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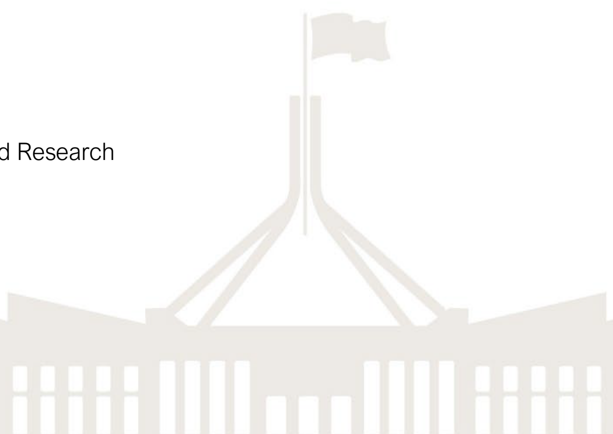

How responsible is responsible government — parliament, statutes, the executive and the courts

The Hon Robert French AC*

Introduction

This paper is about responsibility in the working of our democratic institutions—responsibility in the constitutional sense of responsible government and in a larger moral sense which is indispensable to the success of our democracy and trust in its workings by the Australian people. It acknowledges and celebrates Harry Evans as a role model of responsible commitment to that democracy and to the great public office he occupied for so long.

The Senate, responsible government and Harry Evans

There are 3 key chapters of the Australian Constitution — Chapter 1, the Parliament; Chapter II, the Executive Government and Chapter III, the Judicature. Part II of Chapter 1 concerns the Senate. It was in Part II of Chapter I and in the Senate that Harry Evans made his contribution to the working of Australian democracy as Clerk of the Senate for 21 years from 1988 to 2009.

The Senate is part of the parliament as reflected in section 1 of the Constitution. As an element of the parliament, the Senate is part of the law-making machinery under the Constitution. It is also part of the formal structure of the system of responsible ministerial government defined by the relationship between the executive government and parliament.[1] That relationship is reflected in section 6 of the Constitution requiring a session of the parliament at least once a year, and section 83 of the Constitution requiring parliamentary approval for expenditure by the executive government of any fund or sum of money standing to the credit of the Crown in right of the Commonwealth. Section 49, dealing with powers, privileges and immunities, 'secures the freedom of speech' in debate which historically was a powerful instrument for defending the privileges and immunities of the Senate and the House of Representatives and specifically freedom of speech in debate, which enables parliament to express opinions on the conduct of the affairs of the state. Section 49 also provides the

* This paper was presented as part of the Senate Lecture Series on 1 December 2023.

[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558.

source of power of each chamber of the parliament to summon witnesses or require the production of documents under pain of punishment for contempt.[2]

The first Chief Justice of Australia, Sir Samuel Griffiths, said that the effect of responsible government 'is that the actual government of the State is conducted by officers who enjoy the confidence of the people'.[3] And as was said by the High Court in *Lange*:

> *That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government.*[4]

Responsible government means government chosen from those who have the confidence of the House of Representatives. It also requires that for the most part the Governor-General acts on ministerial advice. Those requirements are not spelt out in the Constitution.

Harry Evans was acutely conscious of the importance of maintaining the constitutional role of the Senate in holding the executive accountable to the parliament and the people through the committee and inquiry processes. In an article written in *The Age* under the headline 'Senate sentinel' in 2009, Michelle Grattan described him as 'a Canberra institution, standing up to governments of either hue, advising senators on how they can push their power, clothing parliamentary adventurism in a benign exterior, with the loping gait of a weekend bushwalker'.[5]

He authored short but illuminating papers on various aspects of the constitutional role of the Senate. In a paper published in 2001 he quoted 2 statements by framers of the Constitution, which he said illustrated the rationale of the Senate.[6] The first was by Sir Samuel Griffith whom he characterised as a conservative:

> *… it is accepted as a fundamental rule of the Federation that the law shall not be altered without the consent of the majority of the people, and also of a majority of the States, both speaking by their representatives …*[7]

The second quotation was by Dr John Cockburn whom he characterised as a radical democrat:

> *… the great principle which is an essential, I think, to Federation—that the two Houses should represent the people truly, and should have co-ordinate powers. They should represent the people in two groups. One should represent the people grouped as a whole, and the other should represent that as grouped in the states.*[8]

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[2] (1997) 189 CLR 520, 559 and see *R v Richards*; *Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

[3] Sir Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, Government Printer, Brisbane,1896, p. 17.

[4] (1997) 189 CLR 520, 559 (footnote omitted).

[5] Michell Grattan, 'Senate's sentinel', *The Age*, 30 May 2009.

[6] Harry Evans, 'The Role of the Senate', *Papers on Parliament*, No. 52, Department of the Senate, 2001, pp. 93–94.

[7] Sir Samuel Griffith, quoted by Sir Richard Baker, *Official Records of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, p. 28.

[8] Dr John Cockburn, *Official Records of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, p. 340.

He had a strong grip of the messy reality of our democracy at work and the fact that having the numbers does not equate to good government. In 2006 he described democracy as a necessary but sufficient condition of good government:

> *To the extent that government in the west has been a more civilised business it has not been due to democracy but something far older: constitutionalism, subjecting government itself, even when power is exercised by a majority, to limitations and restraints. It is more important that the rulers know that their power is limited by enforceable rules than that they bask in the mandate of 'the people'.*[9]

Harry Evans most substantial written legacy lives on in the 14th edition of *Odgers' Australian Senate Practice*. Harry Evans produced 6 editions of the work. The 14th edition was published in 2016, 2 years after his death.

He wrote forcefully and clearly about the role of the Senate in holding executive government to account. He particularly emphasised the importance of the Senate estimates process. He offered a clear eyed vision of its untidiness:

> *Accountability is not a refined process which operates on an elevated plain above sordid politics. Accountability operates down in the swamp of politics amongst the crocodiles and mosquitoes. The political wetlands sustain our cultural life and biodiversity, without them the desert of despotism assumes the landscape.*[10]

Public confidence and public trust

The confidence of the parliament which is a central element of responsible government is itself only meaningful if there is public confidence in the parliament. Trust in our public institutions may be a questioning or even sceptical trust, but trust in their basic working is fundamental.

Sadly there is evidence of diminishing levels of trust in our institutions in Australia. Earlier this year a global report under the banner of the Edelman Trust Barometer issued reflecting the results of a survey-based methodology conducted in 28 countries around the world. This was its 23rd year.

The global index is based on what is called an average percent trust in non-governmental organisations (NGOs), business, government and media. In 2023, Australians were said to have indicated a level of trust measured at 48%. Of course, the first question that one might ask is: why should the Edelman Trust Barometer be trusted? Perhaps because it accords with what we see ourselves. Causative factors included economic imbalance, institutional imbalance, class divides and the battle for truth. Social media plays a part. So it was said:

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[9] Harry Evans, 'Democracy: The Wrong message', *Democratic Audit of Australia*, *Discussion Paper 24/06*, August 2006.
[10] Harry Evans, 'Estimates hearings and government control of the Senate', *Australian Policy Online*, 12 April 2006.

> *A shared media environment has given way to echo chambers, making it harder to collaboratively solve problems. Media is not trusted, with especially low trust in social media.*[11]

The so-called Gen Z is said to lead the decline in trust.

Australia falls into what the Trust Barometer calls the field of moderate polarisation where people see deep divisions, but think they might be addressable. Not surprisingly perhaps the United States (US) falls into what is categorised as 'severely polarised'.

Obviously civics education has a very important part to play. People are less likely to trust institutions whose workings they do not understand or of which they are ignorant. Civics education attainment in our schools is below par as indicated by the National Assessment Program – Literacy and Numeracy (NAPLAN) assessments issued by the Australian Curriculum Assessment and Reporting Authority (ACARA). In my role as Chairman of the Constitution Education Fund Australia, I have become increasingly conscious of the importance of a basic understanding of our democracy by the people whose choices determine its government.[12]

When it comes to establishing and continuing trust in our key constitutional institutions, the parliament, the executive and the judiciary, the people who operate those institutions are key. If the confidence of the parliament necessary to responsible government, is to be meaningful, the people who are elected to the parliament must collectively inspire the confidence of the people who elect them. This requires a basic ethical framework for the discharge of their functions. That is true also for the executive and the judiciary.

Public office and public trust

A general ethical framework can be stated fairly simply:

> *The holder of a public office must discharge its duties and exercise its powers for the purposes for which the office exists and for which the powers are conferred and only for those purposes and according to the conditions and within the limits of the powers.*

This is not only an ethical proposition, it has a legal and constitutional dimension. It encompasses honesty, diligence and rationality. But it does not unreasonably constrain. It is not an unattainable counsel of perfection. It allows for the exercise of public power for a wide range of public purposes even though they may be contestable on grounds of justice, fairness and workability. Judgments about those things are a matter for the parliament.

By way of example, the Australian Parliament has the power under section 51 of the Constitution 'to make laws for the peace, order and good government of the Commonwealth' on the various subjects which are set out in that section. That is a familiar form of provision conferring constitutional power on parliaments. It does not legally limit the exercise of the law-making power by reference to a criterion of peace, order and good government. It does

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[11] Edelman, *2023 Edelman Trust Barometer Global Report*, p. 4.

[12] The Hon Robert French AC, *'Constitutional Education Fund Australia: Serving Vital Needs in Civics and Citizenship Education'*, paper prepared for the Constitution Education Fund Australia, 2022.

not authorise the High Court of Australia to strike down a law on the ground that it is not for the peace, order and good government of the Commonwealth.[13] That judgment, for better or for worse, is a matter for the parliament, which is ultimately accountable to the people. That said, the exercise of public power is analogous to the exercise by a trustee of powers conferred under a trust. That applies to members of the parliament.

The idea that election to parliament imposes a trust-like or fiduciary obligation on the elected member goes back a long way. It was applied to individual members of parliament in the 1920s by the High Court in 2 cases, *Horne v Barber*[14] and *R v Boston*.[15] Mr Horne was a land agent engaged by Mr Barber to sell a property to the Victorian Government. The agent engaged Mr Deany, a member of the Victorian Parliament, to act as a lobbyist for the sale, promising him a share of the commission if it went through. Mr Deany made representations to the relevant minister about the virtues of the property, but did not tell the minister that he was acting in the matter as a commission agent. A dispute arose between the vendor of the land and the land agent about the agent's entitlement to commission. The Supreme Court of Victoria held that the commission agreement was illegal and void because of the involvement of the parliamentarian. The High Court emphasised the obligation of members of parliament as an aspect of responsible government and upheld the decision of the Supreme Court that the commission agreement was void. Sir Isaac Isaacs, who was to be appointed as the first Australian-born Governor-General, said in his judgment that:

> *When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament—censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.*[16]

Justice Rich in the *Horne* case reasoned explicitly in terms of a trust relationship:

> *Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid.*[17]

Similar statements were made in the *Boston Case* decided in 1923, in which a member of parliament was charged with conspiracy. It was alleged that he had agreed to receive

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[13] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, [9].
[14] (1920) 27 CLR 494.
[15] (1923) 33 CLR 386.
[16] (1920) 27 CLR 494, 500.
[17] (1920) 27 CLR 494, 501.

payments as an inducement to use his position as a member of parliament to secure the acquisition of certain lands by the Government of New South Wales. Isaacs and Rich JJ described members of parliament as 'public officers'.[18] They cited the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'.[19] Higgins J made a comparison with private trusteeship and said:

> *He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough.*[20]

That does not mean that the public trust affecting the way a member should discharge his or her work has a legal effect on the validity of a law passed with the support of a person whose vote has been bought with a bribe.

The practical importance of the public trust metaphor waned for a time as specific mechanisms were created for the oversight and accountability of public officials. However, as the late Justice Finn pointed out, a loss of faith in those mechanisms in the late 20th century led to 'renewed interest in "the public trust" and its implications for both officials and for our system of government itself'.[21] In codes of conduct for public officials at many levels, the trust or fiduciary concept is invoked. The *National Anti-Corruption Commission Act 2022* (Cth) includes in its definition of 'corrupt conduct' in section 8:

> *… any conduct of a public official that constitutes or involves a breach of public trust.*

The term 'public official' is defined in section 10 and includes 'a parliamentarian'.

A larger concept of responsibility in government

The ethical framework and the public trust idea tap into a wider concept of responsibility which has a much larger meaning that informs ethics for everybody. That is the idea of responsibility as a response or answer to the myriad questions which in our daily life are posed by family, friends, acquaintances, strangers, society and by events and circumstances which confront us. The great Jewish theologian, Martin Buber, wrote:

> *We practice responsibility for that realm of life allotted and entrusted to us for which we are able to respond.*[22]

Where official power is conferred upon an individual or individuals acting collectively, it attracts the application of the large idea of responsibility and the ethical framework which may give practical expression to it.

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[18] (1923) 33 CLR 386, 402.

[19] Ibid.

[20] (1923) 33 CLR 386, 412.

[21] PD Finn, 'The Forgotten "Trust" The People and the State', in Malcolm Cope (ed), *Equity: issues and trends: the importance and pervasiveness of equitable doctrines and principles in modern private, commercial and public law*, (Leichardt, Federation Press, 1995) p. 134.

[22] Martin Buber, *Between Man and Man*, 2nd edition, Routledge, 2002, p. 109.

So responsibility in the exercise of public power has an institutional dimension, but in the end it rests upon the shoulders of each individual who has the right or freedom to participate or contribute to the working of our institutions.

The key constitutional responsibilities of parliament are to make laws and to scrutinise the work of the executive, including the immense amount of delegated legislation and legislative instruments generated by ministers and public officials and authorities.

The law-making responsibilities of the parliament

The extent and limits of the responsibility of individual parliamentarians in the law-making process is not the same in its detailed content for every parliamentarian, for every law that the parliament considers. The volume and complexity of modern legislation is such that it is simply too much to expect that every member of parliament will have mastered the detail of every element of every law on which they vote. The Constitution does not in terms require that of them.

The regular process for the passage of a bill into law involves a first, second and third reading. The first is a formality, the second, introduced by a second reading speech from the relevant minister, which ordinarily sets out the substance and purposes of the proposed law, and involves substantial debate about that law. The second reading debate may be followed by consideration of the bill in detail in a committee process in which individual clauses or groups of clauses are agreed to or otherwise, and amendments debated. That process may be by-passed if agreed, and the bill proceed to a third reading. A bill may also be referred to an advisory committee for consideration. Broadly speaking, similar processes are followed in the Senate in considering a bill originating in the House of Representatives and passed through all stages there.

Sometimes a bill is declared by a minister to be urgent. If that is agreed by the House, time limits may be determined leading to a guillotine when time is exhausted and the questions necessary to complete that stage of the consideration of the bill are put.

In this setting, those who vote for a bill may include members highly conversant with its provisions, those who are not across the detailed provisions but are conversant with its purpose and effect as set out in the second reading speech and explanatory memoranda and perhaps a committee report — and perhaps some who support a bill because of advice or instructions they have received that the bill is consistent with the policy of the party to which they belong, or is otherwise supported by the leadership of the party.

The interpretation of the laws and the elusive concept of parliamentary intention

This aspect of the law-making function carried out by the parliament leads to a consideration of the principles, assumptions and presumptions about law-making that courts use when interpreting laws in disputes about their meaning. Here a question of institutional and individual responsibility, on the part of courts and judges, arises. Statutory interpretation lies on the constitutional boundary between the law-making role of the parliament and the interpretive role of the courts. The boundary is not defined by a clear bright line. In a dispute about the meaning of a law, courts may be faced with 2 or more reasonably arguable

meanings. In interpreting the statute after a contest they will choose one meaning over others – at least in application to the particular case before them. In such a case, they have a legitimate small scale law-making role for the choice determines what the law is. Sometimes, of course, the meaning is clear and the language allows only one reading.

The rules which the courts apply to the task of statutory interpretation are well known to the parliamentary counsel who draft proposed laws and who will be well aware of the possibility that choices of meaning may arise.

The general approach of the courts to the interpretation of a statute is to go first to the words – that is its text – then to context – that is other provisions of the same law or the legislative scheme. The court may also refer to background materials such as a report of a Law Reform Commission which has given rise to the proposed law. With text and context, the court also looks to the purpose of the law or the particular provision of a law being examined. The purpose might be stated in the law itself. It might be apparent from the text and the place in it of the particular section. It may be stated in the minister's second reading speech.

Section 15AA of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) provides that:

> *In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.*

We often hear the term 'legislative intention' in relation to laws passed by the parliament. None of the above requires a court to try to construct an imaginary intention of the parliament and from that imaginary intention, to determine what parliament intended the Act to mean. The diversity of understandings which different members of parliament have in voting for a law, and perhaps the diversity of reasons for which they might cast their votes, suggests that for a court to first announce that it has discovered a common legislative intention is to announce that it has constructed a fiction. In a formal sense, the legislative intention is said to be ascertained by the court's determination of the meaning of the law having regard to its text, context and purpose and general rules of interpretation laid down in the Acts Interpretation Act and at common law as developed by courts over the years.

In a case decided in 2011, 6 Justices of the High Court said that legislative intention is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted by the court as a statement of its compliance with the rules of construction, both statutory and common law, which have been applied to reach the preferred result and which are known to parliamentary drafters and to the courts.[23] In that case the Court also had something to say about the idea of a statutory purpose:

> *The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.*

[23] *Lacey v Attorney General (Qld)* (2011) 242 CLR 573, 592 [44].

The responsibility of the courts in interpreting the law

In making constructional choices, the courts must stay within their constitutional boundaries. They must not trespass into the law-making domain of the parliament. In a case decided in 2012, 4 Justices of the Court said:

> *In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.*[24]

Nor is it appropriate for courts to construe a statute by imposing upon it a meaning that the words of the statute will not bear in order to achieve some laudable social purpose. They cannot rewrite the law.

Sometimes a law can be interpreted in one way, which may impair or extinguish common law rights or freedoms. If interpreted in another way, it will not have that effect or will have that effect to a lesser extent. It is a well-established principle that the courts in such a case prefer the interpretation which avoids or minimises the adverse impact on existing rights and freedoms. This is a rule of interpretation known as 'the principle of legality'.

The principle is similar to that which is found in human rights legislation in Victoria, Queensland and the Australian Capital Territory (ACT). The human rights legislation there requires that courts should interpret state or territory legislation consistently with fundamental human rights and freedoms which are set out in the Act or schedules to the Act and derived from the International Covenant on Civil and Political Rights.

The High Court has interpreted that requirement under the Victorian human rights legislation as going no further than the common law principle of legality approach. That is, the Court can only choose a meaning which is reasonably open on the text of the legislation being interpreted. The English courts have taken a more robust approach under the *Human Rights Act 1998* (UK) in the United Kingdom.

The responsibility of the courts to stay within their constitutional boundaries is also clear when it comes to deciding whether a law made by the parliament is beyond the law-making power of the parliament under the Constitution. It is a big decision to strike a law down. The first question the court must ask is what does the text of the challenged law mean? Is there an interpretation open that lies within the scope of the parliament's law-making power even though on another interpretation, the law may lie outside that scope?

Section 15A of the Acts Interpretation Act provides that:

> *Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.*

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[24] *Australian Education Union v Department of Education and Childrens' Services* (2012) 248 CLR 1, [28] (footnote omitted).

The first task the High Court undertook in its recent decision about the mandatory detention provisions of the *Migration Act 1958* (Cth) was to determine whether the relevant provisions could be interpreted so as not to authorise a punitive indefinite detention.[25] The Court had previously held that they could not be interpreted to avoid that result. In the recent decision, the Court held that it could not overrule that conclusion. This left the Court to deal with the question of constitutional validity of indefinite detention. It could not interpret its way out of having to deal with that question.

Constitutional interpretation

As appears from the decision in *NZYQ,* constitutional interpretation can take the court into hotly contested areas of political sensitivity. Decisions which do not involve constitutional interpretation may also have political consequences. Examples are the decision in *Mabo (No 2)*,[26] *Wik*,[27] and the decision of the Court in the *Malaysian Declaration Case.*[28] The effects of such decisions can usually be changed by legislation. A constitutional interpretation of the High Court however, can only be changed in 2 ways:

1. by a referendum to amend the Constitution
2. by the High Court overruling its decision.

The judicial protection of the rule of law by implication

The High Court has also in a series of cases since 1996, interpreted the provisions of Chapter III of the Constitution relating to the judicature, in such a way as to protect the institutional integrity of courts and the essential characteristics of courts, federal, state and territory, from legislative intrusions. These cases have provided, among other things, that state parliaments cannot abolish the state Supreme Courts.[29] Further, they cannot deprive the state Supreme Courts of their traditional supervisory jurisdiction over executive action. That is to say, they cannot deprive the state Supreme Courts of their jurisdiction to determine whether action by a minister or a public authority of the state exceeds the legal power that that minister or authority has.[30] The High Court has such a jurisdiction entrenched in section 75(v) of the Constitution — a jurisdiction which cannot be removed by parliament. This leads into the question of responsibility of the courts in holding the executive government to account in determining, where executive action is challenged, whether that action is beyond the legal power conferred on the executive either by the Constitution or laws made under the Constitution.

The limits of judicial review of executive action

In this area also, as in the areas of statutory interpretation and constitutional interpretation, the courts have a responsibility to stay within their constitutional boundaries. It is no part of the court's function in determining the lawfulness of executive action in a particular case, to

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[25] *NZYQ v Minister for Immigration*, *Citizenship and Multicultural Affairs* [2023] HCA 37.

[26] *Mabo v Queensland (No 2)* (192) 175 CLR 1.

[27] *Wik v Queensland* (1996) 187 CLR 1.

[28] *Plaintiff M70 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

[29] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[30] *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

decide that they would prefer a different decision to have been made and to step into the shoes of the executive and make such a decision.

The general framework of judicial review of executive action was set out by Brennan J in an often quoted passage from *Attorney-General v Quinn*:

> *The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.*[31]

The reference to political control picks up the notion of that element of responsible government which involves parliamentary scrutiny of executive action.

Generally speaking the courts require of administrative decision-makers exercising a statutory power, that they comply with what I have termed the logic of the statute. The reasoning process of an executive decision-maker exercising a statutory power must meet the following requirements:

- it is a reasoning process – that is, so far as possible a logical process even though it may involve the exercise of a value judgment, including the application of normative standards and the exercise of discretion
- it must be consistent with the statutory purpose
- it must be based upon a correct interpretation of the statute, where that interpretation is necessary for a valid exercise of a power
- has regard to considerations which the statute expressly or by implication requires to be considered
- must disregard considerations which the statute does not permit the decision-maker to take into account
- must involve findings of fact or the existence of states of mind of the decision-maker which are required by the statute as necessary to the exercise of the relevant power
- must not depend upon inferences which are not open or findings of fact which are not capable of being supported by the evidence or the materials before the decision-maker.

All of this is to say no more than that the court will require the executive to comply with the law which the parliament has made.

The valid exercise of a statutory power by a public officer may require more than rationality in the sense of compliance with the logic of the statute. The decision-maker exercising a statutory power may tick all the logical boxes and yet make an unreasonable decision. Reasonableness imposes an additional element which may involve a concept of

[31] (1990) 170 CLR 1, 35 [17].

proportionality. Metaphorically speaking, it might be rational to use a sledgehammer to crack a peanut, but it will generally not be reasonable to do so.

So far I have considered the role of courts in determining cases in which it may be said that the executive government has exceeded a power conferred on it by statute – that is by a law made by the parliament.

The executive unplugged – non-statutory executive power

There is another ill-defined area of executive power that is more troublesome. That is executive power which comes directly from the Constitution and not from a law made by the parliament in the exercise of its law-making powers.

The starting point for consideration of this aspect of executive power is section 61 of the Constitution which provides:

> *The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*

The content of the executive power conferred by section 61 includes 'the execution and maintenance of the laws of the Commonwealth'. That limb of section 61 covers the case of executive power exercised under a law made by the parliament. The other limb 'the execution and maintenance of the Constitution' does not require statutory authority. Even that limb does not exhaust the scope of executive power.

In the drafting of the Constitution the content of the words 'the executive power of the Commonwealth' which found their way into section 61, were not the subject of much explanation.

The Constitutional Committee, established in 1891 by the National Australasian Convention to draft a federal constitution had, among its list of issues for decision, drafted by Griffith, an executive with 'powers correlative to those of the legislature'. The committee ultimately produced a document which proposed an executive government but said nothing about its powers.[32]

Uncertainty about the scope of executive power is not limited to Australia. Paul Craig and Adam Tomkins, writing in a *Collection of Essays* published in 2006, referred to what they called '[t]he inadequacy of formal definitions of executive power' and described it as 'an underlying shared phenomenon'.[33] In each of the examples they cited, the US, Australia, Canada, New Zealand and Germany, there are gaps and silences in relation to the executive. An Indian judge, Justice PP Mukharji, writing in 1967 about the Indian Constitution, suggested that definitional difficulty is in the nature of executive power:

> *… executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable*

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[32] 'Memorandum of Decisions of Constitutional Committee' printed from day-to-day '(Document 4) in Sir Samuel Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia*, (1891, reprinted 1973).

[33] Paul Craig and Adam Tomkins (eds), *The Executive and Public Law*, Oxford University Press, 2006, p. 4.

> *multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of State in political philosophy and political science.*[34]

Much has been written about executive power since federation and the difficulties of its definition. By 1977 when Professor Jack Richardson wrote about it in *Commentaries on the Australian Constitution*, it had received what he called 'only scant definition'. No case, he said, had yet arisen requiring a definition of the power.[35]

It is reasonably well established that non-statutory executive power enables the Commonwealth to undertake executive actions appropriate to its position under the Constitution, which is sometimes called the nationhood power and the prerogative powers historically accorded to the Crown under the common law and relevant to the functions of the Commonwealth.[36]

The executive spending public money

An important aspect of non-statutory executive power which has come under scrutiny in recent times has been the power of the executive to enter into contracts and to spend public money.

The question of parliamentary control of public expenditure by the executive was one which concerned Harry Evans. In a decision handed down in 2005, *Combet v Commonwealth* the High Court held that the government's industrial relations advertising campaign was an authorised purpose of expenditure under appropriations made by parliament for the Department of Employment and Workplace Relations.[37]

Evans referred to the very broad form of appropriations, stating that there was, as he said, 'very little limitation on the purposes for which money may be spent'.[38] Having regard to the broad brush appropriations held lawful by the Court he observed:

> *It is now clear that control of expenditure must be undertaken by the Parliament or not at all.*

But is it enough that a proposed expenditure is covered by an appropriation of money by the parliament to make it lawful? The answer to that question is no. The executive cannot spend money simply on the basis of a parliamentary appropriation. Parliamentary appropriation is a necessary condition of spending power, but it is not sufficient. The power to spend money and thus the power to contract to spend money must be found in the Constitution itself or in a valid law made under the Constitution. That proposition emerges from a trilogy of cases decided by the High Court in 2009, 2012 and 2014.

The first case was *Pape v Commissioner of Taxation*.[39]

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[34] Prasanta Bihari Mukharji, *Critical Study of the Indian Constitution*, Bombay University Press, 1967, pp. 9–10.

[35] Jack Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution*, 1987, p. 50 and pp. 54–55.

[36] *Cadia Holdings Pty Ltd v New South Wales* (2010) 212 CLR 195, 226.

[37] [2005] HCA 61.

[38] Harry Evans, *'Government advertising – funding and the financial system'*, Parliamentary Matters (No 15), February 2006.

[39] (2009) 238 CLR 1.

Pape concerned the validity of the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (Tax Bonus Act) which made provision for payments to Australian resident taxpayers. This Act was a fiscal response to the global financial crisis described in the explanatory memorandum for the bill for the Act as 'the most significant economic crisis since the Second World War'. The tax bonus was intended to 'provide immediate economic stimulus to boost demand and support jobs'. Brian Pape, a lecturer in law at the University of New England would have been entitled to $250 under section 7 of the Act. He didn't want it and he sued the Commissioner of Taxation asserting that the legislation was beyond power. Justices Gummow, Crennan, Bell and I held that the determination by the executive government of a need for an immediate fiscal stimulus to the national economy enlivened legislative power under section 51(xxxix) to enact a Tax Bonus Act as a law incidental to the exercise of non-statutory executive power. Justices Hayne, Heydon and Kiefel dissented in relation to that proposition. However, Justices Hayne and Kiefel held the Tax Bonus Act to be a valid enactment under section 51(ii) of the Constitution.

Mr Pape lost his challenge. However, an important principle which emerged from it was a win for his view of the executive power of the Commonwealth in relation to public expenditure. That was the proposition that sections 81 and 83 of the Constitution do not confer substantive spending power. Appropriation is a necessary condition of such expenditure. The power to spend appropriated moneys is to be found elsewhere in the Constitution or in statutes made under it.

Pape set the scene for *Williams (No 1)*.[40] *Williams (No 1)* concerned the validity of an agreement between the Commonwealth and the Scripture Union, Queensland. Under the agreement the Scripture Union was to provide chaplaincy services and to ensure those services were 'delivered' as identified in its application for funding. The only obligation imposed on the Commonwealth was to provide the funding for those services subject to the availability of sufficient funds. The plaintiff, a parent of children attending a Queensland school, challenged the validity of the agreement and the lawfulness of payments by the Commonwealth pursuant to it. One of the grounds was that the agreement and the payments were beyond the executive power of the Commonwealth under section 61 of the Constitution. Six of the 7 Justices held that the agreement was beyond the executive power of the Commonwealth described in section 61 of the Constitution as was the making of payments by the Commonwealth to the Scripture Union under the agreement.

In response to the decision in *Williams (No 1)*, the Commonwealth Parliament enacted the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which amended the *Financial Management and Accountability Act 1997* (Cth) and regulations made under it to confer power on the Commonwealth to make, vary or administer arrangements under which public money was or might become payable by the Commonwealth and grants of financial assistance which, apart from the Act, the Commonwealth did not have power to make. Subsection 32B(1) of the Amended Act relevantly provided:

[40] *Williams v Commonwealth* (2012) 248 CLR 156.

If:

(a) apart from this subsection, the Commonwealth does not have power to make:

…

(i) an arrangement under which public money is, or may become, payable by the Commonwealth; or

(ii) a grant of financial assistance to a State or Territory; or

(iii) a grant of financial assistance to a person other than a State or Territory; and

(b) the arrangement or grant, as the case may be:

(i) is specified in the regulations; or

(ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or

(iii) is for the purposes of a program specified in the regulations

the Commonwealth has power to make … the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

On Mr Williams' second challenge, asserting that the payments continued to be unauthorised, the Court held that section 32B should be read as providing the Commonwealth with power to make arrangements or grants only where it was within the constitutional power of the Commonwealth to authorise the making of those arrangements or grants.[41] The validity of the section in its application to a particular payment depended upon it being supported by a head of legislative power. The Court held that the impugned provisions were not for the provision of benefits to students within section 51(xxiiiA) of the Constitution and were not supported by any other head of legislative power. Nor was the making of payments for the purposes of the program within the executive power of the Commonwealth. The impugned provisions were invalid and the payments were unlawful.

Pape and the Williams' cases tell us that the executive government of the Commonwealth cannot spend public money on anything without an appropriation. They must also have legal authority deriving from statute or otherwise from non-statutory executive power found in the Constitution. That said, there are few litigants who would want to go to Court to test the validity of a payment. There are many more prepared to test the correctness of an exaction.

The legislation which responded to *Williams (No 1)* was an attempt at a global fix providing a legislated substitute for the common assumption. It validated all that could be validated. Whether it did so validly may be debatable. Harry Evans would probably have been disappointed in the parliament for passing that legislation.

The general question arises how is the executive held to account? The judicial process is an ad hoc mechanism of accountability. It is not systematic. Ultimately, it is the parliament, as Evans said after *Combet*.

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[41] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

In a submission to the Joint Committee of Public Accounts and Audit inquiring into Commonwealth Grants Administration in October 2022, Professor Anne Twomey observed that:

> *Those who actively approve the grants are rarely aware of the limits on their powers that are derived from the limited legislative support for the spending program.*[42]

As a result, in her opinion, much of the expenditure under grants schemes is unlawful or at least of doubtful legal validity. She put it thus:

> *This needs to stop. Governments should not be unlawfully spending public money. The principle of the 'rule of law' means that the law, including the Constitution, binds the government in relation to the expenditure of public money'.*[43]

Her concern does not appear to have led to any response in the committee's report.

The question remains: who is accountable for the lawfulness of public expenditure – quite apart from the ethical integrity of grants programs – and to whom are they accountable? The exercise of executive power cannot be systematically policed by the courts because they can only respond to the cases brought before them. This emphasises the importance of effective accountability mechanisms in the parliament and, as we have seen, particularly in the Senate.

The executive power of the Commonwealth can lawfully extend to funding programs well beyond those which might find support in heads of Commonwealth legislative power. Where such programs can be effected by grants to the states, the generous powers available under section 96 of the Constitution are available – with conditions to which the states must agree if they are to receive the money – but which they often find to be offers too good to refuse – and with few constitutional constraints.

There are few people who are prepared to come to court to challenge the validity of a payment made by the Commonwealth. There is therefore a practical limit on the accountability which can be imposed by the courts in relation to contracts and payments made under them. Responsible government trumps judicial review every time. The parliament does not have to wait for a case to come before it in order to examine the lawfulness and merits of public expenditure. Sometimes of course, it may not be politically prudent to challenge a popular program. But if responsible government is to mean anything it must mean that the executive is accountable to the parliament for its use of public money. The question is whether the parliament is discharging its function.

Conclusion

Across our constitutional system there are many calls for its actors – the institutions and the people who make them up – to respond ethically to the public interest and the public

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[42] Professor Anne Twomey, Submission No 5 to Joint Committee on Public Accounts and Audit, Parliament of Australia, *Inquiry into Commonwealth grants administration*, 27 October 2022.

[43] Ibid.

purposes which they are called on to serve. The idea of responsible government is at the centre of that picture. The ethical framework offers a larger picture. People like Harry Evans, a true servant of the public who carried out the duties of the Clerk of the Senate, are models for everybody, whether they are in the parliament, the executive or on the bench.

Did Australian parliaments meet regularly during the COVID-19 pandemic?

Harry Hobbs and George Williams AO[*]

Introduction

The COVID-19 pandemic posed significant challenges to governments and governance systems all over the world.[1] Faced with a complex and uncertain virus, Australian governments imposed extensive public health controls to protect the community. Borders were closed, dancing was prohibited, and businesses were shuttered. Families were prevented from seeing their loved ones in aged care homes, whole communities were confined to their local government area, and people were banned from meeting 2 or more friends for a walk outside.[2]

These measures were not imposed after consideration by parliament; they were implemented by the executive. The executive is uniquely positioned to provide quick, decisive, and flexible responses to protect public health and safety in periods of crisis. However, the actions taken by the executive raised questions about the role of parliament during this time. Australia is a representative democracy governed under a system of responsible government in which the executive answers to the people through their representatives in parliament. One might have expected parliament therefore to come to the fore as a highly visible and deliberative forum for community debate. Parliamentary processes offered the opportunity to scrutinise government measures and to build public trust. A striking feature of the response to the COVID-19 pandemic, however, was the 'contraction' of parliament.[3]

In this article, drawn from a longer piece in the *UNSW Law Journal*, we examine and assess how Australian parliaments responded to the pandemic.[4] We divide our paper into 2 substantive parts. Part 1 assesses the core functions of parliament to enable us to identify 4 key roles that parliament should undertake during a public health emergency. Parliament should meet regularly, be provided with sufficient time for debate on key measures and issues, and exercise both legislative and executive oversight. In part 2, we assess Australian

[*] This paper was presented as part of the Senate Lecture Series on 28 July 2023.

[1] Tom Ginsburg, 'Foreword for special issue on legislatures in the time of Covid-19', *The Theory and Practice of Legislation*, vol. 8, issue 1–2, 2020, p. 1.

[2] Orders were voluminous. By 22 May 2020, state and territory governments had enacted 547 statutory instruments relating to COVID-19, the Commonwealth alone had enacted another 172 related measures: Office of Meg Webb MLC, *COVID-19 Committees: A national comparison background briefing paper*, May 2020, p. 8.

[3] Stephen Mills, 'Parliament in a time of virus: representative democracy as a "non-essential service"', *Australasian Parliamentary Review*, vol. 34, issue 2, 2020, p. 8.

[4] Harry Hobbs and George Williams, 'Australian parliaments and the pandemic', *UNSW Law Journal*, vol. 46, issue 4, 2023.

parliaments against the first of these functions. We ask whether Australian parliaments met regularly during the pandemic.

The roles of parliament

It is often noted that the primary function of a parliament is to make and amend law. This central purpose is reflected in the common name of these institutions – while a parliament, assembly, commission, or congress denotes a group of representatives meeting – a legislature legislates. Members of these institutions agree. A 2012 survey of 155 parliamentarians from 15 national legislatures found that more respondents thought legislation to be one of the 2 most important functions of parliament than any other role.[5] However, is this the key role of parliament? Many political scientists have suggested otherwise. After all, 'a large part of the time of these bodies is not devoted to law-making at all'.[6] In fact, 'most of the world's legislatures do not legislate very much'.[7] Any role that parliament may have in law-making 'is not now, nor has it ever been, the dominant one',[8] for law and policy is made elsewhere. What, then, are the functions of modern parliaments? If legislatures are not primarily law-making bodies, what is it that they do?

a) How do political scientists describe the role of parliament?

In *The English Constitution*, British constitutional theorist Walter Bagehot sought to answer this question. Bagehot outlined 5 basic functions of the House of Commons. For Bagehot, parliament held an 'elective', 'expressive', 'teaching', 'informing' and 'legislative' function. The primary function of the House of Commons is its elective function. As the executive must maintain the confidence of the House, the chief role of the House of Commons is choosing the prime minister and the government.[9] If confidence is lost, the House can dismiss the prime minister and elect another to serve in his or her place. The next 3 functions are related. Parliament's role is to 'express the mind of the British people on all matters which come before it'.[10] As part of this, parliament will implicitly educate the British people, and inform the country of grievances and complaints, to lay them before the nation in parliamentary debate, to 'makes us hear what otherwise we should not'.[11] The fifth function of parliament is law-making, 'of conceiving, shaping, amending, rejecting and accepting bills'.[12] While Bagehot acknowledges that 'it would be preposterous to deny the great importance' of this task, it is of less significance than the former roles performed by the parliament, particularly, 'the executive management of the whole state, or the political education given by Parliament to the whole nation'.[13]

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[5] Ken Coghill, Peter Holland, Abel Kinyondo, Colleen Lewis and Katrin Steinack, 'The functions of parliament: reality challenges tradition', *Australasian Parliamentary Review,* vol. 27, issue 2, 2012, p. 60.

[6] Kenneth Clinton Wheare, *Legislatures*, Oxford University Press, London, 1963, p. 1.

[7] Robert Packenham, 'Legislatures and political development', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 546.

[8] C.E.S Franks, *The Parliament of Canada*, University of Toronto Press, Toronto, 1987, p. 5.

[9] Walter Bagehot, *The English Constitution,* 2nd edition, Little, Brown, and Company, Boston,1873, p. 118.

[10] Walter Bagehot, *The English Constitution,* 2nd edition, Little, Brown, and Company, Boston,1873, p.119.

[11] Ibid; and Walter Bagehot, *The English Constitution,* 2nd edition, Little, Brown, and Company, Boston,1873, p.120.

[12] Bernard Crick, 'Parliament in the British political system', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 51.

[13] Walter Bagehot, *The English Constitution,* 2nd edition, Little, Brown, and Company, Boston,1873, p.120.

Since Bagehot, political scientists and public lawyers have added, subtracted, and finessed these central functions. Bernard Crick would combine the expressive, teaching and informing roles into a singular 'communications function'.[14] Richard Mulgan would collapse them all into just 2 broad functions, 'to support an executive from within its own ranks and to hold this executive publicly accountable'.[15] Allan Kornberg sees 3 functions: representative, legislative, and control (or accountability).[16] Michael Mezey, also identifies 3 core activities. Mezey articulates these as legislative, representative, and 'system maintenance', which he articulates as 'the recruitment and socialization of political elites and determining who forms government'.[17]

Alternative formulations have been offered. CES Franks identified 'four essential functions' of the Canadian Parliament: to make a government, to make a government work (that is, 'to give the government the authority, funds, and other resources necessary for governing the country'), to make a government behave, and to make an alternative government ('that is, to enable the opposition to present its case to the public and become a credible choice for replacing the party in power').[18] Indian parliamentarian Laxmi Singhvi would dispense with the legislative role altogether, noting that at least within the parliamentary system, modern legislatures 'have a predominantly debating and consultative function; they inform and legitimize. They correct by influence more than by specific command'.[19]

Scholars have also proposed additional functions. In a study of global parliaments (across both parliamentary and presidential systems), Philip Laundy identifies 6 functions: the legislative, financial, deliberative, critical, informative, and representative.[20] Reflecting his wider scope, Laundy omits Bagehot's elective function, but adds both a financial and deliberative role. Even so, Laundy notes that his global study has revealed that 'the true common denominator' is representation; for almost all parliamentary assemblies have a representative function.[21] Robert Hazell adopts a similar set of roles as Laundy. Hazell identifies 7 distinct tasks: representation, legislation, deliberation, scrutiny, budget setting, making and breaking governments, and redress of grievances.[22]

Other functions can be considered. Ken Coghill, the former Speaker of the Victorian Legislative Assembly, endorses this list but considers 3 more: judicial, constitutional, and electoral roles.[23] As Coghill explains, some parliaments have a judicial function that allows it to impeach or remove incapable or corrupt judicial officers. Others have a constitutional

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[14] Bernard Crick, 'Parliament in the British political system', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 34.

[15] Richard Mulgan, 'The Australian Senate as a "house of review"', *Australian Journal of Political Science,* vol. 31, issue 2, 1996, p. 200.

[16] Allan Kornberg, 'Parliament in Canadian society', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 84.

[17] Michael Mezey, *Comparative Legislatures,* Duke University Press, Durham, 1977, p. 7.

[18] C.E.S Franks, *The Parliament of Canada*, University of Toronto Press, Toronto, 1987, pp. 4–5.

[19] Laxmi Singhvi, 'Parliament in the Indian political system', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 216.

[20] Philip Laundy, *Parliaments in the Modern World*, Dartmouth Publishing Co, Aldershot, 1989, p. 11.

[21] Ibid.

[22] Robert Hazell, 'The challenges facing our parliaments: how can we improve their performance?', *Australasian Parliamentary Review,* vol. 16, issue 2, 2001, pp. 23–24.

[23] Ken Coghill, Peter Holland, Abel Kinyondo, Colleen Lewis and Katrin Steinack, 'The functions of parliament: reality challenges tradition', *Australasian Parliamentary Review,* vol. 27, issue 2, 2012, p. 58.

amendment function such that particular amendments require approval by a special majority of the Assembly. Coghill remarks that, like the budget setting function, this role 'is of such importance that there is a strong argument for treating it as a distinct function'.[24] Some parliaments may also act as an electoral college to elect certain office-holders—this is an electoral function, distinct from making or breaking government. Parliament clearly has many responsibilities.

b) How do Australian parliaments describe their role?

It is useful to examine how political scientists identify the functions of legislatures in parliamentary systems, but it may be more valuable to examine how Australian parliaments themselves articulate their functions. Each parliament in Australia has an accompanying education office or engagement program that provides information and factsheets for citizens, school students and other interested parties. These programs 'aim to promote an understanding and appreciation of the role and significance' of the parliament to citizens and visitors.[25] Six of 9 jurisdictions outline the functions or roles of their legislature. A summary reveals that each understands their functions in broadly similar ways, though they use different language and express their tasks in varied ways. They also often adopt a different ordering, though it is not clear if this is intended to hold any significance.

The Australian Parliamentary Education Office outlines 4 main functions carried out by the Australian Parliament. Those function are to:

1. make laws for Australia
2. represent the people of Australia
3. examine the work of the government
4. provide a place where government is formed.[26]

These functions echo the 5 functions identified by Bagehot. We can describe them as a *legislative*, *representative*, *accountability*, and an *elective* function. These are, of course, high-level descriptors of the main roles performed by the Australian Parliament. The seventh edition of *House of Representatives Practice*, for example, outlines 10 distinct functions.[27] Each of these roles can be housed within the 4 core functions identified. Among others, they include making and unmaking a government, the initiation and consideration of legislation, seeking information on and clarification of government policy, and surveillance, appraisal, and criticism of government administration.

The most recent edition of *Odgers' Australian Senate Practice* lists 12 functions for the Senate.[28] Once again, for our purposes, these functions can be understood as discrete activities or tasks performed underneath one of the 3 core responsibilities already outlined (not including, of course, the elective function). The 12 functions include ensuring that legislative measures are exposed to the considered views of the community, to probe and

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[24] Ibid.

[25] See Legislative Assembly for the Australian Capital Territory, *Programs* (accessed 6 December 2023).

[26] Parliamentary Education Office, *What is the role of parliament?*, (accessed 2 August 2024).

[27] D.R. Elder and P.E. Fowler (eds), *House of Representatives Practice*, Department of the House of Representatives, 7th edition, 2018, pp. 37–41.

[28] Harry Evans, *Odgers' Australian Senate Practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016, pp. 28–29.

check the administration of laws, to keep itself and the public informed, to insist on ministerial accountability for the government's administration, and to exercise surveillance over the executive's regulation-making power.

State and territory parliaments articulate their core functions in similar ways as the Australian Parliament. The New South Wales (NSW) Parliamentary Education and Engagement Office explains that the NSW Legislative Assembly has 4 main roles. They are:

1. to represent the people (*representative*)
2. to form the government for NSW (*elective*)
3. to make laws (*legislative*)
4. to keep the government accountable to the people of NSW (*accountability*).[29]

The Legislative Council has the same functions, excluding the role of forming government.[30] The Tasmanian Parliament Education Office lists the same 4 functions for its parliament. The State Parliament:

1. represents the people of Tasmania (*representative*)
2. forms the executive government (*elective*)
3. scrutinises the executive government (*accountability*)
4. creates and amends Tasmanian laws (*legislative*).[31]

The Western Australian Parliamentary website also lists 4 functions for the Western Australian Legislature. These functions differ slightly from those already discussed. The State legislature:

1. makes law (including for the allocation of funds for government expenditure) (*legislative* and *financial*)
2. debates public policy (*deliberative*)
3. holds the government to account for its policies, actions and spending (*accountability*)
4. represents the people of Western Australia (*representative*).[32]

It does not separately list the Legislative Assembly's role of forming government.

Two states list additional functions for their legislature. The website of the Parliament of Victoria outlines 5 functions. Members of the Victorian Parliament:

1. form a government from its members (*elective*)
2. represent the opinions of the people of Victoria in a public forum (*representative*)
3. debate, pass, amend and repeal laws (*deliberative* and *legislative*)
4. examine and approve government taxes and spending (*financial*)
5. hold the government to account for its policies and actions (*accountability*).[33]

The Queensland Parliament is a unicameral legislature. Its website outlines 6 functions 'which overlap and interact'. They are to:

1. form government (*elective*)

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[29] Parliament of New South Wales, *Role of parliament* (accessed 6 December 2023).
[30] Ibid.
[31] Parliament of Tasmania, *House of Assembly Education Office* (accessed 6 December 2023).
[32] Parliament of Western Australia, *Parliament's role* (accessed 6 December 2023).
[33] Parliament of Victoria, *What is parliament?* (accessed 6 December 2023).

2. make law (*legislative*)
3. budget and supply (*financial*)
4. scrutiny (*accountability*)
5. representation (*representative*)
6. debate and grievance (*deliberative* and *petitions*).[34]

South Australia and the Australian Capital Territory (ACT) do not outline the roles of their parliament or legislative assembly. The Northern Territory (NT) Assembly website lists only 2 functions. According to the parliamentary website, the Assembly's functions are *representative* and *elective*; it is 'the meeting place for the elected Members to represent their constituencies. The party with the majority of Members is able to form government so long as they retain the confidence of the Assembly'.[35]

Australian parliaments thus identify the same 4 core functions: *elective*, *representative*, *accountability*, and *legislative*. What these functions entail can be spelled out in more detail. Under its *elective* function, parliament makes and unmakes governments. The *legislative* function sees parliament initiate, debate, pass, amend and repeal laws, including laws on government spending (that is, budget and supply). The *representative* role of parliament is clear: parliament represents the people and their interests in an open and public forum, including by hearing petitions, and ventilating grievances and other matters of concern. Finally, in exercising its *accountability* function parliament holds the executive to account by seeking information on, appraising and critiquing, government administration, law and policy through committees, parliamentary debate (especially question time), and by examining delegated legislation. Are all these roles as relevant during a public health emergency?

c) What roles does parliament prioritise during a crisis?

In times of national crisis or emergency, extraordinary powers are often considered necessary. The slow and deliberative process that characterises the legislative branch of government is seen as unable to respond effectively when decisive action is required. Yet, while the role of parliament must necessarily adapt during a crisis, this does not mean that it should be entirely dispensed with. Even when threatened by the exigencies of total war or major civil strife, it has long been recognised that national assemblies must continue to meet and exercise certain core functions. In fact, the necessity of exercising its core functions may become even more apparent when the executive is implementing extraordinary powers. With those powers must come heightened scrutiny and vigilance, which parliament is best placed to provide.

Consider the role of the United Kingdom (UK) Parliament during World War II. At the outbreak of hostilities, Arthur Greenwood, the Deputy Leader of the Labour Opposition outlined how his party saw the role of the House of Commons during the conflict. As Greenwood explained, the tasks of the House in this period were twofold. First, to listen 'with sympathy and understanding' to the statements made by the prime minister and government and, 'if necessary, to debate them', by bringing to bear on proposals and legislation 'what we

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[34] Queensland Parliament, *The role of parliament* (accessed 6 December 2023).
[35] Legislative Assembly of the Northern Territory, *About parliament*, 19 September 2023 (accessed 6 December 2023).

honestly conceive to be the views of the British public'.[36] Second, given that the government was focused on the effective prosecution of the war effort, the opposition would be 'closer' 'to the heart of the people'. It therefore fell upon them 'to take the initiative, as responsible public representatives, in raising discussions, to enlighten the Government, to bring home to them the questions that are troubling the minds of the people and to do our best to avoid the Government falling into difficulties'.[37] Ivor Jennings described this formulation of the parliament's role as playing a 'candid friend'.[38] Following the collapse of the Chamberlain Government and the formation of the National Government under Prime Minister Winston Churchill, HRG Greaves characterised the Commons as 'a collaborating Council of State'.[39] In both circumstances, the role of the parliament was understood to be one 'of vigilant supervision and the voicing of popular feeling'.[40] In other words, parliament would exercise representative and accountability functions.

This is not to discount the legislative or elective functions of parliament. It is important that parliament formally pass legislation providing the executive with the necessary powers to respond to a crisis. If the crisis intensifies and government considers further powers are required, it is the legislature's role to consider and determine whether it agrees. Similarly, while the parliament should support the executive in the effective prosecution of its strategy by minimising instability, a point may be reached where it becomes clear that the people no longer support the government's strategy, or the government has lost the confidence of the legislature itself. At these times parliament has a responsibility to exercise its elective function to choose an alternative administration. That no Australian government lost the confidence of the parliament during the COVID-19 pandemic does not mean the elective function is unimportant during times of crisis.[41] In October 1940, the Arthur Fadden Government was defeated in a vote on a supply bill in the House of Representatives. Reluctant to call an election given the House was barely a year old, the Governor-General obtained the assurances of 2 independent members who held the balance of power that they would support a Labor government. John Curtin was subsequently sworn in as prime minister.[42]

In the initial stages of the COVID-19 pandemic, many parliaments appeared to implicitly understand that their primary responsibility was supporting an effective response by representing the interests of their constituents and holding that government to account. Of course, legislation would need to be enacted, but given the overriding sense that 'we are all in this together',[43] parliaments largely deferred to government proposals to suspend parliament or pass economic support measures. Amendments may be proposed, but the

[36] Cited in W. Ivor Jennings, 'Parliament in Wartime I', *The Political Quarterly,* vol. 11, issue 2, 1940, p. 185.

[37] Ibid.

[38] Ibid. Jennings warned that the position could not last for long, for 'either one becomes friend and collaborator, or one becomes really candid and an opponent', p. 194.

[39] H.R.G Greaves, 'Parliament in War-Time', *The Political Quarterly,* April–June 1941, p. 203.

[40] H.R.G Greaves, 'Parliament in War-Time', *The Political Quarterly,* April–June 1941, p. 202.

[41] Note that the initial stages of the COVID-19 pandemic resulted in a 'rally-round-the-flag' effect in many countries, increasing trust in and support for national governments, this effect faded over time where citizens perceived their government's response to be lacking: See generally Sylvia Kritzinger, Martial Foucault, Romain Lachat, Julia Partheymüller, Carolina Plescia and Sylvain Brouard, '"Rally round the flag": the COVID-19 crisis and trust in the national government', *West European Politics*, vol. 44, issue 5, 2021, p. 1205.

[42] John Edwards, *John Curtin's War—Volume I: The coming of war in the Pacific, and reinventing Australia,* Viking, Melbourne, 2017, pp. 256–267.

[43] The Hon Simon Bridges MP, Leader of the Opposition, New Zealand House of Representatives Hansard, 25 March 2020, p.17280.

legislation would be supported. On 23 March 2020, for example, the Hon Anthony Albanese MP explained that under his leadership the Labor opposition would act 'in a responsible and constructive manner'. This would involve putting forward 'suggestions' and 'views to try and improve the [emergency] legislation'.[44] Reminding the government that those views 'do represent, by the way, the largest political party in this parliament', Albanese noted that they should 'be taken into account'.[45] Nevertheless, while admitting the legislation 'is not perfect', Albanese was clear that 'this is not a time to prevent measures which, however imperfect, are necessary to be implemented'.[46]

In Canada, members of parliament also focused on the need to support the government's effective response. This would involve standing 'ready to help find solutions',[47] and 'offer[ing] proposals to better serve [the] interests' of their constituents.[48] The Leader of the New Zealand Opposition understood the role of parliament in a similar fashion. The Hon Simon Bridges MP explained that even when the parliament is adjourned, it would 'join with the Government in seeking to constantly improve our nation's response for the common good of our people'.[49] In the UK House of Commons too, parliamentarians agreed that 'genuine, constructive engagement from Members of all parties', drawing from issues experienced by their constituents could help 'plug the gaps'[50] in the government's immediate response.

If the 2 primary roles of parliament during a pandemic is to exercise representative and accountability functions, how should it fulfil its responsibilities? What sort of activities should it engage in? We outline 4 activities below against which parliament can be assessed in light of its core functions and how these might be exercised during a pandemic. In this paper, we will consider only the first function in detail.

Parliament should meet regularly

In Westminster systems, parliament is 'the source of the legitimacy and authority of a government'.[51] It is thus essential that parliament continue to sit regularly, demonstrating that the executive maintains its confidence. It is also crucial for the government to ensure its policies and administration are supported by the people. Even when accepting the need to adjourn due to rapidly growing case numbers, parliamentarians were clear that 'it is imperative and important that the House continue to sit',[52] for 'during this period, during a time of crisis, is when the Australian public needs us to sit'.[53] While governments continued to update the nation via regular press conferences and media releases, the visibility, publicity, and transparency inherent in the act of speaking through parliament is itself important.[54]

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[44] The Hon Anthony Albanese MP, Leader of the Opposition, *House of Representatives Hansard*, 23 March 2020, p. 2775.

[45] The Hon Anthony Albanese MP, Leader of the Opposition, *House of Representatives Hansard*, 23 March 2020, p. 2776.

[46] The Hon Anthony Albanese MP, Leader of the Opposition, *House of Representatives Hansard*, 23 March 2020, p. 2775. See also Mr David O'Byrne MP, *Tasmanian House of Assembly Hansard*, 26 March 2020, p. 2.

[47] The Hon Andrew Scheer MP, Leader of the Opposition, *Canadian House of Commons Hansard*, 24 March 2020, p. 2069.

[48] Mr Yves-Francois Blanchet MP, *Canadian House of Commons Hansard*, 24 March 2020, p. 2061.

[49] The Hon Simon Bridges MP, Leader of the Opposition, *New Zealand House of Representatives Hansard*, 25 March 2020, p.17280.

[50] The Rt Hon John McDonnell MP, *United Kingdom House of Commons Hansard*, 25 March 2020, p. 414.

[51] C.E.S Franks, *The Parliament of Canada*, University of Toronto Press, Toronto, 1987, p. 11.

[52] Mr Jarrod Bleijie MP, Manager of Opposition Business, *Queensland Legislative Assembly Hansard*, 17 March 2020, p. 605.

[53] The Hon Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard*, 23 March 2020, p. 2894.

[54] Elena Griglio, 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance', *Theory and Practice of Legislation,* vol. 8, issue 1–2, 2020, p. 62.

Parliament should be provided with sufficient time to debate key measures and issues

Regular meetings are important as a symbol of continuity during a time of uncertainty and of the significance of parliament as a public institution that represents the people. But it is not enough for parliament to simply meet and vote on government proposals. Parliament must be provided with sufficient time to consider and debate key measures and issues. In ordinary times, parliament is a forum for the diverse interests of citizens to be heard and potentially incorporated into the design of policy and administration. This role is especially important during times of crisis or emergency. To fulfil its representative function, the legislature must not merely sit but must be provided with 'an opportunity for people representing the different corners of Australia'[55] to articulate their views and seek to have their grievances redressed.[56]

Parliamentary debates are also important for their legitimating function. Simply by assembling and deliberating, even where outcomes are largely preordained, parliaments can reduce societal tension and enhance support amongst the populace.[57] While journalists can critique and challenge government decision-making announced in press conferences, it is in parliament where elected members can and should 'press the government for the answers [citizens] deserve'.[58]

Parliament should maintain legislative oversight, including of delegated legislation

Our constitutional system recognises 'the necessity of draconian powers in moments of national crisis',[59] but hastily drafted and hurriedly enacted legislation is likely to cause unintended and unexpected problems. The same is true for regulations or orders made by a minister or a health officer. Even when parliament is unable to sit, it has 'unique institutional features that allow it to serve as a deliberative forum for scrutinising emergency policies and providing feedback to the executive'.[60] In a crisis, parliament must continue to exercise legislative oversight by examining and critiquing proposed laws and delegated legislation. As the Leader of the New Zealand House of Representatives noted, 'scrutiny during this unprecedented time, when the Government is placed in the position of exercising such extraordinary powers, has never been more important'.[61]

Parliament should scrutinise government administration and policy

Public health emergencies may require changes to parliamentary process and procedure. It is important that the government act quickly to slow the spread of highly transmissible viruses and provide necessary economic support to protect the community. This does not mean,

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[55] The Hon Tony Burke MP, Manager of Opposition Business, House of Representatives Hansard, 23 March 2020, p. 2894.

[56] Ken Coghill, Peter Holland, Abel Kinyondo, Colleen Lewis and Katrin Steinack, 'The functions of parliament: reality challenges tradition', *Australasian Parliamentary Review,* vol. 27, issue 2, 2012, p. 62.

[57] Robert Packenham, 'Legislatures and political development', in Allan Kornberg and Lloyd Musolf (eds), *Legislatures in Developmental Perspective,* Duke University Press, Durham, 1970, p. 536.

[58] Mr Mark Strahl MP, Canadian House of Commons Hansard, 13 March 2020, p. 2061.

[59] *A v Secretary of State for the Home Department* [2005] 2 AC 68, 130 [89] (Lord Hoffmann).

[60] Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?', *Theory and Practice of Legislation,* vol. 8, issue 1–2, 2020, p. 73.

[61] The Rt Hon Chris Hipkins MP, Leader of the House, New Zealand House of Representatives Hansard, 25 March 2020, p. 1731.

however, that parliament should abandon its critical responsibility to scrutinise government administration and policy. Responsible government does not only mean the executive sits within the legislature; it also means 'the government is expected to be a trustworthy steward of the nation's affairs'.[62] It is all the more pressing during a time of national emergency that parliament ensure the government meets this standard.

Assessing the performance of our parliaments

Australians were generally supportive of the actions taken by their governments in responding to the pandemic. In 2022, the Lowy Institute found that 80% of Australians believed Australia 'handled the pandemic well'.[63] This number far exceeded the results for China (45%), the UK (39%) and the United States (25%). But how did Australian parliaments fare? Did they meet regularly? In this part, we assess the performance of our parliaments.

a) The data

The pandemic severely affected the capacity of most Australian parliaments to meet their core function of regular sittings. In 2020, every Australian parliament, except for the Parliament of Western Australia, sat for fewer days than their historical average in the years prior to the emergence of COVID-19 (Figure 1). Unsurprisingly, jurisdictions that had higher case numbers and greater risks of transmissibility lost more sitting days than other jurisdictions. The NSW Parliament lost the greatest number of days in 2020, but their experience was far from unique. Indeed, NSW, the Australian and Victorian parliaments all lost more than 20 days across both houses of parliament. The ACT Legislative Assembly and Tasmanian Legislative Council each lost around 7 days. The NT Legislative Assembly also sat for a significantly fewer number of days in 2020, losing 9 days. While the NT did not experience a spike of cases, the increased vulnerability of its population resulted in a cautious approach.

The success of efforts at containing the spread of the virus meant that not all parliaments were affected to the same degree. South Australia avoided significant community transmission throughout 2020. Even so, the state parliament sat for 6.5 fewer days than their recent historical average in that year. The data is a little complicated in Queensland given the state election was held during 2020, but it appears that the parliament also lost only around 2.5 days. The Tasmanian House of Assembly lost a similar number of days.

One parliament sat for more days than might be expected from its recent historical average. By mid-April 2020, Western Australia had eliminated community transmission of COVID-19 and the state did not report more than a handful of cases until December 2021.[64] Following the initial 'panicky days' of March and April 2020, the Western Australian Parliament increased their number of sitting days.[65]

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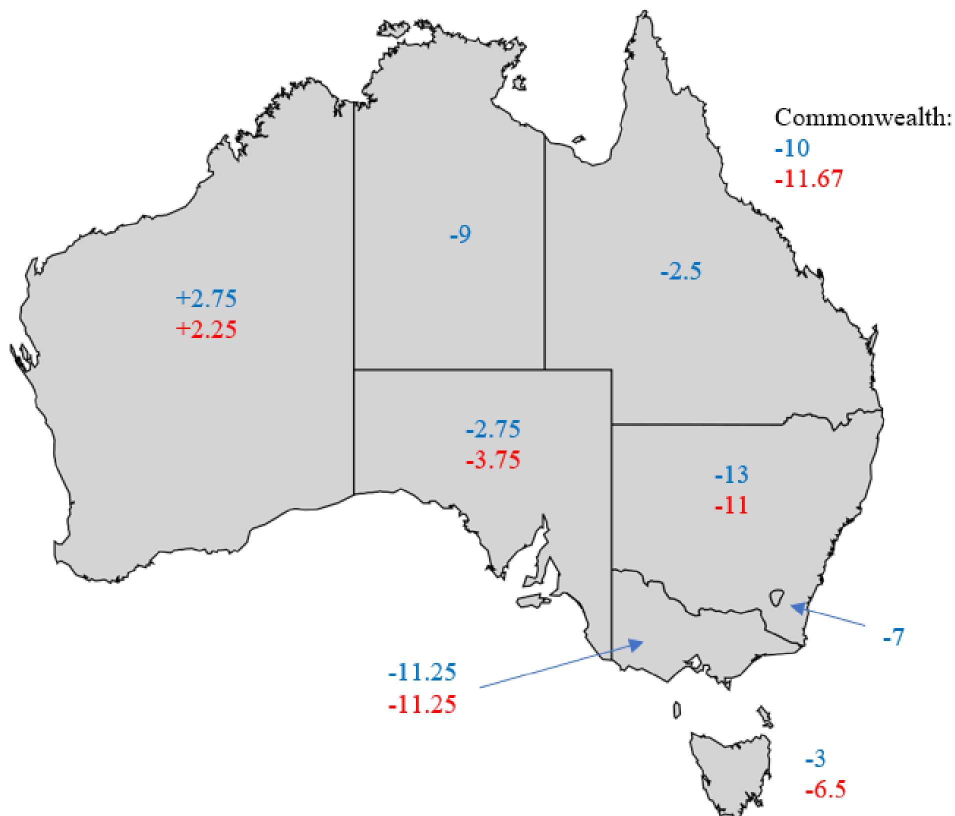
[62] C.E.S Franks, *The Parliament of Canada*, University of Toronto Press, Toronto,1987, p.11.

[63] Lowy Institute Poll 2022, *Covid-19 Pandemic: Global Responses to Covid-19* (accessed 6 December 2023).

[64] Heather McNeill, 'A timeline of WA's COVID-19 response: was our success luck, good management, or a bit of both?', *WAtoday,* 28 August 2020.

[65] Legislative Assembly of Western Australia Procedure and Privileges Committee, *The Legislative Assembly's response to the COVID-19 pandemic*, November 2020, p. 20.

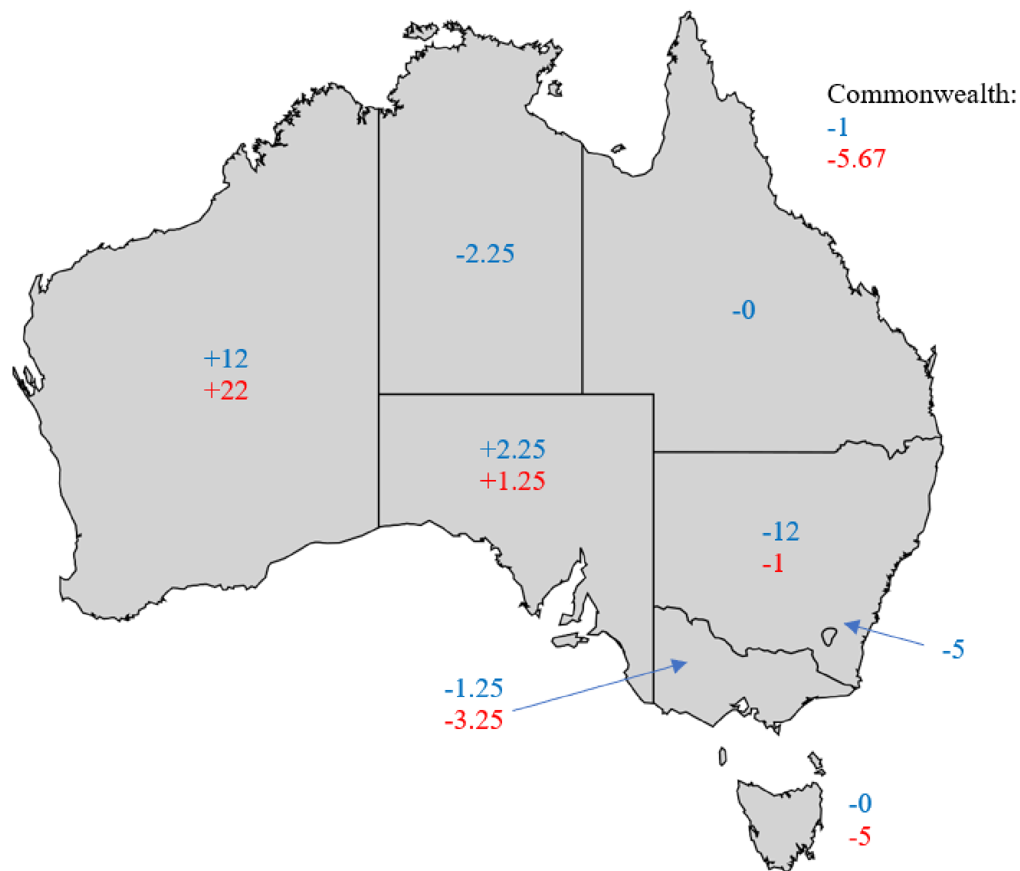
Figure 1: Parliamentary sitting days lost in 2020 (compared to recent historical average)



Lower house in blue text; upper house in red text.

Nevertheless, the Western Australian Parliament's success did not make up for the total days lost across all parliaments. In 2020, Australian parliaments sat for almost 90 days fewer than their average between 2015 and 2019. Every Australian parliament performed better in 2021, but several still sat for significantly fewer days (Figure 2). In particular, the NSW Legislative Assembly sat for 12 fewer days than its historical average between 2015 and 2019. No other House lost as many days.

Figure 2: Parliamentary sitting days lost in 2021 (compared to recent historical average)



Lower house in blue text; upper house in red text

This data is useful but limited. It does not tell us how parliaments responded in the immediate stages of the pandemic. What actions did our parliaments take when COVID-19 first emerged in Australia and sparked considerable alarm? Once again, the results are not impressive. In the jurisdictions most affected by COVID-19, parliaments met very infrequently – if at all – at the height of the crisis (late March 2020 to May 2020). The NSW, Victorian and NT parliaments met just once over a two-month period in April and May. The Queensland, Tasmanian and ACT parliaments met 4 times or fewer in that same period. The Australian Parliament met only 5 times.

Even these stark figures do not reveal the extent of the failure of Australian parliaments to fulfil their core function as the full scale of the pandemic initially took shape. It is worth clearly stating that during this period legislation of great significance was being passed. On 23 March 2020, the first sitting day following the Governor-General's declaration that a human biosecurity emergency existed, the Australian Parliament passed legislation authorising $66 billion in spending, and approved an advance to the Minister of Finance of $40 billion, 'far exceeding the usual limit of $675 million', to ensure the government could respond quickly to the pandemic.[66] At the next sitting on 8 April, $130 billion of spending was authorised. These bills were introduced into parliament and passed within a day. The failure

[66] Senate Select Committee on COVID-19, *First interim report*, December 2020, p. 70; Department of the Senate, *Procedural Information Bulletin No. 342*, 27 March 2020, pp. 2–3.

to sit regularly meant that these funding commitments did not receive significant or comprehensive debate.

b) Governments suspended parliament to avoid accountability

Uncertainty was a defining characteristic of the early days of the COVID-19 pandemic. It is not surprising that in March 2020, parliaments across Australia were quick to adjourn. However, our analysis suggests that governments suspended parliament to evade accountability. They did so by using their numbers in parliament to suspend the legislature for lengthy periods of time.

In most cases, governments worked with opposition members to secure agreement in advance on proposed changes to the standing orders. A cooperative approach allowed parliament to sit with reduced numbers to manage social distancing and expedite the passage of critical measures responding to the pandemic. It also contributed to the sense that all Australians needed to work together to get through this difficult period. However, not all governments informed the opposition in advance that they intended to adjourn parliament. Consider the example of the Australian Parliament.

The Australian Parliament adjourned on Thursday 5 March 2020 for a scheduled mid-session break. Parliament was recalled for a one-day session on 23 March. To ensure appropriate social distancing while maintaining quorum, only 92 members of the House attended the session (a reduction from 151).[67] The standing orders were suspended to facilitate the expedited passage of the government's coronavirus response package and supply bills.

In the early evening, after the successful passage of these bills, the government presented a revised parliamentary sittings calendar that proposed to eliminate 18 sitting days in May and June, effectively adjourning the parliament until 11 August – a twenty-week break. The Hon Christian Porter MP, the then Leader of the House, acknowledged that 'there's likely to be a division with respect to the sitting calendar', but justified the government's proposal on 2 grounds. First, that the House had already agreed that day to 'necessary measures on supply' to 'ensure the proper functioning of government services', and second, that 'some risk attaches to the operation of parliament, particularly during what is anticipated to be the peak point in the transmission of the coronavirus'.[68] As Stephen Mills notes, the government's proposal conceived the role of parliament in the pandemic as effectively limited to providing the government 'with supply and appropriation'.[69]

The opposition resisted the proposed sitting calendar, arguing that it was premature to eliminate sittings several months in advance. Sittings should be scheduled and later cancelled if it proved impossible to hold safely. The Hon Tony Burke MP, the then Manager of Opposition Business, declared that 'the presumption should be that we will meet if it is possible for us to sit'.[70] The then Shadow Treasurer, the Hon Dr Jim Chalmers MP agreed,

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[67] House of Representatives Standing Committee on Procedure, *The House must go on: inquiry into the practices and procedures put in place by the House in response to the COVID-19 pandemic*, December 2020, p. 7.

[68] The Hon Christian Porter MP, Leader of the House, *House of Representatives Hansard*, 23 March 2020, p. 2893.

[69] Stephen Mills, 'Parliament in a time of virus: representative democracy as a "non-essential service"', *Australasian Parliamentary Review*, vol. 34, issue 2, 2020, p.16.

[70] The Hon Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard*, 23 March 2020, p. 2894.

noting that the parliament would need to 'scrutinise the measures which were only announced yesterday and legislated today', because 'the idea that the government has just perfectly nailed every aspect of this $66 billion in new spending is absurd'.[71]

Relying on its numbers in the House, the government's proposed sitting calendar was adopted.[72] Nonetheless, the government was forced to change its plans because of the need to introduce further measures to support the economy. The House was recalled for a one-day session on 8 April 2020 and was again recalled on 12 May. At the end of that session, the House agreed to sit on 13 and 14 May. The House then agreed to sit again in June and early August, though this latter session was cancelled because of an increase in community transmission.[73] The House finally returned on 23 August after a nine-week break.

The NSW Parliament performed even worse in 2021. Following a rise in case numbers, NSW Premier Gladys Berejiklian announced a two-week lockdown of greater Sydney on 26 June 2021. People living in Sydney, the Central Coast, the Blue Mountains, and Wollongong were permitted to leave their homes only for an essential reason, such as shopping for food, medical care, compassionate needs, exercise and essential work or education.[74] Case numbers continued to rise. The lockdown was extended several times and more significant restrictions were placed on residents within the state. Residents in local government areas of concern (all in the western suburbs of Sydney) were placed under curfews and were required to wear a mask at all times outside the house.[75] They also faced more overt police enforcement.[76] It was not until 11 October 2021 that lockdown rules were eased for fully vaccinated people. The following day, the NSW Parliament sat for its first meeting since 24 June. This means that for the entire 107-day lockdown, the NSW Parliament did not sit.

This was not for lack of trying. On 14 September 2021, members of the NSW Legislative Council attempted to reconvene parliament. However, the government thwarted this by relying on standing order 34, which provides that the House will not meet until a minister is present. Conveniently, no government minister turned up and the President of the Legislative Council said he had 'no choice' but to end the sitting.[77] Opposition member the Hon Penny Sharpe MLC was incensed:

> *Democracy is an essential service for the people of New South Wales. As we stand here today, our State continues to face one of the most significant health crises we have faced in recent history. …What the people of New South Wales need right now is hope, transparency and accountability from their Government. It is shameful that the Berejiklian Government would come*

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[71] The Hon Dr Jim Chalmers MP, Shadow Treasurer, *House of Representatives Hansard*, 23 March 2020, p. 2896.

[72] *House of Representatives Votes and Proceedings*, No. 51, 23 March 2020, pp. 833–834.

[73] Stephanie Borys and Jade Macmillan, 'Coronavirus crisis forces fortnight sitting of Federal Parliament to be cancelled', *ABC News,* 18 July 2020.

[74] *Public Health (COVID-19 Greater Sydney) Order (No 2) 2021* (NSW) cl 15C, sch 1A.

[75] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW).

[76] Tom Barnes and Niamh Crosbie, *COVID-19's lasting impacts on workers: how government mismanaged changed working lives in Western Sydney*, Australian Catholic University, October 2022, p. 6.

[77] The Hon Matthew Ryan Mason-Cox MLC, President of the Legislative Council, *New South Wales Legislative Council Hansard*, 14 September 2021, p. 5942.

> *into this Chamber and misuse the rules of the House to stop the majority of elected members from lawfully sitting.*[78]

This aborted attempt at democracy is the closest NSW came to a functioning parliament during lockdown. The absence of parliament enabled ministers to control their messaging to an unprecedented degree. Question time was replaced by a well scripted daily press conference leaving parliamentarians unable to test the justification for public health orders or to demand documents on the modelling behind lockdowns. As one member of parliament noted:

> *Dan Murphy's is open but parliament isn't? We send nurses, doctors, ambos, police, teachers, transport workers, retail workers back to work – but politicians are too precious? No matter the time or crisis, democracy and oversight isn't an optional extra.*[79]

c) Parliaments did not adopt technology quickly

The pandemic necessitated changes to the sitting calendar. However, advances in technology meant that alternative options to ensure parliaments were able to continue to meet in relative safety were available. The Australian Parliament recognised as such almost immediately. On 23 March 2020, the House adopted a resolution stating, in part:

> *[T]he House may meet in a manner and form not otherwise provided in the standing orders with the agreement of the Leader of the House and the Manager of Opposition Business, with the manner in which Members may be present (including for the purposes of achieving a quorum) to be determined by the Speaker.*[80]

The motivation behind the change was to retain 'flexibility'.[81] While the parliament agreed 'the best that we can do is for us to physically meet here', in uncertain times it was important to make certain that 'when the Australian people need the parliament to meet, the parliament can meet'.[82]

However, consistent with government's desire to evade accountability, parliament did not prioritise the use of technology to facilitate sittings. Indeed, it was not until 20 August 2020 that it was finally agreed that members 'unable to physically attend parliament due to reasons related to the COVID-19 pandemic' would be allowed to contribute remotely (for the 24 August to 3 September sittings).[83] Significant restrictions were also placed on remote members' contributions. Those participating remotely were not permitted to vote, be counted for a quorum, move motions, propose or support a proposal to discuss a matter of public

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[78] The Hon Penny Sharpe MLC, Leader of the Opposition in the Legislative Council, New South Wales Legislative Council Hansard, 14 September 2021, p. 5492.

[79] Kelly Fuller, 'MPs slam NSW government as return of parliament put off until "possibly" October', *ABC News*, 30 August 2021.

[80] *House of Representatives Votes and Proceedings*, No. 51, 23 March 2020, p. 334; *Journals of the Senate*, No. 47, 23 March 2020, p. 1562.

[81] The Hon Christian Porter MP, Leader of the House, *House of Representatives Hansard*, 23 March 2020, p. 2901.

[82] The Hon Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard*, 23 March 2020, p. 2902.

[83] House of Representatives, *Agreement for Members to contribute remotely to parliamentary proceedings*, 20 August 2020; and *Journals of the Senate*, No. 59, 24 August 2020, pp. 2064–2065.

importance or call a division.[84] While parliamentarians agreed 'the circumstances of the pandemic warrant a significant evolution of existing rules', they considered that attendance in the House or the Senate should remain a priority given the Australian Constitution contains the apparent requirement that the parliament meet at the seat of government.[85]

Two points are worth noting. First, the prohibition on remote participants from voting may violate the Constitution. Sections 23 and 40 of the Constitution provide that questions arising in the Senate and the House of Representatives are determined by a majority of votes. These sections provide that each elected representative has one vote. The Senate Standing Committee on Procedure casually noted that 'the exercise of this right has always required the presence of the senator in the chamber',[86] but these rules were adopted prior to the development of technology that can facilitate attendance during an emergency. Parliament's failure to adapt during the pandemic is of significant concern.

Second, the Australian Parliament's unnecessary and unreasonable delay in introducing remote participation severely damaged its representative role. It took the Australian Parliament 150 days to implement remote participation. In contrast, the UK House of Commons agreed to allow remote sitting on 21 April 2020, and held the first hybrid session of parliament the following day.[87] The model left much to be desired, but it indicated the extent to which the Commons took seriously its responsibility to meet. Indeed, parliaments around the world managed to undertake hybrid sittings in a prompt manner. A study of legislatures in 159 countries with a population of over 1,000,000 found that 14 states used videoconferencing and/or remote voting in lieu of physical presence between 23 March and 6 April 2020.[88] Many others soon followed.

Conclusion

In times of national crisis or emergency, the legislative branch of government is often perceived as unable to respond effectively or unsuited to doing so. When timely action is required, the executive must take charge in order 'to get things done'.[89] Yet, this does not mean that parliament should abandon its constitutional and democratic responsibilities. In fact, the necessity that parliament carries out its core functions is even more apparent when the executive is exercising extraordinary powers. With those powers must come sharp scrutiny and vigilance, which parliament is best placed to provide.

In this paper, drawn from a longer article in the *UNSW Law Journal*, we have outlined 4 key functions of parliament during a public health emergency.[90] We have assessed Australian

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[84] Note that the Western Australian Legislative Assembly Procedure and Privileges Committee recommended that remote voting be permitted in Western Australia: Legislative Assembly of Western Australia Procedure and Privileges Committee, *The Legislative Assembly's Response to the COVID-19 Pandemic*, November 2020, p. 76.

[85] Senate Standing Committee on Procedure, *First report of 2020*, August 2020, p. 2.

[86] Senate Standing Committee on Procedure, *First report of 2020*, August 2020, p. 4.

[87] *United Kingdom House of Commons Votes and Proceedings*, No. 48, 21 April 2020, pp. 1–2.

[88] Ittai Bar-Siman-Tov, Olivier Rozenberg, Cyril Benoît, Israel Waismel-Manor, and Asaf Levanon, 'Measuring Legislative Activity during the Covid-19 pandemic: introducing the ParlAct and ParlTech Indexes', *International Journal of Parliamentary Studies*, vol. 1, issue 1, 2021, p. 109. The states were: Azerbaijan, Bolivia, Brazil, Chile, Ecuador, Indonesia, Latvia, Mongolia, Poland, Romania, Saudi Arabia, Uruguay, Uzbekistan and Venezuela.

[89] Nick Barber, *The Principles of Constitutionalism*, Oxford University Press, Oxford, 2018, p. 67.

[90] Harry Hobbs and George Williams, 'Australian parliaments and the pandemic', *UNSW Law Journal*, vol. 46, issue 4, 2023.

parliaments against the first of the tasks: the requirement to meet regularly. As we have explained, this function is vital. In a system of representative and responsible government the executive must demonstrate it holds the confidence of the House. Failure to sit for substantial periods of time violates fundamental principles of our constitutional system. More broadly, regular meetings are important as they provide a legitimating function. Simply by meeting and expressing the views of their constituents, parliamentarians can help build community support for extraordinary measures.

Our findings are concerning. Every Australian parliament, except the Parliament of Western Australia, failed to satisfy the central function of regular meetings. Relying on their numbers in the lower house, governments pushed for lengthy adjournments. While significant uncertainty over the scope and nature of the crisis existed, there was no need for Australian parliaments to adjourn for months. This became obvious when parliaments were recalled to pass new measures to respond to the pandemic. Concerns over meeting in person were legitimate. However, parliaments overseas adapted far more readily than Australian parliaments by utilising technology to facilitate hybrid and remote sittings. Even when the Australian Parliament finally adopted this technology, unnecessary, undemocratic, and potentially unconstitutional limitations restricting the rights of members to contribute were imposed.

COVID-19 is unlikely to be the last pandemic we face. If Australia is to respond effectively to future public health emergencies, it is vital that our parliaments improve their performance to better meet their core responsibilities.

‘Not parliamentary?’: Australian semi-parliamentarism and the role of the Australian Senate

Marija Taflaga*

In the early 2000s, the American parliamentary scholar, Stanely Bach, visited Australia to study our bicameral legislative-executive relations. His conclusion after writing a wonderful book about the Senate was that Australia was ‘not parliamentary’, but some kind of strange hybrid like the platypus – a mammal that lays eggs.[1] Indeed, political scientists have struggled to label the Australian political system, with many names arising over the years. The most famous is Elaine Thompson’s the ‘Washminster mutation’, but there have been other variants such as ‘strong bicameralism’.[2]

‘Not parliamentary’ encapsulates the dilemma at the heart of attempting to classify Australia’s legislative-executive relations, and the (beneficial but mostly unintended) consequences that the constitutional framers baked into our system in 1901. I encountered this dilemma myself when I was asked to contribute to a special symposium on the subject of Australia’s executive-legislative relations by another visitor, this time a German, Professor Steffan Ganghof, from the University of Potsdam.[3] Professor Ganghof had developed a new definition for a political system that was not parliamentary, but shared more features with a parliamentary system than not.[4] Ganghof designated this system as ‘semi-parliamentary’, in part as a compliment to Maurice Duverger’s ‘semi-presidential’ concept.[5]

Describing Australia as semi-parliamentary neatly encapsulates what is distinctly different about Australia’s executive-legislative relations: Australia, alongside other semi-parliamentary states (for example Japan), has institutional features which better equip it to manage the traditional trade-off between efficiency and representativeness. In specific terms, this means that Australia’s Commonwealth Government only relies on confidence in the lower house,

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* This paper was presented as part of the Senate Lecture Series on 10 February 2023.

1 Stanley Bach, *Platypus and Parliament: The Australian Senate in theory and practice*, Department of the Senate, Canberra, 2003.

2 Elaine Thompson, ‘The “Washminister” mutation’, in Patrick Moray Weller and Dean Jaensch (eds), *Responsible government in Australia*, Drummond for the Australasian Political Studies Association, Victoria,1980; and Arend Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries*, Yale University Press, New Haven, 2012.

3 Steffen Ganghof, Sebastian Eppner and Alexander Pörschke, ‘Australian bicameralism as semi-parliamentarism: patterns of majority formation in 29 democracies’, *Australian Journal of Political Science*, vol. 53, issue 2, 2018, pp. 211–233; and Marija Taflaga, ‘What’s in a name? Semi-parliamentarism and Australian commonwealth executive-legislative relations’, *Australian Journal of Political Science*, vol. 53, issue 2, 2018, pp. 248–255.

4 Steffen Ganghof, ‘A new political system model: semi-parliamentary government’, *European Journal of Political Research*, vol. 57, issue 2, 2017, pp. 261–281.

5 Maurice Duverger, ‘A new political system model: semi-presidential government’, *European Journal of Political Research*, vol. 8, issue 2, 1980, pp. 165–187.

which means our upper chamber is free to experiment with democratic innovations without jeopardising the government's ability to set a clear agenda and to be responsible for its success and failure.

Do labels matter?

Do we really need yet another typology to describe our system? As I have already outlined above, describing Australia as 'semi-parliamentary' helps to distinguish the important institutional differences in Australia's executive-legislative relations. However, this is a rather abstract argument. I now want to turn to a real world example of why labels might matter and why the average citizen should care (even a little) about how we label our system.

The 1975 crisis: an example of when labels go wrong

It's November 1975. The Whitlam Government is attempting to stare down an intransigent Senate to get its budget passed. This is not the first time that the Whitlam Government has had to face this kind of obstruction from the upper chamber, but in the previous occasion the dispute was resolved by resorting to an election.[6]

The 1975 dismissal crisis is an evocative encapsulation of what happens when political actors do not have an agreed definition of the operating system that they are functioning within and its attendant norms. The first major difficulty was simply that the Liberal and Country parties were not convinced that Labor had a legitimate right to occupy office. This is an important norm – a big one – but it is not related to the discussion of semi-parliamentarism here. The second, and it goes to the heart of what generated the crisis, is that politicians of the day did not agree what were the powers of the Senate.

Without raking over a history that most people know, it was deeply ironic that both Gough Whitlam and Lionel Murphy had spent much of the late 1960s innovatively advocating for, and effectively rediscovering, the Senate's latent and dormant powers.[7] Of particular note, was their advocacy about the Senate's veto power over normal legislation and its effective veto over budgetary bills. One strand of the dismissal debate has turned on whether the Senate *could* do what it did by blocking supply. But in reality, it was always a question of whether the Senate *ought* to have done what it did. The crux of the dispute rested on reconciling the fact that because the Senate had not used its veto powers before. When the Senate did exercise these powers, the political system struggled to recognise that the upper chamber had, in fact, always held those powers. A decision to not use powers, does not invalidate their eventual exercise, which is what happened in November 1975.

Third, and what is perhaps less well understood, is the way that Whitlam chose to react to the news that he had been sacked. After Sir John Kerr had dismissed him at Government House, Whitlam returned to the Lodge where, famously over beefsteaks, he formulated his tactical response to Kerr and Malcolm Fraser's actions with his closest political confidants. The Labor

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[6] Jenny Hocking, *Gough Whitlam: his time: the biography,* vol. 2, Miegunyah Press, Carlton, 2012.

[7] For recent accounts see Jenny Hocking, *Gough Whitlam: his time: the biography,* vol. 2, Miegunyah Press, Carlton, 2012; Paul Kelly and Troy Bramston, *The Dismissal: in the Queen's name*, Penguin Books, Melbourne, Victoria, 2016; Frank Bongiorno, *Dreamers and schemers: a political history of Australia*, La Trobe University Press, Melbourne, 2022; and Harry Evans, Odgers' Australian Senate practice, ed Rosemary Laing, Department of the Senate, 14th edition, 2016.

brains trust came up with an ingenious solution – one that went to the heart of parliamentary practice – which was to call a vote of no-confidence on the floor of the House of Representatives. The logic behind this move was the fact that the Fraser opposition did not have the numbers in the lower house and therefore could not under the doctrine of responsible government, maintain confidence of the House of Representatives. The consequence of a failed confidence motion would require the Fraser Government to resign. This would place Governor-General Kerr in the invidious position of having sacked one prime minister only to have another, his alternative, sacked by the parliament.[8] What would Kerr have done in such a circumstance?

Indeed, Kerr was incredibly lucky that he did not end up in that situation. Because in all the excitement, and all the planning, no-one bothered to inform the Labor Senate leadership team of what happened. And so, when Reg Withers and the Liberal Senate leadership team informed Labor’s Senate team that they were ready to vote, the Labor senators were only too happy to oblige. The budget, upon which everything hinged, was passed. Whitlam’s lower house tactical manoeuvring worked – Fraser was not able to maintain confidence on the floor of the House of Representatives – but it did not matter because the budget had been passed, the immediate crisis had been averted. With the budget passed the machinery of government would keep working and the government would not be facing a literal shutdown. The constitutional crisis was over, and the political crisis would be resolved with an election. This was precisely the deal (pass the budget and go to an election) that Kerr had struck with Malcolm Fraser.

Whitlam’s tactical manoeuvring and planning failed because it did not fully account for the role of the Senate. He was thinking like someone in a parliamentary system. In this kind of system, the confidence college – the part of the legislature (the House of Representatives) that is responsible for supplying confidence to the executive (the government) – is supreme. In such a system, the other part of the legislature, if there is even one, does not have its own mandate or equal source of legitimacy from voters and the attendant powers to match. Had Whitlam fully appreciated that he operated in a semi-parliamentary system he may have strategised differently, and the 1975 crisis as we know it may have gone another way.

This is an illustrative example of why something seemingly as trivial as the correct label for something might in fact really matter. It is also an illustrative example of why we might call Australia ‘semi-parliamentary’ rather than ‘parliamentary’. ‘Parliamentary’ simply cannot account fully for the role of the Senate and its real-world impact on the way politics actually operates in Australia. But does this really matter?

Correct labels resolve disputes and help us develop reforms

First, labels and/or names do matter. It is a matter of common sense that if we all agree that swans can be either black or white, then we are doing a better job of describing reality. In the case of a political system, it can help us to resolve disputes more quickly if we have agreed terms that reflect reality accurately. A real-world example of this is the (increasingly less)

[8] Jenny Hocking, *Gough Whitlam: his time: the biography,* vol. 2, Miegunyah Press, Carlton, 2012; and Frank Bongiorno, *Dreamers and schemers: a political history of Australia*, La Trobe University Press, Collingwood, Melbourne, 2022.

common refrain of lower house members criticising the Senate for being ‘obstructionist’. Political history has demonstrated to us that not only can the Senate block legislation, but enough Australians clearly like it that way, and vote accordingly.

In addition, the right labels can also help us to diagnose or clearly identify problems in our political system that we would like to resolve. In this case, it is *not* the fact that we have 2 chambers (a bicameral system), or even that the Senate is powerful that generated the 1975 crisis.[9] Rather, it was that the actors involved did not have an *agreed definition* about who could do what and the attendant norms or ‘the rules of the game’ about what their use could or would mean. Thus, a deadlock arose and was ultimately resolved in a highly destructive way. The resolution of the 1975 constitutional crisis eventuated in some formalisation of unwritten norms (for example, removing state premier’s powers to appoint replacement senators against the wishes of the relevant parties) and it generated an informal norm where parties would pledge not to block the budget at election times. Likewise, having a clearer idea of where problems are aids in designing their solutions.

In addition, a clear conception of what a political system is, also means it is easier to compare and learn from other political systems, which may also be useful for identifying solutions. In a nutshell, better descriptions unlock research potential by identifying the relevant institutional features and cases for comparison. When we understand the parameters and relevant facts, comparisons with similar semi-parliamentary countries (for example Japan) or legislatures (for example New South Wales (NSW)) can be more meaningful and nuanced. Moreover, understanding the distinction between Australia and other Westminster states, which are typically compared with Australia, become richer as well. Finally, a more sophisticated understanding of the dynamics and interactions of the efficiency-representational trade-off should also spark new questions for scholars to compare other non-Westminster or Anglosphere legislatures with Australia.

A second reason to care whether Australia is a semi-parliamentary system is directly related to our ability to consider the normative possibilities of our political system. Reform debates in Australia are often defined by a set of arguments around the importance of stable government. Rhetorically, this argument rests on the idea that voting for non-parties of government or changing the voting system to achieve higher degrees of proportionality will undermine stable cabinet formation. But, by recognising that our system is not actually parliamentary but semi-parliamentary, we can potentially move beyond the idea that we must make a binary trade-off. This is because our system is *already* set up to accommodate institutional innovations that can allow us to maximise the strengths of both efficiency or representative focused parliamentary systems – that is stability, efficiency, and proportionality with the strength of presidential systems – where their strengths relate to a clear separation of powers and multiple mandates.

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[9] André Kaiser, ‘Parliamentary opposition in Westminster democracies: Britain, Canada, Australia and New Zealand’, *The Journal of Legislative Studies*, vol. 14, issue 1, 2008, pp. 20–45.

What is a ‘semi-parliamentary’ system anyway?

Here is the minimal definition of a semi-parliamentary system as defined by the ideas author, Steffan Ganghof.[10] A minimal definition for an ‘ideal type’. This means that it reflects the absolute minimum number of qualities or conditions that make up ‘semi-parliamentarians’. Another way to think about it is that it is a textbook definition rather than reflecting the messiness of reality. The textbook definition has 3 components, which we will review later in greater depth:

- The first, is that no part of the executive is directly elected.
- The second, is the prime minister and the cabinet are selected by an assembly with 2 parts, only one (in our case, the House of Representatives) can dismiss the cabinet in a no-confidence vote.
- Third, that there must be a second part of the legislature (in our case, the Senate), which has equal or greater democratic legitimacy and a robust veto power over ordinary legislation.

We can see some resemblance to Australia’s Commonwealth political system. However, to really understand the difference it is important to explain where semi-parliamentarianism fits within other executive-legislative relationships.

There are 2 main families of executive-legislative relationships. Parliamentary regimes and presidential regimes. Both types have different institutional logics and tend to produce consistently different results which relate directly to their strengths and weaknesses.

How does semi-parliamentary compare to parliamentary and presidential regimes?

The major strength of parliamentary systems is typically understood to be their ability to streamline accountability. This is because executives are responsible to a legislature that can sack them. This is in direct contrast to presidential systems, which typically have more formalised separations of power. This has some advantages, but the trade-off is lower levels of accountability (though strictly speaking this is debated depending on how accountability is framed/defined).[11] For example, in many systems, the legislature cannot sack a president except in extreme circumstances, and even then, it is typically very difficult to do by design. The other advantage of a presidential system is that presidents have a high degree of popular legitimacy because they are directly elected by the people. By contrast, parliamentary systems typically have prime ministers that are appointed by the legislature. However, these days, prime ministers are, in reality, appointed by their parties and have a quasi-popular mandate. Parliamentary systems are typically considered to be more institutionally flexible and therefore better able to adapt with changing times.[12]

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[10] Steffen Ganghof, ‘A new political system model: semi-parliamentary government’, *European Journal of Political Research*, vol. 57, issue 2, 2017, pp. 261–281; and Steffen Ganghof, *Beyond presidentialism and parliamentarism: democratic design and the separation of powers*, Oxford University Press, Oxford, 2021.

[11] Kaare Strøm, ‘Delegation and accountability in parliamentary democracies’, *European Journal of Political Research*, vol. 37, issue 3, pp. 261–289.

[12] Arend Lijphart, *Patterns of democracy: government forms and performance in thirty-six countries*, 2nd edition, Yale University Press, New Haven, 2012; Nils-Christian Bormann, ‘Patterns of democracy and its critics’, *Living Reviews in Democracy*,

What about weaknesses? Parliamentary systems are believed, theoretically, to have greater potential to deliver efficient government and have clear lines of accountability (again, research suggests that there is actually a great deal of heterogeneity amongst parliamentary systems).[13] However, parliamentary systems do often struggle to balance the legislative parts of the job – that is being representative, deliberative and offering criticism in the legislature and its organs with the disciplinary demands of providing confidence to a government. That is, these days, legislatures in parliamentary systems are often dominated by their executives and therefore do not always do the best job of scrutinising the government.[14]

However, the weaknesses of presidential systems are considered to be more serious.[15] Presidential systems concentrate executive power into the hands of one person, which is dangerous for obvious reasons. It is perhaps glib to say, but a president is, in effect, a secular King. One of the major ways that presidential systems manage this problem, is by introducing term limits. However, this does have the consequence of:

1. denying governing talent from a regime
2. undermining accountability.

Once a president is in their second term, a major accountability lever (elections) is lost. If a regime is unable to enforce term limits, then the danger of concentrating all that executive power into the hands of one person becomes terribly apparent and a regime may backslide into autocracy.

In reality, parliamentary systems are either set up to favour efficiency or representational values. Efficiency is achieved through majoritarian voting systems which increase the probability of stable majorities with clear lines of accountability. While representational values are achieved via proportionality, typically though proportional representational voting systems common in European democracies or New Zealand. In these systems, coalition governments are formed, reflecting the preferences of a wider number of citizens, but where policy outcomes are subject to compromise. This type of broader coalition building can blur lines of accountability for voters because it can be difficult for voters to track exactly why deals were made and for what trade-offs. As noted, electoral systems play a significant role in how incentives in parliamentary systems manifest, but equally important are the relative balances of power that are struck within each parliamentary system. What is relevant for our purposes is the fact that in parliamentary systems the part of the legislature in charge of providing confidence (hiring and firing) for the cabinet (the government), is often not counterbalanced by another part of the legislature with its own equal mandate and equal powers. Australia is different. In our country, our Senate is that imperfect counterbalance.

In recent decades, scholars have come to realise the typology of just parliamentary and presidential systems is not effective at capturing variation across systems. In the case of

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vol. 1, issue 1, 2010, pp. 1–14; and Klaus H Goetz, 'New institutional approaches to the study of political executives', in Rudy B Andeweg, Robert Elgie, Ludger Helms, Juliet Kaarbo and Ferdinand Müller-Rommel (eds), *The Oxford handbook of political executives*, Oxford University Press, 2020.

[13] José Antonio Cheibub, Zachary Elkins and Tom Ginsburg, 'Beyond presidentialism and parliamentarism', *British Journal of Political Science*, vol. 44, issue 3, 2014, pp. 515–544.

[14] Graham Maddox, *Australian democracy in theory and practice*, Longman Australia, Melbourne, 1996.

[15] Juan J Linz, 'The perils of presidentialism', *Journal of Democracy*, vol. 1, issue 1, 1990, pp. 51–69; and Steffen Ganghof, *Beyond presidentialism and parliamentarism: democratic design and the separation of powers*, Oxford University Press, Oxford, 2021, pp. 148–167.

presidential systems, Maurice Duverger argued for the existence of a ‘semi-presidential’ system.[16] This subtype of presidential system was a polity (for example France) where a president and a prime minister have their own mandates and share executive office. A few years ago, Steffan Ganghof argued the same about parliamentary systems.[17] Specifically, that there was a distinct and different subgroup called ‘semi-parliamentary’ systems. Ganghof argued that the Australian Commonwealth, most of the Australian states and Japan constituted examples of such a system.

A minimal definition of semi-parliamentarism

It is helpful to examine the minimal definition of a semi-parliamentary system in a bit more detail.

The **first** condition is that no part of the executive is directly elected. Put another way, for the executive only one mandate is sought. This mandate is channelled via the chain of delegation from voters to the legislature and then to the executive. That is, the executive holds an indirect mandate, which is channelled through, and dependent on, the legislature. In the Westminster tradition we call this responsible government.[18] That is, the executive is drawn from the legislature and is in turn responsible to it. Put another way, the legislature can fire the cabinet. There are no rival sources of legitimacy for executive power.

The **second** condition is that the executive is selected by a legislature with 2 parts, where *only one* part has the power to dismiss the cabinet via a no-confidence vote. This has important implications. As only one part of the legislature is responsible for supplying confidence to the government (our House of Representatives), it means the other part of the legislature (our Senate) can go in very interesting and creative directions in terms of democratic and normative experimentation. Importantly, this second part of the legislature (our Senate) can do this without threatening the formation of stable government with clear lines of accountability. Which in this case may simply boil down to everyone knows who to blame when something has gone wrong.

It is important to note that we are discussing *2 parts* and not *2 chambers*. A semi-parliamentary system *does not* rest on it being bicameral. In fact, it is entirely possible to construct a semi-parliamentary system with one chamber. All that is required is that one part of the legislature is in charge of supplying confidence to the cabinet and the other part can (in theory) do whatever it likes. For example, we could have a unicameral semi-parliamentary system by having a nationwide electorate that used a proportional representational voting system. You might argue that parties need to clear a 2% threshold to claim their seats on a strictly proportionate basis, but a party would need to clear a much higher percentage of the

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[16] Maurice Duverger, ‘A new political system model: semi-presidential government’, *European Journal of Political Research*, vol. 8, issue 2, 1980, pp. 165–187.

[17] Steffen Ganghof, ‘A new political system model: semi-parliamentary government’, *European Journal of Political Research*, vol. 57, issue 2, 2017, pp. 261–281; and Steffen Ganghof, Sebastian Eppner and Alexander Pörschke, ‘Australian bicameralism as semi-parliamentarism: patterns of majority formation in 29 democracies’, *Australian Journal of Political Science*, vol. 53, issue 2, 2018, pp. 211–233.

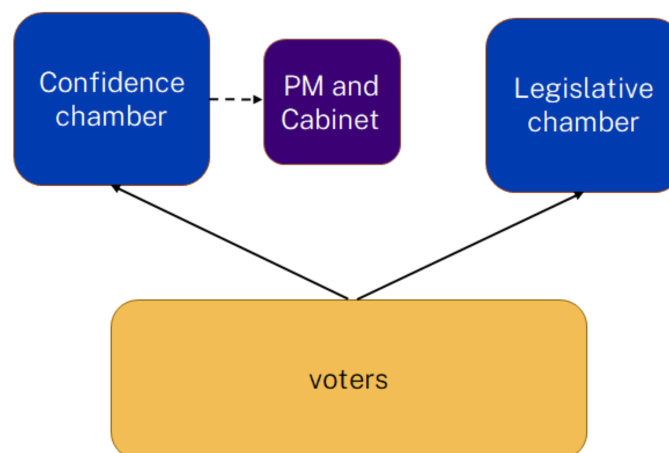
[18] R. A. W Rhodes, John Wanna and Patrick Weller, *Comparing Westminster*, Oxford University Press, Oxford, 2009.

vote (for example 10%, 15%, 20% and so on), in order to vote in no-confidence motions. In this way, *2 parts* of a legislature exist, but with different jobs.[19]

The **third** element is that the second part of the legislature – in Australia that is our Senate – has equal or greater democratic legitimacy. That is, it has its own mandate from voters, which is where our Senate differs from the House of Lords in the United Kingdom (UK) or the Canadian upper chamber whose members are appointed by the government of the day. It also matters that this second part of the legislature has robust veto powers, which make it a meaningful adversary for the part of the legislature responsible for providing confidence to the cabinet (in Australia this is the House of Representatives).

Here is an example of what this looks like in abstract terms (Figure 1).

Figure 1: 2 parts of the legislature: an ideal type of semi-parliamentary executive-legislative relations



Caption: This work is adapted from ‘Semi-presidential and semi-parliamentary government’ by Steffen Ganghof, used under CC BY-NC-ND 4.0 DEED.[20]

Voters elect the confidence chamber from which the executive is selected. Voters also elect a legislative chamber, which can concentrate on the deliberative, representational, and scrutineering jobs. In this idealised/simplified schema Ganghof has (perhaps cynically) highlighted the lack of deliberation going on in the confidence chamber, which is focused on maintaining the position of the government.[21]

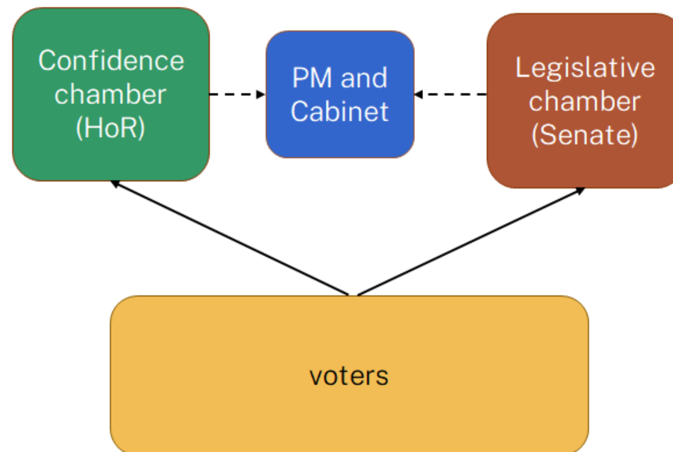
Here is what it looks like at the Australian Commonwealth level (Figure 2).

[19] Steffen Ganghof, ‘A new political system model: semi-parliamentary government’, *European Journal of Political Research*, vol. 57, issue 2, 2017, pp. 261–281.

[20] Steffen Ganghof, *Beyond presidentialism and parliamentarism: democratic design and the separation of powers*, Oxford University Press, Oxford, 2021.

[21] Ibid.

Figure 2: 2 parts of the legislature in semi-parliamentary terms in the Australian Commonwealth



Voters elect the House of Representatives, which is typically dominated by the government of the day. The Australian House of Representatives acts like a conference chamber. Voters also elect a legislative chamber, the Senate, which is more proportional though not absolutely so. This is where the majority of the deliberative and scrutinising work of the legislature is thought to be done in the Australian Commonwealth. This reality is in large part the result of the power of the Senate’s committee system and reflected in the Senate’s standing orders, which are much more favourable to smaller parties and the opposition.[22] At the Commonwealth level the executive is drawn from both chambers, but critically the government lives or dies by its ability to maintain confidence in the House of Representatives alone.[23]

We might think that the Senate is more deliberative and representative than the House, but we can also legitimately ask could it be more deliberative? As mentioned above, Ganghof’s minimal definition reflects an ideal type, which was developed using 6 normative dimensions to assess a semi-parliamentary system.[24] Currently, the Australian Senate is only performing strongly in 3 out of 6 dimensions. The main reason is because of the high degree of disproportionality in our upper house. For example, a Senate vote in NSW is worth less than it is in Tasmania because of the differences in population size. The Australian Senate also lacks an absolute budget veto, however, as we have seen with the example of the dismissal crisis above, it has a *near* absolute budget veto. Additionally, the Senate does not maintain its veto when the conflict resolution mechanism is triggered, that is, we have the double dissolution mechanism to resolve deadlocks between the chambers.

Incidentally, institutionally at least, NSW does meet the definition of an ideal type. However, anyone who follows politics and the ‘bear pit’, would not readily characterise NSW politics as

[22] Harry Evans, *Odgers’ Australian Senate practice*, ed Rosemary Laing, Department of the Senate, 14th edition, 2016.

[23] D. R Elder and P. E Fowler, eds, *House of Representatives Practice*, 7th edition, Department of the House of Representatives, Canberra, 2018.

[24] Steffen Ganghof, ‘A new political system model: semi-parliamentary government’, *European Journal of Political Research*, vol. 57, issue 2, 2017, pp. 261–281.

an ideal type of gentle democracy and it retains features many citizens do not like, such as highly visible adversarialism. That is because the institutional design of a political system is not the only factor in determining how systems run. The actors matter too, which I discuss below.

But why does this matter?

Before we continue, it is important to remind ourselves why this matters. The answer is quite simple: it relates to possible political reforms in Australia. When public debate arises on reforming our parliamentary system, political elites often frame the discussion as a false binary between stable government and greater representation. But as I have attempted to demonstrate*, our political system is already structured to do both normative jobs of efficiency and representation well*. This is because our semi-parliamentary system means Australia has 2 parts to its legislature that draw equal legitimacy, but where only one part has to supply confidence to the government. This means that we can have one part of a legislature doing the job of providing confidence in the government, cabinet stability and clear lines of accountability, while the other part of the legislature can be pushing further down the road towards more meaningful deliberation, scrutiny, representation and even normative experimentation such as citizens assemblies, sortition or other forms of deliberative democracy.

What might we want out of our political system? Norms, trade-offs and semi-parliamentarism

What norms can be accentuated by a semi-parliamentary system? One way to do this is to consider what Australians may want from their political system. Typically, we tend to think of normative values falling under the efficiency banner or the representational banner.

The efficiency of the system relates to 3 factors:

- First, **identifiability**, or how easy it is for voters to identify policy alternatives between potential governments. In Australia, this happens between parties that form government.
- Second, **cabinet stability**, that is how easy it is for a government to maintain its grip on power and who it must negotiate with in order to do so. This is directly related to the;
- Third, which is the **clarity of responsibility**. This boils down to how easy is it for citizens to work out who to blame when things go wrong.

In European-style proportional representation systems, which rely on coalition governments, it is harder for voters to work out exactly who to blame. In the UK, it is very easy to know exactly who is to blame, because of its majoritarian system, which produces strong majority governments that lack a meaningful challenger. In fact, efficiency is typically thought to be most prevalent in majoritarian systems.

By contrast, representational values emphasise 3 different factors:

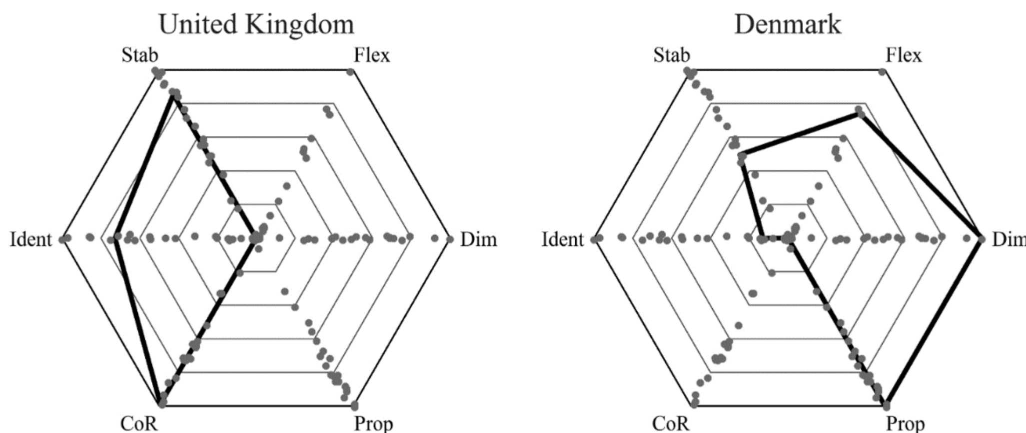
- First, **proportionality**, that is how well the electoral system translates votes by the public into legislative outcomes. This is typically understood to mean seats in parliament.

- Second, **dimensionality**, which is how well the system reflects the reality that voter’s preferences are not uniform across the left-right spectrum. Put another way, someone might like lower taxes (typically coded ‘right’), but also high education spending (typically coded ‘left’).
- The final relates to **flexibility**, which is how much governments are able to choose amongst coalition partners when constructing voting majorities to pass legislation. Greater flexibility means an increased likelihood that of a larger number of voter preferences may be incorporated into the totality of government decision-making.

Importantly, these trade-offs are linked, but not necessarily always zero-sum.

If we consider what these norms might look like in the real world, we can see how different political systems can do a better, or worse job, at fulfilling all 6 normative dimensions. Figure 3 is a graphic demonstration of the 6 dimensions used by Ganghof.[25]

Figure 3: UK and Denmark mapped on 6 normative dimensions



Caption: ‘Trade-off profiles of non-presidential democracies, 1995–2015’ by Steffen Ganghof, used under CC BY-NC-ND 4.0 DEED/ Cropped from original.[26] .

In Figure 3, we have the example of the UK and Denmark, which are considered the ideal type for an efficient parliamentary system and a representational parliamentary system respectively. Here we can see that the UK does a very good job of fulfilling the efficient normative dimensions but performs poorly in terms of representational normative dimensions. By contrast, Denmark is very strong on the representational normative dimensions and comparatively quite weak at the efficient normative dimensions.

If we compare this with the Australian Commonwealth and NSW Parliament (Figure 4), which if you recall is considered an ideal type of a semi-parliamentary system, we can begin to see how Australian models of executive-legislative relations performs better on both the efficient and representative normative dimensions. Where these models struggle is in the area of dimensionality, or the system’s ability to reflect voters’ multidimensional views on policy issues.

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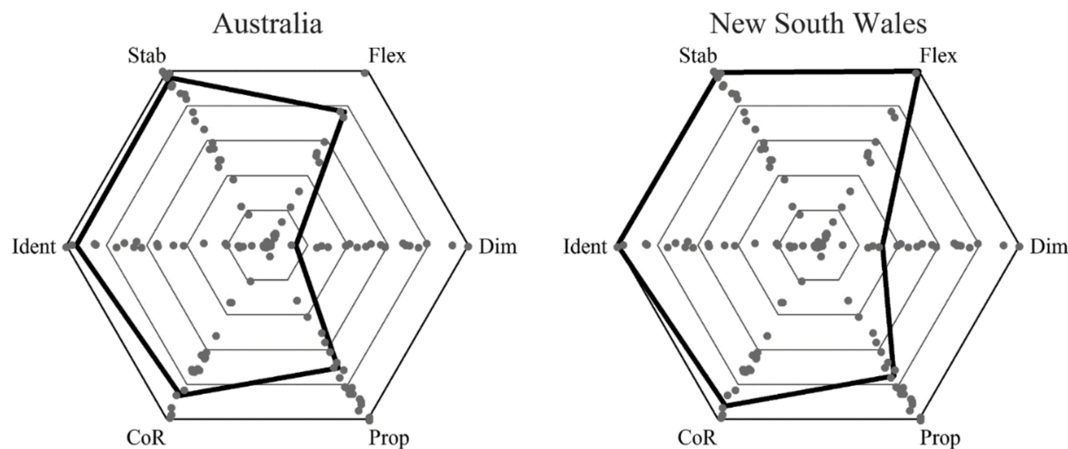
[25] Ibid.
[26] Ibid.

Figure 4: The Australian Parliament and NSW mapped on 6 normative dimensions



Source: ‘Trade-off profiles of non-presidential democracies, 1995–2015’ by Steffen Ganghof, used under [CC BY-NC-ND 4.0 DEED](#)/ Cropped from original.[27]

Importantly, the reason why Australian models of executive-legislative relations can perform well across a higher number of normative dimensions, is because our upper chambers (the second part of our legislatures) are not responsible for providing confidence in the cabinet and they are also powerful in their own right.[28] However, despite relatively good performance on these normative dimensions, findings from the Australian Election Study suggest that voters are currently dissatisfied with democratic and political practice.[29]

Institutions matter and so do actors

One of the main reasons why Australians may feel so dissatisfied with politics is because a lot of discussion of executive-legislative relations tends to overlook or under-play the importance of political parties as key actors. The reality is that although legislative theory tends to assume voters elect representatives who then do all of the deliberative, representational, scrutiny and confidence-securing work of legislature, it is actually political parties that occupy and execute these functions rather than individual legislators.[30]

Political parties are in effect interest aggregators. They make it easier for voters to work out who to vote for by providing us with ideological shortcuts. They are also subject to their own internal logics driven by their formal and informal institutional norms.[31] Parties are highly adaptive and are outstanding at extracting resources from the state and work hard to lock

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[27] Ibid.

[28] André Kaiser, ‘Parliamentary opposition in Westminster democracies: Britain, Canada, Australia and New Zealand’, *The Journal of Legislative Studies*, vol. 14, issue 1, 2008, pp. 20–45.

[29] Sarah Cameron and Ian McAllister, *Trends in Australian political opinion: results from the Australian Election Study 1987–2022*, Australian National University, Canberra, 2022.

[30] For a longer articulation of this argument see Richard Lucy, *The Australian form of government: models in dispute*, 2nd edition, Macmillan, South Melbourne, 1993.

[31] Thomas Poguntke, Paul Webb and Susan E. Scarrow (eds), *Organizing political parties: representation, participation, and power*, Oxford University Press, Oxford, 2017.

out competition were possible.[32] Reform to Australia’s voting system is a ready example of this: politicians appear to make reforms when the existing system appears threatening to the interests of parties of government. For example, consider that the last round of Senate reforms only occurred after the vote delivering a significant, and difficult to manage crossbench. This was despite a decades long debate, which focused on the poor representational outcomes of the previous Senate preference allocation system.[33] Legislative systems such as Australia’s were designed before parties became dominant and that has resulted in a gap between the ideals and the reality of what happens in the legislature and which actors are actually the most influential.

Parties are not all bad though. Parties are also important democratic linkages between the executive and the governed.[34] However, the capability of parties to act as a meaningful democratic linkage has significantly deteriorated over time. Parties struggle to attract members from a wide cross-section of society.[35] Voters are different than they were in the 1950s and are not interested in programmatic politics in the same way as in the past.[36] Aside from electoral pressure and competition there are few institutional incentives for political parties to take their democratic linkage role seriously. Parties the world over have learnt they can occupy office with small organisations and memberships that are not reflective of the general public.[37]

Political parties are the key actors that interpret both the formal and informal rules of how politics and political institutions operate. We can see this very clearly in the evolution of the Senate’s role. Our nation’s constitutional framers (who were overwhelmingly white men) argued over the precise role of the Senate. Many were wary of giving the Senate the vast powers that were eventually written in to the Australian Constitution.[38] After the solidification of the party system in 1909 to1910, and the way the voting system operated meant that the Senate was typically dominated by whichever party won government and the government typically enjoyed a supermajority because of the way the Senate voting system operated at that time. The result was that the Senate was not the location of contestation that we understand it to be today. That was in large part because of the way parliamentary actors and political parties understood the Senate to function, which was reinforced by how the voting and party systems were organised.

It was only the result of a change to the voting system and, later, the rise of the Democratic Labor Party that both voters and parliamentarians began to come to grips with the

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[32] Richard Katz and Peter Mair, ‘Changing models of party organization and party democracy: the emergence of the Cartel Party’, *Party Politics*, vol. 1, issue 1, 1995, pp. 5–28.

[33] Damon Muller, ‘Senate voting reform and the 2016 Senate election’, *Briefing book – key issues for the 45th Parliament*, Australian Parliamentary Library, Canberra, 2016.

[34] Russell J. Dalton, David M. Farrell and Ian McAllister, *Political parties and democratic linkage: how parties organize democracy*, Oxford University Press, Oxford, 2011.

[35] Emilie Van Haute and Anika Gauja (eds), *Party members and activists*, Routledge, London, 2015; and Narelle Miragliotta, ‘Parties and the mass membership’, in Narelle Miragliotta, Anika Gauja, and Rodney Smith (eds), *Contemporary Australian political party organisations*, Monash University Publishing, Clayton, 2015.

[36] Narelle Miragliotta, Anika Gauja, and Rodney Smith (eds), *Contemporary Australian political party organisations*, Monash University Publishing, Clayton, 2015.

[37] Russell J. Dalton and Martin P. Wattenberg, *Parties without partisans: political change in advanced industrial democracies*, Oxford University Press, Oxford, 2002.

[38] Brian Galligan, *A federal republic: Australia’s constitutional system of government*, Cambridge University Press, Cambridge, 1995; and John Uhr, *Deliberative democracy in Australia: the changing place of parliament*, Cambridge University Press, Cambridge, 1998.

representational normative potential of the Senate. It started with people voting for minor parties, senators such as Lionel Murphy began advocating for the Senate’s right to fulfil its democratic functions, and the creation of the Senate committee system in the 1970s. Together these 3 factors saw the Senate’s role and powers evolve and expand to fill the untapped space created by the constitutional framers. By the mid-1990s, the Senate’s standing orders were changed to better reflect a more equal relationship between government and opposition that characterised the true nature of relationships in the Senate. Political parties were essential actors in seeing these changes and evolutions occur and it is political parties that continue to see our legislative institutions evolve.[39]

So now that we have an idea of what a semi-parliamentary system is, and what some of the implications might be, what might we do with this knowledge?

Semi-parliamentarism and some implications for reform

We know that in recent years Australians have been frustrated with the political system. Levels of satisfaction with democracy were in steady decline from the time of the election of the Rudd Labor Government until they reversed – a little – after the election of the Albanese Labor Government in 2022.[40]

Indeed, the data shows a mixed picture. When we consider questions of trust, voters have low levels of trust in government and overwhelmingly believe that people in government look after themselves. Australians also believe that the government is run for a few big interests rather than everyone, which matches their feelings that governments are too distant from ordinary people. Yet, Australians generally believe that their vote matters and that it can make a difference.[41]

The long-term trends indicate that there is a cyclical dimension, with declines in satisfaction aligning with significant political crises. What was alarming about the long-term decline in trust in recent years is the fact that the election of the new Abbott Coalition Government in 2013 did not seem to make a difference. What is interesting about the 2022 data is that people seem to be more satisfied with democracy, but still do not rate governments or politicians very highly.

Indeed, it seems Australians have low confidence in politicians as a class of actors because they appear out of touch and have in recent decades increasingly appeared to run government in favour of elites. Yet, voters still think that who they vote for matters and there is an underlying faith in the overall system. These trends point to, in part, a disillusionment with political parties for some of the reasons outlined above, particularly relating to the breakdown of parties’ role as vital civic linkages.

However, our political system has responded to this (perception of?) deficit through intense local organising. The ‘voices of’ and ‘Teal’ movements are an exciting live experiment in

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[39] Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice*, Department of the Senate, Canberra, 2003.

[40] Sarah Cameron and Ian McAllister, *Trends in Australian political opinion: results from the Australian Election Study 1987–2022*, Australian National University, Canberra, 2022.

[41] Sarah Cameron and Ian McAllister, *Trends in Australian political opinion: results from the Australian Election Study 1987–2022*, Australian National University, Canberra, 2022. pp. 101–105.

grassroots democracy.[42] It has demonstrated that the political system can still generate sufficient electoral competition to keep the major parties on their toes. But significantly, these independent movements are not institutionalised to the same degree as political parties.

Indeed, one of the independents’ virtues is their flexibility and dependence on meaningful civic engagement. Their success has shown that Australians are interested and desirous of more meaningful representation and would like the legislature to do a better job on some of the representative norms outlined above. The risk, however, of relying on independence movements is the large amount of informal volunteer labour required to sustain them. There is no guarantee that the movement will continue or that it will deliver the results that the community wants.

This is not to talk down independents movements, rather it is to point out that we can think about how to introduce formalised institutional features that improve Australia’s representational outcomes. We may want to add more members to the legislature in order to weaken party discipline, which contributes to several undesirable outcomes such as the way it generates multiple disincentives towards open deliberation and debate. We could consider different kinds of proportional representational arrangements in order to increase proportionality. We could consider creating an explicit confidence college, in effect formalising the reality of how politics is largely practised in the House of Representatives and concurrently experiment with different representational models in the Senate.

The point is that our system is *already* configured in such a way that we do not have to trade off stability for a different representational outcome. We can, *already*, manage both well. This does not mean that there would not be unintended consequences – there almost certainly would be. It just means that a core argument that we hear for not undertaking reforms – that we are a *parliamentary system* and that we should not put stable government at risk – is just not true. We are a semi-parliamentary system that already does a better job than most systems at balancing off norms of efficiency with norms of representation – and we could do more if we desired it as a nation.

Yet, most of us have never heard of a semi-parliamentary system. Indeed, evidence from the Australian Electoral Study also suggests that my argument is currently not popular. Australians are lukewarm at best about the Senate’s alternative mandate (Figure 5). Though, importantly, between 20% and 30% of Australians appear to have no opinion either way. But perhaps this is because we are thinking like people who believe they are in the parliamentary system, rather than a semi-parliamentary one.

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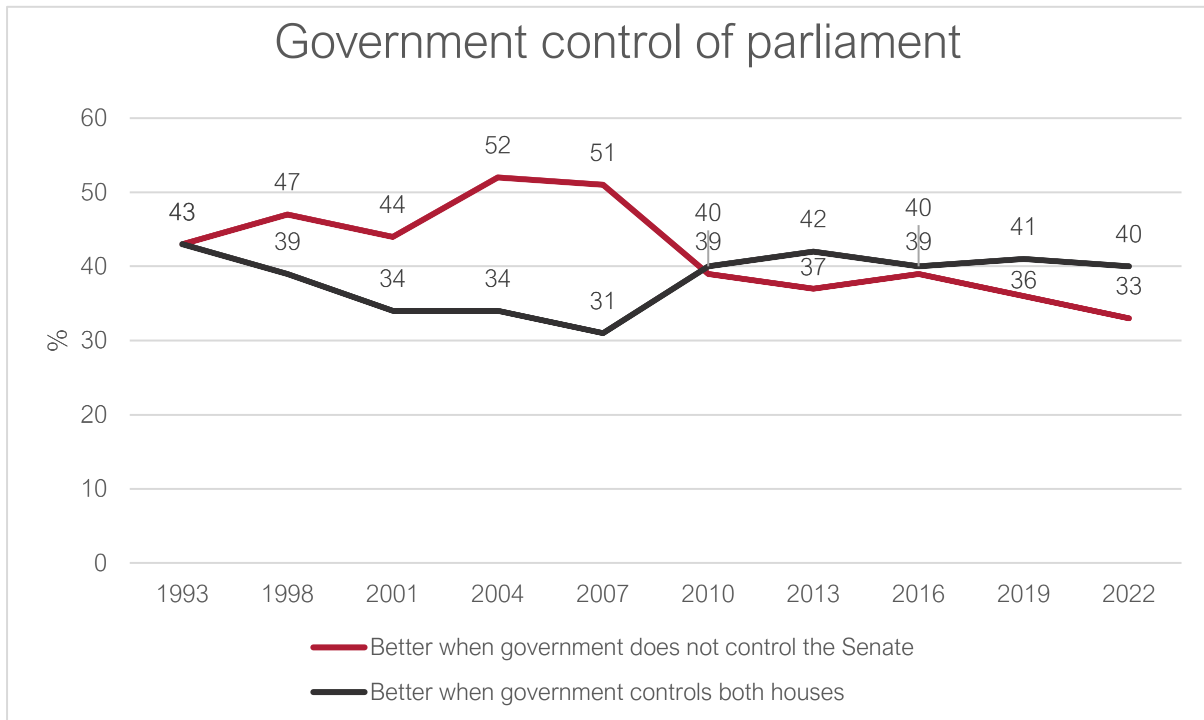
[42] Anika Gauja, Marian Sawer and Jill Sheppard (eds), *Watershed*: *the 2022 Australian federal election*, ANU Press, Canberra, 2023.

Figure 5: Government control of parliament



Source: Sarah Cameron and Ian McAllister, [Trends in Australian political opinion: results from the Australian Election Study 1987–2022](), Australian National University, Canberra, 2022. p. 107.

Global state of democracy: how parliaments can rejuvenate democracy

Leena Rikkilä Tamang*

Thank you for inviting me and the International Institute for Democracy and Electoral Assistance (International IDEA) to speak at the Senate Lecture Series today. It is an honour.

I wish to acknowledge the Ngambri and Ngunnawal peoples as traditional custodians of the land we are meeting on and pay my respects to their elders past and present – and acknowledge all Aboriginal and Torres Strait Islander people who may be attending or following this talk.

As you may have noticed from my accent, I hail from Finland, specifically from Lapland, which is the home of the Sámi people – Europe's only Indigenous group. Unlike Australia, in Finland and the broader Nordic region, we don't have the beautiful tradition of commencing events or gatherings by acknowledging the traditional owners. Personally, I believe that we should adopt a similar practice.

Unfortunately, we have very little symbolism in Finland that recognises and honours the Sámi people, their rights, and their rich culture. But it is essential to note that Finland's Constitution does acknowledge the Sámi people, and we have a dedicated Sámi Parliament.

The same is true in other Nordic countries like Sweden and Norway which have Sámi parliaments and institutions that uphold and protect Sámi rights and culture. I will delve deeper into these institutions later in my presentation. In many respects, the journey of reconciliation in both Finland and Australia has only just begun.

Today is International Democracy Day – established by the United Nations (UN) General Assembly with a resolution adopted on 8 November 2007 to memorialise the Universal Declaration on Democracy.[1] The date itself, 15 September, was proposed by the Inter-Parliamentary Union.

This year's theme – *'Empowering the Next Generation'* – focuses on the essential role of children and young people in safeguarding democracy today and in the future.[2] Therefore, in the second part of my talk I will focus on parliamentary innovations around inter-generational

* This is an edited transcript of a lecture given by Leena Rikkilä Tamang in the Senate Lecture Series on 15 September 2023.

1 *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*, GA Res 62/7, UN Doc A/RES/62/7 (13 December 2007, adopted 8 November 2007).

2 United Nations, *International Day of Democracy 15 September* (accessed 24 January 2024).

justice, environment and future generations, as well on representation and inclusion of youth and Indigenous peoples.

Global state of democracy 2022

I will start by providing you with a sneak peek to the latest findings of International IDEA's Global State of Democracy (GSoD) Indices and the forthcoming report which will be launched on 2 November 2023 in Stockholm.[3] I will then highlight the state of effective parliaments – globally, and in Australia – in reference to the GSoD data.

I should let you know that International IDEA is the only intergovernmental organisation with an explicit mandate to support sustainable democracy. International IDEA combines a diverse membership of countries, including Australia, but also India, Indonesia, Mongolia and the Philippines from Asia and the Pacific region and has a status as permanent UN Observer (a feature that reinforces the legitimacy of our actions).[4]

We work with the multilateral and national actors, including parliaments but also democracy defenders and civil society, in harnessing global action to defend and advance democracy. Our Asia and the Pacific regional office is located here in Canberra at the Australian National University campus.

The global state of democracy in 2023 is complex, fluid, and unequal. The intensity of democratic gains that had once seemed so promising have dulled over the past 2 decades.

In 2022, our data shows that countries with net declines in democratic performance have outnumbered those with net advances for the past 6 consecutive years, with 2021 the worst year on record.

Over the last 5 years, the most widespread, significant declines in democratic performance were observed in elections, parliaments, and judiciaries – the very key institutions meant to serve as checks and balances to the executive. These declines impacted every region of the world. It is probably fair to say that the deterioration in these institutions is a blow to the heart of democracy, affecting people's core ability to 'throw the rascals out', and the elected representatives' power to ensure that the executive does not step out of bounds, and judges' duty to uphold the law in fair and equal ways.

On fundamental rights, globally speaking, the overall declines were not significant. But stagnation at a low level is not a situation to celebrate or tolerate. Moreover, many countries experienced declines in the rights of expression, assembly and association, sometimes connected to deteriorations in security. In such contexts, the fundamental enabling conditions of democracy, including opportunities for debate and dialogue (which drive innovation), are at risk of disappearing.

Over time, such circumstances could wear down the ties that bind people together, potentially impacting civic engagement as well, as people are less willing to risk their security to be active members of their societies.

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[3] International IDEA, *The Global State of Democracy 2023, the new checks and balances*, 2023.

[4] See further, International IDEA, *About International IDEA* (accessed 24 January 2024).

But there are a few green shoots of hope.

After many years of stagnation in levels of corruption, the report finds that there were improvements in this area in countries across all regions of the world in 2022. The picture here is however dampened by the fact that while many of the countries are making progress on corruption, they are also suffering significant setbacks in other aspects of democratic governance.

Nevertheless, the trends here highlight opportunities to learn and implement new approaches to counter corruption. Africa leads with the largest number of country level advances, followed closely by Asia and the Pacific, and Europe.

Public participation remains the brightest hope for the future of democracy. It has remained at a surprisingly high level even in countries with a low level of democratic performance at an institutional level. The resilience of people's commitment to making their voices heard, even in the face of physical danger and serious political instability, as witnessed from Myanmar to Iran, is heartening.

Across the diverse countries of Asia and the Pacific, a broad decline in democratic quality appears to have halted, with the significant exceptions of Afghanistan and Myanmar. However, civic space remains under threat as freedom of expression and of the press, and freedom of association have declined across many countries. After peaking in 2011, freedom of the press has now reverted to 1999 levels.

Across the region, ineffective parliaments and crackdowns on organised civil society have left the judiciary, anti-corruption commissions, and at times mass street protests, and even military restraint as the key constraints and balancing mechanisms.

Democracies in the Pacific, which is a renewed focus of geopolitical tension between the United States and China, saw no significant declines. But in years to come they may see their institutions tested by these outside pressures.

In short, democracy is still in trouble: stagnant at best, and declining in many places.

Before zooming in to what the Indices say about the state of effective parliaments, just a few words about what the Global State of Democracy Indices are and what they measure.

At International IDEA, we understand democracy as a broad concept and one that can have many very different manifestations, depending on a particular society's history, culture and set of priorities. Although there are core tenets of democracy, the way these are operationalised and the way they look in different places can vary widely. There is no such thing as a perfect democracy.

Since 1975, we have measured the extent to which a country has realised aspects of democratic ideals in 4 categories – representation, rights, rule of law and participation – and their sub-attributes.

The goal is to assist policymakers, analysts, scholars, journalists and civil society to assess and compare the quality of democracy. The Indices can also be used to monitor progress on the Sustainable Development Goals (SDG), including SDG 16 which also measures progress on effective and accountable institutions at all levels.

While some primary data collection is conducted within International IDEA, much of the data is taken from 20 other publicly available data sources, Varieties of Democracy data set being the largest. The data set and documentation are freely available for download from the International IDEA website.[5]

What is perhaps noteworthy is that unlike many other global democracy indices, we also measure basic welfare, denoting the extent to which there is access to fundamental resources and social services, such as citizens access to nutrition, social security, healthcare and education.

The GSoD is also largely an expert assessment – it does not measure people's perceptions on democracies, or people's trust on institutions, like for example the world's value survey does. We have recognised this gap and are in fact adding people's perceptions index to complement the overall analysis in the coming year.

This years' *Global State of Democracy Report* will be focusing on the role of what we call 'countervailing institutions' in stopping the erosion of democratic institutions and reacting to the entrenchment of authoritarian forces.

The term goes beyond the traditional understanding of 'checks and balances' to encompass those governmental and non-governmental institutions, organisations and movements that check the aggrandisement of the executive – and balance the distribution of power.

Countervailing institutions are relatively new institutions like human rights commissions and electoral management bodies, as well as civil society networks, popular movements, and investigative journalists, that play an irreplaceable role in ensuring democracy continues to be of and by the people.

What is positive is that in many places of weakened democratic foundation, such countervailing institutions, like anti-corruption commissions, have been able to step in. What is worrisome is that some of the formal countervailing institutions, particularly the traditional 'checks and balances' through the separation of powers, have been suffering.

Effective parliament

Over the last 5 years, the world has witnessed the most widespread, significant declines in 2 of the bedrocks of democratic governance: credible elections and effective parliaments.

This is worrying as these institutions serve dual purposes: they are both at the heart of thriving democracies and key to mitigating decline.

Critically, these declines in effective parliaments are a reversal of a longstanding positive trend that held until only a few years ago.

Legislatures should be the first line of defence against executive overreach. It is here where elected political parties and representatives can, if the need arises, investigate and sanction the executive branch. The legislative branch is also where elected representatives work to reflect people's needs in laws and system design.

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[5] International IDEA, *Global State of Democracy data set and resources* (accessed 24 January 2024).

In many contexts, electoral processes have been marred by disparities in fairness, the exclusion of marginalised communities, the weakening of electoral management bodies, and irregularities in voting and result tabulation.

These challenges undermine the essential role of elections as mechanisms to hold unresponsive governments accountable – the peoples' power to 'throw the rascals out' if they so wish. Furthermore, these problems are exacerbated by weak parliaments that find it challenging to curtail excessive actions by the executive branch.

In our methodology, when we assess the effectiveness of a parliament, we gauge its ability to effectually oversee the actions of the executive branch. So, this indicator is not measuring for example how representative or inclusive the parliament is.

Over the last 5 years, parliaments have struggled to exercise their oversight functions, and significant declines have impacted countries across the political spectrum.

Outside of extreme political crises, like the wave of military coups in several places in Africa and in Myanmar, some high-performing democratic countries such as Japan and Slovenia and mid-performing nations such as Argentina, Greece, Nigeria, India and Nepal have also seen drops in parliamentary effectiveness over the last 5 years.

In contrast, the European region offers inspiration, with 5 of the region's 12 countries demonstrating advances in the effectiveness of parliaments over the last 5 years. High-performing Czechia, Slovakia and Bulgaria and mid-range performing Moldova and Armenia have all seen improvements.

The state of democracy in Australia

Turning now to Australia which remains a high-performing democracy in every measure in the GSoD Indices except civil society.

While remaining well above the global average score in absence of corruption, Australia is yet to regain its standing following declines observed beginning in 2012, which showed weak regulatory structures in combatting foreign bribery and public sector corruption.[6] It is important to note, however, that our data is not yet capturing for example the formation of the National Anti-Corruption Commission, which started its work this year.

There are also declines in some other respects, like media integrity, which is likely due to Australia's concentrated media ownership regulations.

In the realm of effective parliament, Australia is the top performer among its peers – the United States (US), the United Kingdom (UK), Canada and New Zealand (NZ).

The US, despite the serious drop in 2015, still sits slightly above Canada, which may look a bit surprising – albeit this might reflect what we call 'trouble at the top'. All these countries, globally speaking, are performing relatively well, albeit not improving – underlining the fact that there is no place for complacency.

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[6] Cat Barker, Corruption and integrity issues, *Briefing Book: Key Issues for the 45th Parliament*, Parliamentary Library, 2016, p. 184.

Representation measures, in addition to effective parliament, includes 5 other aspects; credible elections, inclusive suffrage free political parties, elected government and local democracy.

In comparison to its peers – Australia is doing well both in terms of representation and parliamentary effectiveness.

New Zealand features on the top, closely followed by Australia, the UK and Canada, with the US below the other 4.

However, in relation to civil society, Australia is behind these other countries. This aspect assesses to what extent civil society organisations are free and influential and the extent to which voluntary, self-generating and autonomous social life is institutionally possible.

Parliamentary innovations

We can see that effective parliaments play a critical role in ensuring democratic governance and, importantly, accountability. Parliaments are the cornerstone of a functioning, healthy political system.

So, let me now turn to some of the innovations, considering where, and how, parliaments can be sources of rejuvenation of democracy, with a focus on inclusion and representation of future generations, youth and Indigenous peoples and finding solutions to some of the most pressing challenges of our time, like climate change.

As we know, the short-term nature of election cycles provides little incentive for political leaders to sacrifice immediate benefits in favour of long-term future goals. There is also the challenge of underrepresentation of some groups in decision making, such as young people, Indigenous peoples and women, even when the decisions most affect them.

Some innovations seek to extend some kind of democratic representation to future generations or even non-human others, using proxies or trustee representatives who can ‘speak for’ these un-represented entities. Others try to deepen democratic participation through greater public deliberation between citizens, experts and stakeholders, to inform decision-making by law and policy makers in parliament.[7]

Parliaments have developed different institutions that suit their systems of government. They can be organised in 3 broad categories:

1. parliamentary committees of the future
2. independent parliamentary commissioners
3. citizens assemblies.

[7] Amanda Machin, ‘Climates of democracy: skeptical, rational, and radical Imaginaries’, *Wiley Interdisciplinary Reviews: Climate Change,* vol. 13, issue 4, 2022, e774.

1. Parliamentary committees of the future

The number of parliamentary committees of the future is increasing, as is cross national collaboration, evidenced by the first World Summit of the Committees of the Future, held in Helsinki in 2022.[8] The second World Summit is to be held in Uruguay this September (2023).

A study made by the Finland Parliament discovered that out of 80 countries looked at, some futures related work was done in 43 parliaments. Of these, 8 were assessed to have so broad a mandate that they matched the idea of a committee of the future despite operating under some other name.[9]

One example comes from Finland itself. The Finland Parliament's Committee for the Future was established in 1993 on the initiative of representatives in the then parliament. It has since been placed on a permanent footing by constitutional amendment. It has 17 members, all Members of Parliament (MPs), selected after each election.

The committee is responsible for Parliament's Future Report, which is a response to the Government's Report on the Future and the Agenda 2030 Report. It may be invited to provide opinions on other proposals, or act on its own initiative. It does not reactively examine legislative proposals, but rather takes a proactive approach and focuses on identifying broader long-term issues that affect the future, usually by undertaking thematic studies.[10]

Some of the questions the committee has decided to work on are:

- how can we, the people of today, help the people of the future to achieve a balance between human activities and the limits of our planet?
- how can we secure people's access to reliable information?
- how to spread the training of future skills – our cognitive structures, values and beliefs of what is possible?
- how to develop such resilience-providing future skills into a civic skill which is equal to literacy?

Timeframes are not only in 10–20 years, but also in 100 years. The committee is interested in increasing understanding on whether someone living in 2223 experiences their body and physical health as well as humanity and communality in the same way as someone living in 2023.

I found the questions asked by the parliamentary committee very interesting:

- what does it mean for the individual to have a good future?
- of what is hope born?

Examining the future at the individual level is also one of the priorities selected by Finland's Committee for the Future.

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[8] Parliament of Finland, *The World Summit of the Committees of the Future 2022*, 2022.

[9] Parliament of Finland, *The World Summit of the Committees of the Future 2022*, 2022, p. 6.

[10] Parliament of Finland, *The World Summit of the Committees of the Future 2022*, 2022, pp. 55–58; Paula Tiihonen, 'Power over coming generations: Committee for the Future in the Eduskunta, the Parliament of Finland', in Alexandra R Harrington, Marcel Szabó and Marie-Claire Cordonier Segger (eds), *Intergenerational justice in sustainable development treaty implementation: advancing future generations rights through national institutions*, Cambridge University Press, United Kingdom, 2021, pp. 400–403. See also Parliament of Finland, *Committee for the Future* (accessed 24 January 2024).

Germany has a Parliamentary Advisory Council on Sustainable Development (the council). Established in 2004, its legal basis is in recurrent decisions of the parliament, each term. The council has 17 members, drawn from all factions in the parliament.

Its functions are to 'monitor and assist' the federal government's sustainability policy by setting indicators and objectives. The council can also present opinions and recommendations to other parliamentary committees, the parliament or government itself.[11] An important part of its role is to evaluate sustainability impact assessments, which must accompany all government bills. The council describes itself as a 'watchdog', as they themselves say, 'it barks as soon as an initiative fails to bear in mind the National Sustainability Strategy'.[12]

In Uruguay, the Futures Commission is examining 'The Future of Work and the Work of the Future'.[13] In Canada, the committee plans to investigate deep technologies, such as artificial intelligence, as well as the role of technology in helping manage migratory movements resulting from various types of crises.[14] In Iceland the committee is looking at the future of democracy and demographic transition using strategic foresight and scenario planning.

2. Parliamentary independent commissioners

Several countries have established independent commissioners, some of whom serve as officers of the parliament, to represent the interests of entities not directly represented in parliament, such as the environment or future generations. The role of a commissioner is to bring sustainable development/intergenerational justice/environmental protection to the heart of parliamentary law-making and government policy, counterbalancing the short-term focus of parliament.

Some commissioners are set up outside the parliament, for example in government ministries such as Malta's Guardian of the Future,[15] or as a separate body, such as the Future Generations Commissioner for Wales.[16] In Wales, the *Well-being of Future Generations (Wales) Act 2015* requires public bodies in Wales to think about the long-term impact of their decisions, to work better with people, communities and each other, and to prevent persistent problems such as poverty, health inequalities and climate change.

Wales is the only country in the world with an Act on Wellbeing of Future Generations. This institution in Wales is attracting a lot of interest around the world but as it is not connected to the parliaments – I will not discuss it more here. But I encourage anyone interested to check them out.

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[11] Franz Reimer, 'Institutions for a sustainable future: the German Parliamentary Advisory Council on Sustainable Development' in Alexandra R Harrington, Marcel Szabó and Marie-Claire Cordonier Segger (eds*), Intergenerational justice in sustainable development treaty implementation: advancing future generations rights through national institutions*, Cambridge University Press, United Kingdom, 2021, pp. 380–382.

[12] Deutscher Bundestag, *Parliamentary Advisory Council on Sustainable Development* (accessed 24 January 2024).

[13] UNDP, *The Special Commission on Futures presented its 2022 agenda*, 8 April 2022 (accessed 24 January 2024).

[14] Parliament of Canada, *House of Commons Standing Committee on Industry and Technology* (accessed 24 January 2024).

[15] Global Network of National Councils for Sustainable Development and Similar Bodies, *Country Profiles: The Guardian of Future Generations (proposed 2011; forthcoming)* (accessed 24 January 2024).

[16] Future Generations Commissioner for Wales, *Acting today for a better tomorrow* (accessed 24 January 2024).

One example that is more closely tied to a parliament is NZ's Parliamentary Commissioner for Environment, which was established in 1986 as a statutory office under the Environment Act. At the time it was established, the Commissioner was unique in the world.

As an officer of the parliament (alongside the Auditor General and the Ombudsman), the Commissioner for Environment reports directly to the parliament as an independent and non-partisan advocate for environmental management. The Commissioner may investigate matters where the environment may be or has been adversely affected and advise on preventative or remedial action. The Commissioner may also be asked by the parliament to report on draft legislation or conduct inquiries on matters that significantly affect the environment.[17]

Israel and Hungary have also established independent commissioners. However, these examples show the vulnerability of commissioners to watering down by political actors over time. In Israel, the Commission for Future Generations was established in 2001, but worked only to 2006, when no new commissioner was appointed to replace the inaugural commissioner. The office was dissolved by law in 2010. One of the reasons given for the end of the Commission was that MPs felt that they, as representatives of the people, should have the free choice to decide what is good or bad for future generations.[18]

3. Citizen assemblies

A third category of innovative process is climate-focused citizen assemblies. A citizen assembly or 'mini-public' is a representative group of citizens (usually randomly selected to ensure wide representation) who gather over an extended time to discuss and propose solutions to important and complex public issues.

They are organised to promote deliberation, by presenting information from experts and then facilitating *collaborative* discussion among delegates to reach solutions that reflect the wider public interest. There is a growing number of citizens assemblies tasked with deliberation on the issue of climate change, generating comparative knowledge on what they are, and how they are most effective.[19] There exists for example Knowledge Network of Climate Assemblies, and closer to home, interesting work done by Nicola Curato from Centre for Deliberative Democracy and Global Governance at the University of Canberra.

Citizen assemblies on environment have been held at country and city level, mostly in Europe, with a few elsewhere.[20]

Apart from climate change, citizen assemblies, including what is called deliberative polling have been organised in Iceland, Mongolia and Ireland in the context of constitutional amendments. Most are set up as one off, ad hoc assemblies, although the UK Sustainable

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[17] Parliamentary Commissioner for the Environment (accessed 25 January 2024).

[18] Shlomo Shoham and Friederike Kurre, 'Institutions for a sustainable future: the former Israeli Commission for Future Generations' in Alexandra R Harrington, Marcel Szabó and Marie-Claire Cordonier Segger (eds), *Intergenerational justice in sustainable development treaty implementation: advancing future generations rights through national institutions,* Cambridge University Press, United Kingdom, 2021, p. 336.

[19] Graham Smith, *Climate Assemblies – Key Features*, Knowledge Network on Climate Assemblies website, 16 December 2022.

[20] Knowledge Network on Climate Assemblies, *Map of Climate Assemblies* (accessed 25 January 2024).

Development Commission has made a proposal for a standing citizens assembly called the Congress of the Future.

This congress, composed of randomly selected citizens, would be convened by parliament once a year. The government or parliament would put the issue/s in need of debate before each congress to deliberate. The commission suggests that the Congress of the Future would provide:

> *Long term thinking enshrined at the heart of our democratic process, raising awareness, creating political space, and generating action on the biggest issues of our time. The Congress of the Future is a way of giving adequate attention to the long term in what has become an overwhelmingly short-term political world.*[21]

This example, although not put into practice, is interesting as it creates a standing link between the citizens assembly and the parliament.

Innovations in representation and inclusion

Representation of young people

An Inter-Parliamentary Union study shows that the global proportion of MPs aged under 30 was just 2.6 % in 2021.[22] Young people are typically under-represented both in the electorate and in parliament. The reasons for this include a high minimum voting age, the way in which positions of power tend to be concentrated among older, established citizens, and an ageing population – in many parts of the world – accounting for a growing proportion of older voters. In addition, there is frequently lower voting engagement of the young generation in jurisdictions where voting is not compulsory.

Reforms and possible changes include lowering the voting age, usually from 18 to 16. These changes are under debate and discussion in NZ and Canada, and a reality in Austria, Brazil and Scotland, for example.

Non-governmental organisations (NGOs) and other organisations increasingly work to involve children and young people in their decision making. Many public and private organisations – including policy makers and governments – have youth advisory panels, to provide advice on issues affecting young people.[23] This is something that parliaments or individual MPs might consider. Youth parliaments, which are forums for young people that replicate parliament, are common. The purpose is usually educational, providing participants with knowledge and experience in how parliaments work. But they can also work to highlight the policy issues and solutions prioritised by young people.[24]

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[21] Sustainable Development Commission, *Breakthroughs for the twenty-first century*, 2009, p.15.

[22] Inter-Parliamentary Union, *Youth participation in national parliaments*, 2021, p. 7.

[23] OECD, *Engaging young people in open government – a communication guide*, 2018, p. 18.

[24] See Inter-Parliamentary Union, *Youth participation in national parliaments*, 2021, p. 50, which states that youth parliaments are reported in 56 % of parliaments around the world. In Australia, see the YMCA Youth Parliament in each state. In New Zealand, see New Zealand Government, *Young people to have their voices heard in Youth Parliament 2022*, 8 September 2021 (accessed 15 May 2024).

One concern with these kinds of models is that they are 'top-down', distant from the real decision making, and the challenge of 'translating listening into action'.[25]

A different way in which some countries have sought to improve the representation of young people in parliament is through quotas. For example, in Kenya, 12 MPs are nominated by political parties to represent special interest groups, which include youth, as well as other categories. In Uganda, 5 seats are reserved for people under 30 years of age, and in Rwanda 2 MPs are elected by the National Youth Council.[26] Quotas that operate through party lists are found for example in Lithuania, Mexico and Sweden.[27]

Indigenous representation

Indigenous representation has received a lot of attention in Australia with the proposal for the Indigenous Voice to parliament, a constitutional change to be put to referendum on 14 October 2023.

There are several examples of parliaments that include or work with Indigenous representative bodies.

As mentioned in the beginning of my talk, Sámi parliaments exist in Norway, Sweden and Finland. They are established by legislation and are elected by voters registered on a Sámi electoral role.

In Norway, the Sámi Parliament is an independent body to develop policies, based on its mandate from the Sámi people. It is the 'prime dialogue partner for the Norwegian government in its Sámi policy' and has administrative responsibility in matters concerning language, culture, and education.[28]

In Sweden, the Sámi Parliament has a dual role, as a body of elected representatives and as an administrative agency of the state, to administer certain government programs.[29]

In Finland, the Sámi Parliament may put initiatives and make proposals to Finnish government authorities. For the last several parliamentary terms, the Sámi Parliament has been proposing amendments to the voter roll eligibility criteria, and to the mandate of the parliament. These proposals hopefully moving forward during the parliamentary tenure.[30]

Other interesting examples include Vanuatu and the Marshall Islands where the parliament can or on certain issues must consult a Council of Indigenous leaders regarding law-making or appointments.[31] It is to be noted that the parliaments in both countries are not bound by law to accept the changes or recommendations – only to consult.

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[25] Julia Pitts, 'Are we giving the voice of the future a word in the present?' in Alexandra R Harrington, Marcel Szabó and Marie-Claire Cordonier Segger (eds), *Intergenerational justice in sustainable development treaty implementation: advancing future generations rights through national institutions*, Cambridge University Press, United Kingdom, 2021, p. 262.

[26] The Electoral Knowledge Network, *Youth and elections, quotas for youth* (accessed 25 January 2024).

[27] OECD iLibrary, *Youth representation in politics, Government at a glance 2021* (accessed 25 January 2024).

[28] The Sámi Parliament of Norway (accessed 25 January 2024).

[29] Sámi Parliament of Sweden, *Background: the State and the Sámi Parliament* (accessed 25 January 2024).

[30] Sámi Parliament of Finland, *The Sámi Parliament – decision-making* (accessed 25 January 2024).

[31] In Vanuatu, the Malvatumauri Council of Chiefs is established by Chapter 5 of the Constitution. In Marshall Islands, the Council of Iroij is established by Article III of the Constitution.

As these examples show, Australia is not alone in developing innovative ways to recognise and include Indigenous peoples in law and policy making.

Other developments in Indigenous representation draw on special measures, such as reserved seats or quotas, to guarantee the representation of Indigenous peoples in parliament. Examples of reserved seats arise in NZ, where the Māori Representation Act requires that 4 members of the House of Representatives be Māori, elected by Māori voters, and in Colombia, where 2 senators are elected in a special national constituency for Indigenous communities.[32]

An example of quotas through the electoral system is Nepal, where the Constitution requires parties to ensure representation through a closed list system for various groups, including women, Dalit, and Indigenous peoples such as Khas Arya, Madhesi, Tharu, Muslims and regional quotas, based on population.[33]

Gender representation and inclusion

These examples focusing on inclusion of youth and Indigenous peoples echo in many ways the older debate on gender equality, which remains to be resolved.

Parliaments are uniquely placed to address current challenges and advance gender parity – not only through the numerical balance of women and men, but through the type of decisions made by all MPs.

MPs – whether they are women, men or non-binary – can use their oversight and legislative scrutiny to eliminate gendered discrimination (even if it is unintentional or indirect), and ensure that the actual impact of laws, policies, programmes and funds on women and men is monitored.

A gender-sensitive parliament can respond to the needs and interests of women and men alike and removes barriers to women's full participation. An updated definition, from Sonia Palmieri, demonstrates that parliaments must move from passive responsiveness to an active pursuit of gender equality:

> *A gender-sensitive parliament values and prioritizes gender equality as a social, economic and political objective, and reorients and transforms a parliament's institutional culture, practices, and outputs towards these objectives.*[34]

There are many examples of innovations in gender-sensitive scrutiny of law-making and accountability across the world.[35]

In Timor-Leste a parliamentary resolution passed in 2009 requires all parliamentary committees to use and promote gender budgeting instruments and methods and establishes

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[32] For these and other examples see International IDEA, *Indigenous Peoples' Rights in Constitutions Assessment Tool*, 7 August 2020, pp. 99–103.

[33] Constitution of Nepal, article 84.

[34] Organization for Security and Co-operation in Europe, *Realizing gender equality in parliament, a guide for parliaments in the OSCE region*, 6 December 2021, p. 15.

[35] For these and other examples see Hanna Johnson, *Gender-Sensitive scrutiny: a guide to more effective law-making and oversight*, Inter Pares, 2022.

a parliamentary process that assigns roles to the different actors involved. Each budget is now accompanied by a gender statement.[36]

The Swedish Riksdag (Parliament) does not have a specific committee on women's rights or gender equality. Rather, all committees are responsible for considering gender. The Speaker's Gender Equality Group promotes gender equality internally through training, research, events and support to individual MPs.[37]

Fiji's Parliament was one of the first to provide for gender scrutiny in its standing orders. All committees must consider gender equality, to ensure that the impact of laws and policies in all areas on both men and women is considered. Every committee report contains a 'gender analysis' section.[38]

In 2007, the Costa Rican Legislative Assembly established a permanent administrative body, the Technical Unit of Equality and Gender Equality to promote gender mainstreaming in all legislative work. It provides training and expert advice, while also coordinating institutional action on gender mainstreaming and developing strategies for communication with civil society.

It is fair to say that, globally, gender equality hangs in the balance and parliaments need to play their part. Gender equality and inclusion is essential to rejuvenation of democracy.

Conclusions

How can we work to prevent democratic decline and make sure that representative democracy can respond to and anticipate the biggest challenges of our time, caused by climate change or technology, or some other crisis?

How can we make sure that those who are most affected by the future consequences of the decisions made today are included in the decision making, one way or the other? All while we are still trying to figure out how to achieve gender equality and representation of the historically excluded groups?

While Australia consistently ranks as a high-performing democracy according to global indices, there is no room for complacency. Civil society is an area with room for improvement. Australia's peak on democratic performance was in 2012.

I have discussed just some examples of innovative approaches by diverse parliaments to improve the engagement of both current and future generations in decision-making processes, and in doing so improving also civic engagement.

Today's global challenges demand longer-term planning than the conventional lifespan of parliamentary tenures. Democracies must not only ensure that their parliaments remain effective and representative but also pioneer new avenues for citizen engagement, drawing on learning from Indigenous practices.

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[36] UN Women, *Timeline of key gender responsive budgeting milestones in Timor Leste*, 2021.

[37] See Lenita Freidenvall and Josefina Erikson, 'The speaker's gender equality group in the Swedish Parliament – a toothless tiger?', *Politics, Groups, and Identities,* vol. 8, issue 3, 2020, pp. 627–636.

[38] See Parliament of Fiji and UNDP, *Scrutinising legislation from a gender perspective: a practical toolkit* (accessed 25 January 2024).

The pressures facing representative democracies are both real and widespread. Declines in electoral integrity and the effectiveness of parliaments, which are the bedrocks of representative democracy, serve as a warning sign. At the same time, democracies must prove their ability to address existential crises like climate change while ensuring decent living conditions for all.

The linkages between effective, accountable, and transparent institutions, the rule of law, justice for all, and sustainable development are integral to the Agenda 2030 and are of concern for all.

The Asia Pacific region confronts a multitude of challenges, including economic recession, rising food and fuel prices, and growing inequality, contributing to social tensions. Alongside these issues, there are concerning declines in various aspects of democracy, from fundamental rights to the shrinking space for civic engagement, as well as challenges to electoral integrity, parliamentary oversight capacity, and judicial independence.

Australia's new development policy rightly emphasises support for civil society and climate change mitigation in our region. However, for civil society to thrive, we must also strengthen core democratic institutions such as parliaments, judiciaries, anti-corruption bodies, election management bodies and human rights commissions. These institutions are vital safeguards for protecting democracy and ensuring equitable representation.

We must heed the voices of democracy defenders, civil society groups, youth, Indigenous peoples and regional parliamentarians.