misunderstanding about the challenges that parliamentarians face in finding solutions to complex issues. Too many academics appear to be so narrowly focussed on specific area of research that they are unable to contribute to public debate, but equally too many parliamentarian adopt such a generic view of the world that they fail to draw on the expertise available in our tertiary institutions. There should be a more proactive way to encourage a more realistic exchange that would be a great benefit to the community.

In each of my post-parliamentary roles I have been very aware and appreciative of the lessons I learned as a senator and a minister. I have seen first-hand how government and the Parliament function. I know the systems and processes and how to work at local, state, national and international levels. I understand the intricacies of lobbying effectively and how to use the media to get issues onto the political agenda. Anyone elected to the Parliament acquires this knowledge but it is not until we leave that we realise just how valuable it is. And certainly senators are particularly advantaged in having sat through many hours of Senate Estimates Hearings when we learn so much about government and the interdepartmental processes (or lack of them). I also found

the Senate Estimates processes especially educational in understanding the tensions between political and bureaucratic priorities.

My experience working in various communities has convinced me that we cannot boast about our status as an effective democracy until we succeed in engaging more citizens in its processes. This is especially important for young people and less advantaged citizens. All parliamentarians are concerned to create better understanding of our democratic institutions. Perhaps some may choose to take on that additional challenge when they leave the Parliament well equipped to enhance the level of understanding of Australia's democracy.

Question — What do you think of the idea of some sort of formal arrangement, as was suggested at the 2020 Summit, for drawing on not only retired politicians but people retired from other areas to act as mentors and so on in their particular areas?

Margaret Reynolds — I think it's a great idea and I remember reading about it after the 2020 Summit. I think that there is that tendency for each generation to try to bring about change and sometimes we succeed and sometimes we don't, and if we don't share the experience it just makes it harder for the next generation. So I certainly think that suggestion that came through at the 2020 Summit should be followed up on.

Question — You're talking about democracy and I think it's a bit like the tail wagging the dog. This occasion right now, on the news, where the senator took her baby into the Senate. She is pushing the envelope really, isn't she? It's not good to throw away all the old rules. I know the younger ones are pushing the envelope but they are trying to throw away everything. I really feel that she is doing more harm than good for females. She could have given the baby to someone else or not even have gone in. It annoyed me because I don't think that she is doing us any favours. It is the opposite actually. We can take some of these things that the younger people have given us and I have endorsed them myself, I have even learnt the computer and everything like that so I'm up with the modern times. But you have to keep some of the old.

Margaret Reynolds — Look, I think the particular experience in the Senate last night was divisive; some people have your view, others say well, why shouldn't she? The reality for those of us who know directly how the Senate works is that we know that there are standing orders and there are certain things you can do and there are certain things you can't do, and strangers can't be on the floor of the Senate because they haven't been elected. I think you need to have a little bit of flexibility if there is an emergency. Apparently there is now child care in Parliament House, that's wonderful, but you do need a little bit of flexibility if there is an emergency. I guess there wouldn't be too many parents who haven't had an emergency where they say: 'What will we do with the children?'

Question — Margaret, democracy only functions properly if the community is politically aware. I don't think the average Australian is particularly interested or aware of what goes on. What can we do about this?

Margaret Reynolds — My answer would be to ensure that real political education is in the curriculum of every school. It is in some areas, and it is done extremely well, but it is very much a hit and miss affair. I remember one of these youth parliaments that I ran in a particular school. You walk in, you don't know the children, you depend on the children to respond to you, and this little boy volunteered to be the President. I think we were doing a Senate that day, and he volunteered to be the President and with my help conduct question time. A teacher came up and put her hand on his shoulder and said: 'Oh Jimmy, you couldn't possibly do that.' I was absolutely floored. I didn't know what to do because the kid was crest-fallen and he had volunteered, and was I supposed to go against the teacher? So I said, 'Oh I'm sure we will manage together' and he became the President. He was great. He just needed that opportunity to show that he could make a contribution, but perhaps he was very bad at his arithmetic or whatever he was doing at school. We tend in too many classes to try to control and manage how children will respond.

I know there is a great concern about partisanship. This is one of the reasons I developed this model, because I used to think, how I can do it so that it's not about Labor, Liberal, National Party and Greens? That's why I developed this idea of a question time based on children's issues and understandings. I think we should do much more of that when they are very young and then gradually change it, obviously, so that they understand the various processes as they go through high school and into university. I can say that I basically agree with you, that it was only when I went back into a lot more community activity that I though, people don't understand what they have got, the value of our democracy and especially the cynicism really upsets me because it's also unfair. In politics you have debates and your arguments with people and there are some people you are more likely to agree with than others but once you get outside you do appreciate just how much work and how much commitment everyone who is elected is prepared to give.

Question — It has been commented by people in the Parliamentary Education Office that teachers are intimidated by the systems. It could be an example of that.

Margaret Reynolds — Teachers are very worried that they will be accused of being partisan and I know I got more invitations than perhaps I should have because teachers thought: 'Oh thank goodness, someone else can do this', and yet they were asking a Labor senator. The fact that I was a Labor senator was irrelevant because of the way we did it. I don't think party politics was mentioned.

Question — I would like to commend Margaret on her active life after politics. I think it's a terrific example. We do invest a lot of time and public money into members of Parliament; I think it's very creditable to you that you have gone on particularly with the democracy education and people's rights. You mentioned a fair go for people with disabilities. I think people knowing their rights is incredibly important, and so is having education that is relevant to young people and being able to work with people with disabilities and giving them a fair go. I would just like to express my admiration. I think you are doing a terrific job.

Margaret Reynolds — Thank you very much.

Question — I would just like to ask if you could reflect a bit more on how we include Australian citizens who are indigenous in our political conversations. There has been a lot of discussion about this around the intervention.

Margaret Reynolds — It's a very good question, and I have a very good example of how involved indigenous communities can be in something that directly affects them.

We get involved in the first place because, before we go into Parliament and represent other people, speak up for other people, we are engaged because we suddenly think of something that affects us or our families or someone close to us. We think: 'That's not fair', and we have got to do something about it; that is really what drives most people.

Now in terms of indigenous communities, a number of years ago there was an issue affecting indigenous communities, it related to native title legislation and at the time I was involved at the United Nations as a parliamentary representative with former Senator Kay Patterson. I went to visit a number of Aboriginal communities in North Queensland and the Northern Territory. I'd been at the United Nations where I was actually doing a bit of work on the Convention relating to indigenous people, the UN Convention. I thought to myself: 'How am I going to talk about this, the United Nations, something that affects people in these very isolated communities?' I got there, and one of the first questions from one of the community was, had I been talking about that 'paper about convention for indigenous people'. The language was not directly correct, whatever that means, but the awareness was there, because it was being debated in local communities.

I think we underestimate many remote communities, be they indigenous, be they remote in terms of geographic or educational levels. If people are concerned about issues that directly impact on them we should be able to involve them in the debate instead of making decisions for them. I don't think we are doing nearly enough in terms of 10 years on, 20 years on, in involving indigenous people in political debate. It's not that they are not interested; we are not listening.

Parliamentary Prayers and Section 116 of the Australian Constitution

Gonzalo Villalta Puig[*]

Introduction

Late last year, the Speaker of the House of Representatives, Mr Harry Jenkins MP, called for debate on the continuation of parliamentary prayers as the practice questions freedom of religion in Australia.[1] Indeed, standing orders require the Speaker of the House of Representatives and the President of the Senate to read a prayer for the parliament and the Lord's Prayer at the beginning of each sitting of the Parliament of the Commonwealth of Australia:

> Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the

[1] See M. Metherell, 'Lord, No: Leaders United Against Removal of Prayer', *Sydney Morning Herald*, 27 October 2008 http://www.smh.com.au/news/national/lord-no-leaders-united-against-removal-of prayer/ 2008/10/26/ 1224955854983.html; ABC Radio National, 'To The Advancement of Thy Glory', *Perspective*, 18 November 2008 http://www.abc.net.au/rn/perspective/stories/2008/2422035.htm; M. Cooper, 'New Calls to Ditch Parliamentary Prayer', *The Age* (Melbourne), 21 November 2008 http://www.theage.com.au/action/ printArticle?id=295195; S. Tudor and G. Villalta Puig, 'Why Prayers in Parliament Should Stop', La Trobe Opinions, 2008, http://www.latrobe.edu.au/news/ articles/2008/opinion/to-the-advancement-of-thy-glory-why-parliamentary-prayers-should-be-replaced. Note that, in the United Kingdom, the National Secular Society recently called on the House of Lords to scrap its equivalent prayers: http://www.secularism.org.uk/callfromnsstoscraphouseoflordspr.html.

> advancement of Thy glory, and the true welfare of the people of Australia.
>
> Our Father, which art in Heaven: Hallowed be Thy Name. Thy Kingdome come. Thy will be done in earth, as it is in Heaven. Give us this day our daily bread. And forgive us our trespasses, as we forgive them that trespass against us. And lead us not into temptation; but deliver us from evil: For Thine is the kingdom, and the power, and the glory, for ever and ever. Amen.[2]

However, under s 116 of the *Constitution*, the Commonwealth shall not make any law 'for imposing any religious observance'. This article examines the constitutionality of parliamentary prayers.

Section 116 and the express right to freedom of religion

Michael Hogan writes:

> The constitutional standing of the relationship between church and state in Australia is a unique mixture of elements derived from a British Constitution and tradition of law, from a superimposed American principle of separation, and from the evolving pattern of Australian federalism and judicial interpretation.[3]

Text of Section 116

The text of the preamble to and s 116 of the *Constitution* combine the unique mixture of elements that Hogan refers to. The preamble to the *Constitution* reads like a 'constitutional obeisance to God'.[4] It states:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth.[5]

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2 House of Representatives Standing Order 38. The current version of the House of Representatives standing orders are available online at http://www.aph.gov.au/house/pubs/standos/index.htm. In the Senate, the first prayer is in different and longer terms: 'Almighty God, we humbly beseech Thee to vouchsafe Thy special blessing upon this Parliament, and that Thou wouldst be pleased to direct and prosper the work of Thy servants to the advancement of Thy glory, and to the true welfare of the people of Australia.' See Senate Standing Order 50. The current version of the Senate standing orders are available online at http://www.aph.gov.au/Senate/pubs/standing_orders/index.htm.

3 M. Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution', *Australian Quarterly*, vol. 53, no. 2, 1981, p. 214.

4 T. Blackshield, 'Religion and Australian Constitutional Law' in P. Radan, D. Meyerson and R.F. Croucher (eds), *Law and Religion: God, the State and the Common Law*. London, Routledge, 2005, p. 82.

5 Emphasis added.

Yet, s 116 of the *Constitution* is akin to a constitutional guarantee of freedom of religion. It states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Thus, s 116 of the *Constitution* comprises four clauses. First, '[t]he Commonwealth shall not make any law for establishing any religion'. Secondly, the Commonwealth shall not make any law 'for imposing any religious observance'. Thirdly, the Commonwealth shall not make any law 'for prohibiting the free exercise of any religion'. Fourthly, 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

Formation of Section 116

The unique mixture of elements that the preamble and s 116 combine was the subject of debate over the course of the final session of the National Australasian Convention held at Melbourne in March 1898.[6] Patrick Glynn of South Australia moved to insert the words 'humbly relying on the blessing of Almighty God' in the preamble as it 'would recommend the *Constitution* to thousands to whom the rest of its provisions may for ever be a sealed book'.[7]

Henry Higgins of Victoria opposed the motion.[8] He thought that the reference to 'Almighty God' in the preamble could imply a power in the Commonwealth Parliament to make laws with respect to religion.[9] Thus, he moved to insert the four separate guarantees in s 116 as 'proper safeguards'.[10] The first three guarantees were a derivation of the First Amendment to, and Art VI, cl 3 of, the United States *Constitution*.[11] The fourth guarantee was an original formulation.[12]

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6 Blackshield, 2005, op. cit., p. 81. See also R.G. Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906*. Clayton, Vic., Melbourne University Press, 1976, esp Ch 11; C.L. Pannam, 'Travelling Section 116 With a US Road Map' (1963) 4 MULR 41 at 51–56; S. McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 Mon LR 207 at 217–221; J. Puls, 'The Wall of Separation: Section 116, The First Amendment and Constitutional Religious Guarantees' (1998) 26 Fed LR 139 at 140–141. See generally F.D. Cumbrae-Stewart, 'Section 116 of the Constitution' (1946) 20 ALJ 207.

7 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January to 17 March 1898, vol. v, p. 1732 (The Debates of the Federal Conventions are available online at http://www.aph.gov.au/senate/pubs/records.htm.); see also McLeish, op. cit., p. 220.

8 Blackshield, 2005, op. cit., pp. 81–2.

9 Ibid, pp. 82–4. See also Puls, 2005, op. cit., p. 140; McLeish, 2005, op. cit., at 220; Pannam, 2005, op. cit., at 53–5.

10 Ely, 2005, op. cit., pp. 58–9. See also McLeish, 2005, at 219–20.

11 See generally Pannam, 2005, op. cit., at 41; J.T. Richardson, 'Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia' (1995) 18 UQLJ 183; Puls, op. cit., p. 139. In the United States of America the decision in *Marsh v Chambers* 463 US 783 (1983) upheld the constitutionality of (non-sectarian) legislative prayer. See also

Interpretation of Section 116

The High Court has interpreted only two of the four guarantees in s 116, namely, the 'free exercise' clause and the 'establishment' clause.

The High Court has interpreted the 'free exercise' clause narrowly.[13] Therefore, the High Court seeks to assess whether the Commonwealth law under challenge unduly infringes the right to the free exercise of religion. As part of that assessment, the High Court may take the general interest into account. In that regard, the High Court considers that a Commonwealth law of general application cannot infringe the right to the free exercise of religion.[14] The rationale is that a law requiring an act or omission that has nothing at all to do with religion is not tantamount to a law prohibiting the free exercise of religion. Correspondingly, the High Court considers that the right to the free exercise of religion is not absolute because religion is so broad a political and ethical concept that it is liable to be misinterpreted to include objectionable, if not otherwise illegal, rituals and practices.

The High Court has developed this line of argument over the four cases that, to date, it has decided on the 'free exercise' clause. In *Krygger v Williams* (1912) 15 CLR 366 at 369, Griffith CJ held:

> Sec 116 of the *Constitution* provides that 'the Commonwealth shall not make any law for … prohibiting the free exercise of any religion'—that is, prohibiting the practice of religion—the doing of acts which are done in the practise of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116.[15]

Hinrichs v Bosma 440 F 3d 393 (7th Cir, 2006). For some recent commentary see: R.J. Delahunty, ' "Varied Carols": Legislative Prayer in a Pluralist Polity' (2007) 40 Cre LR 517; R. Luther III, and D.B. Caddell, 'Breaking Away from the "Prayer Police": Why the First Amendment Permits Sectarian Legislative Prayer and Demands a "Practice Focused" Analysis' (2008) 48 Santa Clara L Rev 569; A. Abrell, 'Just a Little Talk with Jesus: Reaching the Limits of the Legislative Prayer Exception' (2007) 42 Val UL Rev 145. While consideration of the US case law is beyond the scope of this article, the fact is that the application in Australia of the relevant US constitutional principles is limited. The religion clauses in the US *Constitution*'s First Amendment are, at once, both textually narrower than s 116 (there is no prohibition on 'imposing any religious observance') and jurisprudentially broader than s 116, since they have given rise to a distinct and much more rigorous separation of state and religion than is true in Australia.

12 Blackshield, 2005, op. cit., p. 85.

13 T. Blackshield and G. Williams, *Australian Constitutional Law and Theory: Commentary and Materials*. 4th ed., Annandale, NSW, Federation Press, 2006, p. 1207.

14 See generally R. Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin?' (1994) 17 UNSWLJ 409 at 422.

15 Curiously, in *Judd v McKeon* (1926) 38 CLR 380, Higgins J questioned the rationale in *Krygger v Williams* (1912) 15 CLR 366. In the decision, which concerned compulsory voting,

Since its decision in *Krygger v Williams*, the High Court has continued to interpret the 'free exercise' clause narrowly. In *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 132 (*Jehovah's Witnesses Case*), Latham CJ held that it is 'possible to reconcile religious freedom with ordered government':

> Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?
>
> It has already been shown that beliefs entertained by a religious body as religious beliefs may be inconsistent with the maintenance of civil government. The complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil …
>
> The word 'free' is used in many senses, and the meaning of the word varies almost indefinitely with the context. A man is said to be free when he is not a slave, but he is also said to be free when he is not imprisoned, and is not subject to any other form of physical restraint. In another sense a man is only truly free when he has freedom of thought and expression, as well as of physical movement. But in all these cases an obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom …
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> [I]n 1900 it had been thoroughly established in the United States that the provision preventing the making of any law prohibiting the free exercise of religion was not understood to mean that the criminal law dealing with the conduct of citizens generally was to be subject to exceptions in favour of persons who believed and practised a religion which was inconsistent with the provisions of the law. The result of this approach to the problem has been the development of the principle which has been applied in the later cases … according to which it is left to the court to determine whether the freedom of religion has been *unduly* infringed by some particular legislative provision. This view makes it possible to accord a real measure of practical protection to religion without involving the community in anarchy.
>
> There is, therefore, full legal justification for adopting in Australia an interpretation of s 116 which had, before the enactment of the Commonwealth *Constitution*, already been given to similar words in the United States. This interpretation leaves it to the court to

his Honour suggested that a religious duty not to vote would be 'a valid and sufficient reason' for refusal to do so under s 116. See Blackshield, 2005, op. cit., p. 87.

> determine whether a particular law is an undue infringement of religious freedom.[16]

The case of *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 (*Scientology Case*) did not concern s 116 but, nonetheless, the judgment by Mason ACJ and Brennan J is relevant to the interpretation of the section. Their Honours held:

> the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them … Religious conviction is not a solvent of legal obligation …
>
> Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, ie if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.[17]

More recently, in *Kruger v Commonwealth* (1997) 190 CLR 1 at 40 (*Stolen Generations Case*), Brennan CJ held that '[t]o attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids'.[18] Gaudron J added:

> a law will not be a law for 'prohibiting the free exercise of any religion', notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need. Nor will it have that purpose if it is a law for some specific purpose unconnected with the free exercise of religion and only incidentally affects that freedom.[19]

The High Court has interpreted the 'establishment' clause narrowly too. Thus, to the High Court, s 116 only prohibits the Commonwealth from making laws that

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16 *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 126–127, 130–131 (*Jehovah's Witnesses Case*).

17 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 135–136 (Mason ACJ and Brennan J) (*Scientology Case*).

18 See generally N. Watson, 'A Denial of Religious Freedoms: Section 190C(3) of the Native Title Act' (2001) 5(7) ILB 4.

19 *Kruger v Commonwealth* (1997) 190 CLR 1 at 133–134 (Gaudron J) (*Stolen Generations Case*).

set up any religion as the official religion of the State.[20] However, Commonwealth laws may still favour one religion over another.

In *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (*DOGS Case*), the only significant High Court decision to interpret the 'establishment' clause, Barwick CJ held that:

> establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic … It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of … the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth 'establishment'.[21]

In similarly narrow terms, Mason J added:

> the first clause in the section forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution … [T]o constitute 'establishment' of a 'religion' the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.[22]

Much of the jurisprudence on s 116 relates to the 'free exercise' and 'establishment' clauses and so there is little, if any, judicial commentary on the other two clauses of the section.[23] The High Court has not interpreted the 'religious test' clause except to reject, in an unreported decision, a challenge under s 44(i) to the election of a Roman Catholic to the House of Representatives in 1949 on the grounds that he was under acknowledgment 'of allegiance, obedience, or adherence to a foreign power', presumably, the Holy See. In *Crittenden v Anderson* (1950) 51 ALJ 171,[24] Fullagar J held that the challenge

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20 See generally Mortensen, op. cit., p. 421.

21 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 582 (Barwick CJ) (*DOGS Case*).

22 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 612 (Mason J) (*DOGS Case*).

23 Hogan, op. cit., p. 219. Murphy J, in sole dissent, briefly discussed the application of s 116 to oath-taking requirements in *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 229ff. His Honour held that the *Royal Commissions Act 1902* (Cth) infringed s 116 insofar as it required that a witness before a Royal Commission take an oath or, if he or she conscientiously objected, make an affirmation. He observed (at 229) that '[t]he mandate against laws imposing any religious observance protects believers as well as non-believers; it may be a more serious interference with the freedom of religion to impose a religious observance on believers than on non-believers.' The other judges did not address this issue.

24 See generally G. Carney, 'Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification' (1999) 11 Bond LR 245.

was tantamount to the requirement of a religious test as a qualification for public office and, therefore, contrary to s 116. To date, the High Court has not authoritatively interpreted the 'religious observance' clause.

In summary, the High Court has interpreted s 116 narrowly because it has read it as a regulator of Commonwealth legislative power rather than as a guarantee of an individual civil right.[25] The High Court has found further justification for its narrow approach in the limited jurisdiction of s 116, which does not apply to the States even though it is in Ch V (The States) of the *Constitution*,[26] and in the text of the section, which by the preposition 'for' directs the High Court to assess the purpose as opposed to the effect of the law under challenge.

The Constitutionality of Parliamentary Prayers under Section 116

Indeed, the text of s 116 in conjunction with its narrow interpretation by the High Court would make a hypothetical claim of unconstitutionality against parliamentary prayers untenable, for four reasons.

First, s 116 is directed to the 'Commonwealth'. The High Court could interpret the word 'Commonwealth' in s 116 as a reference to any institution of the Commonwealth and, therefore, include not only the legislature but also the Executive and the judiciary. On that interpretation, the High Court could hold that the Commonwealth, under s 116, includes either House of Parliament, namely, the Senate and the House of Representatives.

However, the High Court would be unlikely to adopt such a wide interpretation of the word 'Commonwealth'. The academic consensus is that s 116 does not apply to either the Executive or the judiciary. In relation to the Executive, Hogan writes:

> executive acts of the Commonwealth government are not restricted by this section. It is quite easy to imagine … a determined government avoiding the restraints of s 116 by its powers of appointment and by ministerial advice to government agencies.[27]

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25 In the *DOGS Case* (1981) 146 CLR 559 at 614–615, Mason J stated: 'Although in some circumstances it is permissible to construe a grant of legislative power so as to apply it to things and events coming into existence and unforeseen at the time of the making of the *Constitution*, so that the operation of the relevant grant of power in the *Constitution* enlarges or expands, a constitutional prohibition must be applied in accordance with the meaning which it had in 1900. As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the *Constitution* was enacted.' See also McLeish, 1972, op. cit., pp. 208, 211; S. McLeish, 'Church and State' in T. Blackshield, M. Coper and G. Williams (eds), *The Oxford Companion to the High Court of Australia.* South Melbourne, Vic., Oxford University Press, 2001, pp. 93, 95.

26 There is uncertainty as to whether s 116 applies to the Territories: *Stolen Generations Case* (1997) 190 CLR 1. See generally H.T. Gibbs, 'Section 116 of the Constitution and the Territories of the Commonwealth' (1947) 20 ALJ 375; C.L. Pannam, 'Section 116 and the Federal Territories' (1961) 35 ALJ 209.

27 Hogan, op. cit., p. 222.

In relation to the judiciary, James Richardson writes:

> In one clear demonstration of the weakness of s 116, apparently the provisions were not even thought of as binding on judicial orders. In 1982 a case involving a custody dispute resulted in a High Court statement that s 116 did not bind the Court.[28]

Given the exclusion of the Executive and judicial arms of government from the jurisdiction of s 116, it would be unlikely that the High Court would extend the operation of the section to the department of any individual House of Parliament even if, collectively, the two Houses articulate the legislative arm of the Commonwealth Government. It seems then that the High Court would not read the word 'Commonwealth' in s 116 as a reference to the Houses of Parliament in any capacity other than as makers of law.

Secondly and correspondingly, given that s 116 is directed to 'law', it follows that the High Court would be unlikely to accept that the word includes standing orders made under s 50 such as those that require the reading of parliamentary prayers. On a narrow interpretation, the likelihood would be even lower than stated as the High Court would hold that the word can only ever refer to statutes made by Parliament to the exclusion of any other instrument of law such as standing orders.

On a wide interpretation, the principle of administrative law that delegated legislation is valid only to the extent to which it is authorised by the empowering law[29] could be influential enough for the High Court to hold that the powers under s 50 are powers that the *Constitution* itself delegates to the Houses of Parliament. On that interpretation, the High Court could confer on standing orders a status higher than that of delegated legislation perhaps even equivalent to that of legislation under s 51. However, notwithstanding any theoretical merit of that interpretation, in practice, the High Court could never reconcile the word 'laws' in s 116 with what are, ultimately, rules and orders with respect to the order and conduct of parliamentary business and proceedings subject only to parliamentary privilege.[30]

Thirdly, even if the import of the words 'Commonwealth' and 'laws' in the text of s 116 were not an obstacle, only two of the four clauses of s 116 could potentially ground a hypothetical claim of unconstitutionality against parliamentary prayers. The 'establishment' clause is only concerned with Commonwealth laws that set

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28 Richardson, op. cit., p. 198.

29 *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381 at 381 (Lockhart J). See generally R. Douglas and M. Jones, *Douglas and Jones' Administrative Law*. 5th ed, Annandale, NSW, Federation Press, 2006.

30 Contra *Jehovah's Witnesses Case* (1943) 67 CLR 116 at 123 (Latham CJ) but see below. This particular line of argument was briefly but directly addressed in the Senate debate of 14 June 1901 on the motion to adopt the standing order containing the prayer. As Ely recounts the debate (Ely, op. cit., pp. 123–4), Senator Gregor McGregor (Labor Senate leader) argued that s 116 would preclude parliamentary prayers. 'What did the framers of the *Constitution* mean?' he asked. 'Did they mean that Parliament was not to impose religious observances anywhere else but here?' In reply, Senator Sir Frederick Sargood stated that '[a] standing order is not a law', so s 116 did not apply.

up any religion as the official religion of the State. Standing Orders 38 and 50 do not do so. They do prescribe Christian prayers but even that favouritism would be constitutional.[31] The 'religious test' clause is simply not relevant: parliamentary prayers are not intended as religious tests.

The two other clauses of s 116 could, with some difficulty, ground a hypothetical claim of unconstitutionality against parliamentary prayers. The 'free exercise' clause relates to Commonwealth laws that unduly infringe the right to the free exercise of religion. Arguably, the prescription of Christian prayers could have an effect tantamount to an insult to members of Parliament who follow other religious traditions or who are agnostic or otherwise atheist. However, the High Court has interpreted the clause so narrowly that the lack of a purpose on the face of Standing Orders 38 and 50 with the express intent to infringe the right to the free exercise of religion would prompt the High Court to dismiss a claim of unconstitutionality. The High Court would not consider their effect.[32]

The 'religious observance' clause would be the most appropriate basis for a hypothetical claim of unconstitutionality against parliamentary prayers. The difficulty is that the High Court has never interpreted the clause. Accordingly, the High Court would tend to follow the narrow approach that it has taken to the interpretation of the three other clauses of s 116. In the absence of any precedent, the extent of judicial narrowness is uncertain. In one extreme, the High Court could refer to the Convention Debates and, in deference to the intention of the framers, hold that the clause only forbids the Commonwealth from making Sunday observance laws. In another extreme, the High Court could hold that the prescription of Christian prayers goes against the contemporary and socially acceptable sense of the clause and that, therefore, Standing Orders 38 and 50 are unconstitutional. However narrow an approach it takes, the High Court would still dismiss the claim if, as is likely, it does not accept standing orders as 'laws' and either individual House of Parliament as 'Commonwealth' for the purposes of s 116.

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31 Section 116 does not prohibit the Commonwealth from favouring one religion over another through, eg school funding: *DOGS Case* (1981) 146 CLR 559.

32 See generally *DOGS Case* (1981) 146 CLR 559; *Stolen Generations Case* (1997) 190 CLR 1. In the *Stolen Generations Case*, Gaudron J stated (at 132): 'The use of the word "for" indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity.' See also Blackshield, 2005, op. cit., p. 85. Compare this interpretation to the situation in Canada, with its *Canadian Charter of Rights and Freedoms*. There the test for constitutionality (under *R v Big M Drug Mart Ltd* [1985] 1 SCR 295) requires the court first to consider the purpose of the legislation in question and then, if the purpose appears to be constitutional, to consider its effect. The Court of Appeal for Ontario applied this test in *Freitag v Penetanguishene Town* (1999) 179 DLR (4th) 150; 47 OR (3d) 301. Mr Freitag, a non-Christian, regularly attended his local town council meetings but objected to the practice of commencing the meetings with the Lord's Prayer. The Court of Appeal applied the *Big M Drug Mart* test to the town council meeting procedure (as 'governmental conduct' within the scope of the *Canadian Charter of Rights and Freedoms*), and found that, in both its purpose and effect, the practice of the prayer did infringe Mr Freitag's right to freedom of religion under the *Canadian Charter of Rights and Freedoms*. Such a result would not be possible in Australia under current s 116 jurisprudence, even if s 116 applied to town council meeting procedure.

Fourthly and finally, irrespective of the text of s 116 and its narrow interpretation by the High Court, the convention is that, under s 49, the Commonwealth Parliament orders and conducts its business and proceedings in accordance with Westminster practice and is very much left to administer and manage itself subject only to parliamentary privilege and s 50. Accordingly, the High Court has refused to limit the unlimited discretion of either House of Parliament to order and conduct its business and proceedings under ss 49 and 50 of the *Constitution*. This was the sentiment of the Privy Council in *Harnett v Crick* [1908] AC 470 when his Majesty in Council resolved that '*no Court of law can question the validity of a standing order* duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion'.[33] Three years later, Griffith CJ in *Osborne v Commonwealth* (1911) 12 CLR 321 agreed. Writing about the Houses of Parliament, his Honour stated that the 'conduct of their internal affairs is not subject to review by a court of law'.[34] In that same case, O'Connor J said '[t]his Court … can … in [no] way interfere in questions of parliamentary procedure.'[35] Standing Orders 38 and 50 would be no exception.

Section 116 and the implied right to freedom of thought and conscience

Parliamentary prayers may well be constitutional but they should not be. In fact, the Commonwealth, as a democratic polity, should not sponsor any religion. Any such sponsorship offends against the accustomed community rights of a majority of Australians who believe that the *Constitution* protects the right to freedom of thought and conscience just like it protects other civil and political freedoms.[36] It is not a mistaken belief. As Tony Blackshield and George Williams note:

> the *Constitution* contains, by implication, a commitment to certain fundamental freedoms or democratic values operating as judicially enforceable limits on the legislative powers of the Commonwealth, and perhaps on those of the States as well.[37]

It is then up to the High Court to give judicial expression to that belief and imply a right to freedom of thought and conscience in s 116.[38] Thus, the High Court should no longer interpret s 116 as a regulator of Commonwealth legislative power but as a guarantee of an individual civil right.[39] The rationale is fourfold.

First, the implication of a constitutional right would not be without precedent. The High Court has, in recent times, moved towards a rights-based interpretation of the *Constitution*.[40] The freedom of political communication in *Nationwide News*

33 *Harnett v Crick* [1908] AC 470 at 476 (emphasis added).

34 *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 (Griffith CJ). See generally G. Carney, 'Intervention in Parliamentary Process' in Blackshield et al, 2001, op. cit., pp. 523–5.

35 *Osborne v Commonwealth* (1911) 12 CLR 321 at 355 (O'Connor J).

36 Hogan, op. cit., p. 227.

37 Blackshield and Williams, 2006, op. cit., p. 1291.

38 Puls, op. cit., p. 162.

39 McLeish, op. cit., p. 210.

40 Puls, op. cit., p. 161.

Pty Ltd v Wills (1992) 177 CLR 1 (*Free Speech Case*) is but only one example.[41] There are others. Joshua Puls reports that '[b]etween 1990 and 1993 the High Court handed down twelve decisions all of which had some form of rights considerations'.[42]

Secondly, there is already enough High Court commentary on s 116 to ground an implied right to freedom of thought and conscience. As early as 1943, Latham CJ in the *Jehovah's Witnesses Case* stated:

> The prohibition in s 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion … Section 116 proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion.[43]

More recently, in the *Scientology Case*, Mason ACJ and Brennan J asserted, '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'.[44] The case considered exemptions from pay-roll tax and, therefore, was not on s 116. Nonetheless, the assertion by their Honours is relevant to the argument for an implied right to freedom of thought and conscience.

Interestingly, there is also judicial commentary to the effect that s 116 is an overriding provision applicable to all instruments of law. In the *Jehovah's Witnesses Case*, Latham CJ declared:

> *Section 116 is a general prohibition applying to all laws, under whatever power those laws may be made.* It is an overriding provision. It does not compete with other provisions of the *Constitution* so that the Court should seek to reconcile it with other provisions. It prevails over and limits all provisions which give power to make laws. Accordingly no law can escape the application of s 116 simply because it is a law which can be justified under ss 51 or 52, or under some other legislative power. All the legislative powers of the Commonwealth are subject to the condition which s 116 imposes.[45]

Such a statement may suffice to persuade the High Court to extend a possible implied right to freedom of thought and conscience to all Commonwealth instrumentalities, including standing orders.

Thirdly, the Convention Debates reveal that State neutrality towards religion (which involves, arguably, the 'establishment' rather than the 'free exercise'

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41 See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*Political Advertising Case*).

42 Puls, op. cit., p. 161.

43 *Jehovah's Witnesses Case* (1943) 67 CLR 116 at 123 (Latham CJ).

44 *Scientology Case* (1983) 154 CLR 120 at 130 (Mason ACJ and Brennan J).

45 *Jehovah's Witnesses Case* (1943) 67 CLR 116 at 123 (Latham CJ) (emphasis added). See also Puls, op. cit., p. 142.

clause) was the intention. Before *Cole v Whitfield* (1988) 165 CLR 360, the High Court had seldom sponsored the use of primary sources, like the Convention Debates, as an interpretative aid. Since that decision, the High Court can refer to the Convention Debates in an attempt to discover the ambitions that the founders of the Commonwealth had for the *Constitution*:

> Reference to the history of [the section] may be made, not for the purpose of substituting for the meaning of the words used the scope and effect–if such could be established–which the founding fathers subjectively intended the section to
>
> have, but for the purpose of identifying the contemporary meaning of language used, the subject to which the language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged.[46]

The Convention Debates reveal that the delegates inserted s 116 'to restore the equilibrium upset' by the reference to Almighty God in the preamble. Stephen McLeish agrees that 'the delegates were seeking a balance in matters of religion across the community, in keeping with the historical desire to avoid sectarian disputes in public life.' He concludes:

> underlying s 116 there exists a general conception of state neutrality toward religion, reflected both in the avoidance of religious preferences and in respect for the autonomy of individuals in matters of religion, especially as participants in the wider community.[47]

Fourthly, the Convention Debates also reveal that the use of the preposition 'for' in the text of s 116, which has been the justification of the High Court for its narrow interpretation of the section, 'was done only for the sake of clear grammatical structure'. The original formulation that Higgins had proposed only relied on the preposition once and only with respect to the 'establishment' clause. However, the drafting committee repeated the preposition in the three other clauses.[48]

As a result, it is the practice of the High Court to assess the purpose rather than the effect of a law in apparent contravention of s 116.[49] The equivalent if not identical provision in the United States *Constitution* has a wider scope than s 116 only because the wording of it uses no such preposition.[50]

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46 *Cole v Whitfield* (1988) 165 CLR 360 at 385. See, generally, G. Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution.* Sydney, Lawbook Co, 2008.

47 McLeish, op. cit., p. 223.

48 Blackshield, 2005, op. cit., p. 85.

49 See generally *DOGS Case* (1981) 146 CLR 559; *Stolen Generations Case* (1997) 190 CLR 1.

50 Blackshield, 2005, op. cit., p. 85; Puls, op. cit., p. 143; McLeish, op. cit., p. 93. In *DOGS Case* (1981) 146 CLR 559 at 579, Barwick CJ remarked: 'The divergence in language to which I have earlier referred is apparent from the use of the word "respecting" in the American text and the word "for" in s 116. What the former may fairly embrace, quite clearly the latter cannot: and that is so, in my opinion, even without placing critical significance on the

The High Court should, therefore, correct the editorial mistake that the drafting committee introduced into the text of s 116, and it should correct it through an implied right to freedom of thought and conscience concerned not so much with the purpose but with the effect of the law under challenge. That is, in any event, the approach that the High Court follows in its rights-based jurisprudence such as in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*Political Advertising Case*). That approach is one 'which sees the application of constitutional rights as more a matter of weighing or balancing of competing interests and less a process of finding the 'true nature' of the law under challenge'.[51] Section 116 might allow parliamentary prayers but an implied right to freedom of thought and conscience (perhaps) would not.[52]

Conclusion

In conclusion, the right to freedom of religion under s 116 does not apply to the standing orders that require the Speaker and President to read prayers on taking the chair. Parliamentary prayers may well be constitutional but they should not be. The Commonwealth, as a democratic polity, should not sponsor any religion. Any such sponsorship offends against the accustomed community rights of a majority of Australians who believe that the *Constitution* protects the right to freedom of thought and conscience just like it protects other civil and political freedoms.

This article, therefore, calls on the High Court to give judicial expression to that belief and imply a right to freedom of thought and conscience in s 116. The High Court should no longer interpret s 116 as a regulator of Commonwealth legislative power but as a guarantee of an individual civil right concerned not so much with the purpose but with the effect of the law under challenge.

purposive nature of the Australian expression and the lack of such an element in the American text.'

51 A. Glass, 'Freedom of Speech and the Constitution: Australian Capital Television and the Application of Constitutional Rights' (1995) 17 Syd LR 29 at 32. See also Puls, op. cit., p. 162.

52 Note that an action under s 116 would only proceed if the plaintiff could establish his or her standing and the justiciability of the action. First, standing in this kind of actions may be difficult to establish for two reasons. One, the defendant may argue that the standing orders do not affect the plaintiff's rights and do not alter his or her ability to do anything. Two, only a member of Parliament or a senator would have standing to sue. Secondly, the court may decide that the question of parliamentary prayers is not justiciable on grounds of judicial deference to parliamentary practice irrespective of the standing of the plaintiff.

Donald James Cameron: Senator for Victoria, 1938–1962*

Graeme Osborne

As a young man in Melbourne, Don Cameron, replete with red tie, could be seen boating on the Yarra. Sixty when he took his seat in the Senate in 1938, he left reluctantly in 1962, at eighty-four the oldest man in the federal Parliament, compelled by ill health to abandon plans for a fifth term. Once described as a 'mild chap' with an 'engaging character', he was genial, courageous, sometimes prudish, and was respected for his steadfastness and competence, and his focus on issues rather than personalities. Widely read in current affairs, philosophy and the social sciences, especially economics, with an extraordinary gift for involvement and hard work, he entered Parliament with a varied life experience behind him.

He had been a printer, plumber, contractor, prospector, soldier, wharf labourer, carpenter, journalist, editor, seaman, cook, trade union and Labor Party official, and socialist organiser. Overall, he possessed a 'lifelong devotion to the classical teachings of socialism', the ideals of which formed the basis of his political philosophy in the union movement and in the Senate, but which at times led to political ambivalence.[1]

Donald James Cameron was born in North Melbourne (then Hotham), Victoria, on 19 January 1878, the first child of Alexander Cameron (a Glaswegian slater) and Mary

[1] Victor Courtney, *All I May Tell: a Journalist's Story*. Sydney, Shakespeare Head Press, 1956, p. 50; *Sun-Herald* (Sydney), 10 July 1960, p. 57; *Herald* (Melbourne), 20 August 1962, p. 3; *Argus* (Melbourne), 17 August 1951 (supp.), p. 1.

Ann, née Nairn. He attended City Road State School and, thereafter, South Melbourne College, leaving at fourteen to begin a printing apprenticeship. In 1919 he recalled spending 'most of his early boyhood days in the Gippsland bush' and being initiated into 'wage-slavery', working for Melbourne plumbers and slaters (one of whom was his father). In 1895 he went prospecting on the Western Australian goldfields. Unsuccessful, he completed his apprenticeship in Coolgardie (then a 'brawling frontier town in the grip of a gold boom') on the *Coolgardie Miner*. There, in 1896, he participated in his first strike, claiming later to have concluded that such actions can result from 'unnecessarily provocative or stupidly incompetent management'. He remained in Western Australia, working in a variety of occupations until 1899, when he returned to Melbourne and married New Zealand-born Georgina Eliza Werrin, on 26 April 1899, according to Free Christian Church rites.

Between 1901 and 1902 Cameron was a volunteer in the Boer War with the 5th (Victorian) Mounted Rifles. Wounded, and thereafter carrying a bullet in his thigh, it was, he stated later, the 'turning point' that revealed to him in 'language written in the sufferings and blood of men, women and children, what capitalism … stood for' and led him to lifelong opposition to conscription. During World War I he was a leader in the anti-conscription cause, becoming president of the Western Australian Anti-Conscription League during the Labor Party split. He was a persistent campaigner, often pursued by mobs. One of his sons recalled him coming home one Sunday afternoon 'during the [conscription] campaign, hatless, his clothes torn and suffering from the physical violence caused by … soldiers who attacked him' after a meeting.[2] Cameron entered the labour movement through trade unionism, after he and his young family moved to Western Australia in 1903. He became permanent secretary of the Plumbers' Union in 1912 and part-time secretary of several other unions. He represented the plumbers on the Metropolitan District Council and attended interstate union conferences, finally returning to Melbourne in 1919. On his departure from the West the *Westralian Worker* commented that 'few … can equal Don as a rough-and-ready propagandist.' He possessed 'a virile personality', and was 'endowed with … fine qualities as a comrade and a man.' From serving as the Marine Stewards Union delegate to the Melbourne Trades Hall Council he went on to become, in 1927, a foundation member of the Australian Council of Trade Unions. He was president of the Melbourne Trades Hall Council from 1930 to 1931 and assistant secretary from 1933 to 1938.

Cameron's socialism had begun after his Boer War experience and developed in Western Australia before and during World War I. At a farewell organised by the Social Democratic League in Perth, he was described as 'the most striking personality … W. A. had produced'. After his return to Victoria in 1919 as organiser to the Victorian Socialist Party (VSP), he became the VSP's general secretary (1920–32) and editor of the *Socialist* (1920–23). Cameron found the group in decline. Unfettered

[2] Graham Dunkley, 'Cameron, Donald James', *Australian Dictionary of Biography*, vol. 7; *Westralian Worker* (Kalgoorlie), 7 February 1919, p. 6; *Labor Call* (Melbourne), 1 November 1917, p. 8; *Commonwealth Parliamentary Debates* (henceforth *CPD*), 9 March 1950, p. 556; D.J. Murphy (ed.), *Labor in Politics: the State Labor Parties in Australia 1880–1920*. St Lucia, Qld, UQP, 1975, p. 369; *Westralian Worker* (Kalgoorlie), 24 January 1919, p. 4; *Punch* (Melbourne), 26 February 1925, p. 23; Biographical sketch, Cameron Papers, MS 1005, box 5/31, National Library of Australia (NLA).

internationalism, implying opposition to the White Australia policy, ran counter to Cameron's sense of what was required by Australian labour, and the ailing VSP was wound up finally in 1932. At the 1937 ACTU Congress he demonstrated his continuing retreat from international socialism when he moved an isolationist amendment expressing suspicion of Russian policy and of the League of Nations. In his 1958 history of the VSP, he confirmed his preference for evolutionary rather than revolutionary socialism when he lauded English socialist Fred Henderson for his view that socialists were persuaders, whose aim was to encourage, not impose, socialism.[3]

Equally active in the ALP in Western Australia and in Victoria, having survived an expulsion attempt in 1910 in Western Australia, he attended his first interstate Political Labor Conference in 1915 in Adelaide. In 1917 he was defeated as a Labor candidate for the Western Australian Legislative Assembly seat of Canning. He was a member of the Victorian state executive from 1928 to 1949, Victorian branch president in 1932, and a Victorian delegate to federal conferences from 1934 to 1948. He stood unsuccessfully for the federal seat of Balaclava in 1929, the Senate in 1931 and at a by-election for Fawkner in 1935. In 1932 Cameron became one of the two Victorian delegates on the Federal Executive, a position he held until instructed by the Victorian executive to resign in 1934. He was at the epicentre of the anti-Scullin/pro-Lang movement in Victoria that helped to bring down the Scullin Government. It was, therefore, as seasoned anti-conscriptionist, labour movement veteran, and outspoken democratic socialist that Cameron won his way into the Senate in the 1937 general election (from second position on the Victorian Labor ticket). He took his seat in July 1938. He was re-elected at the general elections of 1943, 1949, 1951 and 1955.[4]

The Cameron who entered Parliament in 1938 had travelled a hard road. The fresh-faced, lean, blue-eyed, dark-haired Boer War volunteer was no longer. Now a stocky veteran with a shock of grey hair topping a face lined by years of industrial and political combat, in photographs he stared unsmiling at a world poised to plunge once again into an armed conflict that would demand further sacrifices from workers still recovering from the Depression. His opponents soon learnt that the newcomer was not easily intimidated. Quick to grasp and use standing orders, he was equally capable of gently-mocking irony, biting critique, reasoned debate, or lengthy recitations of well-researched facts and statistics gleaned from voracious reading. In April 1940 Cameron silenced interjectors with the observation:

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3 George Crawford, *Footprints: History of the Plumbers' Union*. Beaumaris, Vic., George Crawford, 1997, pp. 22–4; *Westralian Worker* (Kalgoorlie), 7 February 1919, p. 6; 7 March 1919, p. 2; 21 February 1919, p. 5; *Labor Call* (Melbourne), 4 June 1931, p. 5; *Westralian Worker* (Kalgoorlie), 14 February 1919, pp. 5, 6; Robin Gollan, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920–1955*. North Sydney, George Allen & Unwin, 1975, pp. 41, 42; Frank Farrell, *International Socialism and Australian Labour: the Left in Australia 1919–1939*. Sydney, Hale & Iremonger, 1981, pp. 91–2, 100, 127, 203; Letters, Cameron to Edgar and Lloyd Ross, 1935, 'The Socialist Party of Victoria. Its Growth and Decline', Cameron Papers, MS 1005, boxes 5 and 10, NLA.

4 *Bulletin (Sydney)*, 20 April 1932, p. 13; *Labor Call* (Melbourne), 17 December 1931, p. 10; Patrick Weller and Beverley Lloyd (eds), *Federal Executive Minutes 1915–1955*. Carlton, Vic., Melbourne University Press (MUP), 1978, p. 162; John Robertson, *J.H. Scullin: a Political Biography*, Nedlands, WA, UWA Press, 1974, pp. 437, 447–8; *Argus* (Melbourne), 22 June 1931, p. 8; 29 August 1931, p. 9; Bede Nairn, *The 'Big Fella': Jack Lang and the Australian Labor Party 1891–1949*, Carlton, Vic., MUP, 1986, p. 277; L.J. Louis, *Trade Unions and the Depression: a Study of Victoria, 1930–1932*. Canberra, ANU Press, 1968.

> Like Epictetus of Ancient Greece, who always tried to teach his students to think for themselves instead of being the mental dependants of so-called superior persons or authorities, I would feel that I had not said anything worth saying if the honorable gentlemen opposite applauded me, or maintained the sleepy silence for which they are so famous.

When Labor took office in October 1941, Cameron, though outside the War Cabinet and frustrated by the difficulties in aircraft production brought about through lack of a central controlling authority, played a careful and useful role in Australia's wartime production regime. Aided as he was by Prime Minister Curtin's choice of the BHP managing director, Essington Lewis, as departmental head, Cameron served as Minister for Aircraft Production from October 1941 to February 1945. He was also Minister Assisting the Minister for Munitions (October 1941 to February 1942) and a member of the Production Executive of Cabinet (November 1941 to February 1945). In addition he was Acting Minister for the Navy, for Munitions and for Aircraft Production during March and April 1945, and Deputy Leader of the Government in the Senate from 1946 to 1949. By all accounts he was a competent and hard-working minister; he had served a sound apprenticeship on a number of Senate committees, notably the Regulations and Ordinances Committee.

In 1940 Cameron had charged that the policy of the second Menzies Ministry was 'War and defence plus big profits and big salaries' and asserted Labor's would be 'War and defence minus big profits and big salaries'. By 1944 he claimed some success, for Labor, he argued, had been able to improve both war production and working conditions. Australia's performance had been exemplary and visitors from allied countries 'had expressed amazement that so much had been done in Australia' in the production of aircraft, armaments and munitions in such a short period. As regards war production, such sanguine statements were in part political, in part war propaganda, but they contained some truth, as Paul Hasluck suggests. Cameron acknowledged that he was less satisfied with industrial conditions—coalminers still laboured dangerously while mine owners profited.

In many ways, the most difficult matter for Cameron was conscription. Australia's soldiers at the time were divided into two separate components: the AIF (voluntary), which could serve overseas, and the Australian Military Forces (conscripted), which could serve only within Australia. When, from 1942 to 1943, Curtin proposed to expand the zone of service for conscripts beyond Australia, Cameron resisted fiercely, despite fears that the Labor Party might again split. Working closely with fellow Victorian Arthur Calwell, and Henry Boote, editor of the *Australian Worker*, he engaged in a debilitating struggle that wounded Curtin deeply. Cameron was also among those ministers who sought during 1944 and 1945 to pave the way for full bank nationalisation, a proposal Curtin opposed.[5]

[5] Photos, MS 1005, box 7, NLA; *CPD*, 22 April 1940, p. 285; Geoffrey Blainey, *The Steel Master: a Life of Essington Lewis*. South Melbourne, Macmillan, 1971, p. 164; Lloyd Ross, *John Curtin: a Biography*. Carlton South, Vic., MUP, 1996, pp. 225–6, 299–308; *CPD*, 19 July 1944, p. 181; Paul Hasluck, *The Government and the People 1939–1941*. Canberra, AWM, 1956, pp. 73–89; *The Government and the People 1942–1945*. Canberra, AWM, 1970, pp. 336–8, 350; Patrick Weller

When Curtin appointed him Postmaster-General in the Cabinet reshuffle of February 1945, the *Argus* observed that Cameron 'should make a good PMG … he is an earnest and tireless worker … well liked by his staff … has a fine command of English … and never signs a document without reading it first.' Cameron believed that Australia should lessen its dependence on the commercial media within Australia and on British imperial telecommunications internationally. In the broadcasting segment of his portfolio, Cameron, like Senator Ashley before him, had to deal with the ABC, now seeking even more independence in a climate still influenced by wartime restrictions. He was faced immediately with the unexpected resignation of the ABC's long-time chairman, W.J. Cleary. With Curtin's support, Cameron recommended R.J.F. Boyer, a commissioner since 1940, as the new chairman.

In the years that followed, Cameron and Boyer helped shape postwar radio. Cameron further implemented recommendations made by the Joint Committee on Wireless Broadcasting of 1941 as well as appointing new commission members in order to ensure a Labor majority. Later, he supported the retention of Boyer as the ABC's chairman despite Cabinet opposition. After Curtin's death, Cameron retained the portfolio in the ministries of the new Prime Minister, Ben Chifley. He oversaw the introduction of parliamentary broadcasts from 10 July 1946, and the launch, on 1 July 1947, of the ABC as a news-gatherer, in the face of Boyer's opposition on grounds of cost. In October 1948 he moved the second reading of the Broadcasting Bill—a clear statement of the Chifley Government's intention to nationalise the ABC. The legislation provided for the establishment of the Australian Broadcasting Control Board for the purpose of overseeing commercial broadcasters. Funding now came from consolidated revenue instead of from licence fees.

Cameron's approach to the ABC was ideological and pragmatic. He saw the ABC as a means of redressing the media imbalance faced by Labor but also as a tool for 'raising' the cultural taste of ordinary Australians, in contrast to Chifley who viewed radio essentially as relaxation. Cameron's prudish side occasionally appeared, as in his description of a broadcaster who advocated contraception as 'despicable', and in his attempt to ban radio stars, Ada and Elsie, and Jack Davey, for 'telling blue jokes'.[6]

Cameron, who had carriage of the Overseas Telecommunications Bill of 1946, saw the maintenance of Australia's own post and telecommunications services by government as critical to national interests. Though amended in the Senate, the

(ed.), *Caucus Minutes 1901–1949*. vol. 3, Carlton, Vic., MUP, 1975, p. 21; Teleprinter messages between Curtin and Cameron, 27–28 April 1943, MS 1005, box 1, NLA; Letters, Cameron to K.J. Kenafick, Kenafick Papers, MS 2048, box 6, NLA; Letter, Cameron to Boote, 7 November 1941, Boote Papers, MS 2070, box 1/1/287, NLA; Ross McMullin, *The Light on the Hill: the Australian Labor Party 1891–1991*. South Melbourne, Oxford University Press (OUP), 1991, pp. 222–4, 232.

6 *Argus* (Melbourne), 3 February 1945, p. 11; Frank Dixon, *Inside the ABC: a Piece of Australian History*. Melbourne, Vic., Hawthorn Press, 1975, pp. 14, 71, 134–49, 176–7, 185–94; Joint Committee on Wireless Broadcasting, report, 1942; K.S. Inglis, *This is the ABC: the Australian Broadcasting Commission 1932–83*. Carlton, Vic., MUP, 1983, pp. 82–3, 123, 128–30, 133–4, 148, 150; *CPD*, 19 June 1946, pp. 1542–4; 27 October 1948, pp. 2132–8; Alan Thomas, *Broadcast and Be Damned: the ABC's First Two Decades*. Carlton, Vic., MUP, 1980, pp. 111, 157–8, 165; *Herald* (Melbourne), 8 November 1948, p. 4; *Argus* (Melbourne), 17 August 1951 (supp.), p. 1.

legislation provided for the establishment of the Overseas Telecommunications Commission (OTC), which ensured that overseas, as well as internal, telecommunications were not privately controlled. Cameron's choice of Giles Chippindall as Assistant Director-General of OTC in 1946 (by 1949 Director-General) brought a tough, experienced administrator to a task that was politically, as well as technically, demanding, and who was capable of implementing ministerial policy. Cameron ensured better working conditions for staff of the Postmaster-General's Department, especially linesmen, country postmasters and rural staff. Ann Moyal, Australian telecommunications historian, describes Cameron as 'an able Postmaster-General who steered through the formation of OTC and presided over the portfolio through the remarkable years of postwar telecommunications and postal growth.'[7]

The Chifley Government lost office in December 1949 and Cameron spent the remainder of his time in the Senate in vigorous opposition, optimistically interpreting the mid-decade Labor split as a necessary new beginning. In March 1950 he attacked the Menzies Government's 'preparations for war', particularly the proposal for compulsory military training. As the Korean War unfolded, he criticised the use of inflation to erode workers' wages, a theme he had pursued since he entered Parliament. In March 1951 he was a member of the all-Labor Senate Select Committee on the Commonwealth Bank Bill 1950 (No. 2) that led Menzies to call for a simultaneous dissolution. In 1954 he questioned the Government's courage in failing to extend recognition to China: 'Are we to be merely the dependants of the United States of America?' In 1957 he advocated an eight-point program along traditional Labor lines, but which included censorship of the media and cinema, clearly indicating that Labor considered it was a hostile media that was impeding the party's return to power. He attacked the proposal for a new parliament building, recommending the money be used for government-funded housing and called for fairer treatment of women in employment and marriage.

He gave his last Senate speech on 1 March 1962, his term expiring on 30 June. For more than an hour, the now silver-haired, increasingly deaf octogenarian traversed his familiar themes including the fundamental importance of education for all, and practical experience for politicians. Again, he warned that unless 'the Government controls the controllers of the monetary system' there would be unemployment. It was, according to observers, a fine speech.[8]

On Tuesday 21 August 1962 the Senate was informed of his passing the day before at Malvern Private Hospital in Melbourne. As senators spoke of him, their recollections were remarkably alike. Cameron appeared to have lived his life mindful of a warning he had given in 1911:

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7 *CPD*, 18 July 1946, pp. 2681–96; 7 August 1946, pp. 3786–8; *Herald* (Melbourne), 26 July 1949, p. 4; 1 March 1947, p. 5; Graeme Osborne and Glen Lewis, *Communication Traditions in Australia: Packaging the People*. 2nd edn, South Melbourne, OUP, 2001, pp. 126–9; Ann Moyal, *Clear Across Australia: a History of Telecommunications*. Melbourne, Nelson, 1984, pp. 180, 205.

8 *CPD*, 9 March 1950, pp. 552–60, 21 June 1951, pp. 183–7, 5 August 1954, pp. 49–57; Eight Point Plan, MS 1005, box 7, NLA; *Herald* (Melbourne), May 15, 1957, p. 13; *CPD*, 1 March 1962, pp. 270–7.

> The man who is a leader in his union gives his time, his brains, and his energy to the cause of unionism and the advancement of his fellow workers … But take that man and place him in Parliament to represent the cause of the worker, and straightaway he creates an invisible barrier between himself and those who laboured with him … and finally placed him in Parliament … There must be no mercy shown to those who deviate from the path that leads to the ultimate goal of unionism—equality of opportunity and the right of every man to enjoy the whole fruit of his own labours.

Cremated at Springvale in Melbourne on 22 August, Cameron left his wife of sixty-three years, and three of their five children—Alexander, Donald and Roy Angus. His estate, valued at £23 173, was distributed in equal shares between his wife and two of his three surviving sons.[9]

[9] *CPD*, 21 August 1962, pp. 295–6; Letters, Senator Kennelly to Roy Cameron, 8 March 1962, Allan Hartready to Gough Whitlam, 23 July 1967, MS 1005, box 5, NLA; *Westralian Worker* (Kalgoorlie), 14 August 1911; *Herald* (Melbourne), 20 August 1962, p. 1; 22 August 1962, p. 3; *SMH*, 21 August 1962, p. 4; *Argus* (Melbourne), 11 December 1937, p. 3; Ross, *John Curtin*, op. cit., p. 267; Cameron file, Australian Dictionary of Biography, ANU.

An Introduction to the *Annotated Standing Orders of the Australian Senate*[1]

Rosemary Laing

> *I have thought that we sometimes too slavishly follow a body that is to some extent analogous to ours, but which is certainly not so altogether. We are not on the same footing as the British Houses of Parliament. We are a new body. We are a Federal Senate. We have a certain analogy with the British Parliament, but only to a small extent; and it is about time that we struck out and thought for ourselves, and adopted a phraseology suited to our own circumstances and conditions.*
>
> *As to the man in the street trying to read and understand our standing orders, I do not think there is any such man.*
>
> **Senator Sir Richard Baker**
> **President of the Senate**[2]

The standing orders of a parliamentary institution reveal much about its character and origins. The degree of borrowing from similar institutions and adaptation for local conditions are particularly important measures. So too is the extent to which an

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1 *Annotated Standing Orders of the Australian Senate*, edited by Rosemary Laing, Deputy Clerk of the Senate, was published by the Department of the Senate in 2009. References in this introduction are to the full published work, available for purchase from the department. For details, see http://www.aph.gov.au/senate. Versions of the commentaries on individual standing orders are also published online.

2 *Commonwealth Parliamentary Debates* (henceforth SD), 10 June 1903, p. 664; 13 August 1903, p. 3523.

institution's standing orders are a dynamic body of rules, responding to altered functions and remaining relevant to the institution as it develops over time and is populated with new generations of members.

Since the Senate first 'struck out' in 1903 and adopted standing orders that were partly borrowed from the colonial legislatures and partly adapted to suit new circumstances, powers and conditions, there has been much thought given to procedural matters by senators and clerks alike and many innovations have been tested and absorbed into the rules.

In charting the origins and development of the Senate's current standing orders, this work also provides a history of the institution albeit from a somewhat Lilliputian perspective. While President Baker may have been correct in his assessment of the interest of the man in the street in such matters, there are, nevertheless, in these 'biographies' of the standing orders, glimpses of unexpected drama and suspense, human interest and insights into the professions of parliamentarian and parliamentary clerk, against a backdrop of twentieth century Australian political history. The value of procedures based on fair play, and respect for the institution and the rights of individual senators in facilitating rational deliberation, is evident throughout these pages.

Annotated standing orders

In the field of bibliographical studies, an annotated edition of a work includes the full textual history of variations between and within editions. More commonly, 'annotated' means the inclusion of commentary to elucidate a text.

Annotated editions of legislation containing commentaries and case notes can be an invaluable resource for legal practitioners, and may also have wider appeal. An illustrious example is Quick and Garran's *Annotated Constitution of the Australian Commonwealth*, published in 1901, in which the authors provided commentaries on each section of the Constitution, its origins and evolution through the convention debates. There have also been several legislatures whose officers have produced annotated editions of their standing orders, including commentaries and historical notes. In recent years, the Canadian House of Commons issued a second edition of its annotated standing orders, following the first edition in 1989. The work is also published online.

This volume is intended as a series of commentaries showing the origin, development and current use of each of the standing orders of the Senate. It is not a strict textual study for its own sake but textual changes are noted where they are changes of substance, and the student of bibliography will also find in the appendices a complete list of the 24 editions of Senate standing orders published from 1903 to 2009, collated for the first time. Its focus is on what we have now and where it came from, not on everything there ever was and where it went. Thus, deleted and defunct standing orders are not generally noted unless they were transformed into, or influenced, something extant.

The idea of an annotated edition of the standing orders of the Senate is not new. After the fourth edition of the standing orders was published in 1937, Senate officers compiled such a work but it was never completed. In keeping with frugal times, with the country still gripped by the Great Depression and Canberra barely more than an isolated backwater, those officers compiled the typescript of the work using the back of recycled mourning stationery left over from the death of Edward VII in 1910 during the Senate's time in Melbourne.[3] The quarto sheets were held in safekeeping, together with a flimsy carbon copy of the typescript, and eventually bound into a thick volume for preservation, probably in the late 1960s or early 1970s.[4] The flimsies, held in two spring back binders along with some additional references, show signs of subsequent use and annotation, particularly those sections dealing with financial legislation.

Internal references suggest that the work may have been intended for publication.[5] For reasons unknown, publication did not proceed. In practical terms, the outbreak of the Second World War, the need to conserve paper supplies, and the inappropriateness of devoting funds to the publication of what would have been a large book with a small potential readership and limited public interest could all explain why publication did not proceed then. Indeed, it may have only ever been intended for internal publication for the use of senators, but even that did not eventuate.

We have disappointingly scant information about the interests of the clerical staff in these years. R.A. Broinowski, who succeeded G.H. Monahan as Clerk in 1938, was better known for his work in establishing the rose gardens at Old Parliament House than for his procedural accomplishments.[6] In 1942, J.E. Edwards became Clerk and a young J.R. (Jim) Odgers joined the staff of the department after five years with the parliamentary reporting staff and the Joint House Department. Edwards had begun to write scholarly articles for journals during the 1930s, including on the Senate's new Regulations and Ordinances Committee, established in 1932, of which he was secretary. He also wrote an important article on the financial powers of the Senate in 1943 and a small monograph entitled *Parliament and how it works*, which he updated at regular intervals after its first publication in 1946.[7]

Encouraged by Edwards, Odgers embarked upon a course of study and self-improvement which was to culminate, in 1953, in the publication of the first edition of

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3 See Plate 23. The stationery is printed with a partial date—'191'—allowing it to be definitely attributable to the death of Edward VII, rather than that of Queen Victoria who died in January 1901 well before the parliamentary elections.

4 Recollections of a former Senate officer (Ian McNeill, later Clerk of the Northern Territory Legislative Assembly).

5 For example, the notes on standing order 33 (Standing Orders Committee) allude to a book (but the mentioned introduction has not been located):

> For details of the work of the Standing Orders Committee reference should be made to the Reports of the Committee, bound up with the sessional volumes of Journals. Some reference is also made to the matter in the introduction to this book.

6 See Richard Broinowski, *A Witness to History: the Life and Times of Robert Arthur Broinowski*. Carlton, Vic., Melbourne University Press, 2001.

7 See the entries on Edwards in Volume 2, *Biographical Dictionary of the Australian Senate*. Edited by Ann Millar, Carlton, Vic., Melbourne University Press, 2004, pp. 477–80; and Odgers in Volume 3 (forthcoming).

Australian Senate Practice. This treatise on the institution of the Senate as one of the essential checks and balances under the Constitution ranged far more widely than commentaries on the standing orders but internal references show that it undoubtedly had its origins in that earlier work, particularly the sections on financial legislation and the powers of the Senate in relation to request bills. Through successive editions in 1959, 1967, 1972 and 1976 (the last three during Odgers' tenure as Clerk),[8] this increasingly confident and polemical work probably overshadowed completely the more pedestrian studies of the standing orders. Furthermore, after the 1937 revision of the standing orders, it would be more than 28 years before the next Standing Orders Committee review and reprinting of the volume occurred in 1965–66.

Institutionally, the Senate was stirring after a long hibernation and beginning to rediscover its constitutional powers following the radical change wrought to its composition by the introduction of proportional representation in 1949. Growing focus on broad analysis of the Senate's constitutional potential rather than on the apparent minutiae of the standing orders is, therefore, not surprising.

There were at least two more attempts to compile editions of annotated standing orders. While he was Clerk, Rupert Loof produced a consolidated version of rulings of the President from 1903 to 1960 with a new index.[9] In the Preface to the work, dated 30 September 1963, he mentioned that a comprehensive set of standing orders showing alterations and additions since 1903, and renumbering, was in preparation but no further trace of that work has been found.[10] Another attempt is mentioned in the department's second annual report, in 1983–84, as a Bicentenary Publications project being undertaken by the Table Office. It was proposed to trace the history and development of the standing orders since their adoption by the Senate in 1903.[11] After initial work on copying and indexing the 1903 debates, the project appears to have stalled although, as with the 1938 MS, the work done in indexing the 1903 debates has been used extensively in the preparation of this volume. Possible reasons for the discontinuation of the project include the increase in the size of the Senate in 1984, from 64 to 76, and the consequently greater demand on the advisory and support services of the department. Associated factors include the focus on planning for the new building, particularly the information systems required to support the operations of the Table Office, and the development of a revised set of standing orders which closely followed the move to the new Parliament House in 1988. Any of these factors could have diverted effort from the project which is not mentioned again in the department's annals. It may simply have been a case of underestimating the scale of

8 A sixth, posthumous edition was published in 1991, based largely on updates prepared by Odgers after he retired. The seventh edition, edited by Harry Evans, was a significant redrafting of the work which is now in its 12th edition and known as *Odgers' Australian Senate Practice*. See Appendix 8 for a complete list of editions of this work.

9 The work remained unpublished, although copies were made for departmental use.

10 It is possible that Loof intended the 1966 edition to fulfil that function but, produced as it was after his retirement, it was only an 'ordinary' edition.

11 Department of the Senate and Senate Standing Committee on Appropriations and Staffing, *Annual Reports 1983–84*, PP No. 259/1984, p. 31. There is no mention of the project in successive reports. It is also possible that the 1938 MS was bound at this time rather than earlier. The volume remained in the Table Office, on a shelf in the office of the Publications Officer, until examined and identified by the writer in 2006.

the project and overestimating the capacity of the office to manage it as an adjunct to its 'normal' work.

Early history: 1901–1903

Extensive deliberations on the nature and detail of its standing orders provided an early demonstration of the Senate's institutional character and independence. Along with landmark debates on the first Supply Bill in 1901, the Customs Tariff Bill in 1902 and the Sugar Bounty Bill[12] in 1903, the debates on the standing orders showed the Senate asserting its place as a coequal partner in the national parliament. Others have told the story of these early years, including how the Senate rejected the draft standing orders prepared by its first Clerk, the anglophile E.G. Blackmore, in favour of adopting, as a temporary measure, the standing orders of the South Australian House of Assembly with which the greatest number of senators, including the President, was familiar.[13] These were the standing orders that had been used for the Federal Convention, to which Blackmore had been Clerk. Blackmore, in consultation with the first Prime Minister, Sir Edmund Barton, had also drafted standing orders for the House of Representatives while its first Clerk, George Jenkins, took on responsibility for organising the ceremonies in Melbourne for the opening of the first Parliament of the Commonwealth of Australia. While Blackmore's draft for the House was adopted (albeit on a temporary basis—till 1950) the Senate commissioned a standing orders committee to go away and devise a set of rules more appropriate to the needs of the new institution. By great fortune, the Senate had chosen as its first President Sir Richard Baker who had been President of the South Australian Legislative Council and a significant contributor to the constitutional conventions. His penetrating insight into the functions and purpose of the Senate under the Constitution and his driving role in developing the standing orders ensured that the heavy Westminster bias of Blackmore was considerably offset.[14]

Two drafts of Blackmore's standing orders were tabled in 1901[15] and a motion was moved by the Government on 5 June 1901 to adopt on a temporary basis the second of those drafts, which had been modified by Senator Richard O'Connor (Prot, NSW), then Vice-President of the Executive Council (and later one of the first Justices of the

12 Known also by its earlier title as the Sugar Bonus Bill.

13 Standing Orders Committee, *First Report*, adopted 6/6/1901, reproduced at J.25 under the heading, 'Temporary Standing Orders'; and see, for example, Chapter 4, 'Rules and Orders', in G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament: 1901–1988, Ten Perspectives.* Carlton, Vic., Melbourne University Press, 1989; and Harry Evans, Introduction, in Volume 1, *Biographical Dictionary of the Australian Senate*., op. cit., p. 1.

14 Blackmore's Westminster bias is very evident in the extent and nature of his correspondence with his Westminster colleagues whose advice on procedure he frequently sought. (Correspondence held by the Department of the Senate).

15 Standing Orders relative to Public Business 'as drafted for Provisional Use by the Clerk of the Parliaments, and Settled after Revision by the Prime Minister (sic.)' were tabled on 10/5/1901, J.7, and ordered to be printed; a similar document—but minus the proposed joint standing orders and certain provisions allowing some motions to be determined without debate—was tabled on 23/5/1901, J.13, and also ordered to be printed. For an account of some of the differences between the two drafts, see Reid and Forrest, op. cit., p. 141.

High Court).[16] The motion was amended to provide instead for the establishment of a Standing Orders Committee to report to the Senate the following day on which State Parliament's standing orders should be adopted instead, pending the preparation of the Senate's own rules.[17] The committee was then appointed and consisted of the President, the Chairman of Committees (Senator Best from 28 June), and Senators O'Connor, Gould (FT, NSW), Downer (Prot, SA), Zeal (Prot, Vic), Dobson (FT, Tas), Higgs (ALP, Qld) and Harney (FT, WA).[18]

Over eleven meetings, the Standing Orders Committee, chaired by President Baker, thoroughly considered and restructured Blackmore's draft and made extensive revisions, often substituting or inserting entirely new provisions. The committee reported to the Senate on 9 October 1901, including in its report detailed minutes in the style of committee of the whole deliberations on a bill and, most importantly, a draft of the proposed standing orders.[19]

A memorandum of the chairman included in the report set out the rationale for, and objects of, the committee's recommendations. It is worth quoting at length:

> In framing the Standing Orders the object of the Committee has been—
>
> 1st To embody in the Standing Orders the meaning and spirit of the Constitution so far as practice, procedure, and the relationship between the two Houses are concerned.
>
> 2nd To carry into effect the resolutions and what the Committee conceived to be the opinions of the Senate. *[This was followed by a list of cases where such resolutions and opinions were given effect, and one case where an alternative was proposed instead.]*
>
> 3rd The re-arrangement of the original Draft Standing Orders, so as to group under the headings of each chapter all the Standing Orders covered by the heading.
>
> 4th The formulation into Standing Orders of what has been the universal practice in the State Parliaments, so as to contain in the Standing Orders themselves, so far as possible, a complete code of procedure.
>
> 5th Simplification of procedure, and abolition of procedure and practices (based on obsolete conditions) which have now no effect or significance.
>
> 6th To provide that the Standing Orders of the Senate and of the House of Representatives shall be identical, except in those cases where difference cannot be avoided.

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16 O'Connor, the son of a NSW Clerk of the Parliaments and himself a former employee of the NSW Legislative Council, brought his own procedural experience and insights to the task. See the entry on O'Connor in Volume 1, *Biographical Dictionary of the Australian Senate*, op. cit., pp. 27–30.

17 5/6/1901, J.22–23.

18 See Appendix 5 for a record of the membership of the Standing Orders and Procedure Committees 1901–2009. Note that the original Standing Orders Committee comprised one quarter of the total membership of the Senate at the time.

19 *Third Report of the Standing Orders Committee together with the Proceedings of the Committee, a Memorandum of the Chairman and a copy of the Proposed Standing Orders as agreed by the Committee*, PP No. L.7/1901. 9/10/1901, J.179.

Reid and Forrest give an excellent account of the 1903 debates on the standing orders which occurred from 10–18 June and 12–19 August, including the crucial role played by President Baker in steering the Senate away from slavish obeisance to the House of Commons in Westminster.[20] In the midst of the two periods of intense debate, the Standing Orders Committee had presented another report recommending the reinstatement of the standing order that Blackmore had first proposed to open the collection:

> In all cases not provided for hereinafter, or by Sessional or other Orders, resort shall be had to the rules, forms, and practices of the Commons House of the Imperial Parliament of Great Britain and Ireland in force on the 1st day of January, 1901, which shall be followed as far as they can be applied to the proceedings of the Senate.[21]

Though he chaired the committee and felt obliged to report the majority position,[22] Baker himself opposed the formalisation of ties with Westminster, preferring the Senate to establish practices and procedures of its own to suit its own constitutional position and circumstances. A majority of the Senate agreed with him and rejected the 'umbilical' standing order.

Having undergone intense scrutiny, the standing orders were finally adopted on 19 August 1903, with effect from 1 September that year. The first edition was a slim foolscap volume, printed by the Victorian Government Printer.

The following year, Baker articulated the mechanism by which the Senate would establish its procedural independence, in a paper entitled 'Remarks and Suggestions on the Standing Orders', tabled on 9 March 1904 and referred to the Standing Orders Committee.[23] He rationalised the omission of the umbilical standing order on the grounds that 'in cases not positively and specifically provided for we should gradually build up 'rules, forms, and practices' of our own, suited to our own conditions.' He made the following suggestions:

(1) That in any case which may arise which has not been provided for by the rules, or in which the rules appear insufficient or manifestly inconvenient, the President should state to the Senate (after mature consideration, if possible) what, in his opinion, is the best procedure to adopt, and that the Senate should decide.

(2) That at the commencement of each session the President should lay a paper on the Table formulating and tabulating all the decisions arrived at during the last session, giving reasons (if it should be necessary to do so) why, in his opinion, any of his own decisions were incorrect, or any of the decisions of the Senate would lead to inconvenient results. The Senate could then take the decisions objected to into

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20 Reid and Forrest, op. cit., pp. 143–45.

21 Standing Orders Committee, *Second Report*, PP No. S.3/1903, tabled 23/7/1903, J.82.

22 See commentary on standing order 38 and 17/6/1903, SD, pp. 993–96, for a possible explanation why Baker would not have dissented from the report.

23 9/3/1904, J.11.

consideration and decide the matter.

These suggestions were adopted by the Senate with the qualification, in relation to paragraph (1), that if no objection was raised, the rule stated by the President would prevail until altered by the Senate.[24] The President's first report to the Standing Orders Committee under paragraph (2) was tabled on 17 August 1905.[25] From 1910, in accordance with a resolution of the Standing Orders Committee on 23 November that year, indexed rulings of Presidents were published following completion of their term of office.[26] Presidents' rulings continue to be an important source of guidance to the Senate in dealing with procedural questions that are either new or, because of changing circumstances, require a new solution. From the beginning, Presidents, in making rulings, have leaned towards the interpretation which preserves or strengthens the powers of the Senate and the rights of senators.[27]

Second edition–1909

President Baker made a significant number of rulings in the early years to elucidate the practices of the Senate, but changes in those practices began almost immediately. Eventually, these would be reflected in amendments to the standing orders. For example, a resolution of the Senate on 7 October 1903 exempted the adjournment debate from the normal rule of relevance but it would take another two years before the Senate adopted a Standing Orders Committee recommendation to amend the relevant standing order accordingly.[28]

Another important early development came in 1905 when the Standing Orders Committee recommended the adoption of a standing order providing for instructions to be given to committees of the whole to expand their powers to amend bills by allowing (on amending bills) amendments to be moved to the parent Act that were not relevant to the subject matter of the bill.[29] This was a significant expansion of powers in the days when the statute book was much smaller and amending bills were more narrowly cast. These days it is rare that an amending bill is so narrowly drawn that a proposed amendment to the parent Act cannot be made relevant to the subject matter of the bill but, at the time, this was a significant statement of the scope of the Senate's legislative interests and powers.

In December 1906 a referendum to change the commencement date for senators' terms under s.13 of the Constitution was carried by the required majorities. Terms that had begun on 1 January would now begin on 1 July and this change in timing affected

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24 Standing Orders Committee, *First Report*, PP No. S.2/1904, tabled 21/4/1904, J.33; adopted 18/5/1904, J.39.

25 J. 37. See Appendix 7 for further issues of Presidents' decisions, which continued to be prepared until 1921.

26 For a list of volumes of *Rulings of the President*, see Appendix 7.

27 See *Odgers' Australian Senate Practice*, 12th ed., p. 20.

28 Standing Orders Committee, *Report*, tabled 22/11/1905, reproduced at J.177; considered 30/11/1905, J.200, SD, pp. 6064–65; adopted 6/12/1905, J.211.

29 Standing Orders Committee, *Second Report*, PP No. S.7/1905 tabled 14/12/1905, J.229; considered and adopted 20/12/1905, J.253–54, SD, pp. 7445–55.

arrangements for the terms of office of the President and Deputy President and some of the assumptions behind procedures for the opening of Parliament. The Standing Orders Committee had been stockpiling a variety of issues and in October 1908 presented a report recommending multiple amendments and alterations, including as a consequence of the referendum. The report lay dormant till the following year but on 9 and 10 September 1909 the proposed changes were extensively debated in the very useful committee of the whole forum which allowed senators to make multiple contributions and argue the toss on the merits of the proposals and any alternatives.[30]

The changes made were wide-ranging and included several clarifications of, and additions to, legislation procedures, and the adoption of new standing orders on, among other things, the recording in the *Journals* of senators' attendance (for the purpose of s.20 of the Constitution), the recording of senators' names after a count-out, and the process for determining points of order. The changes agreed to were so extensive that at the end of the debate on 10 September, a complete reprint was ordered of the whole standing orders, together with a fresh index—rather than the usual loose leaflets of amendments to be slipped or pasted into the existing volume.[31]

Third edition–1922

Before the next full reprint in 1922, the Senate had adopted new standing orders on a number of topics including the interruption of business, the requirement for a senator's recorded vote to accord with his voice vote, the prohibition on standing committees meeting during sittings of the Senate, time limits on speeches and the designation of certain business as 'Business of the Senate' taking precedence over government and general business.[32] This last standing order brought together a number of matters given precedence under other standing orders or by virtue of rulings of the President.[33] These were matters that were identified as so important to the Senate as a whole that they warranted precedence above the business of the executive government.

The Senate had adopted time limits on individual speeches in 1919 following determined efforts by senators to delay the passage of the Commonwealth Electoral Bill the previous year. These efforts included an all-night speech by Opposition Leader Senator Albert Gardiner (ALP, NSW), during which he read the entire bill aloud and, as his stamina flagged, was occasionally allowed by the chair to speak while seated.[34] On the night of 25 and 26 November 1920, Senator Gardiner was

30 Standing Orders Committee, *First Report*, PP No. S.1/1908, tabled 15/10/1908, J.45; debated 9/9/1909, J.119–123, SD, pp. 3206–3212; further debated and adopted 10/9/1909, J.125–126, SD, pp. 3306–3320; with effect from 1/10/1909.

31 10/9/1909, SD, p. 3320.

32 These changes were contained in the following reports of the Standing Orders Committee: *First Report*, PP No. S.1/1914, tabled 10/6/1914, debated and adopted 11/6/1914, J.79–80, SD, pp.1998–2003; *First Report*, PP No. S.4/1919, tabled 16/7/1919, debated 30/7/1919, J.362, SD p. 11027, and adopted 6/8/1919, J.364; *Second Report*, PP No. S.5/1919, tabled 7/8/1919, debated 13/8/1919, J.369–71, SD pp. 11476–527, and adopted 15/8/1919, J.375, SD, pp. 11586–94; *First Report*, PP No. S.2/1922, tabled 4/10/1922, debated and adopted 5/10/1922, J.107, SD, p. 3199.

33 See commentary on standing order 58.

34 See the entry on Senator Gardiner in Volume 1, *Biographical Dictionary of the Australian Senate*, op. cit., p. 48. Also see commentary on SO 189. Old SO 404 allowed a sick or infirm senator 'by

again to be found testing the limits of the new restrictions on debate in committee of the whole, during consideration of the War Precautions Act Repeal Bill. Senator Wilson (Nat, SA) moved the rarely used 'gag' (in the old form 'That the Committee do now divide'). It does not seem to have been an attempt by an impatient government to shut down debate. Senator Wilson was not at that time the honorary minister he would become just over two years later. From a distant perspective, it looks like an episode of determined obstruction by a minority which stretched far into the night and tried the patience of the majority, the vote on the gag being carried by 20 votes to 3.[35]

Fourth edition–1937

In the sessions of 1923–24 and 1925 the use of the gag by government senators became more common, including in association with all-night or weekend sittings when tempers were most likely to fray. In debate on the Appropriation Bill 1923–24, for example, which occurred through the night of 22–23 August 1923, the gag was moved eight times and once more on the Income Tax Assessment Bill [No. 2] which followed it. The gag was also used the following day on the River Murray Waters Bill.[36] In July 1925, the gag was moved 6 times on the Immigration Bill and in August, in relation to the Peace Officers Bill, considered on a Saturday and continuing the following Monday, the gag was moved 21 times.[37]

The gag is a crude device to truncate debate. If a gag motion is agreed to, the main question is required to be put without further debate. While it may have some efficacy for dealing with a single question, it is an ineffective means of dealing with bills to which there may be many proposed amendments and therefore many questions to be determined. After 21 gag motions were required during consideration of the Peace Officers Bill in 1925, the Senate referred to the Standing Orders Committee the formulation of additional standing orders to provide for the limitation of debate on bills declared as urgent bills, otherwise known as a 'guillotine'.[38] The Senate divided on the motion which was carried by 17 votes to 8, Senator Gardiner being amongst those voting 'No'. When the Standing Orders Committee report was debated on 3 March 1926, the Leader of the Government, Senator Pearce (Nat, WA), rationalised the guillotine as a more just device than the gag in the following terms:

> … if an active minority desires to block the passage of a measure, which it knows the majority wishes to pass, it can occupy practically the whole time allowed for debate, and the only weapon in the hands of the Government is the 'gag', by which the mouths of its own supporters are shut, and the whole field of debate is in the hands of those who are opposed to the measure. Under the guillotine provision a reasonable time is allowed for the discussion of a bill or motion, and, that time

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the special indulgence of the Senate' to speak while seated. It was deleted in the 1989 revision and left to practice.

35 Senator Sir Reginald Wilson, Volume 1, *Biographical Dictionary of the Australian Senate*, op. cit., pp. 199–202; 25–26/11/1920, J.215–18 (see especially J.217).

36 22–23/8/1923, J.89–96, J.97; 24/8/1923, J.101.

37 16/7/1925, J.43–46; 29–31/8/1925, J.79–91.

38 4/9/1925, J.97.

> having been fixed, each side alternately can put forward its speakers, and all aspects of the matter can be debated. This is fair to the majority as well as to the minority. It is much fairer than the application of the 'gag', which often excludes useful contributions, and permits what is practically a waste of time by honourable senators who merely talk against time.[39]

Senator Gardiner spoke against the adoption of the guillotine, referring to his own role in delaying the Peace Officers Bill, but the motion was carried by 20 votes to 7 and the guillotine became part of the Senate's procedures, just as it was part of the procedures in much larger houses such as the House of Commons and the House of Representatives.[40]

Of major significance for the future role of the Senate was the establishment, in December 1929, of a select committee to inquire into the advisability or otherwise of having standing committees in a number of areas in order to improve the legislative work of the Senate and increase the participation of senators in such work. The areas in which it was envisaged that committees might be established included statutory rules and ordinances, international relations, finance, and private members' bills. When the select committee initially recommended the creation of committees in the first two areas, as well as adjustments to standing orders to facilitate the referral of bills to committees, it was instructed to reconsider.[41] The committee's second report dropped the recommendation for a Standing Committee on External Affairs, which had apparently made the Government nervous, and the remaining recommendations were adopted on 14 May 1931.[42] They were then referred to the Standing Orders Committee for translation into appropriate new standing orders and amendments which were adopted on 11 March 1932.[43]

This was an historic day for the Senate with the establishment of the Standing Committee on Regulations and Ordinances, which has subsequently scrutinised all newly made delegated legislation to ensure its compliance with fundamental standards of civil society. Moreover, the framework was laid down for the future establishment of other standing committees and the referral of bills to standing or select committees. Although it would be decades before the creation of a system of standing committees

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39 3/3/1926, SD, p.1212; Standing Orders Committee, *First Report*, PP No. S.1/1926, tabled 11/2/1926.

40 3/3/1926, SD, pp.1218–23; J.45.

41 *First report*, PP No. S.1/1930, tabled 9/4/1930, J.62; considered 1/5/1930, J.69, 8/5/1930, J.75; recommitted 15/5/1930, J.81.

42 *Second report*, PP No. S.1/1930, tabled 10/7/1930, J.129; considered and adopted 14/5/1931, J.281. The government's reluctance to endorse the Senate's foray into foreign affairs needs to be seen in the context of Australia's constitutional immaturity in foreign affairs which, at this time, continued to be handled for the dominions through the British Foreign Office via the Colonial Office. Australia did not appoint its own diplomatic representatives till World War II. See Gavin Souter, *Lion and Kangaroo: the initiation of Australia*. Revised edition, Melbourne, Text Publishing, 2001, p. 407 and *passim.* on the evolution of the relationship between Australia and Great Britain.

43 Standing Orders Committee, *First Report*, PP No. S.5/1931, tabled 24/7/1931, J.342; considered 4/3/1932, J.27–29; and adopted 11/3/1932, J.45–46.

and the commencement of regular and routine referrals of bills to them, the means to do so were there in the standing orders from 1932. Gradually, over time, these ideas would be fully realised.

The debate on the establishment of the Regulations and Ordinances Committee was not without controversy, and Senators Rae (Lang Lab, NSW) and Dunn (Lang Lab, NSW) were both suspended on 4 March 1932 for defiance of the chair.[44] These two senators were also indirectly responsible for the next set of amendments recommended by the Standing Orders Committee. In August 1932, after senators chosen at the half-Senate election of December 1931 were sworn in, the Senate proceeded to elect a new President. When there is no President, the Clerk acts as chairman of the Senate. On this occasion, the Clerk, George Monahan, was required to rule on a point of order taken by Senator Pearce that Senator Dunn's speech in support of his nomination of Senator Rae for the presidency was not relevant. The Clerk upheld the point of order. Senator Dunn then moved a motion of dissent from Monahan's ruling and during the debate, the powers of the Clerk in this situation were queried. After some awkward manoeuvres, Senator Dunn's motion of dissent was lost, Senator Lynch (Nat, WA) was elected President by a comfortable majority and the question of the Clerk's powers was referred to the Standing Orders Committee. When that committee reported, it recommended that the relevant standing order be amended to specify that the Clerk has all the powers of President under the standing orders when presiding over the election of a new President.[45]

In the same report, the Standing Orders Committee also proposed a new standing order to provide for the consideration or adoption of committee reports to have precedence over other General Business on certain days.[46] This change allowed the reports of the important new Regulations and Ordinances Committee to receive appropriate attention. The new procedures for referral of bills were redrafted to enhance their clarity and the old forms of the 'gag' motion ('That the Senate [or committee] do now divide') were replaced with the current form ('That the question be now put').

The final set of amendments preceding the 1937 edition were mostly housekeeping matters, occasioned by the pressing need for a reprint 'owing to depletion of stock copies'.[47]

The 1938 MS–a clerkly treasure

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44 No one opposed the establishment of the committee. The issue was its membership. The proposed standing order contained a formula for the nomination of members by the Leader of the Government in the Senate and the Opposition Leader. With the three opposition places to be apportioned between the two opposition groups—the ALP and Lang Labor— personal remarks by erstwhile ALP and National Labour Party Senator Patrick Lynch provoked Senators Rae and Dunn, both Lang Laborites, who then both fell foul of the chair. See 4/3/1932, SD, pp. 647–54.

45 Election of President, 31/8/1932, J.115–16; Standing Orders Committee, *First Report*, PP No. S.3/1934, tabled 31/7/1934, J.454, considered and adopted 1/8/1934, J.459–61, SD, pp. 967–77.

46 The term 'General Business' was adopted at this time, to replace 'Private Business'.

47 Standing Orders Committee, *Report*, PP No. S.1/1937, tabled 26/8/1937, J.39; considered and adopted 1/9/1937, J.44, SD, pp. 347–50.

From 1903 until 1937 the standing orders had been the subject of regular scrutiny and amendment, often vigorously contested. Some significant alterations and additions had been made. Recording and supporting the work of the Standing Orders Committee were the four Clerks of the Senate who had held office during that time: E.G. Blackmore, Charles Boydell, Charles Gavan Duffy and George Monahan. The Clerks were supported by a small number of other senior officers, including the Clerk Assistant, the Usher of the Black Rod and Clerk of Committees (a combined role that from time to time, along with the Clerk Assistant, also took on the duties of Secretary to the Joint House Department), and the Clerk of Records and Papers.[48] In 1937, these positions were occupied, respectively, by Robert Broinowski, John Edwards and Rupert Loof, all to become Clerk in turn.[49]

Which of these men was responsible for assembling what I have called the 1938 MS?[50] Whoever it was had a comprehensive knowledge of the standing orders and their history, a command of the rulings of the President, a high level ability to question the rationale behind the rules, practical experience of committees, and a mind for detail, including the practical impact of particular standing orders on chamber operations. He (for it was, of course, a he) also had a neat, regular hand, somewhat—but not entirely—lacking in distinguishing characteristics.[51] Monahan had 18 years' experience as Clerk and secretary to the Standing Orders Committee, and had worked for the Senate Department since 1901. As his evidence to the Select Committee on the Standing Committee System shows, Monahan had a profound and mature understanding of parliamentary operations, but Monahan retired in 1938 well before the work was completed. Less is known of Broinowski's procedural achievements but he also retired before work on the typescript ceased. Both Edwards and Loof are potential candidates. Appendix 12 contains an assessment of the evidence of authorship which overwhelmingly points to Edwards.

The 1938 MS was a prodigious endeavour and is a precious legacy from that time. Some part of Edwards' scholarship is preserved in this work which makes frequent reference to and use of it.

The barren years and the fifth edition–1966

48 See Appendix 4 for a list of Clerks and senior officers of the Senate and the senior organisational structure of the department over time.

49 See entries on Monahan, Broinowski and Edwards in Volume 2, *Biographical Dictionary of the Australian Senate*, op. cit., and Loof in Volume 3 (forthcoming). Also see Derek Drinkwater, 'Rupert Loof: Clerk of the Senate and Man of Many Parts,' in *Poets, Presidents, People and Parliament—Republicanism and other issues*, *Papers on Parliament* No. 28, Department of the Senate, November 1996, pp. 105–12; and Richard Broinowski, 'Robert Arthur Broinowski: Clerk of the Senate, Poet, Environmentalist, Broadcaster,' in *Papers on Parliament* No. 31, June 1998, pp. 69–75; and *A Witness to History: the Life and Times of Robert Arthur Broinowski*, op. cit.

50 Although the relatively modern binding of the MS is marked 'Annotated Standing Orders Circa 1938,' there is evidence that the work was begun in 1937 and continued for several years. See Appendix 12 for further commentary on, and analysis of, the typescript.

51 Anne Lynch was the first woman to serve as a clerk at the table in the Senate (from 1983), as well as the first woman to be appointed as a Clerk Assistant (1984), and as Deputy Clerk (1988). For the record, she did not have a neat, regular hand!

After the 1937 edition was reprinted, the Standing Orders Committee made one further report to the Senate recommending some minor amendments to the procedures for urgency motions. Presented in October 1938, the report was considered shortly afterwards but was referred back to the committee for further examination.[52] It never re-emerged. At the end of the year, the long-serving Monahan retired to be replaced as Clerk by Robert Broinowski. World events would soon eclipse everything.

During the War, the committee met once, in 1943, to discuss the standing order prohibiting the reading of speeches. The chair of the committee, President Cunningham, made a statement to the Senate conveying the committee's view that the standing order should remain as it was but 'that if a Senator desires for special reasons to read his speech, he should be able to do so by leave of the Senate.' The President indicated that he would rule accordingly.[53]

The Standing Orders Committee did not meet again for ten years until, in 1953, the impending visit of Queen Elizabeth II prompted a quick amendment to the procedures for the opening of Parliament to accommodate the presence of the sovereign herself, rather than the Governor-General as her representative.[54] It was the first visit to Australia by a reigning monarch and the government took the opportunity to arrange for the Parliament to be prorogued on 4 February 1954 until 15 February, to allow for a state opening by the Queen. The necessary amendments were adopted without debate in the October preceding the Royal visit. The President, Clerk and Black Rod had new robes and furbelows for the occasion,[55] but for all his painstaking work on the 1938 MS and the momentous changes to the Senate in 1949, John Edwards' impact on the standing orders as Clerk of the Senate from 1942 to 1955 was minimal.

His successor, Rupert Loof, fared little better. The Standing Orders Committee began to meet again on a more regular basis from 1959 to consider whether any changes were required to the standing orders as a consequence of, among other things, the enlargement of the Senate in 1949. Another spur was provided by an adjournment speech made by Senator Willesee (ALP, WA) on 30 April 1959 in which he called for consideration of amendments to several standing orders. Senators were invited to submit any suggestions for amendment or review of particular standing orders. The review dragged on and a subcommittee was formed in 1963 to make recommendations on which changes should proceed. An issue raised by the Regulations and Ordinances Committee as to whether regulations and ordinances of the Northern Territory and Territory of Papua and New Guinea should be excluded

52 Standing Orders Committee, *First Report*, PP No. S.2/1938, tabled 20/10/1938, J.107; considered and referred back to the committee, 3/11/1938, J.114.

53 10/3/1943, J.303.

54 Standing Orders Committee, *First Report*, PP No. S.2/1953, tabled 16/10/1953, J.399; adopted 20/10/1953 without debate, J.402. See SO 4.

55 Departmental Register of Accounts, 1951–52 onwards, Department of the Senate, shows payments for various items at the relevant time: to David Jones Pty Ltd for a barrister's gown for the Clerk (Edwards), academic gown for the President, jabots and cuffs for the President and Usher of the Black Rod (Odgers), and stockings and shoes for the latter; to local gentleman's outfitter Ken Cook for gloves for the Usher and to R.T. Whyte, Esq., tailor, new breeches for the Usher (on top of a new uniform the previous June, costing £35 8s).

from that committee's purview also delayed the finalisation of the review.[56] The committee eventually reported after Loof had retired, recommending a variety of non-controversial amendments. Most of them were of minor or practical significance only, apart from the establishment of a standing committee of privileges, the incorporation of rules for questions and the exclusion of certain territory regulations and ordinances from referral to the Regulations and Ordinances Committee. The recommendations were adopted on 2 December 1965 and the fifth edition of the standing orders came into operation on 1 January 1966.

The impact of proportional representation

The achievements of the early Senate in severing the umbilical cord to Westminster and robustly questioning its *modus operandi* over its first decades had largely faded by the outbreak of World War II, although the institution was not entirely supine.[57] When the Senate began to rediscover legislative activism from the late 1950s, the standing orders themselves were often not the vehicle for change. A perception had grown up that the standing orders were like the tablets of Moses and should not be interfered with. It was perceptions like these that fostered such practices, for example, as the routine suspension of standing orders to enable bills to be dealt with more expeditiously rather than over a number of days as prescribed in the standing orders. These aberrant practices persisted for decades before a sessional order that reflected actual practice was finally adopted in 1987.[58] Until the 1990s, many of the most significant procedural changes were effected by resolution or sessional order and made it into the standing orders (if at all) only after a significant period of time had elapsed.

The level of interest in maintaining the standing orders should not be regarded as an indicator of the health of the institution. On the contrary, the institution was beginning to hum. Many years later, a former Clerk of the Senate would recall the effect of proportional representation on the Senate in the following terms: 'In 1955 it was very obvious that the Senate had received not just a blood transfusion but a heart transplant.'[59] From the mid-1950s significant changes were taking place. Important stances were being taken, for example, on the Senate's constitutional position regarding appropriation bills for the ordinary annual services of the government.[60] New accountability measures were being tried, such as the examination of estimates of expenditure in committee of the whole before the receipt of the Appropriation Bills from the House (giving the Senate much more time to conduct its scrutiny of the

56 See Standing Committee of Regulations and Ordinances, *Fifteenth Report*, PP No. S.1/1953, tabled 22/9/1959, J.153.

57 For example, see the resolution affirming the constitutional rights of the Senate in relation to the pressing of requests, 16/3/1943, J.312.

58 See SO 113.

59 Alan Cumming Thom, Clerk of the Senate 1982–88, in an address to a conference to mark the twentieth anniversary of the Senate committee system in 1990, *Senate Committees and Responsible Government*, *Papers on Parliament* No. 12, August 1991, p. 27.

60 The Compact of 1965, enunciated by Treasurer Harold Holt in a statement to the House of Representatives, 13/5/1965, HRD, pp. 1484–85. Also see *Report from the Committee Appointed by Government Senators on Appropriation Bills and the Ordinary Annual Services of the Government*, dated 19/6/1964 (PP No. 55 of 1967), whose recommendations formed the basis of the Treasurer's statement.

government's expenditure proposals).[61] After a period of desuetude, select committees were again being employed to inquire into matters of public policy and administration.[62] Parliamentary officers were active in studying, and bringing to the attention of senators, the operation of committees in other jurisdictions.[63] But caution was still the order of the day. When debating Odgers' report on his American travels, Opposition Leader Senator McKenna (ALP, Tas) praised his efforts but urged patience:

> I know that he has a burning ambition to see the Senate play a major role in this Parliament. I merely say to him that, whilst he must not despair, he must be patient. Speaking from an experience of politics extending over a considerable time, I know that it takes at least five years to secure the acceptance of a new idea.[64]

It would take a lot more than five years for Odgers' vision to be realised.

The committee system and the 1970s

The momentous events that culminated on the evening of 11 June 1970 in the establishment of seven legislative and general purpose standing committees and five estimates committees did not originate in a specific recommendation of the Standing Orders Committee. Although the committee had been considering a standing committee system from 1967 and had commissioned the Clerk, Jim Odgers, to prepare a report on the subject which he presented in three parts in November 1969 and in January and March 1970, the committee refrained from making any recommendations and submitted Odgers' reports to the Senate without comment.[65] Part 1 considered the establishment of six specialist watchdog committees on Statutory Corporations, Science and Technology, Petitions, Broadcasting and Television, Narcotics, and National Publicity and Public Relations. Part 2 considered the establishment of six legislative and general purpose standing committees to cover the activities of all departments of state as follows: External Affairs and Defence; Transport and Communications; Trade, Industry and Labour; Legal, Constitutional and Home Affairs; Health, Welfare, Educations and Science; and National Finance and Development. Part 3 provided some additional material and recommended

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61 27/9/1961, J.120 ff. The new procedure was resisted on the basis that it evaded the spirit of the Constitution, and contravened s.53 and various standing orders. Rulings of the Deputy President that the motion proposing it was in order were unsuccessfully challenged. See 26/9/1961, J.116–18, SD, pp. 641–53.

62 For example, on the Development of Canberra (PP No. S.2 of 1954–55), Payments to Maritime Unions (PP No. S.1 of 1958), Road Safety (PP No. S.2 of 1960–61), Encouragement of Australian Productions for Television (PP Nos. 304 and 304A of 1962–63), Container Method of Handling Cargoes (PP Nos. 46 and 46A of 1968) and the Metric System of Weights and Measures (PP Nos. 19 and 19A of 1968).

63 Principally, J.R. Odgers who received a Smith Mundt grant to travel to the USA to study congressional committees. Odgers prepared a report on his return which was tabled in the Senate (*Report on the United States Senate*, PP No. 36 of 1956, presented 15/5/1956, J.61).

64 22/6/1956, SD, p. 1844.

65 *Report from the Standing Orders Committee relating to Standing Committees*, PP No. 2/1970, tabled 17/3/1970, J.33, p.iii.

support for a committee on Statutory Corporations and the six legislative and general purpose standing committees listed previously.

There were three proposals before the Senate on the night of 11 June 1970: a proposal for seven legislative and general purpose standing committees from the Leader of the Opposition, Senator Murphy (ALP, NSW); a proposal for five estimates committees from the Leader of the Government, Senator Anderson (Lib, NSW); and a proposal for six legislative and general purpose standing committees and a committee on statutory corporations, to be set up gradually over a period of 12 months, from the Leader of the Australian Democratic Labor Party, Senator Gair (DLP, Qld). All had been moved and debated concurrently during general business on Thursday, 4 June 1970, and the debate was resumed a week later. When it came to the vote, Senator Murphy's motion was agreed to by 27 votes to 26 with Independent Senator Turnbull (Tas) and Liberal Senator Wood (Qld) supporting the ALP against the combined forces of the Coalition and the DLP. Senator Anderson's motion was agreed to by 26 votes to 25, Senators Turnbull and Wood absenting themselves from the vote. Finally, Senator Gair's motion was defeated on an equally divided vote with Senator Wood voting with the ALP and Senator Turnbull not voting. Senator Wood explained that he was opposing the motion because it effectively duplicated Senator Murphy's proposal which had already been agreed to.[66]

A full account of the events leading to the establishment of the Senate committee system is given in the 6th edition of *Australian Senate Practice.*[67] All parties supported a policy of gradualism in implementing the new system. Time was taken to debate fully such important matters as the membership formulae for the committees, only two of which were established initially as a trial.[68] Membership would accommodate all the groupings in the Senate—government, opposition, and minority groups and independents—but all committees would have government chairs by 'long-standing convention'.[69] The new committees were not permitted to meet during the sitting of the Senate except by order.[70] The importance of these new committees was

66 11/6/1970, SD, pp. 2362–63.

67 6th edition (1991), edited by J.R. Odgers, pp. 728–44. This account develops those in the 4th and 5th editions (1972 and 1976, respectively). Also see the debates on 4 and 11 June 1970, SD, pp. 2048–74 and 2342–67; and for a retrospective on the events, see 'For Inquiry and Report—The First 20 Years, 1970–1990', introduction to *Senate Legislative and General Purpose Standing Committees: The First 20 Years, 1970—1990*, Senate Committee Office, tabled 20/8/1991, J.1392; and *Senate Committees and Responsible Government: Proceedings of the conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees 3 October 1990*, *Papers on Parliament* No. 12, Department of the Senate, August 1991.

68 19/8/1970, J.253–55; SD, pp. 103–09. Note that an attempt by Senator Murphy in the early hours of 19/6/1970 to set the composition and chairing arrangements for the committees was defeated on an equally divided vote. An amendment moved by DLP Senator Byrne (Qld) was similarly defeated. Senator Murphy's membership formula provided for any question on the appointment of a minority group senator to be resolved by the Senate. In addition, the Government and Opposition leaders were empowered to appoint up to two additional members, and ministers were explicitly excluded from membership of any committee. Only the first idea took root and remains standard practice.

69 *Committees of the Australian Senate*, 16/2/1971, PP No. 32/1971, p. 9 and *Australian Senate Practice*, 6th edition, p. 738. 'This convention has always worked well, because the role of committees is fact-finding and not decision-making, and minority reports are always permissible.'

70 See SO 33 for the history of this prohibition, subsequently modified.

recognised, however, in a new provision for notices of motion for the reference of matters to the committees to be able to be given at any time when there was no other business before the chair, or to be handed to the Clerk. Moreover, such notices would have precedence as business of the Senate, ahead of government and general business.[71]

The first two committees to be established were the Standing Committee on Health and Welfare and the Standing Committee on Primary and Secondary Industry and Trade. In a remarkable reflection of the first inquiry undertaken by a Senate committee in 1901,[72] the latter committee's first report was on *Freight Rates on Australian National Line Shipping Services to and from Tasmania*.[73] The Health and Welfare Committee's *Report on Mentally and Physically Handicapped Persons in Australia*, presented in May 1971,[74] was the first report from the new category of committee and the forerunner of many groundbreaking inquiries on matters of national policy significance. Estimates committees received their first reference of particulars of proposed expenditure on 17 September 1970, for report by 13 October 1970.[75] The five committees met over 7 days for a total of 74 hours and eventually reported on 26 and 28 October, having received an open-ended extension.[76]

Meanwhile, President McMullin presented a report in February 1971 pursuant to the resolutions of 11 June 1970 and 19 August 1970 establishing the committees. The report noted developments in other jurisdictions and concluded that the Senate's committee system was now in good company. It noted that estimates committees had been established separately but that it would be up to a future Senate to consider whether the estimates function should ultimately be embraced by the legislative and general purpose standing committees.[77] Suggested operating procedures for estimates committees, circulated by the Leader of the Government in the Senate but not formally adopted by the Senate, were included in the report.[78] The list contains many items that remain familiar to observers of estimates hearings today, including:

- a restriction on no more than three (now four) committees meeting at once because of the constraints on Hansard and the Government Printer in supporting simultaneous meetings;[79]
- the attendance of Senate ministers, preferably throughout the hearings but certainly at the beginning of each department to give any opening statement

71 See SO 25.

72 The Select Committee on Steam-ship communication between Tasmania and the mainland of Australia, established 26/7/1901, J.87.

73 PP No. 160/1971; tabled 9/9/1971, J.677.

74 PP No. 45/1971; tabled 5/5/1971, J.565.

75 17/9/1970, J.299–300.

76 Extension granted 1/10/1970, J.326; reports presented 26/10/1970, J.380; 28/10/1970, J.393.

77 *Committees of the Australian Senate*, 16/2/1971, PP No. 32/1971, p. 4. The estimates function was absorbed by Legislation Committees as part of the 1994 restructuring of the committee system.

78 Circulated by the Leader of the Government in the Senate, Senator Anderson, on 1/9/1970; see SD, pp. 340–41.

79 Accommodation was also a factor and the President's report commented on the limited venues available until the proposed extensions to Old Parliament House, which would contain new committee rooms, were completed—but not in time for the 1971 Estimates (p. 13).

and answer questions, and also if specifically requested by members of the committee;

- questions involving opinions on matters of policy to be directed to ministers, not officers (now in Privilege Resolution (1)(16));
- the practices and procedures of the Senate to be followed as far as possible;
- reports to be brief and accompanied by minutes of proceedings and the Hansard transcript of the evidence, and political comment to be left to debate on the appropriation bills (the primary function of estimates being the seeking of information).[80]

Other aspects of the suggested procedures were not implemented, including the adoption of committee of the whole practices in confining senators to 15 minutes each at any one time. The choice of appropriate officers was left to ministers in the absence of specific powers to call witnesses. This is still largely the case in practice despite the extension of inquiry powers in 1994 to committees examining estimates.

Though still at an experimental stage, the estimates process was judged as a success.[81] Likewise, the legislative and general purpose committees were judged to be doing important work and the report supported the further expansion in the number of these committees operating. It was envisaged that public hearings might one day be televised to further stimulate the growth of public interest and participation in the new committee system.[82]

While committees have gone from strength to strength, there have also been some distractions in the form of occasional proposals to change the nature of the system. An attempt to establish a system of joint committees in the mid 1970s and a second attempt following the 1987 double dissolution are described in more detail in the commentary on SO 25.

The impact of the committee system on the Senate cannot be overestimated. Already, by the time the President made his report in February 1971, debate was judged to be more penetrating because of the specialised knowledge senators were acquiring from committee inquiries. At a retrospective conference on the twentieth anniversary of the committee system in 1990, it was apparent that committee work had transformed the careers of senators. It was a far cry from the situation recounted by former Senator Davidson (Lib, SA) who recalled being told of Menzies' opposition to Senate select committees in the 1960s: ' "Backbench Senators" ', Menzies was reported to have said, 'will have access to matters not meant for them and to material which is inappropriate for their role in Parliament.'[83]

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80 *Committees of the Australian Senate*, 16/2/1971, PP No. 32/1971, pp. 4–5.

81 For subsequent developments relating to estimates, see SO 26 and *Odgers' Australian Senate Practice,* 12th ed., pp. 313–16.

82 *Committees of the Australian Senate*, 16/2/1971, PP No. 32/1971, pp. 7, 14.

83 *Senate Committees and Responsible Government: Proceedings of the conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees 3 October 1990, Papers on Parliament* No. 12, August 1991, p. 23.

Committee work gave senators a greater stake in the institution as well as access to previously unimaginable levels of information. One sign of their engagement was in the resuscitation of the Standing Orders Committee from the later 1960s onwards. Figure 1 gives an indication of the resurgence in activity from that time and Appendix 9 reveals the incidence of reports on such committee-related topics as the disclosure of unpublished evidence, committees meeting after dissolution of the House of Representatives, presentation of committee reports out of sitting, rights of witnesses, questions to committee chairs, staffing arrangements and televising of hearings. There is also no doubt that Odgers, now Clerk, worked away quietly in the background, hanging onto his dream of a committee system and encouraging senators in their select committee work.

Standing Orders Committee reports were extensively debated throughout the 1970s and up to 1983, sometimes frustratingly so as similar territory was traversed at length, often with little apparent result. Senators of the old school like Senators Cavanagh (ALP, SA), Poyser (ALP, Vic) and Wright (Lib, Ind from 1978, Tas) thundered against restrictions on the rights of individual senators. Rationalists like Senator Murphy pleaded for procedures that could be explained to the man in the street without appearing ridiculous.[84] At root, however, was a re-engagement by senators with their procedures to an extent not seen since the first decade of the twentieth century.

The result was the publication of two new editions of standing orders in 1972 and 1977, the sixth and seventh editions and the last before Odgers retired as Clerk in 1979. The 1972 edition included changes to the size of the Standing Orders Committee, the reconstitution of the Printing Committee as the Publications Committee, clarification of the form of the question in committee of the whole when dealing with requests for amendments, time limits on speeches and the publication of committee evidence and documents. New to the 1977 edition were changes to the duration of the bells arising from building extensions, the facility to ask questions of committee chairs,[85] a new form of urgency motion, expedition of bills received from the House of Representatives, procedures for questions on notice and answers thereto, clerical amendments to tabled and printed papers[86] and, most significantly, the adoption of permanent orders for the legislative and general purpose standing committees and estimates committees.

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84 For an example, see the debate on proposed changes to SO 75 (then SO 64), 19/8/1971, SD, pp. 205–27 and Senator Murphy's comments on pp. 218–19.

85 This facility, having been little used, was abolished, initially on a trial basis late in 2008, by resolution of 15/10/2008 adopting a recommendation of the Procedure Committee in its *Second Report of 2008*, PP No. 353/2008, J.1030, and then by temporary order adopted 4/12/2008 to continue during 2009. The temporary order was superseded on 10/3/2009 by permanent abolition of the facility—see SO 72.

86 This amendment (now SO 170) arose from an unfortunate episode concerning the publication of the 5th edition of *Australian Senate Practice*. See Standing Orders Committee, *First Report for 57th Session*, tabled 15/2/1977, PP No. 1/1977, and the entry on Odgers in Volume 3 of the *Biographical Dictionary of the Australian Senate* (forthcoming).

A new order: the case for change

Two further editions, the eighth and ninth, were produced in 1981, during the clerkship of Keith Bradshaw. These were the last before the major revision at the end of that decade. They included such matters as changes to the composition of the Standing Orders Committee to include the Government and Opposition leaders as *ex officio* members, the inclusion of minority groups in the membership formulae for legislative and general purpose and estimates committees, the re-expression of the terms of reference for the Regulations and Ordinances Committee and consequent changes to the formulation of what constitutes business of the Senate, and the re-expression of the rule about commencing new business after a certain point in the day (April 1981 edition). A second edition in the same year was necessitated by a change to the title of the office of Chairman of Committees to 'Deputy President and Chairman of Committees', and the abolition of the requirement for motions to be seconded, changes which affected numerous standing orders. The new procedures for urgency motions and discussion of matters of public importance were also incorporated into the standing orders. There were also some deletions of superfluous or defunct standing orders but, in the November 1981 reprint, care was taken to preserve the existing numbering, not least to avoid rendering the 5th edition of *Australian Senate Practice* (1976) obsolete.

Between 1981 and 1987 there were no changes made to the standing orders but there was a great deal of innovative thought applied to procedural matters and to the broader constitutional context in which the Senate operated. Indeed, Standing Orders Committee reports between 1983 and 1987 were largely ignored and the committee expressed dissatisfaction with this state of affairs in its *Fourth Report of the Sixty-Second Session* and presented a list of outstanding recommendations.[87] Debate on the report began in February 1987 but was not concluded before the double dissolution that year.[88]

The first major issue to receive attention during the 1980s was the financial position of the Parliament in relation to the Executive. The Senate Select Committee on Parliament's Appropriations and Staffing reported in June 1981 recommending a range of reforms including:

- the establishment of an Appropriations and Staffing Committee to determine the estimates for the Senate and to confer with a similar committee of the House of Representatives as required;
- a separate parliamentary appropriation bill, also providing for an Advance to the President of the Senate on the same basis as the Advance to the Minister for Finance;
- amendment of the then *Public Service Act 1922* to provide the Presiding Officers with powers of appointment, promotion, creation, abolition and re-classification of positions and the power to determine terms and conditions of service.

87 PP No. 435/1986, pp. 2–3.

88 24/2/1987, J.1648–49; SD, pp. 544–55.

The establishment of the select committee owes much to the work of former Clerk, Roy Bullock, who, in 1971 at the request of the then President, Senator Sir Magnus Cormack, had written a paper on proposals to secure greater control by the Parliament over the appropriation of money for parliamentary services.[89] The creation of the Appropriations and Staffing Committee (see SO 19) and the introduction of a separate bill for parliamentary appropriations occurred the following year, while changes occurred to the employment framework over the next few years that finally halted the practice of all employment decisions for the Senate Department being made by the Governor-General-in-Council. Full autonomy in staffing finally occurred with the passage of the *Parliamentary Service Act 1999*, when the Clerk acquired the statutory function of employer of all departmental staff.

Major developments in parliamentary privilege also occurred. In 1982 a joint select committee was established to examine any changes considered desirable to the law and practice of parliamentary privilege, to procedures for raising, investigating and determining allegations of contempt and to penalties for contempt. The committee's work was wide-ranging and it presented a final report in October 1984, having tabled an exposure draft of the report in June that year.[90] Section 49 of the Constitution provided for the powers, privileges and immunities of the Houses and their committees to be the same as those of the United Kingdom House of Commons at the time of the adoption of the Constitution until declared by the Parliament to be otherwise. There had been no such general declaration but the report of the joint select committee provided a basis for work to begin on the partial codification of the law of parliamentary privilege.

The real trigger, however, for the Parliamentary Privileges Bill 1987 was provided by two adverse court judgments in NSW in 1985 and 1986 in the case of *R v Murphy* which had the effect of allowing witnesses in court to be questioned about their evidence, including *in camera* evidence, before parliamentary committees.[91] By declaring the scope of the term 'proceedings in Parliament' the Act rendered unlawful such uses of committee evidence, among other things. It was followed in 1988 by a series of resolutions in the Senate giving effect to important principles of parliamentary privilege that did not require, or were unsuitable for, statutory expression.[92] These included codes for the protection of witnesses before Senate committees in general and the Privileges Committee in particular, a non-exhaustive list of matters constituting contempts, procedures for raising and determining matters of privilege, and the pioneering procedures for persons adversely affected by references to them in the Senate to have recourse to a right of reply.

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89 Senate Select Committee on Parliament's Appropriations and Staffing, *Report*, PP 151/1981; also see Reid and Forrest, op. cit., pp. 404–05 and the entry on Bullock in Volume 3, *Biographical Dictionary of the Australian Senate* (forthcoming).

90 Joint Select Committee on Parliamentary Privilege, *Final Report*, PP No. 219/1984.

91 See *Odgers' Australian Senate Practice*, 12th ed., pp. 34–38 for the background to the 1987 Act.

92 See Resolutions of the Senate of 25/2/1988, J.534–36; and explanatory notes, notes on proposed amendments and responses to questions raised in debate, reproduced in Committee of Privileges, *125th Report—Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006, pp. 107–15.

A third, highly significant committee inquiry was undertaken by the Senate Select Committee on Legislation Procedures in 1988. Its aim was to devise procedures to facilitate the referral of bills to committees on a more systematic basis and to expedite the consideration of bills by the Senate. The committee also looked at allocating one day each week for committee consideration of bills and at ways in which the end of sitting concentration of bills could be avoided. [93]

Procedures for the referral of bills to committees had long been available to the Senate but practice had never caught up with the often-expressed desire for greater committee involvement, going back at least as far as the 1929 select committee on the advisability of establishing standing committees for various purposes, including the examination of bills.[94] What the 1988 select committee developed was a mechanism to achieve the referral of bills on a regular basis. It recommended the establishment of a Selection of Bills Committee which would comprise the whips of parties represented in the Senate and four other senators who would meet regularly to examine bills introduced into the Parliament with a view to making recommendations as to whether a bill should be referred, at what stage, to which committee and for how long. There was no formal prescription as to how committees should deal with the bills so referred. They might choose to follow committee of the whole-style procedures and go through the bill in private session, considering whether to recommend amendments. On the other hand, they might choose to subject the bill to a full public inquiry by seeking submissions on it and taking evidence from a range of witnesses before reporting back to the Senate with any recommendations. In practice, the latter approach has been the more common.

The select committee's recommendations were adopted on 5 December 1989 and finally came into effect, after some modifications, in August 1990.[95]

In the meantime, the 1980s was a time of experimentation with the adoption of a variety of sessional orders trying out new routines of business,[96] expedited proceedings on all bills,[97] greater opportunities for debating government documents, committee reports and government responses to committee reports,[98] and the referral of annual reports to committees.[99] These are evidence of a push towards more rational

93 Senate Select Committee on Legislation Procedures, *Report*, PP No. 398/1988. See pp. 24–25 for a summary of the recommendations.

94 The desire is evident even earlier. In 1907, for example, Senator Neild (FT, NSW) moved a motion to refer to the Standing Orders Committee the desirability of amending the standing orders to permit the referral of a bill to a select committee before its second reading; 4/7/1907, J.8. See SO 114 for the outcome. The motion may have been inspired by Senator Neild's experience with his Parliamentary Evidence Bill in 1904. See SO 176.

95 5/12/1989, J.2303–05. See SO 24A for details on the operation of the Selection of Bills Committee. For an account of the procedures and their operation, see John Vander Wyk and Angie Lilley, *Reference of Bills to Australian Senate Committees with particular reference to the role of the Selection of Bills Committee*, *Papers on Parliament* No. 43, June 2005. For a contemporary assessment and possible future directions, see Richard Pye, 'Consideration of Legislation by Australian Senate Committees and the Selection of Bills Committee', *The Table*, Vol. 76, 2008, pp. 34–43.

96 See SO 57.

97 See SO 113.

98 See SOs 61 and 62.

99 See SO 25.

procedures and more opportunities for the Senate to exercise its accountability function. Senators of the day including Senators Macklin (AD, Qld), Vigor (AD, SA) and Hamer (Lib, Vic) came up with innovative ideas, including the first versions of the bills cut-off order.[100]

In commenting on one of the first uses of the new expedited proceedings on bills, Senator Gareth Evans (ALP, Vic) commented that they were 'designed to get rid of mumbo-jumbo'.[101] Behind the scenes, another Evans—Harry Evans, then Clerk Assistant (Procedure)—was also working towards greater rationality in proceedings and the professional development of a growing number of Senate staff. Harry Evans was directly involved in the development of the *Parliamentary Privileges Act 1987* and the 1988 resolutions, having been the principal critic of the NSW judgments, as well as Senate adviser to the Joint Select Committee on Parliamentary Privilege. In February 1985 he started the *Procedural Information Bulletin* as a means of disseminating to staff information about procedural developments in the Senate and its committees.[102] His efforts would culminate in the first major revision of the standing orders since their adoption in 1903.

The 1989 revision[103]

The 1989 revision really began at the end of 1986. If a single catalyst for the revision can be identified, it was in the proceedings on the Australia Card Bill 1986. On 10 December 1986 the necessary questions were put to determine the fate of a second reading amendment, prior to determining the question for the second reading of the bill. In those days, such amendments were determined in two stages, with the first question designed to establish whether there was support for removing words from the motion (proposed to be substituted by other words) before a second question ascertained whether there was support for the substitution. In the Senate, an equally divided or negatived vote on both questions would leave only the original 'That' standing, clearly a ridiculous and embarrassing situation. As Evans argued to his Clerk, Alan Cumming Thom:

> In the proceedings on the Bill the Senate was again in the situation of having only the word 'That' left of the motion, the remainder of the words of the motion having been left out and the Senate having failed to agree to insert other words, an amendment to the words proposed to be inserted having been moved. This situation could have caused embarrassment to the non-government parties and to the Senate as an institution but it was avoided by the motion for the second reading of the Bill being put again by

100 See SO 111.

101 26/5/1987, SD, p. 2907.

102 The *Procedural Information Bulletin* continues to be produced after each period of sitting or estimates hearings and is also distributed widely beyond the department via the internet. http://www.aph.gov.au/Senate/pubs/proc-bul/index.htm

103 This term, like the term 1938 MS, is a term of convenience. The revision began in 1987; a first draft was tabled in 1988, and a revised draft was tabled in 1989 and adopted later that year to take effect from the first sitting day in 1990.

leave.[104]

Harry Evans argued that there was no good reason for not putting all amendments in one question, 'That the amendment be agreed to.'[105] He identified the standing orders that would require deletion if the new practice were to be adopted[106] and also drafted the replacement orders.

At the same time, he made several other suggestions for procedures that could be rationalised and presented to senators as a comprehensive package. These included expedited proceedings for bills (already under consideration), streamlining of procedures for resuming interrupted debates (rather than having to move a motion for the resumption of the debate after each interruption), more liberal rules for giving notices, and putting the question on urgency motions at the expiration of time for the debate. Furthermore, there was a need to rationalise obsolete, superfluous and conflicting provisions and to modernise ambiguous and obscure language. A third problem was the conflict between standing orders and sessional orders that had been in force for many years. Clerks, Evans argued, should take the initiative in proposing changes, thus demonstrating their expertise and understanding as a source of advice, rather than cultivating what might now be called 'secret clerks' business' by maintaining the standing orders as a subject of mystery and complexity that only clerks could interpret.

The proposals were put to the Standing Orders Committee in 1987 and work began on the revision. A first draft was tabled in the Senate on 17 May 1988, together with explanatory material and charts showing the correspondence between old and new numbering. Around 450 standing orders were reduced to just over 200, with some reorganisation of chapters and considerable modernisation of style. By this stage the old standing orders had become a shambles, overridden or modified by sessional orders, and having grown somewhat haphazardly since 1903. There were gaps in the numbering owing to earlier deletions. The archaic language and syntax of the standing orders detracted from their inherent value as sound rules of procedure. The move to a new building in 1988 also prompted some minor changes of a logistical nature.[107] The rationalisation transformed the Senate's standing orders into a set of contemporary procedures for a modern parliamentary body with a focus on legislating and on holding the government of the day to account.

It was intended that the revised standing orders should be a codification and clarification of existing practice by incorporating long-standing sessional orders and by removing duplication and repetition, and provisions that had been made

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104 Memorandum headed 'Procedural Matters' from the Clerk Assistant Procedure, Harry Evans, to the Clerk of the Senate, dated 16/1/1987.

105 For more detail on the background to the 'ancient usage' see SO 91.

106 Including old SOs 144, 145 and 149 which placed quite bizarre restrictions on amendments; for example, SO 144 prevented an amendment to any part of a question after a later part had been amended or voted on. See commentary on SO 91.

107 Specifically, the duration of the bells for quorums and divisions needed to be extended to 4 minutes because of the larger size of the building and the distance between senators' and ministers' offices and the chamber.

superfluous. Numerous proposed changes of substance were explained in notes that accompanied the draft, and the whole package was put before senators and the Procedure Committee (which had superseded the Standing Orders Committee in 1987) with a view to extensive consultations taking place on the form and substance of the changes.[108]

Consultations did occur over the next several months, primarily driven by the then Deputy President, Senator Hamer whose work was acknowledged in a statement by the President when tabling a revised draft on 1 November 1989, together with revised explanatory material which itemised the differences between the earlier and present drafts and the reasons for the changes.[109] A significant group of changes had been requested by senators and these included the restoration of some procedures that had been proposed for deletion on the grounds that they had been little used or considered outmoded. Procedures for a roll call (then known as a call of the Senate), the entitlement of backbench senators to retain their seats during their terms, the requirement for a senator nominated as President to express a sense of the honour proposed to be conferred on him or her, and the prohibition on moving more than once in 15 minutes motions in committee of the whole for the closure or to report progress were all restored at the request of senators following consultations. The suggestion for a new procedure that would allow the President to suspend the Senate in the absence of a quorum, rather than adjourning it, was also rejected. Further changes were made to give expression to procedural rules that had been implicit in rulings of the President.[110]

Unfortunately, it is not possible to consult the debate on the adoption of the new standing orders because there was none. The motion to adopt the revision and for the new standing orders to come into effect on the first sitting day in 1990 was dealt with as formal business on 21 November 1989 and therefore agreed to without amendment or debate.[111]

The 1990s and beyond: new frontiers

Not long afterwards, the Senate also agreed to a series of orders arising out of the Select Committee on Legislation Procedures for the referral of bills to committees and other matters (see above). These did not come into effect till the second half of 1990, at the same time as another major change occurred in the way the Senate would be seen by the world and perceived by itself. This change was, of course, the televising of parliament. Proceedings of both Houses had long been broadcast on radio by the Australian Broadcasting Corporation under the authority of the *Parliamentary Proceedings Broadcasting Act 1946* which also established the Joint Committee on the Broadcasting of Parliamentary Proceedings. The committee's role was to work out

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108 Review of Standing Orders, memorandum by the Clerk of the Senate dated 16/5/1988, tabled together with the first draft of the revised standing orders on 17/5/1988, J.712 (tabled paper no. 739).

109 1/11/1989, SD, p. 2732.

110 Revised Standing Orders: Amendments to the draft tabled on 17 May 1988, dated October 1989, tabled together with the revised draft of the standing orders on 1/11/1989, J.2194 (tabled paper no. 4242).

111 J.2219. See SO 66 for the meaning of formal business.

the general principles on which broadcasting should be allocated between the Houses and to determine the days on which each House should be broadcast. The committee also determined conditions for the re-broadcasting of proceedings. The Act applied only to radio broadcasting. In a resolution of 13 December 1988, the Senate permitted the broadcasting and re-broadcasting on television and radio of sound recordings of excerpts of its proceedings.[112]

Televising of Senate proceedings was initiated by an opposition senator, Senator Vanstone (Lib, SA) in 1990 and, again, its commencement was closely connected with the move to a new building which was equipped with the infrastructure necessary to provide television and radio coverage. Several reports on televising and radio broadcasting of both Houses and their committees had been presented in the latter half of the 1980s by the Joint Committee on Broadcasting of Parliamentary Proceedings but not implemented.[113] Senator Vanstone's motion, moved after a suspension of standing orders, provided for the trial televising of Question Time in the Senate to commence in the August sittings of 1990.[114] The trial became permanent the following year and the House of Representatives also decided to televise its proceedings.

The impact of television and, later, webcasting, on Senate proceedings and their reception by the public is beyond the scope of this study. It is certainly the case, however, that the focus on Question Time as a spectacle and a performance has led to a distorted view of what Parliament actually does and a corresponding decline in respect for the institution.

The reductive effect of television has been considerably offset, in many respects, by the growth of Senate committee work and its consequent impact, made possible by the adoption of procedures for the systematic referral of bills to committees. The percentage of bills referred to committees during the 1990s averaged about 30 per cent of all bills passed by the Senate. During the 2000s to date, this percentage has risen to over 40 per cent. Throughout this period, many bills inquiries have led to bills being amended either as a result of non-government senators moving amendments based on evidence to the various inquiries or, perhaps more commonly, of government amendments drafted to reflect revisions in policy following committee inquiries. It is now a commonplace for ministers in both Houses, when speaking of the fate of their bills, to refer to a Senate committee inquiry as a necessary and useful step in the legislative process, and to program the bills accordingly.

The sudden growth in legislative work in the early 1990s, coupled with an upsurge in the number of select committees being established to inquire into particular matters, usually with a non-government majority and chair, led to an inquiry into the committee system by the Procedure Committee in 1994. The committee had been

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112 J.1293.

113 See, for example, PP Nos. 125/1986 and 145/1987. The committee also reported on the issue in the 1970s. See PP Nos. 61/1974 and 62/1974. See also Standing Orders Committee, *Fourth Report for the Sixtieth Session*, PP No. 274/1982.

114 31/5/1990, J.192–93. For a brief history of the Senate's broadcasting resolutions, including those covering the provision of the House Monitoring Service to external clients and the webcasting of proceedings, see *Odgers' Australian Senate Practice*, 12th ed., pp. 80–81.

directed to inquire into ways in which the committee system could be made more responsive to the composition of the Senate with reference to the number of committees required, their functions and membership, and arrangements for chairing committees, noting the interests of the then opposition in a system of sharing chairs among the parties.[115]

The Procedure Committee proposed a system of paired committees in eight subject areas corresponding to the policy areas covered by the legislative and general purpose standing committees. In each subject area there would be a references committee and a legislation committee, supported by a common secretariat. The references committee, with a non-government chair, would be responsible for inquiring into matters referred by the Senate. The legislation committee, with a government chair, would be responsible for bills inquiries, estimates, annual reports and performance monitoring of the agencies within the subject area. Informally, it was understood that references committees would largely overcome the need for select committees and that any new select committees would be supported by the committee secretariat from the most closely related subject area.[116] The membership of the committees would be determined by a formula reflecting the composition of the Senate. The position of deputy chair was formalised and also subject to the new sharing formula. Other committees were affected by the proposals with the chairs of some committees, including the Privileges Committee, Scrutiny of Bills Committee and the new Senator's Interests Committee, being designated as opposition senators. Senators representing the largest minority party were also allocated chairs of two of the eight references committees. These proposals were adopted on 24 August 1994 and came into effect on 10 October that year.[117]

The restructuring of the committee system was the last of three major developments to occur in 1994, the other two being the implementation of a system of registration of senators' interests and the restructuring of the hours of meeting and routine of business, resulting in the adoption of more so-called family-friendly hours.

The registration of interests had been long in gestation. While the House of Representatives had adopted a system of registration ten years earlier following the change of government in 1983, there had been resistance in the Senate on the grounds that the proposed system was unlikely to be effective. There had been several reports on the issue but no action until, in the aftermath of the so-called 'sports rorts affair' involving the resignation of a minister over the administration of a program of community cultural, recreational and sporting grants, the resolutions were adopted as part of a package of accountability measures.[118] There have been several amendments

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115 Procedure Committee, *First Report of 1994*, PP No. 146/1994.

116 Procedure Committee, *First Report of 1994*, PP No. 146/1994, p. 4.

117 24/8/1994, J.2049–54. See also SOs 25 and 26.

118 See *Odgers' Australian Senate Practice*, 12th ed., pp. 136–37. Earlier reports include the report of the Joint Committee on Pecuniary Interests of Members of Parliament, PP No. 182/1975; *Public Duty and private Interest*, Report of the Committee of Inquiry, PP No. 353/1979; Standing Orders Committee, *Third Report of the Sixty-first Session*, PP No. 112/1984; and *Third Report of Sixty–second Session*, PP No.435/1986. For a ministerial statement on the package of accountability measures, see 3/3/1994, SD, pp. 1453–54, which followed debate on a proposed select committee on 'Certain Government Accountability Matters', namely the community grants program, pp.

to the resolutions subsequently, on the recommendation of the Senators' Interests Committee, including alterations to the dollar thresholds in 2003 to take account of inflation, removal of the requirement for oral declarations of interests in debate and other proceedings and the inclusion of a definition of 'partner' to take account of relationships other than those covered by the term 'spouse'.[119] The resolutions were also augmented in 1997 by a further resolution relating to the registration of gifts intended by the donor as a gift to the Senate or the Parliament.[120]

By the early 1990s, the sitting pattern had settled into a seven day fortnight comprising Tuesday to Thursday in week one and Monday to Thursday in week two with Fridays of week one technically set aside for committees inquiring into bills.[121] Meetings commenced at 2pm on Mondays and Tuesdays and 10am on Wednesdays and Thursdays. Finishing times were not fixed, the question for the adjournment could be negatived (and business therefore continue into the night), and there was no time limit on the adjournment debate, each speaker having up to 30 minutes to speak on a matter of their choice. After particularly arduous sittings at the end of 1992, and after the 1993 election, pressure grew for the Senate to review its work practices and, in particular, the proliferation of late night sittings which were considered undesirable on several grounds.

In August 1993, the Procedure Committee received a reference on the matter and it reported in September.[122] The report was not considered till the following February. In the meantime, 1993 also ended arduously when debate on the Native Title Bill 1993—the 'Mabo Bill'—did not commence till 14 December and continued till the early hours of 22 December. When the Senate debated the Procedure Committee report the following February, one opposition senator, a medical practitioner, warned that fatigue was as debilitating as alcohol as an impairment to rational decision-making and that the Senate should not be legislating by exhaustion.[123] Under the new scheme, adopted as a sessional order on 2 February 1994, the Senate would finish no later than 8 pm on any night and yet the routine of business had been designed so as to ensure at least as much business would be possible under the new arrangements as under the previous ones. Following the change of government in 1996, revisions were made to the new scheme which restored later sittings on one night each week, together with an open-ended adjournment debate on one night and included, for the first time,

1417–53. The resolutions were agreed to and the Committee of Senators Interests established on 17/3/1994, J.421.

119 15/9/2003, J.2365; 22/11/1999, J.2008. For other amendments, see 21/6/1995, J.3473 (increase in certain dollar thresholds) and 10/8/2006, J.2457 (extension of period in which notifications of alterations of interests must be lodged). Relevant reports of the Senators' Interests Committee include *Report 2/1995: Review of Arrangements for the Registration of Senators' Interests*, PP No. 139/1995; *Report 2/2002: Proposed changes to resolutions relating to declarations of senators' interests and gifts to the Senate and the Parliament*, PP No. 312/2002; and *Report 2/2006: Review of Arrangements for Registration of Senators' Interests*, PP No. 76/2006.

120 Agreed to 26/8/1997, J.2324; subsequently amended 8/12/1999, J.2212, 15/9/2003, J.2365.

121 An 8 day fortnight was prescribed in the standing order but this was modified by the sessional orders for referral of bills to committees.

122 Procedure Committee, *Second Report of 1993*, PP No. 212/1993.

123 Senator John Herron (Lib, Qld). See 2/2/1994, SD, pp. 225–27. Senator Herron voted against amendments moved by his party leader, Senator Hill (Lib, SA), that would have removed the proposed time limits on adjournment debates, 2/2/1994, J.1170–71, 1175.

the quarantining of time specifically for government business. After a chequered start, these changes were adopted as permanent standing orders with effect from the beginning of 1997 (see SOs 55 and 57 for further details).

Although it was only a few years since the adoption of new standing orders, the proliferation of long-standing sessional orders and orders of continuing effect led the Procedure Committee to undertake a consolidation exercise in 1996 to incorporate material into the standing orders so that they continued to operate as a complete code of practice. Aspects of the Privilege Resolutions, for example, such as procedures for raising matters of privilege, had already been replicated in the 1989 revision. On this occasion, a large number of sessional and continuing orders were incorporated, with some consequential generalisations of rules, including in relation to:

- the publication of *Hansard* (see SO 43);
- scrutiny of annual reports by committees (see SO 25);
- consideration of appropriation bills examined by legislation committees (see SO 115);
- the cut-off procedures for bills (see SO 111);
- written questions at estimates hearings (see SO 26);
- presentation of government documents and committee reports when the Senate is not sitting (see SOs 166 and 38);
- the 30 day rule for answers to questions on notice (see SO 74);
- procedures for referral of bills to committees (see SOs 24A, 115 and 209);
- time limits on questions without notice and motions to take note of answers (see SO 72);
- time limits on speeches (see SOs 114, 189, 52 and 197); and
- the new times of sitting and routine of business (see SOs 55, 57, 54, 61, 62, 75 and 169).

This process provided a useful model for future updates.

Other orders

The incorporation exercise left a number of orders still outside the standing orders and appropriately so. The Privilege Resolutions, for example, continued to exist as a separate unit because of their length and specialised character, as did the resolutions on Senators' Interests. The various resolutions on broadcasting of proceedings,

including committee proceedings, were consolidated into a separate set of continuing orders for ease of reference. [124]

Resolutions that were not of a procedural character were also kept separate and would continue to be published at the end of the standing orders along with procedural or declaratory orders and resolutions of continuing effect. Resolutions not of a procedural character included those relating to the display of the flag in the Senate chamber, provision of seating in the chamber for House of Representatives members and limitations on the taking of photographs in the chamber.[125] Declaratory orders included those relating to the publication of disallowed questions in *Hansard*, the procedural powers of parliamentary secretaries, procedures for dealing with unauthorised disclosures of committee proceedings, statements to accompany requests for amendments on circulation and procedures for dealing with claims of commercial confidentiality.[126] Another sub-category of orders was for the periodic production of documents of a specific character, including indexed lists of agency files, contracts and advertising and public information projects, assessments of anti-competitive practices by private health funds or providers and progress in pursuing international multilateral agreements on a number of maritime matters.[127] On the other hand, an order for production of periodic returns from the government showing details of Acts which come into effect on proclamation but which had not yet been proclaimed, together with reasons for non-proclamation, had been incorporated into SO 139 as part of the consolidation exercise.

The final category of 'other orders' kept separate from the standing orders was the collection of resolutions expressing opinions of the Senate on a range of matters, including accountability of agencies to parliamentary committees, the determination of parliamentary appropriations, the meaning of 'ordinary annual services' for the purpose of s.53 of the Constitution, measures against retrospective tax legislation, the filling of casual Senate vacancies, the provision of government responses to committee reports and the right of the Senate to be informed of the detention of its members.[128]

Because they are largely self-explanatory and their origins are well documented in the published editions of *Standing Orders and other orders of the Senate*, as well as in *Odgers' Australian Senate Practice*, these orders and resolutions are not dealt with further in this volume.

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124 Procedure Committee, *First Report of 1996*, PP No. 194/1996, 'Proposed Incorporation of continuing and sessional orders into standing orders', p. 3. Also see pp. 1–2 for lists of continuing and sessional orders recommended for incorporation (and subsequently incorporated).

125 Agreed to, respectively, 8/10/1992, J.2861, 18/5/1993, J.164, 21/3/2002, J.269.

126 Agreed to, respectively, 6/2/1995, J.2885, 6/5/1993, J.100 (and subsequently amended), 20/6/1996, J.361 (and also see a further resolution relating to unauthorised disclosure, agreed to originally on 6/10/2005, J.1200–02, and awaiting inclusion in the next edition of standing orders to be published), 26/6/2000, J.2899 and 30/10/2003, J.2654.

127 Agreed to, respectively, 30/5/1996, J.279 (and subsequently amended), 20/6/2001, J.4358 (and subsequently amended), 29/10/2003, J.2641, 25/3/1999, J.626 (and subsequently amended) and 29/11/1996, J.1161.

128 These and various other resolutions of this character are published under the heading 'Resolutions expressing opinions of the Senate' in each edition of *Standing Orders and other orders of the Senate*.

Current trends

Since changing its name in 1987, the Procedure Committee's work has reflected the broader remit implicit in the new name. It has undertaken wide-ranging reviews of procedural matters, such as the routine of business, a function which its predecessor seemed reluctant to embrace when it placed Odgers' reports on possible committee systems before the Senate without comment in 1970. The Procedure Committee's redesign of the committee system in 1994 was the product of broad consultation and did not suffer from sentimental adherence to traditional forms for their own sake. It made good sense for the work of estimates committees to be absorbed into, and coordinated with, the work of the legislative and general purpose standing committees, and for the chairs of committees to be allocated to senators from all sides of the chamber to reflect the composition and character of the Senate as it had developed after the advent of proportional representation.

The Procedure Committee also undertook important work on constitutional issues such as the meaning and application of the third paragraph of s.53 and the rights of the Senate and senators when meeting jointly with the House of Representatives for ceremonial purposes.[129] Its work generally could be seen as more issues-based than in earlier times when it focused largely on particular changes to individual standing orders.[130]

An area in which Senate procedures have developed to cater for an increasingly complex workload is in relation to the consideration of legislation. In addition to the expedited proceedings on bills and the systematic referral of bills to committees, developments include:

- streamlining of consideration of appropriation bills to avoid duplication between estimates hearings and committee of the whole consideration of the bills (see SO 115);
- evolution of the bills cut-off order to ameliorate the end of sitting rush of bills and to ensure adequate time for their consideration (see SO 111);
- the ability for the question on non-government amendments to be put at the expiration of time under a bill declared urgent, not just the question on government amendments (see SO 142);
- the virtually universal adoption of the practice of taking bills as a whole, by leave, in the committee of the whole stage (rather than going through them clause by clause), thereby facilitating subject-based consideration of amendments and greater flexibility generally;
- the routine practice of using running sheets or marshalled lists of amendments to facilitate consideration of amendments to bills;

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129 See *First Report of 1996*, PP No. 194/1996 and *Third Report of 2003*, PP No. 436/2003.

130 Exceptions include the development of solutions to particular problems; for example, the introduction of general time limits on speeches in 1919 (see SO 189) and the adoption of the guillotine in the 1920s (see SO 142).

- the ability to by-pass the committee of the whole stage when not required, but with absolute safeguards on the right of any senator to require a committee stage (see SO 115).

There have also been important developments in mechanisms to facilitate accountability. As part of the same package of accountability measures that preceded the Senators' Interests resolutions, the government also undertook to support a motion proposed by Senator Harradine (Ind, Tas) for the periodic production of indexed lists of files created by departments and agencies, to enhance the transparency of their operations. This motion was agreed to on 30 May 1996[131] and was later joined by similar orders for the production of lists of contracts entered into by departments and agencies, and advertising and public information projects, both initiated by Senator Murray (AD, WA).[132]

A mechanism to preserve adequate opportunities for the consideration of Auditor-General's reports was recommended by the Procedure Committee in 2000 and provides a similar mechanism to that provided for the consideration of government documents and committee reports (see SOs 61 and 62, themselves important accountability mechanisms). Other accountability mechanisms adopted include the 30 day rule, which allows senators to raise in the chamber after Question Time each day any answers to questions on notice that have been outstanding for more than 30 calendar days. An amendment made to SO 74 in the course of the 1996–97 consolidation allows senators to seek explanations from ministers and, depending on the result, to move motions in relation to the explanation or lack of an answer. A similar mechanism was adopted in 2005 in relation to unanswered questions taken on notice at estimates hearings and outstanding orders for the production of documents.

As well as advances in accountability there have also been some setbacks. When the then government obtained an unexpected majority in the Senate at the 2004 election there were statements made to the effect that the government would not abuse this position. The government used its numbers, however, to abolish the non-government-chaired references committees and to bring all committee work back under government-chaired legislative and general purpose standing committees (see SO 25). During the period mid-2005 to the end of 2007 few committee inquiries were agreed to unless they had government backing and were therefore unlikely to subject the government to effective scrutiny. Although the government lost office at the 2007 election, the 2006 restructuring of the committee system was initially left in place and the proliferation of select committees with non-government chairs, apparent before the 1994 restructuring, returned in 2008. The pre-2006 system of references and legislation committees was restored with effect from 14 May 2009.[133]

At the present time, Question Time is under examination and trials have taken place of procedures providing for senators to ask primary questions and up to two

131 J.279. Also see 3/3/1994, SD, p. 1454.

132 20/6/2001, J.4358 (and subsequently amended); 29/10/2003, J.2641, the latter order was initiated in conjunction with the then Leader of the Opposition in the Senate, Senator Faulkner (ALP, NSW).

133 Procedure Committee, *Second Report of 2009*, PP No. 62/2009, presented out of sitting on 16/4/2009, tabled 12/5/2009, J.1882; adopted 13/5/2009, J.1942–46.

supplementary questions, with answers to primary questions limited to two minutes and required to be 'strictly relevant' to the question. These procedures are a truncated version of a system proposed by the Deputy President, Senator Ferguson, and modelled on procedures in the United Kingdom and in New Zealand. The system remains under review.[134]

With change occurring at a more rapid pace and editions of standing orders reprinted at more frequent intervals, the provision of procedural support has also accelerated. When Odgers warned his successors in the early 1980s against renumbering the standing orders and thereby making the 5th edition of *Australian Senate Practice* obsolete, he set a challenge for later Clerks of the Senate.[135] The 6th edition, published posthumously in 1991 after the standing orders had been completely revised, contained charts showing the correspondence between the old standing orders referred to in the text and the new standing orders now in use. With the agreement of the Odgers family, Harry Evans undertook a complete revision of the text in 1994 and has produced six new editions of the work, effectively a new work and known as *Odgers' Australian Senate Practice*, as well as six-monthly updates in between editions (see Appendix 8). The *Procedural Information Bulletin* also continues to be produced after each sitting fortnight and published on the internet, bringing it to a wider audience.

The *Annotated Standing Orders of the Australian Senate* does not duplicate material already covered in *Odgers' Australian Senate Practice* but contains many references to it and to the earlier 6th edition. It is designed to complement those works for any reader who is interested in more detail about how the Senate arrived at its current procedures.

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134 Procedure Committee, First, Second and Third Reports of 2008, PP Nos. 334/2008, 353/2008 and 500/2008; *First Report of 2009*, PP No. 35/2009.

135 The source of this anecdote is the present Clerk, Harry Evans.

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