Enriching Democracy—Achievements of the Senate Crossbench and Backbench in the 45th Parliament*

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Introduction

The 45th Parliament was like no other—which is true of all parliaments in western democracies. Each carves its own place in the parliamentary history of its country.

For many the distinguishing feature of the Senate during the 45th Parliament is the number of senators who did not serve their full term. Of the 76 senators elected at the 2016 double dissolution election, at least nineteen did not.[1] Not all left on their own volition, as ten were held by the High Court to be ineligible to serve as senators under section 44 of the Constitution.[2] Not all disqualifications related to citizenship—other provisions of that section were adduced in relation to former Senator Culleton (bankruptcy, and convicted and under sentence) and former Senator Day (office for profit under the crown). At least nine senators chose to leave, creating casual vacancies.[3] Despite such disruption, the remaining senators continued to pursue their agendas, through legislative and other means.

Background

The Senate's legislative powers, which are set out in the Constitution, are the same as those of the House of Representatives, with the exception of legislative proposals relating to appropriation and taxation. Section 53 (Powers of the Houses in respect of legislation) provides:

> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

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1 If the two senators who were appointed by the High Court and resigned are included, then 21 senators did not serve their term.

2 Sitting as the Court of Disputed Returns and acting on referrals from the Senate.

3 If the two senators who were appointed by the High Court and subsequently resigned are included, then 11 senators resigned.

> The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
>
> The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.
>
> The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
>
> Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Section 51 lists those matters which fall under the Commonwealth Parliament's jurisdiction. Neither section 51 nor section 53 makes any recommendation as to the status of senators exercising these legislative powers. The Senate itself has placed no prohibitions on any senators pursuing a legislative outcome to achieve their policy positions. Indeed, since the beginning of 2011 the Senate's standing orders specifically provide for the consideration of private senators' bills.[4] Although the 2011 amendment provided for the specific consideration of bills, there have always been opportunities for non-executive senators to introduce and have bills considered.[5] The 2011 amendment increased these opportunities by virtually doubling the available time each sitting week and quarantining time for debate on private senators' legislation. In practice the standing order has operated so that the available time each year is divided proportionately between non-government parties and independent senators. However, there seems to be an unofficial agreement that one of the periods each year will be allocated to the consideration of a government senator's private bill.

While time for the consideration of private senators' bills is incorporated in the Senate's routine of business, the amount of time available and how that time is apportioned imposes limitations on any backbench senator in the prosecution of their legislative agenda. Arguably if you are a member of a large party in the Senate the time available is proportionally greater than that of a single independent senator.

[4] Private senators' bills are those that are introduced by senators who are not acting as ministers, including backbench government senators.

[5] In June 1901 the Senate adopted a sessional order that provided for the consideration of both government and general business. General business is that business initiated by non-executive members, excluding business of the Senate matters.

However, your agenda is notionally in competition with those of other senators in your party. It is therefore rare for any private senators' bills to enter the statute book.

This paper looks at the fate of three legislative proposals from non-executive senators, all of which achieved some success, and examines how that success was achieved and whether these successes should be regarded as disruptions.

The first of the bills to be considered is the sixteenth private senators' bill to receive Royal Assent since federation. Introduced by a backbench government senator, the bill passed both the Senate and House of Representatives and was assented to on 8 December 2017.

Marriage Amendment (Definition and Religious Freedoms) Bill 2017

The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 was initiated in the Senate, introduced on a motion sponsored by Senator Dean Smith and eight other non-executive senators on the day the results of the government's postal vote were announced (see below for further discussion of the postal vote).[6] The motion not only provided for the introduction of the bill but also sequestrated periods in the routine of business to ensure that debate was not truncated—all senators who wanted to speak would have the opportunity to do so. The vote on the bill was to be a conscience vote and the two hours and twenty minutes allocated to the consideration of private senators' bills under standing orders was not going to be long enough to give every senator an opportunity to speak. In asking that the motion be considered as a formal motion,[7] the then Attorney-General, Senator George Brandis, indicated that allocating the government's legislative time to debate 'delivers on the Prime Minister's promise to facilitate such debate in the event of a yes vote'.[8]

The yes vote the Attorney-General was referring to was the result of the government postal vote. It had been put in place when the Senate had refused to reconsider the Plebiscite (Same-Sex Marriage) Bill 2016. The bill was to establish a legislative framework for a compulsory vote in a national plebiscite that would ask Australians 'Should the law be changed to allow same-sex couples to marry?'. It had been considered and passed by the House of Representatives in October 2016, but had failed to pass the Senate in November of that year. The government's attempt to resurrect the bill by proposing to restore it to the Senate's agenda (the *Notice Paper*) was defeated on 9 August 2017.

6 Marriage Amendment (Definition and Religious Freedoms) Bill 2017, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1099.

7 That is considered without amendment or debate and finalised immediately.

8 Senator George Brandis, Senate debates, 15 November 2017: 8557.

The postal vote utilised an existing legislative base—the *Census and Statistics Act 1905*. On 9 August 2017 the Treasurer issued a Direction to the Australian Statistician requiring the Bureau of Statistics to collect statistical information from all Australians on the electoral roll (on a voluntary basis) as to their views on whether or not the law in relation to marriage should be changed to allow same-sex couples to marry.[9] It provided for the results to be published on or before Wednesday, 15 November 2017. On the Wednesday morning the results were announced and that afternoon the bill was introduced, with the debate adjourned to the next sitting day.

The seamless transition from the announcement of the result, confirming that 61.6 per cent of voting Australians supported the legislative change, to the introduction of the bill belies the carefully choreographed lead-up to that day.

Since 2006 the Notice Papers of both houses had contained iterations of bills which would give recognition to same-sex marriage. On the day Senator Smith's bill was introduced, the Senate's *Notice Paper* already listed three private senator's bills dealing with the matter. Two legislative outcomes were sought in the existing bills—altering the definition of marriage to be the union between two people and the recognition of same-sex marriages that had been celebrated overseas. While these were broadly the objectives of the Smith bill, it took a more mature legislative approach resulting in more sharply defined outcomes.

Such an approach was made possible, not just by the legislative drafting that had preceded it, but through the committee inquiries that took place on previous bills. Perhaps the most important inquiry in terms of shaping the Smith bill was the work of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill which reported in February 2017.

The committee was established in November 2016 to examine the exposure draft of a bill that had been released by the government to inform its proposed plebiscite. Following the failure of the plebiscite bill to pass the Senate earlier in the month, the select committee was to consider, amongst other matters, 'potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate'.[10] Another focus of the inquiry was 'the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations'.[11]

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[9] Census and Statistics (Statistical Information) Direction 2017, dated 9 August 2017 [F2017L01006], www.legislation.gov.au/Details/F2017C00661.

[10] *Journals of the Senate*, 30 November 2016: 712.

[11] Ibid.

The committee had eight senators as members, half drawn from the government's backbench and the other half divided equally between the opposition benches and the crossbench. It also provided for other senators to participate in the inquiry without being full committee members. Committees are often defined by the members and the approach taken by the Chair. This was the case in this inquiry where the Chair, Senator David Fawcett, indicated in the Chair's forward to the report:

> The committee considers that this inquiry into the Exposure Draft…provides an opportunity to consider much of this evidence in a more collegiate and coordinated manner and to identify where there may be areas of agreement, and to better understand and narrow those areas where there are differences of approach.[12]

The report was carefully calibrated to advance debate. The committee made no recommendations but identified areas of consensus and areas for future discussion. In doing so, it expressed its intention that:

> this body of evidence will prove a valuable and instructive foundation, identifying the scope of issues to be addressed by a parliament considering legislative changes to the definition of marriage in this area.[13]

Senator Smith, a member of the committee, used the committee's work to instruct his bill, which departs from the exposure draft in line with the committee's conclusions. Participating in the committee's inquiry also gave him the opportunity to tease out issues and test his ideas with witnesses and refine his views on how to frame an acceptable bill. This work was reflected in the drafting and the negotiations undertaken which resulted in eight co-sponsors to his motion for the introduction of the bill. These sponsors were from across the political spectrum, including the leaders of the opposition and the Australian Greens, other government backbenchers as well as crossbench senators.

The statement made by the Leader of the Australian Greens, Senator Richard Di Natale, just prior to the bill's introduction gives an indication of the compromises that had been negotiated to achieve a draft of a bill primed for success:

> Let me make it very clear: the Greens made significant concessions in ensuring that a cross-party bill that got widespread support would be able to be presented to this chamber. We engaged in that committee process in

[12] Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report* (Canberra: Department of the Senate, February 2017): ix.

[13] Ibid.

> good faith, knowing that we would have to give some ground if this parliament was to support it. This bill is not the bill the Greens would have introduced if we were proposing legislation ourselves.[14]

Despite this negotiation and perhaps because of the resulting compromises, the Senate considered a range of amendments to the bill proposed by a number of senators, including a Greens senator. Some of the amendments were an attempt to refocus the terms of the bill, particularly in how religious beliefs were accommodated. The only successful amendments were those posed by the then Attorney-General, which can generally be described as technical and consequential amendments—tidying up the statute book.

Senator Smith's motion to amend the Senate's usual routine of business included extended hours and a provision that the end of the sitting week would be determined by the conclusion of the Senate's proceedings on the bill. However, this did not eventuate as the bill completed all stages and passed the Senate with a day of the sitting fortnight remaining, during which the Senate returned to its normal routine of business.

Not all private senators' bills that pass the Senate are granted the extended consideration of the Smith bill, although this is more likely when the main parties allow conscience votes. Usually debate is limited to the time provided in the routine of business. It is rare in this period of business for any question to be resolved by the Senate. Debate fills the allocated time and the final speaker is interrupted by the Senate reaching the time nominated for the next item of business. However, the next case study proved to be one of the exceptions to that rule.

Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018

The tampon tax bill, introduced by Senator Janet Rice in May 2018, sought to remove the GST from sanitary products by amending the *A New Tax System (Goods and Services) Tax Act 1999*.

This Act is one of the Acts that established a goods and services tax, a broad based tax initially envisaged as applying to all goods and services in Australia. However, the price of the passage of the bills was a narrowing of the base with exemptions provided on a range of goods and services. The revenue raised by the Commonwealth levying the tax is distributed between the states and territories in accordance with the *Intergovernmental Agreement on Federal Financial Relations*.

[14] Senator Richard Di Natale, Senate debates, 15 November 2017: 8559.

Under the Agreement, provision was made for further amendments to either the base or the rate of the tax (generally 10 per cent) to be made with the unanimous agreement of the states and the endorsement of the Commonwealth Government of the day.[15]

The tampon tax bill sought to achieve GST free sanitary products by inserting a new definition (sanitary products) in the Act and providing that the supply of these products was GST free.[16] Senator Rice, in speaking to the bill, acknowledged the requirements placed on the government by the Intergovernmental Agreement and argued the Commonwealth should lead the way:

> The only states that currently do not support axing the tax all have Liberal governments. The Prime Minister needs to show leadership, bring the remaining states into line, and support this Greens bill to axe the tampon tax.[17]

During her brief speech, Senator Rice also indicated that she had written to the 'state and territory treasurers to urge their support for removing this unfair tax'.[18] She also indicated that the work to remove GST on sanitary items had been going on since the 'introduction of the tax in 2000 when a petition with 10,355 signatures was lodged. She reported the shift in support for the removal of the GST, indicating the most recent petition on the matter had over 127,000 signatures.[19]

A government backbench senator responded, arguing the importance of maintaining a broad revenue base to states and territories as it is determinative of how much money they get to undertake their responsibilities. Senator Amanda Stoker argued that it was not only the Commonwealth that wanted to maintain the broad revenue base, but also the states and territories, reporting that at the recent meeting of state and territory treasurers 'not a single state or territory raised this as an issue with the Treasurer and not one of them indicated that they as a jurisdiction had changed their point of view'.[20] In 2015 the government wrote to the state and territory treasurers proposing the removal of the GST on sanitary products, but did not receive unanimous agreement.[21]

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15 Intergovernmental Agreement on Federal Financial Relations, section A14 of Schedule A, www.federalfinancialrelations.gov.au/content/intergovernmental_agreements.aspx.

16 Treasury Laws Amendment (Axe the Tampon Tax) Bill 2018, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1128.

17 Senator Janet Rice, Senate debates, 18 June 2018: 2993.

18 Ibid.

19 Ibid.

20 Senator Amanda Stoker, Senate debates, 18 June 2018: 2995.

21 Lauren Cook, 'Removing GST on Feminine Hygiene Products', *Flagpost*, (Parliamentary Library, 29 November 2018), www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/November/Removing_GST_on_feminine_hygiene_products.

Debate on the bill lasted half an hour before an opposition senator stood and moved to close the debate, asking that the question be put. A successful response to that question was rapidly followed by the succession of questions required to complete the Senate's proceedings on the bill and it was passed. Accordingly, it was sent to the House of Representatives for its consideration.

The bill was duly introduced into the House on the reporting of the message, but it was not debated and finally lapsed from the House's *Notice Paper* at the end of the 45th Parliament. However, at the October meeting of state and territory treasurers there was unanimous agreement to remove the GST from 'feminine hygiene products' and, following a consultation period, the Minister for Health issued the 'A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2018' which made the necessary amendment.[22]

The use of a determination to make various health goods GST free under section 38(47) of the A New Tax System (Goods and Services) Tax Act was not unprecedented. In fact, the then Senator Leyonhjelm asked a series of questions at the Additional Estimates hearing in February of 2018 about extending existing determinations to cover sanitary products. The Treasury officers present were unsure of the reasons why the minister could not simply add other items to the existing determinations and agreed to take the question on notice.[23]

Senator Leyonhjelm's suggestions as to how to remove the GST from sanitary products was not the first attempt to do so. In June 2017 another Greens senator moved an unsuccessful amendment to the Treasury Laws Amendment (GST Low Value Goods) Bill 2017.[24] Senator Larissa Waters' amendment was very similar to the terms of her colleague's bill but was proposed as an additional amendment to a government bill amending the A New Tax System (Goods and Services) Tax Act. Proposing amendments to a government bill is a tried and tested means to further the legislative proposals of opposition or crossbench senators and can sometimes result in success, as was the case for the next proposition—amendments to the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018.

22 Ibid.

23 Senator David Leyonhjelm, *Committee Hansard*, Senate Economics Legislation Committee, 28 February 2018: 139.

24 Treasury Laws Amendment (GST Low Value Goods) Bill 2017, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5819.

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

The Home Affairs Bill was a government bill introduced into the House of Representatives in March 2018. The bill addressed a number of migration and customs issues including the return of a non-citizen to Australia.[25]

The Selection of Bills Committee considered the bill in Report No. 5 of 2018, and recommended that no committee inquiry was required, suggesting the bill was unremarkable.

Following its introduction into the Senate on 20 August 2018 the bill was not considered again until the last sitting week of the parliamentary year. On 4 December 2018, when debate on the second reading resumed, the opposition announced that an apparently routine bill was about to become 'a little bit more complicated':

> as I understand it, there is going to be a proposal in the committee stage of this bill, by a Greens senator, to link measures from members of the House of Representatives crossbench to this bill. As a consequence, there may well be further amendments moved by the Labor Party, given the change in circumstances.[26]

The measures Senator Kim Carr was referring to were those in a bill before the House of Representatives which were introduced by five independent and crossbench members. That bill, which became known as the Medevac bill, provides for the temporary transfer to Australia of transitory persons and their families held on Manus Island or Nauru if they are assessed by two or more treating doctors as requiring medical treatment. Rather than begin the legislative journey in the House of Representatives as a bill, these measures were repackaged as amendments to be moved in the Senate to the government's bill.

Later that day, a notice of motion was lodged in the names of a Greens senator and an independent senator proposing to order the government's business by granting precedence to the government's Home Affairs bill over all other business and imposing a limitation on the debate, effectively setting in place a guillotine. When the notice was moved the next day it was amended to alter the time at which the bill would be given precedence and the time that the questions on the remaining stages of the bill were to be put to the Senate. In his comments the previous day, Senator Carr had indicated that the opposition would need time to have their proposed amendments drafted and this may explain the revised times and date. The amendment which

[25] Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018, www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6069.

[26] Senator Kim Carr, Senate debates, 4 December 2018: 9269.

revised the restricted time for the debate on the bill was agreed and the motion was also successful—both questions were resolved without division.

Any amendment to the bill would need to go to the House of Representatives for its consideration and the revised timetable for the bill left a very narrow margin for that to occur in what remained of the 2018 sittings. The resolution required the Home Affairs bill to be called on at 12.45 pm on Thursday and the remaining questions of the bill to be put at 1.50 pm. Thursday was the last scheduled day of the 2018 sittings.

At the appointed time the bill was called on and debate resumed. In the intervening time a raft of amendments had been circulated, both to the motion for the second reading of the bill and to the bill itself. As the Senate proceeded to systematically consider the amendments, which included amendments to the Medevac amendments and government amendments, Question time and other business vanished. Among other matters, the government's amendments sought to insert additional schedules to the Home Affairs bill, which were other government bills recast as amendments. The proceedings were protracted as various senators requested that the questions on the amendments be divided and moved that standing orders be suspended. Finally, after the House of Representatives had adjourned for the day, the bill was passed with only the amendments relating to the medical evacuations being agreed to.

The amended Home Affairs bill spent the summer break languishing between the two houses. When the message was reported to the House at the beginning of the 2019 sittings the government challenged the constitutionality of certain amendments, citing limitations upon the financial powers of the Senate. The Speaker left the matter to the House, which agreed to the Senate's amendments with further amendments, including one intended to address the constitutional point. The various votes on the bill in the House were carried with opposition members and most non-aligned members in the majority, 75 votes to 74.

The Senate agreed to these amendments in a process put in place on the motion of the opposition that allowed for a single question to be resolved—'That the amendments made by the House be agreed to'. It was carried 36 votes to 34 and the normal processes for assent were followed, with the bill receiving assent on 1 March 2019. However, after the 18 May election the government sought to remove the Medevac amendments from the *Migration Act 1953*, introducing the Migration Amendment (Repairing Medical Transfers) Bill 2019 into the House in July. The bill has passed the House and is under inquiry by the Senate's Legal and Constitutional

Affairs Committee. Therefore, the ultimate fate of the Medevac amendments is currently unknown.[27]

The Senate's role

In his last lecture in the Occasional Lecture series, Harry Evans reminisced on his years as Clerk and reflected on the culture of independence of the Senate. He maintained that the culture had been carefully 'nurtured by long periods of non-government majorities and lack of government control of the chamber' since federation. Concern was expressed that that 'independence is now entirely dependent upon a non-government party majority' and that the Australian Parliament 'is under a degree of domination that would not be tolerated elsewhere'.[28] It is that culture of independence that prevents the Senate becoming a rubber stamp under executive dominance.

In a representative democracy scrutiny of the executive, its policies and legislation is a function of the Parliament. Such scrutiny leads to greater accountability and transparency, resulting in better outcomes for those the Parliament serves—the Australian people. It is a critical function and one that is generally exercised in the Australian federal sphere by the Senate as a house of review. However, reacting to the executive's policies and administration, while significant, is also a limited contribution to the democratic process. The Senate is an elected body with legislative functions—it is difficult to argue that exercising those functions should be viewed as disruption, yet they read as such because of expectations as to how our government-dominated parliaments typically function. None of the case studies was innovative in its approach, all relied on precedent.

All three case studies, each a very different story, enjoyed success because the Parliament supported the proposals. The passage of the Smith bill included the votes of many on the government's frontbench in both houses. It was considered during time routinely spent debating the government's agenda and with the acknowledgment of the Attorney-General that this was to facilitate its consideration. The removal of the GST on sanitary products required the executive to make the amending determination, after undertaking the requirements of the Intergovernmental Agreement. The Senate's Medevac amendments were successful in the House, despite the government's opposition, because of the support of the majority. Without this support none of the proposals would be law.

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[27] Since this paper was written, the Senate has passed the Migration Amendment (Repairing Medical Transfers) Bill 2019, with the government securing crossbench support for the legislation. The bill received Royal Assent on 4 December 2019.

[28] Harry Evans, 'Time, Chance and Parliament: Lessons From Forty Years', *Papers on Parliament* 53 (June 2010): 5 and 7.

The journey to achieve that success highlights how the Senate and the work of senators contribute to the democratic process. Senator Smith used his participation in the select committee process to engage with the community, to test ideas, to tease out solutions so that the bill he developed found acceptance with the majority, despite the reservations expressed both in debate and in the amendments proposed to the bill.

The solution of an amending determination to remove the GST on sanitary products was voiced in an estimates hearing, as Senator Leyonhjelm queried why it could not be adopted. The departmental officers were unable to name the problem but undertook to take the question on notice and therefore explore the issue. That exploration was also aided by Senator Rice's bill offering a way forward and both influenced the outcome.

With the Home Affairs bill the crossbench succeed in importing amendments initially introduced in a private members' bill and worked with the opposition to have the proposal become law. The constitutional argument mounted by the government was met in the House by the opposition proposing amendments that would dispose of the issue. The opposition also worked with the crossbench to facilitate the bill's final consideration in the Senate.

The Senate may test the government's patience, but its diverse benches can enrich rather that disrupt democracy.