

## **HOW DEMOCRATIC IS PARLIAMENT?**

### **A case study in auditing the performance of Parliaments**

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#### *Introduction*

This Democratic Audit of Australia discussion paper is a cautious first attempt at an audit of the institutional performance of the Australian Commonwealth Parliament. My findings are that the Australian Parliament falls well short of its democratic potential, measured against the standards used in the Democratic Audit of Australia: political equality; popular control of government; civil liberties and human rights; and structures for public deliberation. Although I provide a few examples of practices that measure up against these standards, I show that many practices are sub-standard. I rank practices along a scale of democratic performance: high, medium and low. But my audit of parliamentary ‘benefits’ is quite provisional. It is not, for instance, a cost-benefit analysis, because it is notoriously difficult to obtain reliable data on the real cost of parliaments. Further, I have made no attempt to map comprehensively the range of Australian parliamentary ‘benefits’: a task which would be exhausting well before it became exhaustive. My aim is to use samples of what might be considered ‘debatable democracy’ to stimulate fresh discussion over how the Australian Parliament measures up as a democratic public institution.

My rankings reflect relative rather than absolute judgments. Indeed, the four performance standards devised for the Australian Democratic Audit are themselves terms of art crafted

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to provoke debate over professional judgments about the state of democracy in Australia. In this case, to ‘measure up’ means to ‘shape up’ by putting serious effort into the process of democratisation. It helps to see democracy as a work in progress rather than as an end-state. My judgments of high, medium or low performance are judgments of effort as much as achievement: the judgments tell us more about parliamentary practices than parliamentary powers as such. The available legal power is usually greater than the demonstrated political effort. In this parliamentary audit I am trying to assess institutional effort rather than describe the formal powers available to a parliament.

Institutional effort is probably harder to investigate than I acknowledge; and I accept that my three performance categories of high, medium and low are far from scientific. But the larger point is still relevant: that what matters in democratic performance is not so much the power as the practices that draw on that power. For example, parliaments will vary in the efforts their members make to promote ‘political equality’ or any of the other values associated with the four performance standards. Further, each parliament will vary internally, with some practices reflecting greater or lesser effort than others to promote, say, ‘political equality’. Therefore, in my approach, a parliament can score high, medium *and* low in relation to any or all of the four performance standards. A parliament might have a few practices at the high end and many more practices at the low end. It is thus virtually impossible for an evaluator to award an overall grade to any one parliament in relation to any one performance standard.

Although this diversity of judgment will annoy evaluation purists, it is appropriate to my purpose, which is to stimulate fresh public discussion over parliamentary performance.<sup>2</sup> Anxious academics can put their minds to the task of perfecting the evaluation methodologies while the rest of us get on with the more immediate community debate over the democratic qualities of our parliaments. I should warn that my findings are not as pessimistic as cynics might hope for. After reporting my four sets of rankings, I conclude with some general observations on how parliaments can change and improve

their institutional performance—should they have the political will to do so. I include some recommendations for institutional change to strengthen the Australian Parliament as a democratic institution.

### *Control of the Senate*

In politics, timing is everything. This report is being published as we approach 1 July 2005 when the Howard government takes control of the Senate: a rare example in recent history of an Australian government having a ‘double majority’ with control over both the House of Representatives and the Senate. Governments since 1981 have had to cope without Senate majorities. Not that Oppositions have fared any better: neither of the two main parties competing for government (the Liberal-National Party Coalition and the Labor Party) has been able to win a majority in the Senate over this period. The balance of power has been held by a moving feast of minor parties and Independents, sometimes favouring the Coalition and sometimes favouring the Labor Party, but at many times split between the two opposed camps of the major parties.

Many observers since 1981 thought that Australian governments would rarely if ever regain control of the Senate. The electoral rules seemed to favour an even spread of Senate seats between the two major party blocs, with Australian electoral behaviour suggesting that minor parties and Independents would pick up the small share of Senate seats left in the balance. Now all that has changed, with the Howard government obtaining a narrow majority of coalition Senate seats over the non-government parties: 39 to 37. This surprising double majority tells us something important about Australian democracy: that governments can indeed govern and need not suffer the adversity of a ‘hostile Senate’ common to the last Fraser government (1981–83), the Hawke governments (1983–91), the Keating governments (1992–96) and earlier Howard governments (1996–2005).

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<sup>2</sup> See also Uhr, John, ed, 1992, *Program Evaluation: decision making in Australian government*, ANU Federalism Research Centre; and Uhr, John, ed, 1996, *Evaluating Policy Advice: learning from the*

One important implication of this brief discussion of control of the Senate is the distinction between *powers* and *practices*. The performance of parliamentary institutions depends on both formal powers and on informal practices. The much-discussed ‘double majority’ that begins on 1 July 2005 will involve no alteration of the formal powers regulating the relationship between the House of Representatives and the Senate. But we can assume that there will be alterations in the informal practices regulating this bicameral relationship. Thus parliamentary performance varies according to changes in institutional practice, even though formal institutional powers might remain unaltered. This distinction between powers and practices highlights the role of political conventions in managing and moderating parliamentary powers: conventions that vary with the political understanding of those parliamentarians exercising power over the institutional mechanisms at their disposal. Judgments of the Australian Parliament’s institutional performance have to be sensitive to this conventional dimension, making predictions of future performance very unwise.

I will return to this theme of the ‘double majority’ in my conclusion. History suggests that possession of a ‘double majority’ is not proof positive that parliamentary performance will fall off the democratic scale, just as losing control of the Senate is not proof of improvement in parliamentary performance. One of the ironies of a government party’s control of both houses is that suddenly government members have no one else to blame for faulty policy or flawed legislation. Governments find it so convenient to blame ‘the Senate’ for obstructing their initiatives. Even backbench dissenters can complain about opposition obstruction of their conscientious plans to improve government performance. But when a ‘double majority’ arrives, as it did under the first term of the Fraser government, government backbenchers know that they now have only themselves to blame for not correcting government faults. In a sense, backbench dissent increases because the leverage of the backbench is now relatively more important, given the eclipse of the opposition. We remember the instances of small-l liberal dissent under the Fraser government but next time around it could just as equally be small-c conservative dissent.

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*Commonwealth experience.* ANU and Department of Finance.

The small-l liberals, however, have now emerged—with the promise of two bills to amend government detention schemes for so-called ‘illegals’.<sup>3</sup>

More of that later. First we have to raise some threshold questions about the core notion of a ‘majority’ as it appears in democratic theory, before turning to the ‘majority’ as it appears in the Australian Parliament.

*The problem of majority rule*

We often define democracy as ‘majority rule’, and we might be tempted to think that the ‘double majority’ illustrates the rare achievement of democracy under the Australian system of parliamentary government. Yet any ‘majority rule’ definition of democracy invites questions on two fronts:

\* what constitutes a ‘majority’ (e.g., majority of participating voters, a majority of eligible voters, a majority of all Australian citizens, a majority of all who live in Australia regardless of citizenship, a majority of all Australian citizens regardless of whether they are living in Australia or not or, even more simply, a plurality of participating voters?);

\* what constitutes ‘rule’ (e.g., rule as the majority sees fit, any form of rule that is not unconstitutional, rule according to norms of due process, or, to return to ‘majority’ questions, rule as determined by simple, by absolute or by supra-majorities?).

Of course, there are many other definitions of democracy that vary the formula from this quite practical one of ‘majority rule’. Strictly speaking, democracy means *rule by the people* rather than rule by a majority of the people. In so-called classical models of democracy, the people (traditionally defined in non-inclusive terms depending on class and gender restrictions) have direct responsibility for self-rule. In the idealised classical

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<sup>3</sup> See eg Moylan MP, Judi, 2005, ‘Detention policy fails the test of humanity’, *The Australian*, 26 May. See also Colman, Elizabeth, 2005, ‘Backbench revolt on detention’, *The Australian*, 25 May, 2005, ‘Outspoken MP’s fight for dignity’, *The Australian*, 26 May, 2005, ‘Anger over bid to change Migration Act’, *The Australian*, 27 May.

image, the people meet together, directly sharing the powers of self-government. Modern democracy departs from the ideal of direct democracy: forms of direct democracy like the Australian constitutional referendum are the exceptions to the norm of indirect or representative democracy. Modern democracy is based on ideals of political representation, where a chosen few act on behalf of the many—whose role is reduced from that of direct rule to that of choosing who should rule. Under modern systems of representative democracy, the primary role of ‘the people’ is as electors: choosing representatives to act on their behalf.

Practices of majority rule are common to both classical forms of direct democracy and modern forms of indirect or representative democracy. Even where the people in an ancient polity assemble together, there had to be some provision for determining courses of action when there was a division of opinion. Democratic practice seems usually to embrace majority rule as the preferred way of resolving disagreement. Classical democracy, however, had its own debates over precisely which majorities should matter—should it be a majority of citizens or a majority of families, clans or tribes, or a majority of districts or villages, or a majority of workplaces or of employment or economic groups? Numbers do matter. But numbers of which type of voters matter most? So too in modern forms of indirect democracy, where doctrines of majority rule emerge as ways of making democracy manageable when ‘the people’ disagree over who should represent them.

The underlying idea is sound. At its idealistic best, the modern democratic ideal is based on a core value of political equality, with each person equal in dignity to any other, carrying as many rights and so accorded as much political relevance as any other. The highest standard of political decision-making is rule by a consensus of freely-chosen representatives. However, the theory of democratic consensus is undercut by the practice of democratic disagreement, with most decisions, including decisions over political representation, falling far short of unanimity. The rule of the majority emerges as a feasible substitute for unanimity: with the majority thought to represent what most of ‘the people’ want. The key premise here is the importance of political equality: if each voter

counts for one and no more than one, then the votes of the majority trump the votes of any minority.

Yet this core value of political equality can cut both ways: either favouring majority rule or qualifying it. When democracy is defined as equal respect and equal voice for all citizens and not simply ‘majority rule’, the foundation principle of equality operates to protect the rights of minorities, indeed the rights of each individual, to fair treatment while generally moderating the ruling rights of majorities. For instance, democratic critics of majority rule argue that this definition of democracy lends itself to so-called ‘majoritarianism’, particularly the tyranny of the majority where ruling majorities ignore the rights of minorities who, after all, comprise a valuable part of ‘the people’.<sup>4</sup> Democratic critics of ‘majoritarianism’ look to institutional checks and balances (e.g., bicameralism, proportional representation) to combine majorities and minorities as complementary parts of ‘the people’ in any effective democratic system. The ‘Westminster Model’ of parliamentary democracy is often regarded as a good example of a majoritarian system, which many of its democratic critics rate unfavourably against the standard of ‘consensus democracy’.<sup>5</sup> Other names for the anti-majoritarian ideal include ‘power-sharing democracy’ or ‘inclusive democracy’ or any of the other ‘varieties of non-majoritarianism’ analysed, for example, by leading United States democratic theorist, Arend Lijphart.<sup>6</sup>

This is not the place to explore these theoretical dimensions of democracy. But the imminent arrival from 1 July 2005 of one version of majority rule (rule by a majority of elected representatives) makes it urgent that we closely examine practices of parliamentary democracy in Australia. This is where theory can help. Lijphart identifies many elements of ‘consensus democracy’ at work in the Australian case, including federalism, a written constitution, a formal legal separation of powers between the three

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<sup>4</sup> See the imaginary (and imaginative) dialogue between ‘Majoritarian’ and ‘Critic’ in Dahl, Robert, 1989, *Democracy and its Critics*, Yale University Press, pp. 136-52.

<sup>5</sup> Dahl, *Democracy and its Critics*, pp. 156-60. More recent is Norris, Pippa, 2004, *Electoral Engineering*, Cambridge University Press.

branches of government, and bicameralism. One could go further:—the electoral system’s use of preferential voting for parliamentary elections, the use of proportional representation for the Senate and, arguably, even compulsory voting. Compulsory voting is relevant because it makes it harder for political minorities to pass themselves off as political majorities—think of the dubious majority of the recently re-elected Blair government, winning two-thirds of the parliamentary seats with only one third of the votes cast, at an election where almost 40 per cent of voters did not vote.

*Defining democratic auditing*

Questioning parliament’s democratic status is an important part of the Australian democratic audit. This question asks us to think about the extent to which the Australian national Parliament, and indeed all Australian parliaments, are democratic—defining ‘democratic’ in terms of the standards supplied by the Democratic Audit. Remember that for my purposes, ‘democracy’ really means ‘democratisation’: progress towards greater degrees of democracy. For many analysts, ‘democracy’ refers to an aggregated set of performance scores used to assess whether political regimes are ‘in’ or ‘out’ of the family of democracies. By contrast, the Audit approach is to assess the strengths and weaknesses of political institutions, threats and opportunities, against specified democratic standards. My own approach here is to use ‘democratisation’ to refer to the process of becoming more democratic, not only in the lead up to status as a ‘democracy’ but in the subsequent process of becoming a more complete democracy. By contrast, many conventional studies of the Australian Parliament frequently make two assumptions. First, that the political parties with the majority of parliamentary seats truly represent ‘the majority’, when in fact this is often not the case. Second, that the restricted standard of ‘majority rule’ is the appropriate and uncontested standard against which to judge the performance of our parliamentary institutions.

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<sup>6</sup> Lijphart, Arend , 1999, *Patterns of Democracy*, Yale University Press. See also Crepaz, M , Koelble, T. and Wilsford, D. eds, 2000, *Democracy and Institutions: The life work of Arend Lijphart*, University of Michigan Press.



For the purposes of this democratic audit, I take a different approach. My aim is to judge Parliament against the stricter standards provided by the Audit rather than the conventional ‘majority rule’ standard. This standard alone is almost bound to generate lower assessments than many conventional approaches; but this is the price we pay for taking democracy seriously. The four standards devised by the Australian Democratic Audit can help us map the democratic potential of Australian institutions and practices, measured in terms of:

**Standard 1: Political equality:** referring particularly to the contribution parliaments make to *strengthening democratic citizenship* by promoting equal opportunities for political participation and political representation

**Standard 2: Popular control of government:** referring particularly to the contribution parliaments make to *strengthening public accountability* of government by protecting the public interest against undue private interests dominating the processes of government

**Standard 3: Civil liberties and human rights:** referring particularly to the contribution parliaments make to *strengthening civil liberties* through effective scrutiny of legislative proposals and through timely review of threats to human rights by holders of executive power

**Standard 4: Public deliberation:** referring particularly to the contribution parliaments make to *strengthening processes of public deliberation* by promoting opportunities for balance and diversity in arenas of opinion-formation in the public sphere

For this study, these four categories comprise a convenient set of performance standards. They might not be perfect, even as guides to democracy, but they do throw the light of publicity on four important lanes on the highway of democratisation. How then do we go about evaluating institutional performance in terms of these standards? Alas, there are no off-the-shelf methodologies for evaluating political institutions like parliaments. There are, however, now a number of democratic audits of parliaments, to which this paper

adds another case study to keep alive the international debate over ways and means of evaluating parliamentary institutions.<sup>7</sup> The intention of this case study is to widen the pool of possible models, hoping to stimulate discussion over ‘what works’, institutionally and evaluatively.

One threshold problem is that there is reasonable doubt that ‘democracy’ is itself the appropriate standard for judging a parliament. Odd as it might sound, parliaments are not really democratic. They can be democratic but parliaments were not designed as democratic institutions. Those that we admire around the world have been modernised to make them look like democratic institutions, and sometimes even to act like democratic institutions. But most of these modernisations have been external impositions: grafting on elements of democracy to parliaments that maintain, often even sustain, many pre-democratic values and practices. Parliaments are not naturally or automatically relevant to contemporary democracy. They have to be made relevant to democracy. If we as citizens of democracies do not try to make them relevant to democratic values and practices, then we can not presume that parliaments themselves or their members will do that for us.<sup>8</sup>

### *Defining a parliament*

As we descend into particulars, we have to turn our attention from auditing to the object of the audit: parliament. Audits of political institutions can only proceed if there is an institution with sufficient organisational coherence to make the assessment feasible. To state the problem crudely: what if ‘parliament’ does not exist as one single or coherent public entity? What if ‘parliament’ is instead something of an umbrella term to describe an important political site with many competing entities, where the only agreed

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<sup>7</sup> See eg Petersson, Olof, et al, 1999, *Democracy and Leadership: report of the democratic audit of Sweden*, Stockholm; Beetham, David, et al, 2002, *The IDEA Handbook on Democratic Assessment*, IDEA; Henderson, John and Bellamy, Paul, 2002, *Democracy in New Zealand*, University of Canterbury; Beetham, David, et al, 2003, *Democracy under Blair: a democratic audit of the UK*, ‘Politico’s; Docherty, David, 2004, *Legislatures*, Canadian democratic audit series, University of British Columbia Press.

<sup>8</sup> See Uhr, John, 2003 ‘Reforming the Parliament’, in C MacIntyre and John Williams eds, *Peace, Order and Good Government: state constitutional and parliamentary reform*, Wakefield Press, pp. 228-40.

performance goals are to out-perform other entities competing for political attention? If this is right, ‘parliament’ is less than the sum of its component parts, and not altogether suitable for performance evaluation.<sup>9</sup> ‘Parliament’ is characterised by many competing organisations rather than one coherent organisation. Not simply government versus opposition but more generally the multiplicity of its competing political parties within government as well as within non-government ranks, the two competing parliamentary chambers and the obvious internal competition within apparently coherent components like political parties. What organisation there is in Parliament is driven by networks of competing interests struggling to use the formal authority of ‘the Parliament’ to legitimate preferred agendas of public power and public policy.

My solution to this problem of systemic disorganisation is to turn this ‘defective organisation’ on its head. It is true that parliaments are peculiar institutions with distinctive degrees of disorganisation. This very disorganisation is not a sign of a dysfunctional public body but a valuable institutional strength. The capacity of a parliament to function as an effective political assembly depends on the dispersed nature of parliamentary powers, which can only be deployed through considerable efforts of co-ordination among the many competing parts of the larger institution. Governments know this only too well, which explains why they take as much responsibility as they can for initiating, co-ordinating and terminating the flow of parliamentary business. The institutional performance of a parliament will be judged quite differently if the reference point is democratic *government* or democratic *governance*. ‘Governance’ refers to systems of political decision-making. ‘Government’ refers to the most powerful decision-maker. Parliaments can play various governance roles: minimally as electoral colleges determining who forms the government of the day; or more broadly by establishing other institutional decision-makers (such as parliamentary committees or legislated public authorities like auditors-general) capable of participating in the governance process. Governments have predictable reasons for treating parliaments as under their control: politically, administratively and financially. But when judged against a reference point of

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<sup>9</sup> Uhr, John, 1993, ‘Parliamentary measures: evaluating Parliament’s policy role’, in Ian Marsh ed *Governing in the 1990s*, Longman Cheshire, pp. 346-75.

democratic governance, parliaments' performance standards shape up quite differently, with the dispersal of powers within parliament taking on particular public value.

Parliaments are typically fragmented into competing centres of power and responsibility. One of the few integrating forces in 'parliament' is the government of the day, which needs parliamentary approval for its legislative program, including of course its budget program. Non-government components such as the opposition have every incentive to say 'no' to government initiatives, if for no other reason than to market their 'product differentiation' to voters. Only the governing party really needs a well-organised parliament: in part to minimise challenges to its legitimacy and in part to maximise its access to formal legislative power granted to 'the parliament' under the Constitution. To be blunt: parliaments tend to be whatever governments want them to be.

Historically, parliaments generally favour or accommodate serving governments. Given this predictable tendency, many modern democratic constitutions try to devise limits to the powers of executive governments to dominate parliaments. The Australian constitutional framework is a good example of a useful, if minimalist, attempt to restrict the capacity of governments to shape parliaments in their own image. This framework is relevant to a democratic audit because it highlights the general gulf between the constitutional system and contemporary standards of democratic governance. I concede that there is much of genuine democratic value in the Australian constitutional framework; but I also concede that this framework favours executive governments, reflecting quite traditional assumptions about the norms of 'responsible government'.<sup>10</sup> Hence, those few explicit restraints on the power of executive governments to control parliament are all the more valuable as anchor-points of democratic governance, and parliaments should do all that they can to protect and supplement such restraints.

Parliaments might derive from pre-democratic interests but many democratic constitutions balance those pre-democratic values with more modern values of parliamentary independence. I want to highlight three of the original constitutional

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<sup>10</sup> Uhr, John, 2004, 'Parliament and the executive', *Adelaide Law Review*, 25 (1), pp. 1-15.

restraints on the power of governments over parliaments because they illustrate some of the democratic potential embedded in the Australian constitutional system that Parliament can use to strengthen its capacity for independent action. These provisions provide important elements of the Australia constitutional framework conducive to democratisation. The first element to note is that the Australian constitutional framework contains a version of the separation of powers doctrine in that it separates the formal legislative powers of Parliament (in Chapter 1 of the Constitution) from the formal executive powers of the government (in Chapter 2 of the Constitution). Then of course there is the further separation of the formal judicial powers of the High Court (Chapter 3 of the Constitution). One small yet significant hint of the separation of Parliament from the political executive is found in s5 which holds that Parliament must be convened not later than 30 days after return of the writs after an election and in s6 holding that there shall be meetings of Parliament ‘once at least in every year’. These provisions are not necessary for the formation or conduct of a new government. They do, however, put obligations on new governments to convene newly elected Parliaments sooner rather than later, and to do so annually.

A second element is the constitutional bifurcation of ‘the Parliament’ into two chambers, with each house empowered virtually equally, each with its own internal powers of self-regulation. One consequence of this separation is to increase rather than diminish the prospect of what the Constitution terms Senate ‘disagreement’ with the House of Representatives. The constitutional architecture anticipates that the power of initiation will be in the lower house and the considerable powers of reaction will be in the upper house. The Constitution would not contain its detailed conflict resolution procedures if its authors had not anticipated ‘disagreement’ between the two houses. A third element also relates to the relative independence of the Senate from the House of Representatives, based on the Senate’s *fixed* term of six years (broken only by ‘double dissolution’ of both houses) compared with the House’s *maximum* term of three years.

All of this might sound academic but it is important to recognise the tensions between the rather flimsy constitutional protections for parliamentary democracy and the everyday

realities of executive government. Nothing illustrates this tension better than the fact that Australia can get along well enough without a parliament every three years or so. During the last election year, Australia was without a parliament for nearly 10 weeks: during the election period Australian democracy was in a kind of receivership, with a caretaker government minding the store until the election. Parliament was dissolved on 31 August for an election on 9 October. The new Parliament did not meet until 16 November: so that there was no Parliament from the end of August until mid November. This situation is not quite correct, as a Senate select committee did meet on 1 September to hold a one day public inquiry into ‘the Scrafton evidence’. The one day sitting of a Senate committee illustrates a potential anomaly in our conventional definitions of ‘the parliament’ and of the practical meaning of a dissolution. But the larger point is that neither house of the national parliament met over this 10 week period.

After the election, the Governor-General called on the leader of the winning party to form a new government, one of the first tasks of which was to advise the Governor-General on the timetable for the first meeting of the newly elected parliament. Thus parliaments cannot do anything really until their membership has been determined through election. The larger implication is that parliaments will begin to slow down or stop doing things when their members think that an election is in the offing. The problem is not that elections necessarily come early and interfere with the business of a parliament: the real problem is that members never really know when an election might be on the cards, and so can never really be sure about their parliamentary timetable. As my conclusion notes, this is a heavy price we pay for executive control of the election timetable.

A new issue arising out of executive control of the election timetable is that of electoral enrolment. At present many new voters put off enrolling until an election is called. The Commonwealth Electoral Act provides for a week after an election has been called for voters to enroll or change their enrolment details. Some have argued this rush makes it difficult to ensure there are no fraudulent enrolments. The federal government has signaled its intention to amend the Electoral Act after 1 July to close the roll on the

(unpredictable) day the election is called. This action creates a strong argument for fixed terms.<sup>11</sup>

One of the few restrictions on the discretion of a prime minister to determine election timing relates to the Senate. Senators serve for fixed six year terms, with half their membership up for election every three years. Hence, whenever governments call early elections, they can expect a lag time to allow for the retiring senators to serve out their term before the newly elected senators can begin their own period of service. This occurred at the 2004 election, held on 9 October. When the newly elected members of the House of Representatives met as arranged on 16 November, none of the 36 newly elected state senators had yet taken up their new positions. This situation arose because the Constitution provides a fixed term for State senators, with the expiry date for that half of the Senate being the end of June 2005.

#### *Evaluating parliament performance*

Time now to apply the four standards and see how well the Australian Parliament measures up in contemporary practice. Each of the four applications begins with a sketch of the standard in question, including a summary statement of what a low, medium and high measure or ‘score’ might involve. Each application then identifies examples of Australian parliamentary practices that fall into these three performance categories. This exercise in auditing is quite tentative and experimental. What follows is grist in search of a mill.

#### *STANDARD 1: POLITICAL EQUALITY*

Political equality relates to ‘voice’: in a parliamentary audit it refers to the ways that parliaments represent the people’s voice in all its political diversity, facilitating equal representation of all participating political viewpoints.

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<sup>11</sup> Sawyer, Marian and Kelly, Norm, 2005, ‘Parliamentary Terms’, Democratic Audit of Australia, February.

A core democratic value is political equality, including equal opportunity to become a political representative. Parliaments can be judged according to their protection of this value. Restrictions on voting rights would breach this standard, as would restrictions on rights to stand as parliamentary candidates and to take one's place as a parliamentary representative. Equality of opportunity to be a political representative does not imply equality of outcome in parliamentary representation because democratic elections are contests with few winners and many losers. Parliaments can contribute by legislating to ensure that elections are free and fair, and that electoral systems fairly represent the diversity of political opinion attracting electoral support. Parliaments can go further and devise 'rules for representation',<sup>12</sup> such as proportional representation, that allocate parliamentary representation to 'losers' who, however, obtain significant electoral support. Parliaments can and should go much further and protect the rights of minor representatives to participate in the parliamentary process of debate and inquiry, and to provide resources for this purpose, thereby promoting the value of political equality as an operational reality and not just a worthy ideal.

Currently the criteria for determining parliamentary party status around Australia, and hence the additional resources that go with party status, are largely geared to the parliamentary representation of the National Party. For example, to achieve parliamentary party status, in Victoria a party must have 11 members of parliament (the number of National Party parliamentarians), while in Western Australia a party must have 5 members of the Legislative Assembly—making the Nationals eligible but ruling out the Greens, who have had 5 members in the Legislative Council. In Western Australia, the government punished a 'troublesome' (minor-party controlled) Legislative Council through a 23 per cent reduction of its resources in real terms since 1999. The manipulation of resources available to minor parties not only offends against the political equality principle but also against the popular control of government and deliberative democracy principles. The cut in resources to the Western Australian Legislative Council

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<sup>12</sup> Uhr, John, 2001, 'Rules for representation' in G Lindell and R Bennett eds, *Parliament: the vision in hindsight*, The Federation Press, pp. 249-90.



has made it difficult for committees to employ quality and experienced staff, and committees have been less able to engage in extensive public consultation.<sup>13</sup>

At the federal level, a party must have at least five seats in either the Senate or the House of Representatives to be awarded party status. Such status brings extra research and media staff (around 12 extra staff in all) as well as additional salary, travel and postal allowances for the party leader. From 1 July the Australian Democrats will no longer be eligible for party status, meaning a loss of more than \$1 million. The Greens will not be eligible for party status, despite having higher voter support than the Nationals. The resourcing of the parliamentary departments has also been vulnerable, affecting not only Committee staffing and public consultation but also the Parliamentary Library, an important research resource for non-Government members in particular,

Commitment to political equality clearly varies between parliaments. Think, for example, of the right to vote. A parliament elected on a restrictive franchise would not even meet this basic test and thus would fail a threshold test of democratic relevance. Equal voting rights *sounds* simple, but of course it is not. Recent struggles over the weighting of rural votes in Western Australia or over prisoners' voting rights illustrate this complexity.<sup>14</sup>

Mid ranking scores would belong to those parliaments honouring substantive *equality of* participation as distinct from formal *rights to* participation. For instance, how relevant to democracy is a right to vote if it is not accompanied by a right to be elected by standing for office? A century ago, the women's movement faced just this problem of having to jump two hurdles. Substantive equality of access rights also means that all voters should have a reasonable expectation of having their voices represented, and not just the predictable expectation that parliament will be dominated by the voice of the winners. This is not what it sounds: a defence of *minority* rights. It is something stronger: a defence of *majority* rights where majorities should be defined to include all those voices

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<sup>13</sup> Kelly, Norm, 2004, 'Defining Parliamentary Parties—A Real Status Symbol', Democratic Audit of Australia, December.

attracting community support beyond a minimal threshold. Certain types of electoral systems facilitate this sort of enlarged representation of true majorities.<sup>15</sup> Perhaps just as important are protections against the power of passing majorities to lock in their passing preferences as permanent features of the parliamentary or electoral system. These precautions against the power of passing majorities can be even stronger when supported by devices like the referendum, which prevent parliamentary majorities from altering public decision-making regimes without overwhelming popular authority.

The highest scores would go to those parliaments where the equality principles extend to *equality of parliamentary opportunities*. This means more than simply having the right of minorities to have dissents recorded and to have opportunities to rebut majority views. Here it means power-sharing, along the lines that all parties get their fair share of power to contribute to the agenda of parliamentary business. Examples of highly relevant parliamentary practices would be those which share around parliamentary power such as those where all participating political parties have equal opportunities to set the agenda of parliamentary business, and to share in positions of power such as committee chairs and the like. This process need not congest parliamentary business with unrealistic requirements of decision by consensus. It can mean, however, that each party or group in turn get their opportunity to use the powers of parliament to promote their cause.

How does the Australian Parliament measure up against this standard? Historically, the Australian Parliament has had to struggle to meet this standard. The Constitution is remarkably permissive, leaving it up to Parliament to determine whether and to what extent political equality should be a relevant guide to parliamentary standards. The Australian Parliament has gone some distance down the road of political equality: in terms of legislating for adult suffrage (1902), for preferential voting (1919), for compulsory voting (1924), for proportional representation in the Senate (1948), for Indigenous voting rights (1962), for the franchise for 18 year olds (1973), for

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<sup>14</sup> Consider Sawyer, Marian , 2003, 'They do things differently there...Democracy in Western Australia', Democratic Audit of Australia, November; Costar, Brian , 2004, 'The Voting Rights of Prisoners', [Democratic Audit of Australia](#), July..

approximately equal House of Representatives electorates (1974), and public funding for elections and political parties (1984). These (among others) define and refine the ‘rules for representation’ relied on by the Australian Parliament.

But what do contemporary practices tell us about the place of political equality in the institutional norms of the Australian Parliament?

One of the strengths against the political equality standard is the many effects of proportional representation in the Senate. These elections include the election of minority candidates representing minor parties and Independents, which are part of the power-sharing process that has developed in the Senate in the years since the original adoption of proportional representation in 1948. The spread of Senate seats corresponds more closely than House seats with the proportion of votes won. At the 2004 election, the governing coalition won 45 per cent of the Senate vote and won 52.5 per cent of the Senate seats. The Labor opposition won 35 per cent of the vote and won 40 per cent of the Senate seats. The Greens won 7.66 per cent of the vote and won 5 per cent of the Senate seats. Family First won 1.76 per cent of the Senate vote and won 2.5 per cent of the Senate seats. By contrast, the ruling Liberal-National party coalition won 46.70 per cent of votes cast in the House of Representatives, and on this share of the vote they won 58 per cent of the seats in the House of Representatives. The opposition Labor party won 37.63 per cent of votes cast in House of Representatives elections, which gave them 40 per cent of the House seats. The Greens won just over 7 per cent of the vote but won no seats. Family First won 2 per cent of the vote but no seats.

Against this background, we can compare the relative power of Independents and minor party representatives in the House of Representatives, where their voice is largely confined to marginal protest against the policies and practices of the major political parties, especially those in government. The absence of any system of proportional representation in the House of Representatives means that minority parties and

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<sup>15</sup> Uhr, John., 2003, ‘Measuring Parliaments against the Spence Standard’, in G Orr, B Mercurio and G William eds, *Realising Democracy: Electoral Law in Australia*, The Federation Press, pp. 66-79.

Independents can be treated as abnormal exceptions. By contrast, the Senate electoral system almost guarantees a number of minority representatives each election. Despite the strengths of the Senate electoral system against the political equality standard, there is still, however, significant discrimination against Independent candidates in the ballot paper design and other aspects of the electoral process.<sup>16</sup>

Conventions are fragile things but the Senate conventions seem to imply that whenever there is not a government majority, then the preferred practice is to share power among all represented political groupings: including a share of the power to control Senate committees. Since 1994 the Senate Standing Committees have been divided into references committees, with non-government chairs and non-government majorities, and legislation committees where the government retains control. House of Representatives conventions seem to differ: minority and Independent groupings can seek proportionate representation on House committees. Yet this system falls short of a right to control a proportionate share of House committees. This difference reflects contrasting stories about what ‘democracy’ means in institutional practice.

Among the mid-performing elements here I can point to the persistence of preferential voting, which has been used in Commonwealth parliamentary elections since 1919. The original idea was to allow competing conservative parties to avoid the risks of first-past-the-post contests with Labor. Swapping preferences meant that a number of anti-Labor parties could contest elections without splintering the conservative vote. The system is now used for elections for both houses, allowing voters in House contests to influence the final outcome, even though they might never obtain a local representative from their party of original choice. Public confidence in the legitimacy of Parliament is probably related to public confidence in the merits of preferential voting. While preferential voting does not reward voters as directly as does proportional representation, it does reward the smaller political parties. Although they might not win seats themselves, they can engage in ‘preference deals’ (where parties recommend to their supporters how to direct their

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<sup>16</sup> Curtin, Jennifer, 2005, ‘Getting elected as an Independent: Electoral laws and party favouritism’, Democratic Audit of Australia, May.

preferences) in the hope of winning policy concessions from the major political parties competing for government. One defect of the arrangements where proportional and preferential voting is combined, as in the Single Transferable Vote system used for the Senate, is that voters do not always know where their preferences are going: the Senate ballot paper allows voters to endorse whatever preference flows have been registered by their favoured party and voters' preferences can go in surprising directions without the knowledge of the voters concerned. Democratic voting procedures require transparency in party allocation of preferences *well before* elections are held. Although registered tickets are available on the Australian Electoral Commission website shortly after they are lodged, there is low awareness of this, or that the tickets can be asked for at polling booths, or that parties might allocate preferences in very different ways from what might be assumed from their policies. One solution is to allow voters themselves to express their preferences between parties above the line, as happens now in New South Wales.<sup>17</sup>

Among the low-performing aspects, I would have to include the absence of any sustained form of Indigenous representation. From July 1 2005, the Australian Parliament will have no Indigenous representation, with the only current representative, New South Wales Australian Democrats Senator Aden Ridgeway, retiring after losing his seat at the 2004 election. Earlier critics have drawn attention to the contrast with New Zealand, which has long had a number of 'reserved' Maori seats [these seats are based on the Maori roll and the number varies with the number of Maori enrolling on this rather than the general roll, currently seven]. This New Zealand policy of Maori seats dates back to 1867 when property qualifications for the franchise would otherwise have precluded Maori voters, due to collective forms of land ownership. Australian policies of colonial self-government had no comparable interest in aboriginal representation. In retrospect, one of the casualties of the decision of New Zealand not to join the Federation of the Australian colonies was the absence of any call for 'reserved' parliamentary representation in the form of aboriginal-only seats. The Senate might be thought an ideal institution to experiment with such novel forms of parliamentary representation: first there were State

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<sup>17</sup> Brent, Peter, 2004, 'Time to Scap the Ticket Vote for the Senate?', Democratic Audit of Australia, November; Sawyer, Marian, 2004 'Above-the-line voting in Australia', Democratic Audit of Australia, June.

senators; then Territory senators were added in the 1970s. The interests of Aboriginal Reconciliation might well demand that the next wave be the establishment of Indigenous senators from each State and Territory. This issue is all the more urgent now that the Australian Parliament has wound up the Aboriginal and Torres Strait Islander Commission which, when established in 1989, provided an important function as a national representative assembly for Indigenous peoples. Through the agreement of the major political parties, the Aboriginal and Torres Strait Islander Commission is being terminated, thereby depleting opportunities for elected office for Indigenous peoples — and calling attention to the need for Parliament to repair this aspect of Australia’s democratic deficit through dedicated seats for Indigenous representatives.

*STANDARD 2: POPULAR CONTROL OF GOVERNMENT*

This standard relates to accountability and in parliamentary audits it relates especially to the public accountability that governments accept when (or is it ‘if?’) responding to parliamentary demands for information, explanation and action.

Low scores here could mean that tests of popular control are satisfied by conventional theories of the popular mandate enjoyed by popularly elected governments. But whether an elected government really has a right to claim a popular mandate depends on many things, including the fairness of the electoral system underpinning elections. Classic Westminster electoral systems with ‘first past the post’ single-member electorates are actually very weak foundations for claims of a mandate, because these electoral systems filter out substantial minorities, sometimes even majorities. The problem is in the translation of votes to seats. Claims to relevance in terms of popular control vary with the fairness of electoral systems. If popular control really means control by the people as a whole, as distinct from control by the people supporting the government, then parliaments based on electoral systems like those of the Australian House of Representatives get qualified scores in terms of democratic relevance.

Turning to another aspect of popular control, and moving up the score chart to medium performance, we find those parliaments with greater controls over the *operations* and not simply the *formation* of governments. Think of this as the accountability part of the story. Parliaments managing instruments of accountability and subjecting governments to investigation in various arenas of accountability reach high into the realms of democratic relevance. There are any number of steps on the ladder of accountability, from the low ones of ‘collective ministerial responsibility’ to the high ones of sustained investigation into individual ministerial responsibility. I should of course mention the many mechanisms of public service accountability to parliament —such as scrutiny and oversight committees —flowing —from the financial accountability of public bodies for their contribution to public management.

Democrats could aim even higher. At the highest levels of performance, why not promote popular control through mechanisms for popular recall of misbehaving ministers—or poorly-performing parliamentarians for that matter? Or if that sounds too interfering, then at least experiment with more sustained experiments in direct democracy, such as the referendum. The Australian Constitution stipulates that formal constitutional change may only proceed through popular referendum. But there is nothing to stop Parliament from authorising referendum processes for other types of policy or political change. If this sounds too participative, then there are plenty of expert advisory bodies that Parliament can enlist to provide extra-parliamentary input before elected representatives exercise their own judgment. For example, Parliament could establish any number of independent and properly resourced agencies to investigate and report to Parliament on the detailed operations of government or the merits of policy options. Important to this action is the level of independence—in terms of appointment, security of tenure, and adequate resourcing—that such agencies have. Money inevitably matters: external audit of financial operations is perhaps the most important of these investigative and advisory functions, performed at national level by the Australian National Audit Office (ANAO). But there is no reason why Parliament should not have the range of other review agencies available to it that United States legislatures (State legislatures as well as Congress) have found necessary to establish. Audit agencies review patterns of past expenditure: what is

holding Parliament back from calling for something like the Congressional Budget Office to balance the budget-makers in Treasury who devise the expenditure blue-prints well before the ANAO gets a chance to review their implementation?

Where does the Australian Parliament measure up on this standard?

Among the high-performing aspects here are the much-publicised Senate estimates hearings, which draw in public servants as well as ministers and draw on the expertise in public finance of the ANAO: a core public agency established under law to provide reports to Parliament on the financial accountability of government-funded activities and entities. The House of Representatives has experimented with estimates committees but has largely left the field to the Senate, safe in the knowledge that for all their noise and occasional nastiness, Senate estimate hearings stop short of ever actually amending the budget bills they are established to consider. For its part, the Senate seems reconciled to this legislative limitation, knowing that it can instead use the twice-yearly hearings as opportunities to inquire into any matters vaguely relevant to ‘the budget’, as most things in government are. Government ministers who are senators have little alternative but to face these committees, prepared to set aside nearly a week a year to the task of explaining (just one more time) why non-government senators seem so ill-informed about the merits of government programs.

The Senate divides the work of estimates hearings up among eight specialist legislative committees. Although chaired by government senators, almost all the questioning is conducted by non-government members of the committees, and almost all the answers are provided either by one or two Senate ministers appearing before each committee — or, more importantly, by public servants in an unusual example of officials’ direct parliamentary accountability. Committees can call on expert advice from the ANAO to supplement ministerial and bureaucratic explanations. Committees engaged in estimates hearings may only meet when the Senate is not sitting, and even then no more than four committees may conduct hearings at the same time: all of which maximizes their ability to attract media coverage. Unlike many parliamentary committees, estimates committees



may not take evidence in camera which also increases their commitment to publicity and their contribution to wider public debate.

A medium level of performance can be seen in the institutional management of ministerial responsibility. Conventional approaches ask why it is that ministers no longer resign or offer their resignation over public service maladministration and failure. To my democratic mind, this concedes too much to executive discretion, as though the choice is, and should be, theirs to make. I am not trying to turn the clock back to an imaginary golden age of individual ministerial responsibility. My focus is less on what does or does not happen, and more on who might say what *should* happen. Individual members of parliament, particularly when in opposition, might say they know what standards should apply. But how many parliaments have taken any institutional responsibility to set explicit standards? The Australian Parliament acts under a code of ministerial conduct issued by prime minister John Howard —with the prime minister as the sole person responsible for implementing the code: law-maker, judge and jury! Inevitably, opposition members charge that compliance with the code is discretionary, so long as ministers have the support of their prime minister. I argue that a democratic Parliament should lay down its own law or code of ministerial conduct and misconduct. This rarely occurs.<sup>18</sup> Parliaments defer to the political executive and simply complain that executives do not live up to their own proclaimed principles of ethical conduct. A better level of performance in terms of popular control really belongs to those parliaments that not only control the *process* but also control the *principal*, i.e. the political executive, by laying down the law on ministerial standards.

Among the lowest levels of performance here relate to Parliament's light-handed regulation of political parties and their lifeblood: political financing. Democratic politics is party politics; so too parliamentary government is party government, in the sense that extensive power over parliament and public policy rests with the leadership of the ruling party. The 'rules for representation' devised by Parliament include extensive regulation

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<sup>18</sup> Uhr, John, 2005, *Terms of Trust: arguments over ethics in Australian government*, UNSW Press, pp. 142-5.

of the operations of political parties which are, in many ways, the business units of democratic politics. But parliamentary regulation of political parties, especially of contributions from non-public sources, barely meets basic tests of democratic accountability. If the ideal is popular control over government, then the reality is private contributor control over party. Since 1983, Parliament has delegated much of its immediate responsibility for monitoring the integrity of the electoral system to the joint standing committee on electoral matters.<sup>19</sup> This committee provides a useful public forum for debate over policy alternatives, with opportunities for minor parties and Independents to air grievances over the management of the system by the major political parties. Many critics have argued that the established system of private financing of such public bodies as political parties is loaded in favour of the hidden hands of undisclosed and unaccountable financial backers. But things can get worse. Media reports indicate that the current government is waiting its time of Senate control to revise the system to increase the limits on non-reportable contributions to parties from private sources.<sup>20</sup>

### *STANDARD 3: RIGHTS AND LIBERTIES*

This standard relates to the rule of law, and in parliamentary audits it relates especially to the parliamentary processes of law-making and legislative scrutiny of government initiatives: regulations as well as bills.

At the lower end of positive performance are those parliaments keeping up to date the public law protecting individuals against undue trespass and interference by governments and other power-holders. Of course, every piece of legislation has the potential to impact adversely on individual rights and liberties. A democratic parliament would have safeguards in place so that the legislative process included scrutiny of the civil liberties

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<sup>19</sup> <http://www.aph.gov.au/house/committee/em/index.htm>

<sup>20</sup> Sutherland, Tracey and Allen, Lisa, 2005, 'Minchin advocates donor privacy in political party contributions', *Australian Financial Review*, 23 May; Tham, Joo-Cheong, 2005, 'Donor threshold plan over the top', *Sydney Morning Herald*, 30 May; Fraser, Andrew, 2005, 'Electoral boss says \$1500 limit should stay', *The Canberra Times*, 31 May 2005; Tham, Joo-Cheong, 2005, 'Political donation changes favour the rich and increase the risk of corruption', *Democratic Audit of Australia*, May..

impacts of legislation, including of course regulations and other forms of subordinate legislation.

Higher ranking would go to parliaments with more systematic protections against legislative and administrative intrusions against civil liberties. For instance, the power of parliament to disallow rights-offending regulations is an increasingly important part of the parliamentary armoury. So too ‘scrutiny of bills’ committees with capacities to alert parliament to suspect legislative provisions, and to stall the passage of legislation until parliament is ready to supply its *informed* consent to government legislative proposals.

But the highest scores would go to those parliaments with charters or bills of rights, especially where those charters or bills call on parliament to do all it can to promote positive rights (to public assistance) and not simply protect negative rights (against external interference). This is civil liberty broadly understood, and it also requires parliamentary action to respect the separation of judicial powers and to promote an independent judiciary.

How does the Australian Parliament measure up against this standard?

Among the highest levels of performance is the Australian parliamentary system for legislative scrutiny of government regulation. The foundations go back to the originals of the Commonwealth Parliament, when the Senate successfully amended the original legislative scheme for the administration of acts and regulations to grant *either* house power to disallow regulations and other forms of delegated legislation.<sup>21</sup> This empowering piece of bicameralism owes nothing to proportional representation but instead reflects a more basic structural element in the Australian parliamentary system: under the Constitution, the two houses are virtually equal in their legislative powers, because the house with specified limitations on its amending powers (i.e., the Senate, with restrictions over its power to amend certain financial bills) can, however, *reject* any

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<sup>21</sup> Walsh, Robert and Uhr, John, 1985, ‘Parliamentary disallowance of delegated legislation’, *Legislative Studies Newsletter*, 10,, pp. 11-20.

bill. This constitutional authority was sufficient for the early Senate to insist that the same equality should apply to parliamentary powers to disallow government regulations. Decades later, the Senate in 1932 established a ‘Westminster’ first: a committee dedicated to legislative scrutiny of government regulations, responsible for advising the Senate on disallowable instruments offending civil liberties criteria.

Almost five decades after the establishment of the Senate Standing Committee on Regulations and Ordinances, the Senate established a companion Scrutiny of Bills Committee. This Committee has responsibility, among other things, to advise the Senate on the appropriateness of regulation-making provisions in bills and need for amending civil liberties protections. This combination of committees is internationally regarded as an excellent example of rights-protection in the legislative process. In the Australian absence of a bill of rights, this international profile is remarkable. In the presence of steadily increasing ‘government by regulation’, it is all the more remarkable that Parliament, or at least the Senate, has capacity to scrutinise this largely invisible form of legislation. And at some cost to government: in 2000, 14 of 1850 regulations were disallowed by the Senate; in 2001, 2 of 1293; in 2002, 6 of the 2035; in 2003, 5 of the 1522; and in 2004, one of the 1749. Of course, to say that ‘the Senate’ disallowed government regulations really means that a *majority* in the Senate chooses to disallow: after 1 July 2005, the governing coalition will have a majority and therewith sufficient votes to defeat future proposed disallowance motions. Even before the government gained its majority in the Senate, loopholes had been observed in the system for scrutiny of delegated legislation. The existing regime whereby regulations must be tabled within 15 sitting days means that regulations may have been in operation for some months before there is an opportunity to disallow them. Audit author Ernst Wilhelm proposed that governments should be required to table regulations within a shorter period and that regulations should not come into operation until the time for allowances had expired or both houses of parliament had approved them.<sup>22</sup>

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<sup>22</sup> Wilhelm, Ernst, 2003, ‘Government by Regulation: A Case of Democratic Deficit?’, *Democratic Audit of Australia*, December .

Of mid-ranking performance is the oddly-titled ‘Main Committee’ in the House of Representatives, which is a committee open to all members for the progression of uncontroversial and unopposed business. The House of Commons has adopted something similar, in the confidence that the Australian model demonstrated the value of a forum operating on lines of cross-party consensus, with no provision for the sorts of partisan disagreement or recorded votes so common in the House itself. The establishment of the Main Committee has provided members with greater opportunities to advance personal views and engage in debate, free from the adversarialism of postured disagreement. Any divisions occurring in the Main Committee have to be authorised by the House, which itself is a major disincentive to disagreement. The Main Committee functions as a default ‘committee of the whole’ for consideration of non-controversial legislation, and its success can be seen to underline the high proportion of non-controversial legislation enacted by the Australian Parliament. But there are other things to be seen, too: given that governments initiate by far the great bulk of legislation, what real opportunities do non-government interests have to check that supposedly non-controversial business deserves to escape contest and challenge? It is possible that the two major political parties might agree not to disagree, but an effective democracy would want to know what assurances are in place to persuade other political viewpoints, such as minor parties and Independents.

Low performance can be illustrated by the overwhelming domination of government bills in legislation passed by the Australian Parliament. The total number of so-called ‘private members’ bills passed since Federation is only 16, with 9 initiated in the Senate and 7 in the House of Representatives. The number increases by 3 if we include successful bills sponsored by Speakers. The House of Representatives sees on average 6 private members’ bills introduced each year; the Senate around 16.<sup>23</sup> Yet few if any get close consideration. Over the last three years, Parliament has passed on average 145 bills a year and, in almost every year, almost every bill is a government bill. Each year there are a number of non-government bills introduced, usually by opposition members; not all of

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<sup>23</sup> Uhr, John and Wanna, John, 2000, ‘The future roles of parliament’, in M Keating, J Wanna and P Weller (eds), *Institutions on the Edge?* Allen and Unwin, pp., 18-9.

these are ever debated; many simply fade away through government inability to find them a place in the parliamentary timetable. Responsible party government might mean giving all responsibilities for governing to the dominant political party; but a more democratic version of parliamentary government would protect the rights of the non-dominant parties to play an active part in the self-government of the political community. Being able to introduce one's own legislation is only the start of this democratic process; having it debated with a prospect of eventual passage is the next step necessary if the Australian Parliament is to move up the rankings of effective parliamentary democracies.

#### *STANDARD 4: PUBLIC DELIBERATION*

This standard reflects the growing importance of concepts of deliberative democracy, and in parliamentary audits it relates especially to parliament's ability to model (or at least set an example for) political deliberation and to strengthen wider public deliberation.

The lowest scores map parliamentary restraints on governmental power, and the highest scores map parliamentary promotion of powers exercised by non-government bodies. The core idea here is that parliaments are indeed talking shops and that they have responsibility for strengthening not simply their own institutional process but wider public processes of political deliberation.<sup>24</sup> A nation's political culture cannot be governed and ruled solely from the parliamentary centre. But parliaments can do much to support, encourage and facilitate sources of public deliberation such as public broadcasters and other opinion-forming media. Parliament itself can model best practices of public deliberation, drawing non-state actors and groups into its participative processes so as to reframe government discourse into a more open and democratic shape.

The lowest (but welcome) scores go to those parliaments with protections against the powers of government to interfere with free speech by citizens and by elected

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<sup>24</sup> Consider Uhr, John, 1998, *Deliberative Democracy in Australia: the changing place of parliament*, Cambridge University Press.

representatives. This is the negative end of democratic relevance, with parliament limiting the reach of the state and protecting rights of free association by civic groups.

Mid-range scores go to parliaments maximizing their own institutional capacities to promote greater public participation in the legislative and policy process and acting to mediate between the state and civil society by facilitating extensive parliamentary engagement with citizens' groups.

Highest scores go to those rare and special parliaments acting to shape and structure the 'public sphere' itself. Democracy is better to the extent that the public sphere is a domain of non-dominating relationships, with opportunities for those without institutional or economic power to participate in public debate and even to shape the agenda of public debate.

How does the Australian Parliament measure up against this standard?

At the high end of performance are Senate select committees. These are committees established as one-off inquiries into controversial matters, typically sponsored by non-government parties or Independents to bring sustained publicity to problems facing government. The House of Representatives can and does establish select committees, where a government is prepared to risk it<sup>25</sup> but Senate select committees almost always arise from decisions by non-government senators. Examples include the current select committee on mental health, and former committees on 'the Scafton evidence', on the free trade agreement with the United States, and on 'a certain maritime incident'. Their relevance to this category of public deliberation is that they illustrate ways that parliaments can overcome government reluctance to speak publicly about alleged policy and administrative failures. Further, select committees frequently act as bridges between the government and interested community groups affected by alleged government failures: such as migration, taxation, medicare to name a few recent Senate examples. Of

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<sup>25</sup> For example, the 2003 Select Committee on the Recent Australian Bushfires which reported on 5 November 2003: *A Nation Charred: Inquiry into the Recent Australian Bushfires*.

all the types of parliamentary committees, select committees most often turn outwards to face the community and engage a wider range of public witnesses. They have no more power than other committees to guarantee government compliance with their recommendations, but they do, as it were, interrupt normal proceedings with fresh public input—providing interested groups with opportunities to correct and re-set the policy agenda, aligning it more closely with views neglected by governing interests.

A good illustration of the mid-ranking performance in this category is the role of Parliament's own bureaucracy as a so-called 'department of the opposition'. The ability of ministers to exercise policy and administrative leadership is greatly dependent on the availability of their public service departments. The rest of the elected representatives have few alternatives to the availability of Parliament's own advisory and research staff: public servants employed by Parliament, working in three public agencies, each funded by the government rather than independently by Parliament: the Department of the House of Representatives, the Department of the Senate, the Department of Parliamentary Services which includes the Parliamentary Library with its legislative research services. The relevance of this body of parliamentary officials is that, without their advisory and research assistance, non-government parties and Independents would have much less to contribute to parliamentary and public life. One need only mention the public debate over the proper role of Senate officials to recognise the influence exercised more generally by parliamentary staff. The striking thing is that it is the government of the day and not Parliament that determines the budget of these three public agencies, unlike the US where the Congress itself votes monies for the Congressional Research Service. In Australia the Parliamentary Departments exist at the pleasure of the serving government, conscious no doubt, that with a change in electoral fortunes, they too will face their time in relative exile and will be equally dependent on these services. In this context, it is notable that the most recent example of a private member's bill becoming law was one sponsored this year by the President of the Senate (Senator Calvert, Liberal Tasmania): the Parliamentary Service Amendment Act. This legislation re-establishes a statutory position of Parliamentary Librarian and is intended to protect the Parliamentary Library as a distinct and independent information and research bureau: thereby strengthening



recommendations of the government's Podger Report of 2002.<sup>26</sup> The question of resources remains a vexed one; information and research staff will be lost because additional money has not been provided for the level of security now required.

The low end of Parliament's contribution to public deliberation is illustrated by Question Time. The situation is slightly better in the Senate than in the House of Representatives. Yet this might simply reflect the absence of the two leading combatants: the prime minister and the leader of the opposition. A number of rule changes also distinguish the Senate version, such as time limitations on questions and answers, more readily available use of supplementary questions, provision for a post-Question Time stock-take by senators where attention can be drawn to incomplete or evasive answers. But it is the House of Representatives version that deservedly attracts most public attention: this is where the party leaders of the two main parties display their adversarial antics at their very best—or worst. A striking element of the Australian model of oral questions is how much it is shaped around the interests of serving governments. Former Labor prime minister Paul Keating expressed the prevailing ethos when he declared that question time is 'a courtesy extended to the House by the Executive branch of Government'.<sup>27</sup> Governments trespass more than a little on this courtesy by insisting that half of the questions (averaging 18 per Question Time over recent years) must come from the government's own backbench. Questions begin with the opposition and then alternate between opposition and government. The effect is obvious: ministers arrange tame questions in order to deliver rehearsed answers that begin as government policy statements before emerging as partisan attacks on the public credibility of the opposition. Governments use Question Time to mobilise their own supporters into a state of perpetual campaign readiness. The best that an opposition can do is to match it with the government: a strategy as ineffectual as it is unedifying. Who gains from this process? Probably the one who appears and speaks most often: the prime minister of the day. Over the second half of the 1990s decade, prime minister Howard answered just under 40 per

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<sup>26</sup> Grace, Jane and Coombs, Moira, 2005, *Parliamentary Service Amendment Bill 2005*, Bills Digest No. 118, Parliamentary Library, 15 March.

<sup>27</sup> Quoted in Uhr, *Deliberative Democracy in Australia*, p. 198.

cent of all questions asked (compared with the United Kingdom prime minister at Westminster answering around 15 per cent).

*Conclusion*

This discussion paper coincides with the Howard government's recovery of control of the Senate. The prospect of government domination of both houses of Parliament has triggered widespread debate over the 'death of parliament' and the birth of unrestrained executive government under the new regime. There is an upside, even for democrats. At page 4, I noted that the imminent 'double majority' would put the onus of responsibility on the government backbench to play the part of conscientious parliamentarians in the absence of 'the opposition' of non-government Senate majorities that we have witnessed in the period 1981-2005. By way of conclusion, I want to suggest (rather than argue) that these conditions of total parliamentary control by a governing majority can also be the conditions for a renewal of parliamentary democracy. My evidence comes from Australian political history, which, I concede, is suggestive rather than persuasive.

The larger point is that parliaments can and do change; they can and do improve their institutional performance. Change happens, proving that structures are far from permanent barriers to our initiative and power of agency. Australian governments have acted on 'dual mandates' before, however, even then they have not been able to arrange everything their own way. My argument is that there is a paradox about parliamentary change. Many constructive changes within parliament are not really initiatives: they are actually reactions against changed relationships initiated by executive governments that, if left unchecked, would weaken a parliament's independence to act as a valuable public institution. They show that even under strong party control, parliaments can change in ways that strengthen their democratic relevance.

I have three examples. The first is perhaps the most impressive, because it shows how change can occur to the very basis of a system of parliamentary representation even when

a government has dominating control over the existing system.<sup>28</sup> The Australian Labor government under Chifley in 1948 had control over both houses of parliament, much as the Howard government is about to assume. But the fascinating difference is that Chifley's governing party initiated changes to the electoral system that had the effect of weakening the possibility of any subsequent government controlling the Senate. They did this by bringing in proportional representation for the Senate, designed to make it harder (but not impossible) for governments to get Senate majorities. Sure enough, as is well known, Chifley's party knew that they were on the way out and this Senate change was intended in the short run to save their Senate majority in the event of a Menzies win at the 1949 election. Both events came about. But the larger point is that constructive change can and does occur, even if many of the consequences do not surface for many years.

Let me now give two other examples of changes to quite fundamental institutional relationships that have strengthened the Australian parliament. Two relevant parliamentary committees are the committee on Regulations and Ordinances, and the Scrutiny of Bills committee. They are both Senate committees and they were both established during periods of government control of the Senate: the committee on delegated legislation as far back as 1932 and the bills committee in 1981-82. These two committees initially arose in circumstances with a strong governing party in control of both houses of parliament, just like the period we are about to enter. Establishment of the Scrutiny of Bills committee was promoted by Liberal backbencher Alan Missen, who waited until the loss of the government's Senate majority in 1981 before successfully urging a number of his Liberal colleagues (including Senator Robert Hill) to cross the floor in support of his motion for the new committee.<sup>29</sup> Government backbenchers initiated this significant development in the Senate committee system, with no public support from their party leadership.

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<sup>28</sup> Uhr, John, 1999, 'Why we chose proportional representation', in M Sawer and S Miskin eds, *Representation and Institutional Change*, The Senate, pp. 14-20.

<sup>29</sup> Herman, Anton, 1993, *Alan Missen: Liberal Pilgrim*, Poplar Press, pp. 145-6. See also Missen, Alan, 1982, 'Senate committees and the legislative process' in J R Nethercote ed., *Parliament and Bureaucracy*. Sydney, Hale and Iremonger, pp. 130-2.

Both committees have become valuable case studies in how to strengthen parliamentary capacities in the core area of independent legislative scrutiny. Both committees arose from concerns about how to strengthen parliament's relevance as a protector of individual rights and liberties in the face of intensified law-making by governments. Sure enough, *consolidation* of these changes towards a strengthened parliament would, and did, require financial and staffing resources; but *initiation* of these changes required, as the essential prerequisite, uncommon political will among a committed group of elected representatives. My simple point is that change happens: including 'backroom' changes in power relationships that can strengthen parliament's relevance as a public institution, usually in reaction to changes in the 'front office' initiated by the serving government.

Finally, a word of warning about 'democratic auditing'? Democratic auditing is very much an art rather than a science. This quality is even more pronounced when we try auditing the performance of parliaments. As prominent public institutions, parliaments have their formal *powers* but they also display many informal but characteristic *practices*. Some but not all of these practices derive from the formal powers. Between the black-letter powers and the operational practices we find many political conventions shaping institutional performance. Those interested in auditing, assessing or evaluating a parliament's performance have to be clear about what it is they are reviewing: formal if little used powers; informal but pervasive political conventions; or some amalgam of institutional practices reflecting a blend of prescription and convention. Assessing institutional performance is hazardous, mainly because of the unacknowledged power of changing political conventions over how elected representatives interpret the place of 'democracy' in their institutional roles.

Most parliaments, in fact, display a clash of conventions, including a clash of conventional understandings of what a democratic parliament can and should do. I conclude by noting the latest reports of government initiatives planned for the period after 1 July: 'Howard curbs Senate probes' to quote the front page of a recent issue of *The Melbourne Age*. The report gives details of government moves to limit the powers of

Senate estimates hearings.<sup>30</sup> Estimates committee hearings are a good example of Senate accountability mechanisms that arose initially in 1970 when coalition governments had first begun to lose their traditional Senate majority. Now that a Senate majority has returned, government sources are flagging changes that would turn back the clock. Current Senate leader, Defence Minister Robert Hill, is reported as saying that he does not anticipate ‘the change to be particularly radical’.<sup>31</sup> Whatever the result after 1 July, current discussion of these proposed changes illustrates the clash of conventions I refer to and the extent to which parliamentary performance turns on the changing institutional culture of the major political parties, especially those in government.

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<sup>30</sup> Koutsoukis, Jason , 2005, *The Melbourne Age*, 4 June.

<sup>31</sup> Hudson, Phillip, 2005, ‘Restrain Senate revamp, Hill says’, *The Sunday Age*, 12 June 2005.