

Bicameralism: Australia in Comparative Context

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The Contemporary Bicameralism Conference at Parliament House assembled politicians, parliamentary officers and academics around the theme of Australian Bicameralism in Comparative Context. Professor Anthony Mughan (Ohio State Uni.) observed that approximately 40 percent of countries have bicameral legislatures.¹ In terms of the powers of the upper house vis-à-vis the lower house, no two countries are exactly the same, but they broadly range between the power to delay legislation to some form of co-equality. Professor Mughan characterised this dichotomy as between representation and redundancy.

Despite the 'bi' emphasis in the program, with such topics as 'Takes Two to Tango', tellingly much of the discussion centred on the role of upper houses. Historically upper houses have been aristocratic in many parts of the world but now are becoming more geographically representative or regionally-based. Australian developments in the Australian Senate and Legislative Councils in New South Wales, Tasmania, Victoria and Western Australia were contrasted with international developments in Anglo-American comparator countries, from the strong democratically elected United States' Senate (upon which Australia's 'states house' is based) to the weaker (in practice), appointed British House of Lords and Canadian Senate. Importantly, often less-discussed experiences² from the Asia Pacific region were also shared, with interesting case studies of India, Indonesia, Japan and Pacific Island nations. Continental Europe also featured with the case of Italy.

¹ Professor Mughan also noted that only 25 percent of those countries have federal systems.

² At least in the English-language literature.

The first part of the conference introduced cross-party perspectives of Australian Bicameralism, and particularly the role of the upper house in the federal parliament. Clerk of the Senate, Harry Evans, suggested that there was no such thing as bicameral relations, framing the issue in terms of the majority of the Senate versus the government. Representations of the Senate range from states house to house of review, and even 'unrepresentative swill' as famously charged by former Labor Prime Minister Paul Keating. Dr Deb Foskey³ was more complimentary, and as a minor party politician characterised the Senate a 'minorities' or 'different voices' house rather than a states house. Senator the Hon. John Faulkner⁴ agreed that the Senate was never a 'states' house as originally envisaged, but was divided along party lines from the beginning. This became a theme throughout the conference with bicameralism often framed in party political terms, as it was often difficult to discuss the role of the upper house without considering the legislative behaviour of political parties.

Michael Baume brought a unique perspective as both a former Liberal Senator and a Member of the House of Representatives. He contended that the Senate has the capacity to be unrepresentative, noting that Tasmania has ten times the voting strength of New South Wales in terms of population. Senator Faulkner also acknowledged that the composition of the Senate with equal numbers for each original state does not reflect the Chartist democratic principle of one-vote, one-value, but recognised that it did offer protection for smaller states. Mr Baume was also critical of the 1984 electoral reforms that increased the size of parliament and made it more difficult for one major party to win a majority in the Senate. Yet new Labor Senator Louise Pratt, a former Member of the Legislative Council in Western Australia, examined how the electoral majorities in the upper house can offer protection from the tyranny of the majority. Indeed, Mr Murray expressed concern that Prime Ministerial and Cabinet power has been growing, and is only subject to scrutiny through the Senate estimates committee process and the media.

³ Former Greens Member of the Legislative Assembly in the Australian Capital Territory.

⁴ Also Special Minister of State, Cabinet Secretary and Vice-President of the Executive Council.

Senator Faulkner observed that the major parties have been critical of the Senate at various times, but are now used to minor parties and independents holding the balance of power. He explained that there is more scrutiny in the legislative process and more drama in Senate debate than in the House of Representatives, as the outcome can often be uncertain until late. However, former Democrats Senator Andrew Murray, as an active member of the Senate crossbench sharing the balance of power, reflected on how the Senate has to continuously demonstrate its relevance and justify its existence. Liberal Senator Marise Payne candidly discussed how governments often use mandates to diminish the role of Senate yet a significant proportion of Australians vote for the Senate with its review role in mind. While the Liberal-National Coalition enjoyed majorities in both houses during their last term of government, Labor has not had control of the Senate since the first election using proportional representation in 1949 and have traditionally favoured abolition, particularly during the period of Democratic Labor Party representation and after the 1975 Constitutional Crisis. Senator Pratt conceded that Labor needs to resolve incoherent responses toward upper houses, although the party is generally accepting of the Senate's role now. Mr Baume concluded that while it is the quality of the Senators that is ultimately important, the House of Representatives is simply a theatre and the absence of an upper house is a threat to democracy.

In terms of future reform, Senator Faulkner insisted that the Senate's power to block supply needs to be resolved (and deadlocks in general), and proposed fixed four-year terms (and fixed election dates) for both Houses of Parliament. Mr Murray argued that political parties should at least be subjected to minimum standards of political governance, noting that corporations and unions are subject to rigorous legislation. He also criticised the Howard government for reducing the tenure of Senate Clerks to ten years. Mr Murray concluded that Constitutional reform should focus on the idea of a social contract and pondered whether republican ideas of separation of powers and federation should exist

and if so in what form. However, Mr Baume claimed that reform or change is often for self-interest rather than the public interest.

The second part of the conference examined Australian Bicameralism from the perspectives of parliamentary officers and academics, and further explored bicameralism in state parliaments. Dr Bruce Stone (UWA) presented an overview of state upper houses, noting that they traditionally had a qualified franchise, fixed terms, and favoured the wealthy. Currently, upper houses range from state-wide constituencies in New South Wales and South Australia to the Senate-like Legislative Councils of Western Australia and, recently, Victoria, and to the non-party chamber in Tasmania with its elaborate rotation of members and independent elections. Dr Stone observed that lower houses generally overrepresent the major parties, while minor parties gain representation in upper houses. He argued that design innovations, such as district magnitudes, rotation of members, and the use of odd numbers of seats in multi-member electorates, all strengthen checks and balances. Furthermore the term length is very important, with shorter lengths often resulting in less independent mindedness. Dr Stone argued that upper houses should not exactly reproduce party balance in the lower house.

Much of the discussion of Australian parliaments focused on the value of parliamentary committees in ensuring accountability. One of Labor's leading Senate committee inquirers, Senator Faulkner, declared that the Senate is more powerful than at any time since Federation, particularly due to the establishment of the committee system in 1970, which enhanced the Senate's 'House of Review' function. Changes to standing orders and procedures have also given the Senate more power. Senator Faulkner argued that the estimates committees are the best accountability mechanism of any Australian parliament, and made the Senate a genuine house of scrutiny. Senator Payne lauded community engagement through submissions to committees, yet Mr Murray noted more substantial roles for committees in other countries, where Ministers

may submit proposed legislation to committees, and committees can write legislation.

The experiences in state parliaments were not as positive. The Clerk of the New South Wales Legislative Council, Lynn Lovelock, discussed the right of Members of the Legislative Council to demand documents and how governments (mis)use privilege to restrict access. Ms Lovelock also discussed the self-referring inquiries of General Purpose Standing Committees, which operate like Senate Committees. Professor Brian Costar (Swinburne Uni.) critiqued the committee process in Victoria and argued that there was limited evidence yet of a culture of scrutiny, acknowledging the 150 years of bad relations between the lower and upper houses and the recent electoral reforms. Interestingly Dr Foskey's experiences of committees in the Australian Capital Territory Legislative Assembly were much more positive, despite its unicameral nature and small committees of only three members. This also reinforced the fact that the parliamentary committee process and accountability more generally are not inextricably linked to bicameralism. Rather, Dr Foskey argued that a proportional representation electoral system is key. This prompted Mr Baume to question whether there would be a need for a Senate if the House of Representatives was elected using proportional representation.

Another prominent issue in the discussion of Australian upper houses was the vexed issue of the role of upper houses in relation to appropriation bills. Professor Richard Herr (UTas) noted that there have been Treasurers in the upper houses of New South Wales, Victoria and Tasmania. However, the Australian Constitution prevents the introduction of appropriation bills in the upper house. Senator Pratt argued that budgets are holistic and bills cannot be treated individually, and that one house cannot both make a budget and independently review it. Mr Evans noted that there are approximately 400 Commonwealth statutes that appropriate any and unlimited future amounts, thus restricting Senate involvement in these areas.

The third part of the conference explored some North American and European experiences of bicameralism. Professor Mughan opened discussion, noting that upper houses are generally regarded as inferior to lower houses, with the exception of the United States' Senate. Dr Stanley Bach examined the history of the United States' Constitution with the federalist idea based on the concept of shared sovereignty and the Senate was originally selected by state legislatures. He discussed how dividing a legislature and rendering each house different is a way of weakening the legislature, and that the Constitution is not a majoritarian document. Professor John Owens (Westminster Uni.) then explored more recent developments, observing that more unity within parties and more majority party cohesion have resulted in more partisanship/polarisation. Seventy percent of the votes in Congress pit the majority of one party against the majority of another party and since the 1960s the ideological gap between the major parties since has arguably increased.⁵ In terms of intercameral relations, he remarked that whilst the House of Representatives behaves in a typical majoritarian fashion, the Senate is less predictable,⁶ consistent with Senator Faulkner's earlier point about the Australian Senate. Professor Owens also noted that the President also affects intercameral relations, and if the same parity controls the executive and both houses of the legislature then there can be high degrees of cooperation. In this regard, he argued that party control of the different chambers ultimately makes a significant difference to intercameral relations.

The contrast between the United States and its northern neighbour sharply illustrated Professor Mughan's earlier point about the dichotomy of upper houses between representation and redundancy. Professor Campbell Sharman (UBC) argued that there is no parliamentary tradition of strong bicameralism in Canada, as upper houses were not part of colonial governments and even responsible government was a novel idea at the time of federation. While the

⁵ Professor Owens also noted that no party has enjoyed a filibuster-proof majority in the Senate since 1990.

⁶ However, Professor Owens determined that 85 percent of the time the majority party achieves its preferred outcome.

Senate theoretically has extensive powers, in practice these are restrained, with the Senate reviewing legislation and undertaking committee inquiries. Professor Janet Hiebert (Queens Uni.) examined bicameralism in terms of protecting the rights of citizens, and argued that in Canada, the Charter of Rights acts a check on executive power rather than parliament. Courts can (and do) invalidate legislation inconsistent with the Charter, while the Senate is politically weak.

The Canadian Senate is not elected, with the Prime Minister of the day nominating Senators to fill vacancies.⁷ Thus loyalty to the national party is important, yet Professor Sharman noted this partisan method of appointment removes legitimacy. Professor Sharman cited the threat to accountability of the lower house and fears that it could be subverted by partisan interests as the primary reasons for non-election. Current Conservative Prime Minister, Stephen Harper, has refused to fill any of the 14 outstanding Senate vacancies, except for one from Quebec during his previous term to ensure that Montreal had a representative in Cabinet, and for the 'elected' Alberta nominee. The province of Alberta has run nominee 'elections', although Liberal Prime Ministers have not accepted these elections.

Similarly the non-elected British House of Lords has also been the subject of reform debates. Dr Meg Russell (UCL) chronicled the recent major developments in the British House of Lords. Beginning in 1999, Tony Blair's Labour Party removed most of the Hereditaries,⁸ with the house now comprising both party members (chosen by party leaders) and independents (chosen by an Appointments Commission) drawn from 'the great and the good'. Dr Russell argued that the end of Conservative dominance in 1999 and the near-end of hereditary membership signalled the emergence of a more confident chamber. She noted that the previously rare use of the significant delay powers now presents a bigger threat.⁹ She observed that a more

⁷ Senators are appointed for a 'life' term until the age of 75.

⁸ Leaving only 96 Hereditaries and 26 Bishops among the 732 members.

⁹ Dr Russell found that there have been over 400 defeats of government bills since 1999, and 40 percent of those defeats have resulted in significant policy changes.

assertive House of Lords developed alongside a more rebellious House of Commons, and that there is clear evidence that government is consulting more with peers in the early legislative stages. Thus Dr Russell argued that veto power is not essential.

While the House of Lords is appointed, Dr Russell argued that it is proportional with over 200 independent members seen as 'expert', which suits the anti-(party) political times, as does the independence of the Speaker and the non-partisan nature of debate. Furthermore, the large size makes it harder to control and ensures no 'blackmail potential' by individuals or small groups. While the Labour government remains committed to a policy of electing the upper house, Dr Russell claimed that wholesale reform remains unlikely, as different electoral systems create competing legitimacies.¹⁰ Rather, she argued that party balance and long terms of office are more important than elections. Dr Russell contended that election by closed party lists would produce a similar result to the current process of appointment, and observed that the modern Lords has high levels of female representation and is very multicultural. A similar observation was also made by Senator Pratt in relation to Australian upper houses. As a gay and lesbian rights advocate, she suggested that seeking election to the upper house was 'easier', and noted the more diverse backgrounds of upper house members.

Finally, Dr Riccardo Pelizzo (Griffith Uni.) discussed the Italian experience of bicameralism. The composition and powers attributed to each chamber are (almost) the same, yet the Senate is often perceived as irrelevant in the study of Italian politics. While most legislation is introduced into the Senate, the lower house performs greater oversight of bills. Dr Pelizzo canvassed some proposals for reform, including reducing the number of Senators from 315 to 100, like the United States, or creating a chamber representing regional governments, like the German Bundesrat.

¹⁰ The House of Commons is elected using 'First Past The Post', while the House of Lords would probably use proportional representation, which tends to be more representative of the wider population but less representative of the major parties.

The concluding sessions of each day focused on experiences in the Asia Pacific region. Professor Herr presented cases studies from the South Pacific, noting that most states are small and therefore unicameralism is the norm while parties are less of a factor. Four states have informal second/third chambers, generally focusing on custom, and Professor Herr argued that in Fiji the third chamber may be considered more powerful than the Senate. Yet weak second chambers are not only a feature of small states, as exemplified by Canada, the United Kingdom, and also Indonesia. Dr Stephen Sherlock discussed developments in post-1998 Indonesia, and characterised the arrangement as unicameralism with an extra chamber or 'soft bicameralism' as the second chamber¹¹ is weak with only advisory powers. In contrast, Dr Ashok Acharya (Uni. Delhi) presented the case of India where the upper house shares power with the lower house over appropriation bills, in addition to three special exclusive powers in relation to the states, as members are appointed and selected by state lower houses. Dr Acharya described the Indian upper house as a 'house of correction rather than obstruction'. Yet he still proposed reforms such as increasing seats for more populous states or enabling representation of local government units.

Finally, Dr Yusaku Horiuchi (ANU) discussed the current unprecedented deadlock in the Japanese Diet, with different parties controlling each house. While the upper house can only delay budget bills for 30 days, it can reject other bills within 60 days, however the lower house can pass the rejected bills with a two-thirds majority. Dr Horiuchi observed that the current opposition Democratic Party of Japan is blocking legislation in the upper house and has no interest in cooperating with the Liberal Democratic Government. He canvassed possible constitutional reform, and interestingly was the only panellist to advocate weakening the upper house. He proposed allowing the Prime Minister to dissolve both houses or by reducing the revoting provision in the lower house from two-thirds to a simple majority. However, the initiation of constitutional change requires two-thirds approval of both houses. Alternatively, and again in

¹¹ Dr Sherlock explicitly referred to it as a second chamber rather than an upper house.

contrast to many other conference participants, Dr Horiuchi proposed changes to the electoral rules so that one party was more likely to control both houses. He also argued that the major parties should discuss procedures for conflict resolution, and concluded by asking 'What is the *optimal* strength of the second chamber in parliamentarianism?'.

Most of the proposed parliamentary reforms presented at the conference and questions of power and accountability centred on the role of the upper house or second chamber rather than the legislature as a whole, or even the executive. Bicameralism clearly is a neglected topic, but it really does take *two* to tango, or perhaps even three including the executive, yet much of the focus was on the 'weakest' link. Where upper houses are strong is in the accountability process by providing oversight and scrutiny of legislation. Given strong party discipline in many countries, this can often only be achieved where the governing party does not have a majority in the upper house. At the same time when the major opposition party holds a majority, oversight and scrutiny can easily become obstruction and frustration. Thus bicameral relations are as much about relations between political parties as any constitutional or institutional constructions.