Do parliaments need upper houses?

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Australia's federal parliament is bicameral ("two chambered"). It has two houses – a lower house called the House of Representatives and an upper house called the Senate. Legislation must be passed by both houses, and signed by the Governor-General, before it can become law.

The Senate is important for good government, because it can act as a restraint against unpopular or poorly drafted legislation passed by the House of Representatives. A political party or coalition may have a majority in the lower house but not in the Senate, where it may need to negotiate with other parties and soften controversial laws before they can be passed.

Five out of the six Australian state parliaments also have two houses – eg the Legislative Assembly (lower house) and Legislative Council (upper house) in New South Wales. Australia and many other nations have adopted bicameral parliaments for one primary reason: as a protection against tyranny.

The problem of power

Lord Acton recognised the problem of power in his famous letter to Bishop Mandell Creighton in 1887: "Power tends to corrupt, and absolute power corrupts absolutely."[1]

British Prime Minister William Pitt the Elder had said much the same thing in a speech to the House of Lords in 1770: "Unlimited power is apt to corrupt the minds of those who possess it."[2]

Earlier still, French philosopher Baron Charles-Louis de Montesquieu noted the problem in his book *The Spirit of the Laws* (1748). He suggested limiting the tendency for governments to become tyrannical, by proposing a "separation of powers".

Montesquieu believed that power in society should be separated among the three French classes: the monarchy, the aristocracy and the commons (ordinary people). He said that such a system would provide "checks and balances" – thus coining a phrase we still use today.

Montesquieu said a government must have certain features if its citizens are to have the greatest possible liberty. He said that since "constant experience shows us that every man invested with power is apt to abuse it ... it is necessary from the very nature of things that power should be a check to power".

This can be achieved by separating the executive, legislative, and judicial powers of government. If different persons or bodies exercise these powers, then each can check the others if they try to abuse their powers. If only one person or body holds several or all of these powers, then nothing can stop that person or body from acting tyrannically.[3]

He also said the parliament (or legislature) should be composed of two houses, each of which can prevent acts of the other from becoming law. The judiciary should be independent of both the parliament and the government. Judges should restrict themselves to applying the laws to particular cases in a fixed and consistent manner.[4]

Montesquieu visited Britain from 1729 to 1731. He expressed admiration for its system of government which had evolved over many years to embody, if somewhat imperfectly, many of the ideas he later expressed in his book *The Spirit of the Laws*.

This book had great influence on political leaders across the Atlantic as they began framing a constitution for the new United States of America. At the US Constitutional Convention of 1787, *The Spirit of the Laws* was frequently cited as delegates attempted to lay down the principles for a government that would maximise political liberty while also maintaining the rule of law. The resulting Constitution reflected many of Montesquieu's ideas, including his advocacy of a separation of powers via such measures as bicameral parliaments.[5]

The Westminster system of government

The Westminster system is a democratic system of government based on the UK model. It is named after the home of the UK parliament - the **Palace of Westminster** on London's River Thames. In 1547 the House of Commons sat in the choir stalls of the Royal Chapel of St Stephen in the Palace of Westminster – in rows of pews along opposite sides of the room, facing each other. This tradition fostered the present two-party system of government as well as the saying of prayers at the beginning of each parliamentary sitting day.

Features of the Westminster system in the UK and many former British Empire countries (such as Canada, Australia, India and Singapore) include:

- a **government** chosen by a democratically elected lower house of parliament, requiring support by a majority of MPs in the lower house to stay in office;
- a **prime minister** as head of government, who leads a **cabinet of ministers** who direct non-political public servants in their administration of government responsibilities such as health, education etc (ministers and their staff are called the **executive branch** of government);
- an **opposition** led by the leader of the party with the second largest number of seats in the lower house;
- a **constitutional monarch or governor** who is non-political and acts only as advised by the prime minister and cabinet – except in a constitutional crisis, where the monarch or governor uses "reserve powers" to act as an impartial umpire to resolve it, usually by calling an election;
- a **constitution** – a written or unwritten **set of rules** about how the government, parliament and judicial system are to operate;
- usually, a **two chambered** (bicameral) parliament – the lower house choosing the government; the upper house acting to review all bills passed by the lower house, with the power to initiate as well as reject legislation.[6]

In Britain, the upper house is called the **House of Lords** – originally made up of hereditary peers and Church of England bishops. It is not elected, so is not considered "democratic". Nevertheless it has been a useful house of review. During recent decades, the most thoughtful speeches on burning issues have often

been in the House of Lords. "The Lords" have amended the sometimes poorly drafted legislation passed by the House of Commons, where strict party control fosters shallow, "party line" debate.

Recent reform in the House of Lords has limited the number of hereditary peers. Most members are "life peers" appointed by the government of the day, and many are men and women of considerable ability, experience and professional expertise.[7]

The Australian Senate – constraining government power

The eminent Australians who framed the Australian Constitution in the late 19th century were well aware of the need for a separation of powers. They drew upon experience in other countries, especially Britain, the US and Switzerland, to devise a system of government in which no single group could gain absolute power. They designed a bicameral parliament with a lower house called the House of Representatives and upper house called the Senate – as in the US.

Harry Evans has been the Clerk of the Senate since 1988. In 2008 he wrote: "Australia may be regarded as one of those fortunate societies which has managed to deal with the problem of power by constructing a system in which the power of the state is constrained by power controlling power. The Australian Constitution has many of those safeguards which arise from that construction:

- a practically irremovable constitutional monarch, operating through a prestigious representative;
- federalism: an entrenched division of power between the centre and the states;
- the cabinet system, which ensures collective decision-making by a politically responsible group rather than one person;
- responsible government, whereby the holders of the executive power can be removed at any time when the legislature (parliament) loses confidence in them;
- an independent judiciary with a powerful constitutional court."[8]

However Harry Evans believes that these safeguards have been weakened over time. Various High Court rulings have meant that the commonwealth government can and does interfere with the responsibilities of the states. The cabinet is largely controlled by the prime minister and his inner circle, who dictate votes in the lower house where the government always has a majority. Members of the judiciary are appointed by the executive alone – if governments hold power for long enough, the High Court can be stacked with judges of a particular or extreme ideology.

The Senate, with 12 senators elected from each state and two from each territory, stands out as a lone bulwark against the otherwise relatively unfettered power of the prime minister and government of the day. The method of election (by proportional representation since 1949) usually ensures that the government does not have a majority of senators and must negotiate with other parties to achieve its legislative aims.

Governments tend to dislike upper houses for this very reason – they act as a check on government power. Former Australian Prime Minister Paul Keating once described the Senate as "unrepresentative swill",[9] even though its members represent the diversity of Australian viewpoints more effectively than the House of Representatives. Other government leaders have complained that upper houses "obstruct" government legislation.

Biblical insights into government

The Bible presents all human beings as having an innate dignity. The account of creation in the first book of the Bible states: "So God created man in his own image, in the image of God he created him; male and female he created them."[22]

This human dignity is recognised in Australia's system of government by allowing all adult citizens to participate – through voting, standing for office and, if elected, exercising power.

The Bible also states that all human beings are corrupt: "They are all alike corrupt; there is none that does good, no, not one."[23]

This vulnerability of humans to corruption is recognised in Australia's system of government through the system of checks and balances which carefully limits the power entrusted to any one person or group.

Harry Evans said that the "obstructionist" charge against the Senate is not supported by the facts. "In the first ten years of the Howard government, during which it lacked a majority in the Senate, an average of 154 bills were passed each year. There were only 17 deadlocked bills in the term 2001-2004," he said.

"… It may be argued that they were important bills. The contrary consideration is that, lacking broader support, they did not deserve to pass. Many more passed that were also important. Thus there was little obstruction. Many bills passed because the government compromised with other parties and accepted amendments. This can hardly be called obstruction; it is what legislatures are meant to do, according to the textbooks."[10]

Harry Evans said Senate inquiries may be even more important than the Senate's legislative role. "During its history the Senate has adopted measures which have had the effect of compelling governments to provide information and to explain themselves in ways that would otherwise not be required," he said. "These measures ranged from insisting in 1901 on details of proposed expenditure in appropriation bills, to requiring in 2001 the publication on the internet of details of government contracts. All of these measures depended, directly or indirectly, on governments not having control of the Senate…

"Of particular significance was the establishment in 1981 of the Scrutiny of Bills Committee, to scrutinise all legislation to detect any violations of civil rights or of legislative propriety. This measure was taken, in a period when the Fraser government had a majority in the Senate, only because several government senators promoted it and then voted against the government on the issue," Harry Evans said.[11]

NSW Legislative Council – uncovering corruption

The NSW Legislative Council was originally an undemocratic body – its members were appointed by the governor on advice from the government of the day. However this changed with reform in 1978, when 45 Council members were elected by proportional representation from the whole state, with a third of the seats contested at each election. In 1991 the number of Council members was reduced to 42, with half the seats contested each election.[12] Proportional representation has made possible the election of minor parties who are not normally able to achieve lower house seats – such as the Greens and the Christian Democratic Party (CDP, formerly known as Call to Australia). CDP leader Rev Hon Fred Nile MLC was first elected to the NSW Legislative Council in 1981. He was elected for a third term in 2007.

Harry Evans has described some of the ways in which the NSW Legislative Council provides a safeguard against tyranny. One example is the Council's power to require the NSW government to produce documents on matters of public concern, in situations where the government wanted to protect itself by keeping the documents secret.

"In 1996, when the Treasurer (a member of the NSW Legislative Council) refused to disclose documents in response to an order, the Council ejected him from the chamber and from the building. He was sufficiently ill-advised to take the Council to court, and lost the case comprehensively," Mr Evans said. "The NSW Supreme Court upheld the power of the Council to impose a penalty for refusal of an order for documents… Council orders for documents have now

become so unremarkable that they go unreported … the first disclosures of disturbing information about the financial entanglements of the cross-city tunnel were the result of a Council order."[13]

SA Legislative Council – under attack

From 1857 to 1973, only people with property could vote for the SA upper house. Its members saw their role as protecting the interests of the "landed gentry", and restraining any excesses of the democratically-elected lower house, the SA House of Assembly. In 1857, members of the SA Legislative Council were elected from the whole state as a single district. In 1881, the state was divided into four, and later five, districts for upper house elections. Rural districts were given extra weighting. Rural votes generally had double the value of city votes.

In 1973 the Dunstan Labor government insisted on democratic reform of the upper house – eventually achieved after considerable negotiation with the Liberal opposition. Dr Clem Macintyre and Professor Dr John Williams of Adelaide University have noted: "… by the end of the Dunstan era the Legislative Council of South Australia had moved from being one of the least democratic chambers in any of the Australian parliaments to being arguably the most democratic. It had universal adult suffrage and used proportional representation with the whole of the state as a single electorate, thereby facilitating the election of minor parties."[14]

As Harry Evans showed with the Senate, the SA Legislative Council has passed or wisely amended the vast majority of government legislation. Many observers believe the few bills rejected by the Council – such as a bill to legalise SA brothels in 2000 – deserved their fate. But just as Paul Keating as prime minister in 1992 lashed out at the Senate for failing to support every part of his legislative program, so SA Premier Mike Rann has attacked the upper house in his state. On 24 November 2005 Mr Rann announced that if re-elected in March 2006, he would hold a referendum on the SA Legislative Council at the next election in 2010.

"There'll be a referendum and people can either vote to keep the upper house as it is; vote for reform to reduce the number of MPs and give them four year terms instead of eight year terms; or finally abolish the upper house," Premier Rann said. "… I would prefer the option of either abolishing the house or substantially reforming it. I think the upper house in South Australia is run as a 19th century institution. It isn't relevant to the 21st century."

However Independent "No Pokies" upper house MP Nick Xenophon – later elected senator for South Australia – strongly disagreed, saying upper houses are vital for good governance. He quipped: "If Premier Rann succeeds in abolishing the upper house, his lasting legacy for South Australia will be to put the 'mock' back in democracy!" [15]

Mr Rann has since acknowledged that a referendum to abolish the SA Legislative Council would fail. However a different question – reducing the number of Council members from 22 to 16 and cutting their terms from eight to four years – may be put to SA voters in a referendum at the state election in March 2010.[16] A yes vote could weaken the power of the Council.

Queensland's lost upper house

The Queensland Legislative Council chamber, complete with plush red carpet and furnishings, is still in use in Brisbane's Parliament House. It provides a dignified setting for official openings of parliament by the Queensland governor, and the occasional reception or poetry reading.

However its original purpose – to serve as an upper house to constrain abuse of power by the Queensland government of the day – ceased in 1922 when the Council was abolished, in defiance of an earlier referendum.

The bicameral parliamentary system of the new colony of Queensland, set up in 1860, was copied from the parent colony of New South Wales. Members of the Queensland Legislative Council were appointed for life by the governor on advice from the premier of the day.

Since early governments were conservative, so were the unelected upper house MPs. The Australian Labor Party was formed and began to win government in the 1900s. The ALP was unimpressed when the Council blocked part of its reform agenda. In 1915 the Queensland Labor government twice passed a bill in the Legislative Assembly to abolish the upper house – but that house, comprising mostly non-Labor MPs, rejected it.

To resolve the deadlock, the government held a referendum to abolish the Council in 1917. But most people – 179,105 – voted a clear no. The yes vote was just 116,196. Queenslanders wanted to keep their parliamentary safeguards.[17]

Labor forces were not deterred. Over the next few years, Labor governments advised the governor to appoint a total of 30 new Labor members of the Legislative Council – enough to defeat the remaining conservative members. A bill to abolish the Council eventually passed in 1921 and came into effect in 1922. Some conservative calls for reform rather than abolition of the upper house fell on deaf ears.

Nicholas Aroney and Scott Prasser comment: "Queensland's Constitution was thus fundamentally altered through successive acts of executive and legislative power effectively concentrated in the hands of the premier and cabinet. And, indeed, the politics of Queensland have ever since been determined by this same concentration of power – executive and legislative – in the hands of a small coterie of politicians. If there was no separation of powers under the conservative regime of Premier Bjelke-Petersen, its origins are to be traced to the abolition of the Legislative Council by the progressive forces of 1922…

"As Justice Bruce McPherson has pointed out, 'In fashioning an instrument of unlimited power for their own use, the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of executive authority in Queensland can be in no doubt who were responsible for creating it.'"[18]



Queensland Governor Penelope Wensley opens Parliament in the Chamber of the Legislative Council on 21 April 2009

While other states have at times been plagued by government corruption, Queensland has arguably experienced more of it. In recent times, Queensland governments have attempted to deal with the lack of government accountability associated with their "winner takes all" power in the single house. They have established a Crime and Misconduct Commission and parliamentary committees.

However these attempts have not succeeded, since members of the CMC are appointed by the government, and every parliamentary committee has a majority of government members. Only an upper house, elected by a different method from the lower house (like the Senate), can provide independent oversight of government operations and adequate review of legislation.

Aroney and Prasser argue that Queenslanders should vote in a referendum to restore their upper house of parliament: "Queensland's present unicameral legislature fails to deliver democratic practice, effective citizen participation, regional and minority representation and accountable government. An upper house for Queensland is an idea whose time has come …"[19]

Electing an upper house - proportional representation

All lower houses in Australia, except for Tasmania's, are composed of members elected from single-member electorates. This favours large political parties and

generally results in a party or coalition having a clear majority in the lower house, thereby enabling the formation of a strong government. In the absence of an upper house, however, an unfettered government may become an elected dictatorship.

A government having no effective checks on its power can become crudely "majoritarian" and ignore the views even of substantial minorities in the community. In contrast to majoritarianism, a healthy democracy includes a "willingness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views".[20]

For an upper house to provide an effective check on such majoritarian rule it must not be controlled by any major party or coalition. Rather, the composition of the upper house should reflect a broader range of community opinion than the lower house. This is best achieved with multi-member electorates and proportional representation as the voting system.

A good example of multi-member electorates is provided by the Australian Senate, for which each state acts a single electorate from which six senators are elected. For state legislative councils, the whole state acts as a single electorate in New South Wales and South Australia.

For electing the legislative councils in Victoria and Western Australia, the states are divided into several multi-member regions, each returning several members. In Victoria, five members are elected from each of eight regions. In Western Australia, six members are elected from each of six regions.

Proportional representation has proved successful as an upper house voting method that achieves a broader composition including independents and representatives of the larger minor parties as well as the major parties. As a result, the government party or coalition seldom controls the upper house and must negotiate contentious legislation with others. Usually, this results in modified legislation that is more acceptable to a larger proportion of the community – a good democratic outcome.

For a candidate to be elected from a multi-member electorate by proportional representation, his or her total number of votes must exceed a quota. The quota is the total number of formal votes divided by one more than the number of candidates to be elected. For example, in a regular Senate election where there are six senators to be elected in each state, the quota is the number of votes divided by 7 - ie approximately 14%. This system generally results in the upper house better reflecting the spread of political views in the community rather than being completely dominated by the major political parties.

Electing an upper house - rotation and double terms

Another positive contribution that upper houses can make to good government is stability. When the government formed in the lower house changes, a new and inexperienced government may make hasty decisions and introduce ill-conceived legislation. An upper house elected by rotation, with only half of the members facing re-election each time, provides greater continuity of experience and stability.

Governments formed in the lower house are rightly accountable to the people at elections every three or four years. However this can lead to short-term thinking and planning which may not be in the best interests of the state.

A longer term for upper house members has the advantage of encouraging a longer-term perspective when government legislation is reviewed. Even members of a major party are encouraged to think more independently when they don't have to face an election so frequently.

A rotation system of re-election works well in states where the upper house is elected from the whole state as a single electorate. In New South Wales, the upper house has 42 members with 21 elected each time from the whole state. The quota of 1/22, or about 4.5%, enables several smaller parties to be represented. In South Australia, the upper house has 22 members with 11 elected each time from the whole state. The quota of 1/12, or about 8.3%, is also within reach of some smaller parties.

The Australian Senate also uses the rotation system of re-election. Each state is represented by 12 senators, with six being elected at alternate normal elections.

Conclusion

Sir Winston Churchill famously said "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those *other* forms that have been tried from time to time."[21]

Upper houses, as they have developed in Australia, have proved to be an effective means of improving the way democracy works by providing an important check on the growing power of executive governments.

Where upper houses exist, they should be defended vigorously against impatient and power-grabbing politicians who would prefer unconstrained power. The way such upper houses function should be subject to continual improvement, with an eye to the fundamental purpose of an upper house of providing an effective check on the government of the day.

Where there is no upper house – as in Queensland, or in the Northern Territory as it considers moving towards statehood – the establishment of an upper house should be a matter of priority for all those who value good government. ■

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