
Strengthening Australia's Senate: Some Modest Proposals for Change

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Introduction

I believe in Australia's Senate. To be more precise, I believe that a vigorous and assertive Senate is necessary for the continuing health of Australian democracy. However, I also believe that the Senate today is not as vigorous or assertive as it can and should be. My purpose here is to explain these two statements and then to offer some proposals for enabling the Senate to live up to its responsibilities and its potential.

Before going any further, I should admit that I'm not an Australian. I'm an American who has spent almost of his professional life working for the US Congress in Washington, DC. So you may wonder if I'm going to be guilty of taking criteria that are suitable to the American Senate and applying them to the Australian Senate, which is a very different institution. The US has a President and two houses of Congress, each of which is elected independently of the others, and none of which is responsible to either of the others. By contrast, it's common knowledge that Australia has a parliamentary system ... except that's not entirely true.

It is true that Australia has a prime minister and a cabinet, all of whom are members of the House of Representatives or the Senate. And it's also true that the prime minister and the cabinet—the government—are responsible to the House of Representatives in the sense that the House could, by a majority vote of its members, force the government to resign (even though that hasn't happened in decades and is almost inconceivable in Australia today). In these respects, the Australian constitution certainly does draw on the Nineteenth Century British model of parliamentary government.

On the other hand, the Australian Constitution also drew from the American constitution when it established a Senate that, like the House of Representatives, is directly elected by the people and that has almost the same legislative powers as the House of Representatives. During the century since Federation, some observers have argued that creating a second chamber of this kind was a mistake. Others have been certain that the authors of Australia's constitution certainly couldn't have intended for the Senate actually to use all the powers they gave it. In this view, the only good Senate, in Australia at least, is one that doesn't interfere in the business of government, no matter what formal powers the Senate was given more than a century ago.

In this view also, a vigorous and assertive Senate is incompatible with responsible parliamentary government, in which power flows from the people to the elected members of the House of Representatives, and then from the House of Representatives to the

government that it creates and that it can destroy if and when the House decides that the government is not exercising its power in a way that's satisfactory to the Australian people. At election time, political power flows back from the government to the people when, by voting on candidates for election to the House, they pass judgment on the government's record and its promises for the future, and decide whether to keep it or replace it. Any other institution, like the Senate, that can interfere in this relationship among the people, the House of Representatives, and the government is at best superfluous and at worst a danger to the simplicity and purity of responsible parliamentary government.

I disagree. I believe that this appealing picture doesn't fairly describe the reality of government and politics in Australia today. In fact, within fairly broad constitutional limits, the government in Canberra can do more or less what it likes between one election and the next, but only if the Senate allows it.

The reason lies in the internal strength of the Labor Party and the Liberal-National Party coalition. In the House of Representatives, the members of each party always vote together, except on those rare votes of conscience—on issues such as abortion and embryonic stem cell research—on which party leaders don't try to impose a party position. On all other votes, ALP Representatives march to vote in lockstep, as do Representatives of the Liberal and National parties, and the situation is not much different in the Senate. The government decides on its legislative program. It then may have to negotiate some of the details of its bills in private discussions with Representatives and senators of its own party, but only its party. Members of the other parties aren't invited to participate in these discussions, nor are they informed about what's being decided until the government has reached agreement with its MPs and senators. Then the government can shepherd its bills through the House of Representatives as quickly as it wants and with only the changes (if any) that the government wants to make. The Opposition in the House can criticize and complain, but it cannot hope to change the outcome.

The government will remain in office until the next election unless the members of its own party in Parliament decide to change their leaders, including the prime minister. If there is such an internal party revolt, a decision is made behind closed doors, after which the Opposition and the Australian people may be told that they have a new prime minister. This is not a decision made by Parliament; it is one made by the majority group of members within Parliament. Formally, the government is responsible to the House of Representatives; in practice, it is responsible only to the members of its own party in Parliament.

It might not matter so much that the government really isn't *responsible* to Parliament, but only to the MPs of its own party, if the government actually was *accountable* to the people through Parliament for its actions and inactions. If there's one thing we've learned during the past twenty years or so, as we've seen many countries hope to become—or claim to have become—democracies, it's that what often are called 'free and fair' elections aren't enough. Democracies require more than periodic elections to retain or replace the people in power; such elections are necessary but they're not sufficient for democracy. Democracy also requires that there be effective ways for the government to be held accountable *between* elections for what it does and doesn't do. That's why it's so important, for example, that a democratic government should be 'transparent'—that we

should be able to learn not only what our government decides, but also how it makes its decisions, so we can understand who may have influenced those decisions, and why.

In a parliamentary democracy, the government is supposed to be both responsible and accountable to Parliament. To take a phrase from detective stories, Parliament should have the means, the motive, and the opportunity to know what the government—the government that it created—is doing with the power that Parliament gave it. Only if Parliament can make the government account to it can Parliament decide if it should continue to have confidence in its government or if it should replace it. And only if the people know what Parliament learns can they decide if the members they've elected to Parliament are acting wisely or unwisely in keeping the power of government in the same hands or entrusting it to others instead.

This is an attractive theory, but one that's hard to reconcile with strong political parties. Australian MPs know that their re-election to the House of Representatives, their influence as members of the governing party, and any hopes they may have for ministerial appointments, all depend on the success of their party, and especially its public reputation and prospects for victory at the next election. Knowing this, MPs of the governing party generally have little or no political incentive to do anything as members of the House of Representatives that would make their party look bad. Whatever the theory of responsible government may be, government MPs have little to gain politically from questioning or criticizing their government's decisions, supporting searching inquiries into their government's actions or inactions, or, generally, holding their government accountable before the Australian people. Instead, they have far stronger reasons to defend their government and to protect it against criticism, as long as they can do so without doing irreversible damage to their own credibility.¹

In short, Australia's government is not responsible or accountable to the House of Representatives in any effective way. The House will not force the government to resign, except if there is an internal party revolt that replaces the prime minister without affecting party control of the government and without any meaningful participation by MPs of the other parties. Responsibility has been moved from the chamber of the House of Representatives to the party room of the majority party. Furthermore, holding government accountable through searching public inquiries into what the government has done and what it plans to do has little appeal to the majority of MPs who want to protect their own political futures and the electoral prospects of their party.

This is why I began by saying that a vigorous and assertive Senate is necessary for the continuing health of Australian democracy. A political system is not healthy when the government is responsible only to its own supporters who have little reason to hold it accountable for what it does. And this is why, whatever the original intentions and expectations of the Constitution's authors may have been, it is so fortunate that they established a Senate with the power to hold the government accountable, though not responsible, to it.

¹ As a reader of an earlier version of this essay reminded me, not all politicians are motivated all the time by concerns for partisan advantage and personal advancement. There also can be intra-party differences that cannot always be contained within the party rooms.

We need to recall two important dates. One was 1948, when Parliament decided that future Senate elections should be decided using a system of proportional representation. At Senate elections now, therefore, senators are elected from each state on a statewide basis, with most voters choosing a party's list of candidates (by voting 'above the line') and with each party winning the number of seats that corresponds most closely to the percentage of votes it received. This system makes it much more likely that minor party and independent candidates will be elected to the Senate than to the House of Representatives in which one candidate is elected from each constituency.

The result has been that, for much of the last half-century, the party with a majority of seats in the House of Representatives—and, therefore, the party forming the government—has not also had a majority of seats in the Senate. Instead, there usually has been a non-government majority in the Senate: not an Opposition majority, but a majority that can be formed by the Opposition joining in temporary coalitions with minor party senators, independent senators, or both. Because of the 2004 election results, there was a surprising break in this pattern between July 2005 and June 2008. However, I think most observers who are foolish enough to make predictions about such things expect that the pattern of non-government majorities in the Senate is likely to persist unless there are significant changes either in the parliamentary election laws or in the balance of popular support between Labor and the Coalition.

The other date to recall is 1975, when a non-government majority refused to vote supply in an attempt to force the government to resign, even though it still had majority support in the House of Representatives. The Coalition, led by Malcolm Fraser, effectively succeeded with the help of the Governor-General who dismissed the Labor government of Prime Minister Whitlam. At the time, some argued that the Senate was trying to make governments responsible to both the House of Representatives and the Senate, when the two chambers were controlled by different majorities and even though this would violate the essential basis of responsible parliamentary government. The events of 1975 continue to evoke strong opinions today, but I suspect there now is widespread agreement on this point: that however the Senate uses its constitutional powers, it should not use them to make or un-make the government of the day, even if it might be able to do so by using tactics similar to those used in 1975.

At this point, though, we have to return to the distinction between responsibility and accountability. Even though the Senate should not try to make the government responsible to it, it certainly should make the government accountable to it. If the House of Representatives, and not just its majority party members meeting in private, can't be expected to do more than criticize and complain about the government's legislative plans and priorities, the Senate can and should be prepared to do so. If the House of Representatives doesn't regularly and carefully monitor and, when necessary, investigate how the government implements the laws already on the books, the Senate can and should do so. If the Senate doesn't engage in careful scrutiny of government legislation and administration, there is no one else with the official authority to do so, and the government will be beyond effective control between one election and the next.²

Because the Senate exists, Australia cannot rightly be called a parliamentary system of government, as it was known in London through much of the Nineteenth and Twentieth

² Except for whatever scrutiny the media choose to provide.

centuries. On the other hand, because the Senate exists, Australia can have an effectively accountable government, but only if the Senate is up to the job.

I don't mean that the Australian Senate should become an antipodean version of the US Senate; my purpose really is not to lead Australia down a path toward abandoning its Westminster heritage in favor of imitating Washington instead.³ What I do mean is that the Australian Senate should not be satisfied with congratulating itself that it is so much more vital than the upper chambers in the political systems with which Australia has in decades past been most likely to compare itself: the UK's House of Lords (which has proven easier to tear down than to rebuild), Canada's appointive Senate (which may continue to survive only because of a lack of agreement on an alternative to it), and New Zealand's Legislative Council (which was abolished in 1951).

Australia's Senate should have greater ambitions; it should be more vigorous and assertive, and more willing to exercise the powers the Constitution gives it, than it usually has been. Ultimately, what will matter most is the Senate's determination, its appreciation of its responsibilities, and its self-confidence in its own constitutional legitimacy and public support. Nonetheless, there are various organizational and procedural reforms that deserve serious consideration. For example, the Clerk of the Senate, Harry Evans, has devised his own lucid and comprehensive reform agenda for Parliament as a whole.⁴ Here, however, I shall discuss only a handful of reforms under the headings of:

1. Question time
2. Committee review of legislation
3. Senate committees and House ministers, and
4. Frequency of Senate sittings

I've described these reforms as 'modest' because I've deliberately chosen to focus on only a few of them, and then only on reforms that don't require new legislation or, what would be worse, constitutional amendments. Almost any reform that strengthens the Senate is likely to be perceived as threatening by the government and, therefore, it's likely to be opposed by the House of Representatives that is controlled by the government's majority. So it would be an uphill battle to try strengthening the Senate in ways that require new laws or changes in existing laws. By the same token, Australians have been noticeably reluctant to approve constitutional amendments, so amending the Constitution in ways that strengthen the Senate is likely to be an exercise in futility or one that requires great patience.

Instead, the reforms that I'll propose here are ones that the Senate can adopt by itself or ones that the Senate can compel the government and the House of Representatives to accept if the Senate has the determination to do so. Standing alone, the effect of each reform will be relatively modest, but I make no secret of my hope that their collective effect will be to begin subverting the governmental status quo in Canberra.

Question Time

³ I readily acknowledge, however, that my thinking about reforming the Senate certainly reflects my familiarity with the US Congress.

⁴ Harry Evans, 'Parliament,' in Robert Manne (ed.). *Dear Mr. Rudd: Ideas for a Better Australia*. Melbourne, Black Inc. Agenda, 2008, pp. 59–71.

If the Senate as a whole is to become more effective in holding governments accountable for how they implement the laws, it should change how it conducts its daily Question Time.⁵ Although there are other opportunities for non-government senators to make speeches and shorter statements in the chamber that challenge government policies and actions, only Question Time allows them to pose sharp, pointed questions to government ministers in the Senate. In its present form, however, the Senate's daily Question Time leaves much to be desired as an accountability device.

Question Time begins at about 2:00 p.m. and runs for about an hour on every day that the Senate sits. The President of the Senate calls on an Opposition senator to ask the first question and then calls on the appropriate Senate minister to respond. After this exchange: '[t]he chair calls senators alternately from the government and non-government sides of the chamber to ask questions, and ensures that the allocation among senators is as wide as possible.'⁶ Unlike the House of Representatives, the Senate limits the length of questions and answers. A senator is not supposed to take more than one minute to ask a question and the minister should not use more than four minutes to answer it. If this exchange is followed by a supplementary question and answer, neither should exceed one minute. So if senators use all the time allotted to them and there are no supplementary questions, there is time to ask and answer roughly twelve questions each day. In practice, an average of about 22 questions actually have been asked daily in recent years.

One problem, however, is that half (or almost half) of these questions are asked by senators who support the government, and their questions usually contribute nothing to government accountability. These senators have very little reason to criticize or challenge, much less embarrass, their own government, so most of their questions are designed and planned in advance to give Senate ministers opportunities to explain what a fine job their government has been doing or what a catastrophe it would be if the Opposition were to come to power. Questions coming from government senators are known disparagingly as 'Dorothy Dixers' in honor of a newspaper advice columnist who was reputed to write the questions she then answered in her column.

The result is that half of Question Time each day is effectively wasted. There are more than enough other times during each sitting for Senate ministers to congratulate themselves and their colleagues and to make statements about their government's intentions. There is no good reason to use half of Question Time for this purpose, except to keep to a minimum the number of real questions that otherwise would be asked.⁷

A second problem is that Senate ministers are not required to answer the questions they're asked. 'While standing orders give senators the right to ask questions of ministers and

⁵ Formally, 'questions without notice' to distinguish them from 'questions on notice' to which replies are supposed to be received in writing.

⁶ Department of the Senate, *Senate Brief No. 12: Questions*, p. 1. Available at www.aph.gov.au/Senate/pubs/briefs/brief12.htm.

⁷ Occasionally, to be sure, government senators ask questions that really are intended to obtain information or call a minister's attention to a problem in their state. However, they have ample other opportunities to communicate with ministers of their own party, and such questions aren't asked often enough to justify allotting half of all questions to government senators.

certain other senators there is no corresponding obligation on those questioned to give an answer.’

President Baker ruled on 26 August 1902 that there was ‘no obligation on a minister or other member to answer a question’, and in 1905 he ruled: ‘It is a matter of policy whether the Government will answer a question or not. There are no standing orders which can force a minister or other senator to answer a question.’ Other presidents have stated that answers are ‘optional’ or ‘discretionary’ and that, ‘There is no obligation on a minister to answer; he does so merely as a matter of courtesy.’⁸

Senate ministers are sure to respond to every question they are asked, but whether they actually answer them is another matter altogether.

Although this may seem strange at first blush, there actually is a good reason for not requiring Senate ministers to answer the questions put to them: someone would have to decide whether a minister’s response actually answered the question, and this is a matter of judgment, not something that can be calculated or measured. The minister almost certainly would say that he or she did answer it; the non-government Senator who asked the question almost certainly would say that the minister did not. So who would have the final word? It would be impractical to expect the Senate to vote on whether to accept each answer as adequate or to reject it, and it would be unrealistic to expect the Senate’s President to decide. With each decision the President made, he or she would alienate one side of the house or the other, and no President could retain the support of the Senate for long under those circumstances.

This situation in which senators can ask questions and ministers don’t have to answer them is not unique to the Australian Senate. The same policy applies on the other side of Parliament House, in the House of Representatives,⁹ and it also applies in the Canadian House of Commons.¹⁰ Even in the British House of Commons, where all MPs accept that the Speaker presides in a fair and impartial manner, he or she has no power to rule on whether the answer to a question is relevant or adequate:

Although there are many rules regarding the content of Questions, there are no rules—other than those relating to debate and parliamentary language—that govern ministerial answers. In particular, a Minister cannot be compelled to answer a Question and, although a complete refusal to answer is rare ... a Member who is not satisfied with the

⁸ Harry Evans (ed.). *Odgers’ Australian Senate Practice* (12th ed.). Canberra, Department of the Senate, 2008, p. 491. Available at www.aph.gov.au/senate/pubs/odgers/index.htm.

⁹ ‘It is the established practice of the House, as it is in the House of Commons, that Ministers cannot be required to answer questions.’ I.C. Harris (ed.). *House of Representatives Practice* (5th ed.). Canberra, Department of the House of Representatives, 2005, p. 550. Available at www.aph.gov.au/house/pubs/PRACTICE/index.htm.

¹⁰ ‘[I]n response to a question Ministers may answer, defer an answer, take the question as notice, explain briefly why they cannot make an answer at that time, or say nothing.’ Canada, House of Commons. *Précis of Procedure* (2nd ed.). Ottawa, Table Research Branch, 1987, p. 26. ‘The speaker’s role in question period is to ensure that the rules of order and procedure are respected. He is not responsible for ensuring that topics are adequately covered, or that ministers give useful answers ...’ C.E.S. Franks. *The Parliament of Canada*. Toronto, University of Toronto Press, 1987, p. 146.

answer he has received has no redress except to try to ask more Questions on another occasion or to raise the matter in some other way. The Speaker has no powers to intervene¹¹

In Canberra, however, there is an additional reason why Senate ministers may not answer parliamentary questions: they may not know the answers. In mid-2008, of the 30 Labor ministers, seven were senators; the same was true in mid-2007, during the last year of John Howard's Coalition government. These seven Senate ministers are supposed to answer questions every day not only about the work of their own departments but also about the work of all the other government departments, because the 23 ministers who are Representatives do not appear in the Senate to answer questions concerning the work of their departments.

In mid-2008, for example, Senator Faulkner, with the titles of Special Minister of State and Cabinet Secretary (as well as Vice-President of the Executive Council), also represented during Question Time the Minister for Trade, the Minister for Foreign Affairs, the Minister for Defence, the Minister for Veterans' Affairs, and the Minister for Defence Science and Personnel, all of whom were members of the House of Representatives and so could not respond personally to questions relating to their exercise of executive powers. In other words, in addition to Senator Faulkner's other responsibilities, he was expected to respond every day the Senate sat to questions concerning virtually any aspect of Australia's international and national security policies and activities. Similarly, Senator Wong, the Minister for Climate Change and Water, also was the one person charged with responding to questions on behalf of the Representatives serving as the Minister for Employment and Workplace Relations, the Minister for Social Inclusion, the Minister for the Environment, Heritage and the Arts, the Minister for the Status of Women, the Minister for Employment Participation, and the Minister for Youth. Under these circumstances, is it any wonder that Senate ministers sometimes can't answer questions very well, or not at all, even if they might want to?

Senate ministers don't have to answer the questions asked of them and they may not know the answers; these are at least two of the reasons why Professor John Uhr concluded a decade ago that Question Time 'is not well designed to perform as an accountability forum.'¹² The situation in the Senate chamber feeds on itself, to the detriment of government accountability. Senate ministers often respond to questions not by answering them, but by making complimentary little speeches about their government or by attacking the party of the senator who asked the question. Anticipating that their questions won't be answered, non-government senators often transform their questions into attacks on the government's competence, motives, or integrity. Any serious interest in using Question Time to probe into the efficacy of government policies and the efficiency of government administration too often gets lost in the melee. Although Question Time in the Senate usually is more restrained than it is in the House of Representatives, it hardly conveys an image of Parliament in which Australians can take pride—unless, that is, they have trouble distinguishing between democratic governance and Aussie Rules football.

¹¹ J.A.G. Griffith and Michael Ryle. *Parliament: Functions, Practice and Procedures*. London, Sweet & Maxwell, 1989, p. 254.

¹² Uhr was speaking of the House of Representatives but his conclusion applies with almost equal force to the Senate. John Uhr, *Deliberative Democracy in Australia*. Cambridge, Cambridge University Press, 1998, p. 199.

The defenders of Question Time will explain that it is an arena of the never-ending electoral campaign and a forum in which the mettle of ministers and their prospective replacements are tested. Skill at dueling with words is an essential talent for a parliamentary politician who hopes to rise to a senior ministerial position when his or her party is in government. And nowhere is that skill put to the test better than during the daily gladiatorial contests that constitute Question Time in both houses of Parliament. That may well be so, but it is a high price to pay—too high a price in my opinion—for sacrificing Question Time as one important way that the Senate can hold the government accountable to the Australian people.

To improve the current situation, the Senate should make two basic reforms in its procedures for Question Time.¹³ One of them is sure to infuriate the government; the other is equally certain to infuriate the non-government side of the Senate.

First, the entire daily period for Question Time should be devoted to questions (and what passes for answers) from non-government senators. Dorothy Dix, who passed away many years ago, finally should be allowed to rest in peace. The gentle questions, which aren't really questions at all, from government senators rarely serve any purpose other than to waste time and protect Senate ministers from answering (or not answering) twice as many questions from non-government senators than they now have time to ask.¹⁴

¹³ In the British House of Commons, a lottery determines which of the many oral questions that are submitted actually may be asked. Therefore, there is no assurance that questions will be allocated equally between the government and Opposition or among all the parties represented in the House. UK House of Commons Information Office, *Parliamentary Questions* (Fact Sheet P1), March 2007, p. 8. In Canada, the Speaker recognizes the Leader of the Opposition or another member of that party to ask the first question, which may be followed by two supplementaries. Then:

[e]ach of the lead questioners of the other officially-recognized parties is permitted an initial question and one supplementary question. *Throughout the rest of Question Period, other Members representing parties in opposition to the Government continue the questioning.* Members representing the governing party, Members of political parties not officially recognized in the House and independent Members are also recognized to ask questions, *though not as often as Members of officially-recognized opposition parties.* (Emphasis added.) www.parl.gc.ca/compendium/web-content/c_g_questions-e.htm.

See also Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice*. (2000 edition), Chapter 11, 'Questions', p. 7 of online text available at www.parl.gc.ca/MarleauMontpetit.

¹⁴ One knowledgeable reader of an earlier draft of this essay disagreed, writing to me that:

Confining question time to non-government senators would simply reinforce the unfortunate perception that accountability is something imposed by opposition on governments. We should not give up the hope that government backbenchers will pursue accountability issues with appropriate questions. A better solution would be simply to enforce the existing rules about question time, which would confine questions to questions and answers to answers.

My friend's optimism is laudable, but I find little basis for it in the Senate's history and practices. Of course, the new system I'm proposing always can be revised if there is clear and compelling evidence that government backbenchers are, in fact, thirsting to ask 'appropriate questions'. I also am sceptical about a reliance on enforcing the existing rules about question time, and for two reasons. First, as I've noted, while Senate ministers may be required to *respond* to questions, they are not required to *answer* them. Second, I doubt that any President of the Senate could be expected to make defensible rulings as to whether a question is a question or an answer is an answer without an opportunity to study them in advance.

The President should turn to the Leader of the Opposition in the Senate to ask the first question. Then the President should call on a minor party senator or an independent senator to ask the second question.¹⁵ Thereafter, the Leader of the Opposition in the Senate should be allowed to call on his or her fellow members (unless the Leader chooses to give time for a question to another minor party or independent senator). Also, there would be no need for supplemental questions as such because the Opposition would decide for itself whether it wished to follow up one question with another on the same subject. Naturally, the Senate's President should remain responsible for maintaining order, enforcing the time limits on questions and responses, and ensuring that all questions meet the requirements that the Senate has established.¹⁶

Senate ministers undoubtedly would strongly resist these changes that would subject them to twice as many challenging, even hostile, questions as they now face. Fortunately, though, there is a second reform in Question Time that should be adopted and that would greatly ease the burden on Senate ministers.

It simply is unrealistic to expect seven Senate ministers to be well prepared—every day—to give useful and substantive answers to questions about the policies and actions of their own departments and all the other departments whose ministers are members of the House of Representatives. It is hard to imagine how Senate ministers possibly can prepare themselves adequately every day unless they simply ignore their other responsibilities as senators, ministers, members of their party, and representatives of their state constituencies.

To ease the burden on them, and to make it at least possible for them to be prepared to respond to questions with meaningful and reasonably well-informed answers, most Senate ministers should be relieved of the burden of answering questions every day. As the stand-in for the prime minister, the Leader of the Government in the Senate should be present and ready to answer questions each day the Senate sits. For the other Senate ministers, however, a rotation system should be established, by negotiation between the government and Opposition parties in the Senate, which requires each of the other Senate ministers to answer questions on only one day each week. This rotation scheme would continue from week to week, so that each Senate minister would know on what day he or she would answer questions and would have a week to prepare. Because unexpected developments may require immediate answers to questions, the weekly rotation should be subject to adjustment by the Leader of the Opposition in the Senate on twenty-four hours notice, but only to permit questions on one or more specific subjects, or without formal notice by agreement between the two major parties in the Senate.¹⁷

¹⁵ Which of these senators is to ask questions on which days is something that the minor party and independent senators should negotiate with the Leader of the Opposition in the Senate or the Opposition Whip. The President should ensure that none of these senators is called upon a second time until each minor party and independent senator has been called upon the first time. If the number of minor party and independent senators increases substantially beyond their current numbers, this procedure might have to be adjusted in the interests of fairness to them.

¹⁶ See *Australian Senate Practice*, 12th ed., op. cit., pp. 497–501.

¹⁷ In London, the Speaker may decide to allow an MP to ask an 'Urgent Question' to a Minister, the rota notwithstanding. The Senate could opt for this approach instead of the alternative that I propose. It needs to be remembered, however, that the British Speaker, once elected to that office, removes himself or herself from partisan politics, whereas the President of the Senate remains an active and respected member of a parliamentary party. Giving the President the authority—and responsibility—to decide

This kind of arrangement is not unprecedented. In fact, it would demand more of Senate ministers than the system used in the British House of Commons:

Ministers take it in turns to answer Questions, the rota of Ministers being decided by the Government, after consultation with the Opposition parties. In practice each of the major departments comes top of the Question rota, which is the essentially relevant position, on one day every three or four weeks, and always on the same day of each week. Some Ministers answering for smaller departments, for instance, the Minister for the Arts or the Attorney General, have a short fixed time after other Ministers on Mondays.¹⁸

What's more, the Australian House of Representatives employed a rotation system during 1994–1996:

[I]n 1994 the Keating government introduced a roster system loosely modeled on British practice which limited the prime minister's appearance to two days each sitting week. Many junior ministers were rostered to appear much less frequently. The Howard government restored the forms of earlier Question Time practice, so that all House ministers were liable to be questioned each sitting day.¹⁹

A key difference between Keating's innovation and the plan I propose is that the Leader of the Government in the Senate would be present every day to answer questions that, in the House of Representatives, would be put to the prime minister.

Eliminating questions from government senators should be anathema to the government, just as radically reducing opportunities to question most Senate ministers from four days to only once each week should be anathema to the Opposition—which suggests to me that, taken together, the two reforms may strike a fair balance. But would implementing these reforms transform the Senate's Question Time, immediately and fundamentally?

Perhaps not. Senators evidently have become accustomed to Question Time as it currently works, and to think of it not as a forum for government accountability, but as an arena in which to promote themselves and their party with their career prospects and the next election in mind. In fact, some senators probably relish the verbal combat that now takes place during a Question Time that is a forum for 'questions without answers', as John Uhr has put it, 'as each side pursues opportunities to raise questions about the capacity of their opponents to govern the country, and to try to win the battle for a greater share of public

whether a proposed question is urgent, which inescapably involves the exercise of discretion, would inevitably leave him or her open to charges, whether justified or not, that this discretion has been exercised with partisan advantage in mind.

¹⁸ Griffith and Ryle, *op. cit.*, p. 259. On question time in the House of Commons generally, see UK House of Commons Information Office, *Parliamentary Questions*.

¹⁹ Uhr, *Deliberative Democracy in Australia*, *op. cit.*, p. 198. Perhaps Howard would not have abandoned Keating's plan if it weren't for the daily platform that 'Dorothy Dixers' give the Government in both chambers.

opinion.’²⁰ And perhaps senators are right in thinking that many Australians are more interested and entertained by the fireworks that Question Time, even in the Senate, sometimes provide than by less explosive exchanges about what the government is doing and how well it’s working. I believe, however, that government accountability is too important to be brushed aside in the interests of providing entertainment and promoting senators’ careers.

In fact, the reformed Question Time that I propose should result not only in more substantive questions but also in a more focused inquiry each day. With fewer Senate ministers (other than the Leader of the Government in the Senate) in the chamber to answer questions each day, non-government senators would be encouraged to concentrate their questions on only one or a very few subjects. A minister still would be free to avoid giving a substantive answer to a question, but there would be a much greater chance than there now is for one or more follow-up questions to prevent the minister from using evasion or counter-attack to avoid the initial question. Senate ministers really would have a chance to demonstrate their knowledge and prove their mettle in debate. Also, if the media knew that questions on the next day would concentrate on immigration policy, for example, or on health care and other services for the aging, or on the impact of the Australian-US free trade agreement, they might pay more attention to, and report more thoroughly on, the questions and answers than they often do now.

What I propose here evidently has one of the same goals in mind as the recent proposal made by Senator Alan Ferguson, until August 2008 the President of the Senate and now its Deputy President and Chair of Committees, and the chair of the Senate’s Committee on Procedure. In a September 2008 report made by that committee, it presented (without endorsement) Senator Ferguson’s proposal that there be some notice given of questions that senators wish to ask each day, and that each question that is asked may be followed by as many as six supplementary questions.²¹ The result would be to limit the number of subjects that could be raised each day during question time, but permit each subject to be explored, through supplementary questions, in greater depth than now is the Senate’s practice.

In a discussion paper attached to the Procedure Committee’s report, Senator Ferguson comments on the considerable time and effort that the public service invests every day in preparing for questions that, under the current system, aren’t asked:

A significant amount of time and resources in government departments and agencies are put into preparation for question time in areas that may not be required on that day. Public servants from many departments and agencies expend a significant amount of time preparing briefing material for their ministers on a wide range of subjects within their areas of responsibility. Because it is not known which minister will be subject to

²⁰ Ibid. p. 198; and John Uhr, *Questions Without Answers: An Analysis of Question Time in the Australian House of Representatives*. Canberra, APSA/Parliamentary Fellow Monograph No. 4., 1982.

²¹ Senate Procedure Committee on Procedure. *First Report of 2008*. September 2008, p. 1. This report is available at www.aph.gov.au/senate/committee/proc_ctte/reports/index.htm. Also included is a proposal that answers are to be directly relevant to each question, though there is no discussion of how relevance would be determined and how this requirement might be enforced effectively. Related articles appeared in the *Canberra Times* on 25–28 August 2008 and are available at www.camberrattimes.com.au.

questions on a particular day, or which specific area within their portfolio, the briefs try to cover every possible area of questioning. The briefs are often quite broad in their approach, providing the minister only enough to satisfy one or two questions. This time and effort used to provide briefing covering such a wide range of possible parliamentary questions could be spent more productively and efficiently in other areas if it was known that question time would focus in detail on a few specific subjects.²²

It's not clear to me how much Senator Ferguson's proposal would alleviate this problem. Under his plan, there would be only three hours' advance notice of each question to be asked each day, and I assume—and hope—that public servants now begin preparing for possible questions well before that time.²³ So it's quite possible that public servants would still have to invest a great deal of time in preparing a Senator to reply to questions that won't be asked. And every Senate minister would have to reserve much or all of the time between 11:00 a.m. and 2:00 p.m. on each sitting day in anticipation of learning at 11:00 a.m. that he or she would have to respond to at least one primary question and as many as six supplemental questions in just a few hours' time.

Under my scheme, the public servants in each department would know in advance on what day of each week, barring emergencies, their minister or the Senator representing their minister would be required to answer questions. They would have as much time as they need to prepare their briefing materials. In addition, Senate ministers also would be able to allocate their own time more efficiently because, again barring emergencies, they would know on what days they would have to be present to answer questions, so they could allocate ample time to digest the briefing materials that public servants had prepared for them.

As I've explained, it would be necessary under my proposal for the Senate to be able to re-arrange the weekly rotation pattern when there are pressing questions relating to some unexpected development. It is possible that the value of the rotation pattern could be undermined if senators routinely insisted on re-arranging it. Whether that actually would happen remains to be seen. In fact, it might be advisable for the Senate to implement Senator Ferguson's plan for six months on an experimental basis, and then to experiment with my plan for a similar period of time. Then the Senate would be able to make a more informed decision about the plans' respective advantages and disadvantages, and how the Senate's preferred plan might need to be refined before being adopted on a permanent basis.²⁴ What's most important is that the Senate agree on the need to make Question

²² Ibid. p. 7. The discussion paper, dated August 2008, is entitled 'An opportunity for revitalization,' and includes a comparative summary of question time in the UK, New Zealand, and Canada.

²³ In New Zealand, Standing Order 372 requires that oral questions be submitted in writing during the morning of the day on which they are to be asked. In England, the texts of oral questions must be submitted at least three days in advance. See UK House of Commons Information Office, *Parliamentary Questions*, p. 7. There is no such requirement in the Canadian House of Commons.

²⁴ In fact, since this was first written, the Senate conducted a two-week test, in late 2008, of 'a more limited change to question time' than Senator Ferguson originally had proposed. See Senate Procedure Committee, *Restructuring Question Time: Third report of 2008*, November 2008. This report is available at www.aph.gov.au/Senate/committee/proc_ctte/reports/2008/report3/index.htm. 'The main features of the scheme are that answers to questions will be limited to two minutes, two supplementary questions will be allowed to each questioner, and there will be an explicit requirement for answers to be

Time a more productive part of each day's proceedings and a more effective procedure for holding the government to account.

One final point needs to be made on this subject. We need to bear in mind the truth behind the statement that then-Treasurer Paul Keating made in the House of Representatives in 1988: that Question Time 'is a courtesy extended to the House by the Executive branch of Government.'²⁵ As it now stands, if Question Time in the Senate became too demanding or threatening to Senate ministers, they could systematically decline to reply to questions in any meaningful way (and notwithstanding any possible requirement for 'directly relevant' answers), and there is nothing that the Senate could do about it. What's more, there is no requirement that the daily Question Time continue for an hour or for any other length of time. 'It is a long-established practice for question time to be terminated by the Leader of the Government in the Senate asking that further questions be placed on notice.'²⁶

Experienced observers tell me that no government is likely to begin abbreviating Question Time to protect itself against criticism. It is just possible, however, that this might not remain true once all questions begin coming from non-government senators. So it would do no harm for the Senate to amend its standing orders to require, first, that there be a one-hour Question Time on every day that the Senate sits, unless the Senate votes otherwise or unless the Leader of the Opposition in the Senate ends it in less time, and, second, that Senate ministers must respond to each question, even if no rule can ensure that each of their responses actually is an answer to the question asked.

Before moving on, I should at least mention that, in other parliaments, ministers who are members of the lower house appear in person in their 'senate' to explain their bills and to participate in Question Time. Writing about how efforts to reform the House of Lords could benefit from the examples of other parliaments, Meg Russell wrote recently that:

It is obviously important that ministers should retain access to the upper house, particularly for the presentation of government bills and statements. It also seems desirable that ministers should continue to answer questions in the upper house. However, all of these activities take place in other second chambers, irrespective of whether the ministers concerned are members of the chamber. This is because the convention barring House of Commons ministers from the House of Lords is highly unusual. In most countries ministers may speak in either chamber, irrespective of whether they are a member of that chamber. If this convention were adopted in the UK [or Australia] it would enable members of the upper house to question and debate with senior cabinet

'directly relevant' to the questions.' Department of the Senate, *Procedural Information Bulletin* No. 226, 14 November 2008, p. 4. During this trial period, there were 'minor difficulties mainly related to the requirement for answers to be 'directly relevant' to the questions.' The Senate subsequently decided to continue the trial during 2009. Department of the Senate, *Procedural Information Bulletin* No. 227, 5 December 2008, p. 4.

²⁵ Quoted in John Uhr, *Deliberative Democracy in Australia*, op. cit., p. 198.

²⁶ Department of the Senate. *Senate Brief No. 12: Questions*, pp. 4–5. Available at www.aph.gov.au/Senate/pubs/briefs/brief12.htm.

ministers, including possibly the Prime Minister. This could in fact improve the accountability of government to the upper house, ending the practice whereby questions are frequently answered by junior House of Lords ministers who are expected to cover an extremely wide brief.²⁷

Reasonable as this may be, I fear that if I were to propose that House ministers actually should appear in the Senate chamber to answer questions about the policies and practices of their departments, I would be dismissed, along with my more modest proposals, as being revolutionary and out of touch with reality. So, on second thought, please forget that I even mentioned the idea.

Committee review of legislation

The Senate is proud of its committee system, and justifiably so. It has created an unusually elaborate and active collection of committees, especially for an upper house in a political system that looks to Britain for its antecedents.

The importance of these committees can't be over-stated. In fact, it may not be an exaggeration to say that no parliamentary body can be taken seriously unless it has a functioning committee system that's well-designed for the constitutional and political context in which the committees operate. I've found no better summary of why committees are so important than the one offered by an Israeli political scientist, Reuven Hazan, in his book on comparative parliamentary committees and committee reform:

The main advantage of committees is that more work can be accomplished. Committees can subject government bills to more detailed scrutiny than the entire legislature can, thereby raising the level of expertise and the number of bills examined. Committees can assess the implications of proposed bills, ensuring that unwanted consequences are avoided through proper amendments. They provide a more informal setting for deliberations than the plenary, shunning the demagoguery of debates in the legislature in exchange for less rhetoric and more frank, responsible discussion; they reduce the degree of partisan divisions, which are more pronounced in the plenary, allowing compromises to be worked out; they expand the opportunities for members to participate in the work of the legislature, particularly members of the opposition parties, interest groups, and concerned individual citizens. Committees provide the government with much-needed feedback, which the executive is more likely to perceive as constructive committee criticism and thus is more likely to take into account than it would have in open plenary debate. They are the educational arena for newly elected parliamentary members, and the specialization forum for prospective government appointees, and they provide democratic endorsement for

²⁷ Meg Russell, *Reforming the House of Lords: Lessons from Overseas*. Oxford, Oxford University Press, 2000, p. 274. In India, '[e]very minister has the right to speak in and take part in the proceedings of either House ...' R.C. Tripathi, 'Rajya Sabha: the Upper House of Indian Parliament,' in R.C. Tripathi, *Second Chambers: Bicameralism Today*. New Delhi, Rajya Sabha Secretariat, 2002, p. 126.

executive actions, thereby enhancing the stability of the democratic regime. Committees today are essential for the efficient dispatch of parliamentary business, their contribution is of incalculable value, and no parliament would be able to operate without them.²⁸

Some of Australia's Senate committees deal with what are essentially internal and often house-keeping (sometimes called 'domestic') matters, such as the Committee on Procedure and the Committee of Privileges. Others are select committees that are created temporarily to address a complex matter of immediate concern, such as the Select Committee on Mental Health, the Select Committee on Housing Affordability in Australia, and a committee that shall interest us later, the Select Committee on a Certain Maritime Incident, established early in 2002 to inquire into what had become known as the 'children overboard' incident. Still other committees are joint committees that bring Representatives and senators together to consider matters of importance to both houses, such as the Joint Committees on Electoral Matters, on Treaties, on Intelligence and Security, and on Public Accounts and Audit.

In addition, two Senate committees have government-wide responsibilities. The Committee on Scrutiny of Bills reviews all new proposed legislation to make sure that these bills satisfy certain standards—for example, that they do not 'trespass unduly on personal rights and liberties.' The Committee on Regulations and Ordinances is charged with applying similar standards as it reviews all proposed new 'delegated legislation'—that is, regulations, ordinances, and other binding rules that laws have authorized departments and other agencies to issue. For example, these committees will look at a new bill or a new regulation affecting the work of the Department of Education, Employment and Workplace Relations, and ask whether the bill or regulation meets the committee's standards, not whether it would be wise or effective public policy.

The committees that will concern us here, however, are the Senate committees that have responsibility for public policy on different subjects. As of 2008, there were eight of these committees, the Committees on:

- Community Affairs
- Economics
- Education, Employment and Workplace Relations
- Environment, Communications and the Arts
- Finance and Public Administration
- Foreign Affairs, Defence and Trade
- Legal and Constitutional Affairs, and
- Rural and Regional Affairs and Transport

Seven of these committees were first created in 1970, with the eighth being added in 1977, and they became known as 'legislative and general purpose standing committees', although I'll refer to them more simply as 'policy committees.' Each committee had eight members, with four coming from government ranks and with one of the government

²⁸ Reuven Hazan, *Reforming Parliamentary Committees*. Columbus, Ohio, the Ohio State University Press, 2001, p. 3.

senators serving as the chairman. Furthermore, even if the other four members joined to create a tie vote with the government in a committee, the government would win because the chairman was given a 'casting' vote. This meant that the chairman could vote for himself or herself and then, when necessary, cast a second vote to break a tie. So in a Senate that usually had non-government majorities, the government actually had majorities on each of the Senate's policy committees.

In part because of this situation, the Senate decided in 1994 to divide each of its eight policy committees into two: a legislation committee, to which bills usually were referred, and a references committee that usually was charged with inquiring into issues that the Senate assigned to it. Each pair of committees had overlapping memberships and a shared secretariat, but different majorities. The government had the chairs and majorities on the legislation committees while the non-government parties had the chairs and majorities on references committees.

Because of this arrangement, the government could control what happened to bills that were referred to any of the Senate's legislation committees. However, it lacked the same control over the work of the references committees.²⁹ Not surprisingly, therefore, after the Coalition government gained control of the Senate in 2005, it re-combined the legislation and references committees in favor of the pre-1994 arrangement. Once again, the Senate had eight policy committees with the government again in control of each of them thanks to the fact that it held four of the eight seats on each, including the chairman with his or her casting vote to break ties. And so the situation remains under the current Labor government, which now faces its own non-government majority in the Senate.

This is an unusual situation. In some parliaments, the party or coalition of parties that controls a majority of seats in the whole chamber also has a majority of seats on each of its committees, and one of its members chairs each committee. In other parliaments, the same basic principle applies, except that the Opposition party chooses a majority of the members, and the chair, of at least one committee (often the Public Accounts Committee) with a government-wide mandate for reviewing how government funds are spent. And in still other parliaments, committee seats and chairmanships are allocated among all parliamentary parties in proportion to the share of seats they occupy in the chamber as a whole. But in Australia's Senate, strangely enough, the government once again has effective control over all the Senate's policy committees, even when it has only a minority of seats in the Senate as a whole. Whichever party or parties controls the Senate, the government party controls its committees.

Although US legislatures follow the first practice of giving the majority party a majority of seats, including the chairmanship, on all committees, I don't recommend that the Australian Senate do the same. That probably would be too drastic a departure from current practice and it would fail to take account of the parliamentary elements of Australia's political system. Instead, I propose that the committees should remain equally divided, with four government and four non-government senators serving on each, but that the chairmanships also should be equally divided. A government senator would serve as chair (and have a casting vote to break ties) on four of the committees, and a non-

²⁹ And for the same reason, non-government majorities in the Senate referred a few bills to reference committees where the government lacked a majority.

government senator would chair each of the other four. The government and Opposition parties, in consultation with minor parties and independent senators, would have to agree among themselves how the chairmanships are allocated, but perhaps with a stipulation that a committee chairman from one side of the Senate must be succeeded by a chairman from the other side.

The now-abolished division of each of the Senate’s policy committees into a pair of legislation and references committees pointed clearly to the two primary kinds of work that such parliamentary committees can do. First, they can review bills that propose new laws; and second, they can review the ways in which existing laws have been interpreted and administered. The eight current committees have been active on both fronts. During 2006, for instance, each of them met for an average of 142.25 hours over an average of 41.38 days. But whether that’s a lot or a little depends on how you look at it. The same numbers tell us that each of the committees met on an average of less than three hours on one day each week in 2006 and for an average of about three and a half weeks during that year (assuming a 40-hour work week). There also was considerable variation from one committee to the next. In 2006, for example, the Committee on Community Affairs met for 241 hours on 62 days while the committee on Finance and Public Administration met for only 77 hours on only 19 days. That comparison by itself suggests that it may be time for the Senate to think about how to even out the workload among some of its committees.

Committees are valuable institutions in the Senate, or any other parliamentary body with heavy responsibilities, because they create a system of division of labor. Instead of all the senators having to meet together to do everything, they have created a collection of workgroups that can take up different tasks at the same time. Also, each committee has specialized responsibilities, so its members can become the Senate’s own experts on foreign affairs or education policy or whatever other issue the Senate has assigned to a committee. It is in the Senate’s interests to allow its committees to do more work for it and to enable them to do that work better than they now can.

In the rest of this section, I’ll present several proposals for increasing the role of the Senate’s policy committees in the legislative process. In the next section, we’ll turn to a problem that has hampered the committees in their efforts to review how the government of the day has been administering the laws that already have been passed.

Table 1

Bills Referred to Committees in the Senate, 1990–2007

	Bills introduced in the Senate and received from the House	Bills referred through Selection of Bills Committee	Total number of bills referred	Percentage of bills referred
1990	197	21	27	13.7
1991	221	37	42	19.0
1992	264	42	56	21.2
1993	201	41	48	23.9

1994	199	56	58	29.1
1995	194	33	42	21.6
1996	163	30	46	28.2
1997	252	71	76	30.2
1998	218	60	84	38.5
1999	233	54	74	31.8
2000	189	63	78	41.3
2001	188	36	45	23.9
2002	218		65	29.8
2003	190		71	37.4
2004	153		60	39.2
2005	195	50	62	31.8
2006	218	93	102	46.8
2007	207	66	72	34.8
Totals	3700		1108	29.9

Notes: The data for 1990–2001 and for 2002–2007 are taken from different sources—see the note on sources below—and so may not be precisely comparable. The data for the more recent period include instances in which provisions of a bill or an exposure draft of a bill were referred to a committee. *Work of Committees* for 2004 indicates for the first time that some bills were referred through the Selection of Bills Committee, but only for the period from 16 November to 31 December. The editions for 2002 and 2003 do not identify which bills, if any, were referred through the Committee.

Sources: For 1990–2001: Tables 1 and 2 (pp. 52–53) of John Vander Wyk and Angie Lilley. *Reference of Bills to Australian Senate Committees. Papers on Parliament* No. 43, June 2005. For 2002–2007: Data on numbers of bills introduced compiled from annual editions of *Business of the Senate*, a publication of the Table Office of the Department of the Senate. Data on numbers of bills referred compiled from ‘New references’ to each committee, as listed in the semi-annual and annual editions of *Work of Committees*, a publication of the Committee Office of the Department of the Senate.

With the establishment of its policy committees in 1970, it became possible for the Senate to send a bill—usually a government bill that the Senate has received from the House of Representatives—to one of these committees for it to study, and perhaps even to make recommendations for changing the bill in some respects, before the Senate as a whole begins to consider it in detail during plenary sessions.³⁰ We know, however, that for the next 20 years, the Senate rarely took advantage of this opportunity. As part of their invaluable research, two Senate officials, John Vander Wyk (now retired) and Angie Lilley, calculated that of the 4,085 bills that the Senate received from the House or that senators introduced in the Senate between 1970 and 1989, only 29 or 0.7 per cent of them were referred to one of the Senate’s policy committees for study.³¹

³⁰ Review of proposed legislation by Senate committees is the subject of chapter 7 of John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century*. Melbourne, Melbourne University Press, 2007.

³¹ John Vander Wyk and Angie Lilley, *Reference of Bills to Australian Senate Committees. Papers on Parliament* No. 43, June 2005, Table 1 at p. 52; available at www.aph.gov.au/senate/pubs/pops/index.htm. An additional 26 bills were referred to joint or select committees, making for a total of 55 bills, or 1.3 per cent of the total, that the Senate referred to some committee. See also Kelly Paxman, ‘Referral of Bills to Senate Committees: An Evaluation.’ in *Papers on Parliament* No. 31, June 1998. Available at www.aph.gov.au/senate/pubs/pops/index.htm.

This situation began to change in 1990 when the Senate created its Selection of Bills Committee to recommend to the Senate which bills should be referred to which of the Senate's committees, and when the committees should review each bill and for how long.³² Table 1 shows that, during the following 18 years, through 2007, 1.3 per cent jumped to almost 30 per cent for the entire period. This is one of those cases where it's not obvious just what is the cause and what is the effect. Did the Senate send more bills to committees because it now had a Selection of Bills Committee to recommend that it do so, or did it establish this committee because it wanted to send more bills to committees? Whichever the case—and there's probably truth in both speculations—Table 1 documents that, since 1990, the Senate usually has made its referral decisions at the recommendation of its Selection of Bills Committee, but not in every case.

According to the Senate's website, the committee's membership 'consists of the Government Whip and 2 other senators nominated by the Leader of the Government in the Senate, the Opposition Whip and 2 other senators nominated by the Leader of the Opposition in the Senate, and the whips of any minority groups.'³³ Vander Wyk and Lilley explain how proposals for referrals come to the committee:

Most proposals for references are conveyed by the whips from party spokespersons in the subject areas of the bills under consideration or, occasionally, as the result of a request by an independent senator. Most proposals come from the non-government parties, but the government will seek to refer bills on occasion, particularly some controversial bills, sometimes to pre-empt a non-government reference for political reasons but more often to ensure, in the realisation that a reference will be inevitable (in a non-government majority chamber), that a bill or the provisions of a bill are referred as early as possible so that the government's legislative program is not unduly delayed.³⁴

Table 1 shows how much more often the Senate has been referring bills to its committees since 1990 than during the two preceding decades. The fact remains, however, that more than two-thirds of the bills on which the Senate was asked to act were never reviewed by a Senate committee at all. In five of the eight years since 2000, the percentage of bills

³² www.aph.gov.au/Senate/committee/selectionbills_ctte/index.htm.

³³ The effect is to give an extra vote to the Coalition parties. During 2006, with a Coalition government in power, the committee had nine members: three from the Liberals and 3 from Labor, plus the whips of the Nationals, the Australian Democrats, and the Greens. In other words, the committee included both the 'Government Whip' and the Nationals' whip, even though the Nationals were part of the government. So the government had four members and the Opposition (Labor) had three. Neither had a majority of the nine members. For a majority, the Coalition needed the vote of one of the two minor parties, whereas the Labor Opposition needed the votes of both. In 2008, with a newly-formed Labor government in power, there were three government members, four from the Liberal-National Coalition, and one each from the Greens and the Family First party. Now the government needed the votes of both minor parties to win in the committee, whereas the Opposition needed the vote of only one of them. However, Vander Wyk and Lilley imply that this hasn't mattered very much in practice because 'it was acknowledged that whatever the majority on the committee might recommend, in the end the numbers in the Senate would decide. The practice in later years when the committee could not reach agreement was for it simply to report its disagreement and leave it to the Senate to determine an outcome, rather than the majority on the committee making a recommendation which might then be overturned in the Senate.' Vander Wyk and Lilley, *Reference of Bills to Australian Senate Committees*, p. 20.

³⁴ Vander Wyk and Lilley, *op. cit.*, p. 16.

referred did exceed one-third, but it has never reached half. Even today, the Senate usually legislates without the benefit of what should be the expert opinion and advice of one of its committees. That situation apparently satisfies the Senate, but I think the Senate is denying itself the opportunity to be a more effective and independent legislative body.

Vander Wyk and Lilley point to some of the key advantages of committee review of legislation:

At a minimum, the benefits of committee review include the identification of technical deficiencies and unintended ... consequences. The possibility that a bill will undergo committee scrutiny may in itself cause the initial drafting to be done more carefully and with more thought to issues which could be raised in committee consideration. In the broad, review may result in a re-examination of the policy of parts or all of a bill, or the way in which particular policy matters are to be implemented.

Committee review of a bill is usually done with greater transparency than the processes of government leading up to the production of the bill. Committee processes are nearly always open; most committees will invite submissions and hold public hearings. Representations to government in respect of proposed legislation are often made behind closed doors. Public proceedings promote contestability of views.

Perhaps the single most important benefit of the committee examination of bills is that participation is not limited to the legislators: a committee can seek input from any source it wishes, whether it be the minister, departmental advisers, academic and other experts, state governments, interest groups, and members of the public ... Committee inquiries enable legislators to directly test the various views on a bill in a way not possible in a plenary session.³⁵

Yet, until now, the presumption has been that a bill will not be the subject of study by a committee unless the Senate decides otherwise. I propose to reverse this situation: the Senate should give each of its policy committees the authority to review and report to the Senate on any proposed legislation or prospective subjects of legislation on matters for which the committee has responsibility. This would mean that each bill that a Senator proposes or that the Senate receives from the House of Representatives would be referred to the appropriate committee immediately after its first reading.³⁶ This also would mean

³⁵ Ibid. pp. 2–3.

³⁶ This would be consistent with the Senate's current practice of referring bills to committee after first reading, not after second reading, which minimizes the impact of committee review on the government's legislative timetable. Reference decisions would be made by the President of the Senate, or by the Clerk acting on the President's behalf, and on the basis of how earlier bills on the same subject had been referred. Of course, the Senate would retain the ability to change a referral decision or to refer a bill to more than one committee. It might be objected that many bills do not require committee review, and that is the reason they are not recommended for referral by the Selection of Bills Committee. That may be, but it seems to me that committee members as subject experts should be best qualified to make that judgment. Furthermore, Holland has found that half the committee reports on the bills he examined that were referred to Senate policy committees during 2003–2006 failed to

that there would be no need for the Senate to refer provisions of bills or exposure drafts of bills to its committees because the committees already would have the continuing authority to review and report on them.³⁷ And finally, this would mean that the committees also would be free to review and report on the need for legislation that the government has not yet undertaken to draft, but only, of course, if the committees have the time to do so.

In the September 2008 report to which I referred in discussing Question Time, the Senate's Committee on Procedure expressed its belief 'that it is important to maintain the principle that only the Senate may decide whether bills should be referred to committees, and it would not be desirable to adopt any procedure whereby bills may be referred without explicit authorization by the Senate.'³⁸ Presumptuous though it may be for me to disagree with such a distinguished committee, I do disagree, at least until the committee offers a persuasive argument why the 'principle' it enunciated is so important and desirable.

The only principle the committee could have in mind is that the Senate's committees are and should remain creatures of the Senate as a whole and subject to its direction. No one should disagree with that principle, nor would my proposals affect it. The Senate would continue to have authority to instruct any committee as to how, when, or whether it should act on any bill, any provisions of a bill, or any exposure draft of a bill. In addition, though, my proposals would advance another, equally important, principle: that the Senate should have the benefit of the most thorough and informed consideration of a bill that time permits before debating it in detail and approving it.

The key premise the Senate should accept is that the Senate's policy committees, or at least their respective chairs and deputy chairs, should be deeply involved in decisions controlling how the Senate reviews and evaluates legislation within the subject matter competence of each committee.

It will be said that many and perhaps even most bills are too insignificant to require committee review, and that requiring committees to review all bills will distract them and reduce the time they have available to review the bills that really do require their

recommend any amendments to them, suggesting that the Selection of Bills Committee often was misguided in deciding which bills needed to be referred. Ian Holland. 'Senate committees and the legislative process.' Working Paper, Strengthening Parliamentary Institutions Project, Australian National University Canberra, 2008, p. 12.

³⁷ As it now stands, if the House of Representatives hasn't passed a government bill, the Selection of Bills Committee can't yet propose that the Senate refer the bill to one of its committees because the Senate hasn't yet received it. However, it can and sometimes does refer *provisions* of that bill to one of its committees. This allows the Senate committee to begin work even before the bill of which those provisions are a part arrives from the House of Representatives. Similarly, the Senate can refer to one of its committees an *exposure draft* of a bill that the government has not yet formally proposed to the Parliament. The government will release an exposure draft when it wants to solicit comments and recommendations that it can incorporate into its bill before submitting it formally for parliamentary action. These constructive developments have prevented avoidable delays and given Senate committees more time to review legislation. I simply propose to give the Senate's policy committees the standing authority to do what the Senate now authorizes them to do on a case-by-case basis.

³⁸ Senate Procedure Committee, *First Report of 2008*, p. 2.

attention. I agree, but I also believe that the committees themselves should have something to say about which bills require their attention and which do not. As committee members become even more knowledgeable and expert than they are now, they should be the senators best able to recognize potentially important issues that a seemingly inconsequential bill may raise.

It is easy to imagine ways in which all bills can be referred to the appropriate policy committees without having inconsequential bills consume their time. For example, there might be a procedure by which each policy committee chair and deputy chair would present a joint statement to the Senate on the first day it meets during each sitting week. The statement might read something like this:

During the week just ended, five bills were referred to our committee.

The committee has determined that the following four bills do not require separate committee inquiries:

The Parliamentary Catering (Insignificant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Even Less Significant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Truly Insignificant but Necessary Amendments) Bill 2009

The Parliamentary Catering (Positively Trivial but Necessary Amendments) Bill 2009

The Committee also has determined that the fifth bill, The Parliamentary Catering Bill 2009, does merit a committee inquiry. At present, and barring unexpected developments, the committee anticipates completing this review in no more than 30 calendar days.

The Committee will report to the Senate if and when it becomes necessary to change the schedule for this inquiry.

With this report in hand, it then will be possible for the new Legislative Planning Committee (discussed below) or any senator to propose to change a committee's plans. Control over the Senate's policy committees—what they do and when they do it—will continue to rest with the Senate, just as it should. But now the Senate will be able to exercise that control with the benefit of its committees' best judgments about how they should allocate the limited time available to them for both legislative and other inquiries.

An alternative would be to retain the existing Selection of Bills Committee and the Senate's current procedures for deciding which bills should be referred to its policy committees, but with an added requirement that the Selection of Bills Committee consult with a policy committee's chair and deputy chair before deciding whether to recommend that the Senate refer a bill to that committee. I believe, though, that this arrangement would prove to be considerably more time-consuming than the procedure I propose. Again, what's most important is that the Senate's policy committees be involved more

actively and more often in the process of appraising government legislation. With that goal accepted, the Senate certainly should ask itself if there are better ways to achieve it than the proposals I've made here.

I want to emphasize, however, that these proposals are neither new nor radical. In New Zealand, each bill normally is referred to a committee after the unicameral parliament agrees to it in principle, and the committee usually has six months to study and report on the bill. Then, any amendments that the committee recommends unanimously are included in the bill automatically before the parliament as a whole debates it in detail and considers other amendments to it. If the committee recommends other amendments, but not unanimously, the parliament votes on all of them by a single vote, and, again, this vote occurs before the stage at which any other amendments to the bill can be proposed.³⁹

Or take the example of the new unicameral Scottish Parliament that was established only in 1999. There, it is the normal practice for all government bills to be referred to a committee (and sometimes to more than one), and for the committee to consider the same bill twice. The committee considers and reports on a bill after it is introduced and before the parliament votes on agreeing to the principles of the bill. Then, after that vote, the same committee often considers the bill again, instead of the whole parliament considering it in detail in the chamber, and, at this stage, the committee actually can amend the bill instead of just recommending amendments for the parliament as a whole to consider. Finally, committees of the Scottish Parliament can even develop their own proposals for bills, in addition to the government bills that are referred to them.⁴⁰

In his study of parliamentary committee reform, Hazan indicates that the lower houses (the equivalents of Australia's House of Representatives) of Germany, Great Britain, Israel, Italy, and the Netherlands all routinely refer bills to committees.⁴¹ And the same practice also is reported by the authors of a collection of essays on the development of committee systems in the lower houses or unicameral parliaments of seven former Soviet republics or satellites—Hungary, Poland, the Czech Republic, Bulgaria, Estonia, Lithuania, and Moldova—that recently have had opportunities to design new parliamentary institutions.⁴² Another series of essays indicate that, as of 2001, bills were regularly or routinely referred to committees in the upper houses of Austria, Chile, Japan, Poland, and Switzerland.⁴³ Although these examples obviously don't constitute a survey

³⁹ Standing Orders 285, 291, 294, 296, available at www.parliament.nz/NR/rdonlyres/078D6043-9E03-4D87-93BA-A6BB84ACC063/6619/standingorders20095.pdf. Also see *Parliament Brief: The legislative process*, available at www.parliament.nz/en-NZ/PubRes/About/FactSheets; and Ian Holland, 'Senate committees and the legislative process,' p. 7. Having a single vote on all these committee amendments, instead of separate votes on each of them, almost certainly increases the likelihood that all of them will be approved.

⁴⁰ Rules 9.6, 9.7, and 9.15 of the Standing Orders of the Scottish Parliament, available at www.scottish.parliament.uk/business/parliamentaryProcedure/index.htm. Also see *The Work of Committees in the Scottish Parliament* and *The Scottish Parliament Debating Chamber*. Edinburgh, The Scottish Parliament Public Information Service, 2008. Both are available at www.scottish.parliament.uk/vli/publicInfo/publications.htm; and Ian Holland, 'Senate committees and the legislative process,' p. 7.

⁴¹ Reuven Hazan, op. cit.

⁴² David M. Olson and William E. Crowther (eds.). *Committees in Post-Communist Democratic Parliaments; Comparative Institutionalization*. Columbus, Ohio, The Ohio State University, 2002.

⁴³ Tripathi, op. cit.

of parliamentary practices around the world, they do suggest that it surely would be reasonable for the Senate to ask if there may be something that it can learn from their choices and experiences.

As I've said, the Selection of Bills Committee now does more than recommend to the Senate which bills should be referred to a committee. It also recommends how long a committee shall have to study each bill that is referred to it. The problem is that the committee's members, at least half of whom have other responsibilities as party whips, aren't necessarily experts on the complexity of each bill and the issues it raises, how much committee study it deserves and requires, and how long that process will take. These judgments can be made better by committees whose members, we should hope, develop years of experience in dealing with bills on the subjects for which their committees have responsibility. So the burden of proof should be on those who argue that there is no need or no time for a committee report on a bill, and that it's fine for the Senate to pass a bill without the considered judgment of the committee whose members are supposed to be the Senate's best experts on the subject it addresses.

The Senate often has had to revise the decisions it has made at the recommendation of the Selection of Bills Committee. According to the data that Vander Wyk and Lilley provide, in every year from 1990 to 2001, at least one-third of the time that the Senate referred a bill (or a package of related bills), the Senate then had to grant the committee additional time beyond the reporting deadline that the Selection of Bills Committee originally had recommended and the Senate had imposed. In four of the twelve years, 60 per cent or more of the bills (and fully 78 per cent of them in one year) were subject to extensions of time for the committees to report on them. About half of these extensions of time were for a week or less, but somewhat more were for periods of between one week and six months, and sometimes one extension was not enough for a committee to complete its work.⁴⁴

As we shall see later on, the Senate doesn't meet all that often, so it still would need to be able to exercise some control over its policy committee's priorities and schedules. I also propose, therefore, that a committee report to the Senate within three working days after a bill is referred to it on when it expects to begin and then to complete its review of the bill. In the case of routine or inconsequential bills, a committee also would have the option of reporting that no committee review is necessary.⁴⁵ These committee planning reports then would be reviewed by a Legislative Planning Committee, with the same membership as the current Selection of Bills Committee. The Legislative Planning Committee should be able to recommend that the Senate require a committee to give a bill higher or lesser priority, and more or less time for reviewing it, than the committee proposed.⁴⁶ This would give the committee and its chairman an opportunity to explain the reasons behind the planning report on a bill, but it still would leave the Senate with final control over the legislative agendas and activities of its committees.

⁴⁴ Vander Wyk and Lilley, *op. cit.*, Tables 8 and 9 at pp. 59–60.

⁴⁵ If it is not practical for the committee to meet within this deadline, its chair should be empowered to make its planning report on a bill on behalf of the committee after as much consultation with other committee members as possible, and subject to having the chair's recommendation reviewed and, if necessary, amended when the committee is next able to meet.

⁴⁶ In the case of emergency legislation, the Legislative Planning Committee also should be empowered to move at any time that a specific bill not be referred to a Senate policy committee at all.

Implementing these proposals will make the legislative work of the Senate's policy committees more demanding and time-consuming for its members. I make no apology for that. Committee work may attract less public attention than debates in plenary sessions, but it can and should contribute more to perfecting sound legislation. However, if senators are to be convinced to devote more time and effort to their committees' legislative work, they must be satisfied that the Senate will give their recommendations the attention they deserve.

With this in mind, I also propose that the Senate revise its procedures to give priority to a committee's recommendations for making specific amendments to a bill when the Senate considers it in detail in what's known technically as a 'committee of the whole.' The Senate's standing orders now provide generally that when the Senate considers a bill in detail, it first considers each clause (or part) of the bill in order and then it considers any new clauses that senators may propose as amendments. Next it considers any schedules included in the bill and any new schedules that senators may propose. I propose that these procedures be changed only to provide that the first amendments on which the Senate acts during its consideration of each clause or schedule should be any specific amendments to it that the policy committee reporting the bill has proposed.⁴⁷ By giving priority to a committee's recommendations in this way (but without going as far as New Zealand's practice that I mentioned several pages earlier), the Senate would be acknowledging the expertise of its committee and assuring the committee's members that their recommendations will receive priority attention so that the time they devote to committee review of legislation will have been time well-spent.

I hope that this set of proposals would promote four objectives. First, they would create the routine expectation that the Senate will not debate, amend, and pass a bill without the benefit of the opinions and recommendations of its committee that specializes in the bill's subject. Second, by giving each policy committee more legislative authority and responsibility, these proposals also should encourage the committees to develop even more expertise than they now have. One result could be to promote greater stability and continuity in committee membership. Another might be to encourage the Senate to expand the resources of its committee office, whose officers are highly competent and dedicated but often stretched too thin to do everything that needs to be done as well as everything they'd like to do.

Third, I admit to a hope that increasing the legislative importance of the Senate's policy committees also may increase their value as places where bridges can be built across the great partisan divide that so often seems to separate government and Opposition.⁴⁸ Vander Wyk and Lilley put it better than I could:

⁴⁷ There now is a procedure by which the Senate can approve all of a committee's amendments to a bill at once, but it apparently is not used regularly: 'A fast method of processing bills returned from committee is provide ... by means of a motion for the adoption of a committee's report, thereby adopting any amendments recommended by the committee. This motion may not be moved if a senator has circulated other amendments.' *Odgers' Australian Senate Practice*, 12th ed., pp. 243–244. See also Vander Wyk and Lilley, *op. cit.*, pp. 44–45.

⁴⁸ Avoiding what Ian Marsh has called 'fake adversarialism' masking 'tacit bipartisanship', because the two parties often agree on legislation while maintaining the façade of almost perpetual disagreement. Ian Marsh, 'Australia's representation gap: a role for parliamentary committees.' *Papers on*

Senators do not come to a committee inquiry as disinterested parties: they will usually have some preconceptions and will be aware of their parties' policies on issues relevant to the bill under inquiry. But committees, unlike a plenary body, provide a forum in which there is more room for manoeuvre and more scope for influencing or changing a view. Committees, being smaller, tend not to be as party political and combative. In the main there tends to be less public posturing and greater attempt to address the issues and test alternative viewpoints. Senators are interacting not just with the other side of politics, as they would in a plenary body, but directly with acknowledged experts in the relevant field, or people and organisations likely to be affected by the legislation. Also, there is some tradition in Senate committees of seeking to arrive at a consensus view where practicable.⁴⁹

And fourth, as senators gradually develop a greater sense of collective identity as committee members, the committees could become a uniquely valuable forum in which to explore and familiarize the Australian people with emerging and long-term issues that otherwise might not reach the political front-burner until they already have become crises. As some recent Senate committee inquiries have demonstrated, committee members working together to understand developing issues on which the major parties have not yet locked themselves into hard and fast positions have a real opportunity to develop policy approaches that attract bipartisan, if not consensual, support.⁵⁰

In Washington, I have seen some of the most intensely partisan Representatives and senators working together cooperatively to devise mutually acceptable legislative solutions to problems that they have studied together, sometimes over a period of years. They don't forget their partisan differences, of course, or the different kinds of national policies that their parties usually prefer. But what divides them becomes less important when they not only agree that there is a national problem that needs fixing, but when they also have reached some agreement about what's caused the problem in the first place and when they've participated in the same committee meetings to assess alternative legislative solutions.

Vander Wyk and Lilley conclude their study by stressing that the Senate can take full advantage of the contributions that its committees can make to legislation if changes in procedures and organization are accompanied by an essential change in 'attitude':

This would be for all parties, but particularly governments, to accord Senate committees greater recognition and a greater role in the process of finally shaping legislation, to acknowledge that governments and other parties do not have all the knowledge on a particular policy issue,

Parliament, No. 44, January 2006, pp. 1–10. Available at [/www.aph.gov.au/senate/pubs/pops/pop44/marsh.pdf](http://www.aph.gov.au/senate/pubs/pops/pop44/marsh.pdf).

⁴⁹ Vander Wyk and Lilley, *op. cit.*, p. 3.

⁵⁰ See, for example, Ian Marsh, 'Australia's representation gap', *op. cit.*

and that desirable changes to proposed legislation do come out of the public inquiry process—even if they do not always accord entirely with the policies of the government or another party.⁵¹

It's just possible that making the Senate's policy committees more central to legislative decision-making may encourage the government and Opposition to reach agreement and enable them to do so with fewer delays and public recriminations. I offer no guarantees, of course, but it is just possible.

Senate committees and House ministers

The responsibilities of the Senate and its committees extend beyond reviewing proposals for new laws, however important that task is. The Senate has the equally important responsibility to review the interpretation, implementation, and administration of the laws that already have been enacted.⁵² To do this, however, the Senate—and its committees—obviously need access to the best possible information about government actions and inactions, and the reasons for them. There is truth to the old adage that 'knowledge is power. To the extent that the government is able to control what information Senate committees receive, it is able, to that same extent, to shape and limit what the committees and the Australian people can learn about government performance.

When a committee seeks information about a department's activities and their consequences, it can turn to private citizens and organizations affected by the department's policies and practices. If, however, the committee also wants to know—as it should—about the reasons underlying those policies and practices, it must seek that information from inside the department itself. Specifically, it can turn to career public servants, it can turn to ministerial advisors whom ministers select to assist them, and, of course, it can turn to the ministers themselves. There have been problems affecting the kinds of information, if any, that Senate committees can expect to receive from each group of officials. In discussing these problems, it will be helpful from time to time to refer to the report of the Senate's Select Committee on a Certain Maritime Incident, to which I referred earlier, that was set up in 2002 to study and report on the 'children overboard' incident.⁵³

It has become accepted practice for senior public servants to appear before the Senate's policy committees when invited to do so (although there are exceptions, as we shall see). However, there are important limits on the kinds of questions to which they are expected to respond. The Senate itself has instructed its committees that '[a]n officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.'⁵⁴

⁵¹ Vander Wyk and Lilley, *op. cit.*, p. 49.

⁵² Others would distinguish between these two kinds of committee activities and the work committees also may do in policy development and investigations. See for example Halligan, Miller and Power, *Parliament in the Twenty-first Century*, *op. cit.*

⁵³ Senate Select Committee on a Certain Maritime Incident, *Report*. 2002.

⁵⁴ *Odgers' Australian Senate Practice*, 12th ed., *op. cit.*, p. 599. This provision was included in resolutions on parliamentary privilege that the Senate approved in 1988. It remains in force today.

Consistent with this Senate directive to its own committees, a 1989 government document made available by the Department of Prime Minister and Cabinet begins by observing that:

the public and parliamentary advocacy and defence of government policies and administration has traditionally been, and should remain, the preserve of Ministers, not officials. The duty of the public servant is to assist ministers to fulfill their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration.⁵⁵

With this in mind, the written submissions and oral evidence provided to committees by public servants:

should not advocate, defend or canvass the merits of government policies (including policies of previous Commonwealth governments, or State or foreign governments);

may describe those policies and the administrative arrangements and procedures involved in implementing them;

should not identify considerations leading to government decisions or possible decisions, in areas of any sensitivity, unless those considerations have already been made public or the Minister authorises the department to identify them ...⁵⁶

The long and short of it, then, is that if a committee wants to inquire into the reasons for a government policy or decision, and if committee members want to challenge the government to defend that policy or decision, public servants can't tell them all they want to know. When a public servant is asked questions that call for him or her 'to give opinions on matters of policy', the committee can expect to be told that those questions need to be referred to a minister. That answer is perfectly appropriate—public servants should not be asked to defend policy decisions made by their political masters—but, as we shall see, it also is all too likely to lead nowhere.

If a committee can't ask public servants to defend the policies of their departments, perhaps it can ask ministerial advisors instead. In recent years, there has been a significant growth in the number of departmental staff, most of them not part of the career public service, who are selected by the minister to assist him or her with advice that can involve politics and public relations as well as policy. In principle, these advisors are not supposed to have managerial authority. So when an advisor tells public servants that their minister wants something done, the advisor is assumed to be speaking for the minister and acting at the minister's direction. In practice, however, some ministerial advisors have been given managerial responsibilities, and it can be very tempting for other advisors to give direction to public servants on the basis of what the advisor thinks the minister would

⁵⁵ Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, p. 3, available at www.pmc.gov.au/guidelines/index.cfm and www.aph.gov.au/senate/committee/wit_sub/index.htm

⁵⁶ Ibid. pp. 5–6.

want if he or she had been consulted or on the basis of what the advisor believes to be in the minister's best interests.⁵⁷

In any event, Senate committees have trouble learning what these ministerial advisors say or do because the government of the day typically has prohibited them from appearing and giving evidence.⁵⁸ There are two key arguments in support of this prohibition. First, it is the ministers themselves, not their staff, who are responsible to Parliament. And second, if committees could compel advisors to disclose the opinions and recommendations they offer their ministers, this would inevitably undermine the free flow of ideas between advisors and ministers. Both these arguments are powerful. Yet it certainly is easy to understand why a committee would become frustrated when it cannot question advisors who seem to be acting as government executives, and perhaps acting on their own initiative, not at the direction of their ministers. So it is equally easy to understand why the Select Committee concluded in 2002 that '[t]he time has come for a serious, formal re-evaluation of how ministerial staff might properly render accountability to the parliament and thereby to the public.'⁵⁹

This recommendation is a good one, but there is something much more fundamental that's needed. The time really has come for a serious (if not necessarily formal) re-evaluation of how *ministers themselves* might properly render accountability to the parliament and thereby to the public. To be sure, Senate committees have encountered problems in being unable to get some of their questions answered by public servants and in not even being able to ask questions of ministerial advisors. But these problems are only symptomatic of an underlying problem that is far more serious: the fact that Senate committees have no assurance of being able to question the ministers themselves, except for the handful of ministers who also are members of the Senate.

To put it bluntly, there simply is no way that the Senate, through its committees, can hold the government accountable for its decisions and actions if it cannot question the people who make those decisions and direct those actions. This is the problem that the Senate needs to address, and if and when it finally does so, the problems that its committees have had with questioning public servants and ministerial advisors will become far less significant.

There have been instances in which ministers serving in the House of Representatives have accepted invitations to appear before Senate committees. It obviously is best for such appearances to continue to be arranged in a consensual and collegial manner. But what happens when this proves unsuccessful, when House ministers decline to appear, and

⁵⁷ The Select Committee concluded in its report that 'departmental staff can no longer be sure that an instruction or request from a ministerial advisor has the blessing of the minister, or is consistent with the minister's view on how a matter is to be approached.' Select Committee on a Certain Maritime Incident, *Report*, p. 188. The Labor Government's July 2008 *Code of Conduct for Ministerial Staff* (available at www.smos.gov.au/media/code_of_conduct.html) addresses these concerns by emphasizing that ministerial staff 'do not have the power to direct APS [Australian Public Service] employees in their own right and that APS employees are not subject to their direction,' and that 'executive decisions are the preserve of Ministers and public servants and not ministerial staff acting in their own right.'

⁵⁸ The state of play in the US is discussed by Harold Relyea in *Presidential Advisors' Testimony Before Congressional Committees: an Overview*. Report for Congress of the Congressional Research Service, 2008. The current government's *Code of Conduct for Ministerial Staff* doesn't address this situation; in fact, it doesn't mention Parliament at all.

⁵⁹ Senate Select Committee on a Certain Maritime Incident, *Report*, p. 183.

doesn't a minister's refusal to appear voluntarily create at least a suspicion that there are questions the minister doesn't want to answer?

Let's review briefly the experience of the select committee that the Senate established to inquire into the 'children overboard' incident. To explore this subject, the Select Committee took testimony from numerous public servants, both military and civilian. However, the Minister for Defence, who was himself a Senator, directed certain officials not to appear before the committee.⁶⁰ The Select Committee requested ministerial advisors to make written submissions and to appear at hearings, but they didn't do so. And finally, the Select Committee made the same requests of the former Minister for Defence, but he also failed to comply.⁶¹ The former minister and his advisors were pivotal figures in the episode the Select Committee was charged with investigating. It is certainly fair to ask, therefore, if the Select Committee could have been expected to fulfill its responsibilities to the Senate—and ultimately to the Australian people—if it couldn't question people whose answers were absolutely essential to its inquiry. I think the question answers itself.

How did the Select Committee respond to the refusals it encountered? By and large, by doing nothing. The Select Committee could have attempted to compel their testimony and then recommended that they be found in contempt of the Senate when they refused. However, the committee concluded that it would not:

exercise its power to compel their attendance, and thereby expose the [public servants] and advisors to the risk of being in contempt of the Senate should they not respond to the summons. Part of the reason not to summon was based on the previously expressed view that 'it would be unjust for the Senate to impose a penalty on an officer who declines to provide evidence on the direction of a minister.'⁶²

And with respect to the former minister's refusal to accept the Select Committee's invitation to testify, the committee chose not to contest the argument that it should not try to compel testimony from a *former* Representative who *had been* a minister because it could not compel testimony from a *sitting* Representative who *was* a minister.

I'm sure that the members of the Select Committee thought they were acting prudently and judiciously. But what were the lessons that the government then in office or any later government could take from this episode? That it can refuse to permit key witnesses, who either are or had been on the Commonwealth's payroll, from answering questions from Senate committees, and that it can do so with impunity.

Under these circumstances, the Senate cannot effectively hold the government to account. It's unrealistic, as a practical political matter, to expect the majority in the House of Representatives to ask and insist on answers from ministers of their own party to the hard and probing questions that accountability requires. Only the Senate with a non-government majority has both the power and the political incentive to compel the government to explain the choices it's made and the actions it's taken. I propose, therefore, that the Senate insist on its need to have members of the House of

⁶⁰ Ibid. p. 178.

⁶¹ Ibid. p. 180.

⁶² Ibid. pp. 182–183.

Representatives who are ministers appear before Senate committees and answer questions concerning their actions as ministers.

Why didn't the Senate do this long ago? The reason lies in an interpretation of a convention governing relations between the House of Representatives and the Senate that, when carried to an extreme, is detrimental to accountable government. Under that convention, neither house claims the right to question a member of the other house. To some, this convention is grounded in the constitution; to others, it is based on the need to preserve mutual respect and effective working relations between the two houses of Parliament.

I think we can agree that, as a general matter, one house should not interfere in the internal affairs of the other and each house should refrain from questioning the statements and activities of those serving in the other house. The argument underlying this convention is that whatever bicameral harmony there is in Parliament House would be seriously damaged if one house decided to interrogate members of the other house. The principle is sound and one that is respected in the US Congress as well as in the Australian Parliament.

This convention is recognized and defended in both houses, as the following quotations from *Odgers' Australian Senate Practice* and *House of Representatives Practice* document:

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a house of a state or territory legislature. Standing order 178 provides that if the attendance of a member or officer of the House of Representatives is required by the Senate or a Senate committee a message shall be sent to the House requesting that the House give leave for the member or the officer to attend. This standing order reflects a rule of courtesy and comity between the Houses ... It may be that these limitations on the power to summon witnesses in relation to other houses have the force of law ...⁶³

Standing orders of both Houses set down procedures to be followed if a member of the other House is to be called to give evidence before a committee. If a committee of the House wishes to call before it a Senator who has not volunteered to appear before it as a witness, a message is sent to the Senate by the House requesting the Senate to give leave to the Senator to attend for examination. Upon receiving such a request the Senate may authorize the Senate to attend.⁶⁴

Notice that there is no problem if a member of one house, including a minister, appears voluntarily before a committee of the other, especially when authorized to do so by the house of which he or she is a member. Senate committees typically *invite* persons to appear before them as witnesses. If a person declines the invitation, the committee can *summon* him or her to appear. If the prospective witness fails to comply with this summons, there can be consequences: 'A person failing to comply with a lawful order of a

⁶³ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 60.

⁶⁴ *House of Representatives Practice*, 5th ed., op. cit., pp. 657–658.

committee to this effect may be found to be in contempt of the Senate and ... subject to a penalty of up to six months' imprisonment or a fine not exceeding \$5 000 for a natural person [that is, you or me] or \$25 000 for a corporation.'⁶⁵

The problem arises when ministers hide behind this convention to avoid accounting to the Senate for their statements and activities as members of the government. Representatives who are ministers (call them MPs-as-ministers) wear two hats, so to speak. On the one hand, they are like every other member of the House of Representatives in that they each represent a specific geographically-defined constituency and its residents, and they have the responsibility to participate in all the decisions that the House makes. On the other hand, and unlike all other Representatives, they also have executive responsibilities for departments of the Commonwealth government. It is only in this latter capacity that the Senate, acting through its committees, should hold them accountable for what they've done.⁶⁶

The Select Committee's report contains page after page of learned analysis as to the immunity that members of one house enjoy that protects them against being summoned to testify before committees of the other, and then whether such immunity extends to ministerial advisors and to former ministers.⁶⁷ The one point on which these scholars evidently agree is that neither the House of Representatives nor the Senate will try to compel testimony before their committees by members of the other house. I don't propose that Senate committees should abandon this well-established policy and try to compel MPs-as-ministers to appear and testify. But, you may ask, if Senate committees continue simply to request, not summon, MPs-as-ministers to testify, won't they simply continue to decline—or refuse, depending on how polite they choose to be—to do so?

Probably so. As an American, I'm more than familiar with struggles for information between congressional committees, on the one hand, and cabinet secretaries (the US equivalent of ministers) and other political appointees in the executive branch, on the other. Sometimes these disputes have ended up in court, but more often they have been resolved, to no one's entire satisfaction, through a process of political negotiation. This process usually has succeeded because the president and other executive branch officials came to understand (1) that a committee really was determined to receive the testimony or documents that it sought, (2) that the committee had the support of its parent body (either the House of Representatives or the Senate), (3) that continuing resistance by the president or a cabinet secretary would result in damaging media accusations of

⁶⁵ *Odgers' Australian Senate Practice*, 12th ed., op. cit., p. 378.

⁶⁶ This is essentially the same point that, ironically, a UK House of Commons committee made about British peers who were advisors to the government, arguing that they should not be 'able to hide behind the convention, established long ago, for utterly different circumstances, that members of the other House cannot be summoned to appear before House of Commons committees.' Quoted in Ian Holland, 'Reforming the conventions regarding parliamentary scrutiny of ministerial actions', *Australian Journal of Public Administration*, v. 63, n. 2, June 2004, p. 13.

⁶⁷ These documents, which don't have page numbers, appear following the text of the report of the majority of the Select Committee's members and precede the report of its government members. But also see Holland's excellent historical analysis in 'Reforming the conventions regarding parliamentary scrutiny of ministerial actions', op. cit. This article received the Senate's own Richard Baker Senate Prize in 2005.

‘stonewalling’ and ‘cover-up’, and (4) that there are penalties—usually political, not legal, penalties—that Congress can impose on a recalcitrant executive branch.

This experience suggests that, although it may take time and although it may be painful, the Australian Senate has the wherewithal to convince governments that their MPs-as-ministers should accept invitations to testify before Senate committees because the costs of declining to do so will be too great for a government to pay. To borrow a line from Mario Puzo’s *The Godfather*, the Senate must make the government an offer it can’t refuse. In doing so, the Senate must demonstrate that it truly is determined to prevail and that it really is prepared to impose sanctions that governments will find too costly to endure. In other words, the Senate must convince the government of the day that it is willing and able to flex its constitutional muscles.⁶⁸

Let me offer one example of what the Senate can do. The first key vote that the Senate takes on a government bill is on a motion for the second reading of the bill. This is supposed to be a vote on ‘the principle of the bill and whether it ought to be passed by the Senate.’⁶⁹ Usually the Senate passes this motion; then it can begin debating the bill, and amendments to it, in detail. But if the Senate defeats a second reading motion, the bill is in a kind of procedural limbo unless and until the Senate changes its mind.⁷⁰

Imagine, then, that an MP-as-Minister has refused a Senate committee invitation to testify on a matter of grave concern to the committee. The committee can advise the minister that the non-government majority in the Senate is prepared to reject the motion for the second reading of the next bill, or any bill, that the minister wants to see passed unless and until the minister appears before the committee and answers questions to its satisfaction. The Senate would be saying, in effect, that it is not willing to give the department in question any additions to, or changes in, its legal authority until the minister has accounted for how that department has exercised the authority it already has.

This use of this approach can be calibrated to suit the gravity and urgency of the committee’s need for a minister’s testimony. If the issue is less than earth-shaking, the Senate’s non-government majority might defer second reading on one bill that rises to roughly the same level of importance, but no higher.⁷¹ If the issue is one of great importance, on the other hand, the Senate could vote to defer second reading on any or all

⁶⁸ Holland (Ibid. p. 13), argues for ‘a negotiated consensus about circumstances in which ministers will appear [before Senate committees]. My reservation is that the Senate first should strengthen its negotiating position by demonstrating its will and its ability to prevail.

⁶⁹ *Odgers’ Australian Senate Practice*, 12th ed., op. cit., p. 237.

⁷⁰ ‘The motion for the second reading is that this bill be *now* read a second time. The rejection of that motion is an indication that the Senate does not wish the bill to proceed at that particular time. Procedurally, therefore, the rejection of that motion is not an absolute rejection of the bill and does not prevent the Senate being asked subsequently to grant the bill a second reading.’ *Odgers’ Australian Senate Practice*, 12th ed., op. cit., p. 237 (emphasis in original).

⁷¹ In other words, the Senate could reject the motion for second reading, while making it clear that it would pass another motion for that purpose after the dispute between the committee and the MP-as-minister has been resolved.

bills, except those that address genuine emergencies or that provide funds to continue the existing operations of the Commonwealth government.⁷²

The first time this happens, the government and its senators certainly would cry ‘foul’. I’d expect to hear predictions from the government side of both houses that the sky is about to fall or the world is about to come to an end. And at first, the government probably would expect that its cries of outrage would induce the non-government Senate majority to give way and withdraw from confrontation. If the Senate is adamant, however, and especially if it is willing to up the ante by deferring action on more important bills, sooner or later the government will begin to worry that it is paying too high a price to protect its MP-as-minister from the questions of a Senate committee.⁷³ At that point, we should expect serious negotiations to begin, resulting in an arrangement that gives the committee less than everything it wanted but far more than it otherwise would have gotten. In time, as governments become convinced that the Senate really will carry out threats to defer passage of government bills, the threat of such action should be enough to bring MPs-as-ministers to committee meeting rooms on the Senate side of Parliament House.

But would the Senate ever do such a thing? Its history does give us reason to doubt it, but there is a precedent that offers hope.

The Parliament meets each year for several ‘sitting periods’, each lasting several months. In the 1980s, senators became increasingly concerned about the concentration of government bills that the House was sending the Senate near the end of sitting periods, which didn’t leave the Senate enough time to consider them carefully. To make a longer story short, the Senate ultimately adopted a new rule stating that, unless the Senate votes to exempt it from the rule, a government bill ‘is deferred to the next period of sittings unless it was first introduced in a previous period of sittings and is received by the Senate in the first two-thirds of the current period ...’⁷⁴ Predictably enough, the government ‘strongly resisted’ the new requirement,⁷⁵ and equally predictably, the world didn’t come to an end.

The Senate can convince the government to change its ways if the Senate has the will to do so. It did so with regard to the timing of legislation coming over from the House, and it can do so with regard to MPs-as-ministers testifying before Senate committees. If it does, it won’t be too many years before new editions of the two parliamentary reference books that I’ve been quoting, *Odgers’ Australian Senate Practice* and *House of Representatives Practice*, will be reporting that Senate committees have no need to summon ministers who are members of the other house because those ministers accept committee invitations to testify and respond to questions that concern their ministerial responsibilities.

⁷² I am *not* suggesting that the Senate threaten to withhold supply from the government. In Washington, Congress certainly would consider delaying or reducing the annual appropriation of funds for a recalcitrant secretary’s (minister’s) department until he or she agreed to testify before a congressional committee, but Canberra is a different place with a different history that includes still-vivid memories of what happened in 1975.

⁷³ The Senate’s success will depend, to a considerable degree, on how successful it is in convincing the media and the public that its committee’s need for ministerial testimony is real and compelling.

⁷⁴ *Odgers’ Australian Senate Practice*, 12th ed., op. cit., p. 232.

⁷⁵ *Ibid.* p. 234.

There are several dangers that will have to be avoided. First, Senate committees will have to refrain from asking MPs-as-ministers questions that concern their actions or positions as members of the House of Representatives and as representatives of their electorates, not as ministers. As I wrote some years ago:

[s]urely there will be instances in which committees and ministers will disagree as to whether a particular line of inquiry crosses this border. In those cases, let the public (and the media) decide whether the Senate is intruding into matters that are none of its business or whether the minister is stonewalling.⁷⁶

Second, there is a danger that committee inquiries into a government's policies and its implementation of the laws will degenerate into investigations in search of headlines for partisan advantage. And third, there is a danger that MPs-as-ministers will appear before Senate committees but then decline to answer important questions, citing an easily-abused doctrine called 'public interest immunity' that justifies a refusal to disclose information if doing so, in the minister's judgment, would not be in 'the public interest'.⁷⁷

These latter two dangers are too real to be ignored and I have no simple ways to protect against them. One danger would involve Senate committees abusing their authority for partisan purposes; the other would involve ministers abusing their authority for partisan protection. Perhaps the best that can be hoped is that the two will balance each other—that committee members will learn to restrain their partisan instincts in order to encourage ministers to be forthcoming in their testimony, and that ministers will learn that invoking 'public interest immunity' without obvious justification will only arouse senators' partisan suspicions and provoke unwelcome committee interrogations and skeptical media commentary.

⁷⁶ Stanley Bach, *Platypus and Parliament*. Canberra, Department of the Senate, 2003, p. 309.

⁷⁷ For more information, see *Odgers' Australian Senate Practice*, 12th ed., op. cit., pp. 468–490, and Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, pp. 8–9.

The Senate accepts that public interest immunity may be claimed by Ministers (and officials can refuse to answer questions pending an opportunity for a Minister to make such a claim). However it does not accept that such claims by the Executive are a conclusive answer. The position adopted by the Senate has been that the claim may be determined by the Senate and, if determined against the Executive, that the Senate has the legal right to the information. In contrast, the Executive has adopted the view that a statement that disclosure is contrary to the public interest made by a Minister in response to a summons from a House or committee is conclusive. In the absence of any exercise of the penal powers of the Senate, the practical effect of this approach to date has been that conflicts are resolved in the political arena rather than in the courts. In recent times, the predominant view, both in the Executive and the Senate, has been that the courts should not have jurisdiction to determine such claims of public interest immunity. It seems a consensus may be developing that the resolution of these disputes is essentially a matter of political judgment, not a question of legal rights and obligations. Australian Government Solicitor, *Appearing Before Parliamentary Committees*. Legal Practice Briefing Number 29, 1996. Available at <http://www.ag.gov.au/publications/agspubs/legalpubs/legalbriefings/index.htm>.

More than anything else I'm proposing here, this recommendation is likely to evoke the loudest cries of outrage and the most media reports of a 'crisis' on Capital Hill. Is it really important enough to justify the furor that it's almost certain to inspire? I can best answer this question by asking another one: Is it really important for the Australian people to know what their government is doing, and not just what the government wants them to know?

Frequency of Senate sittings

The proposals I've already made generally envision a Senate that does more than it has been doing. So it's only fair to ask if we can reasonably expect the Senate to do more or if it already is working at full capacity.

One way to approach this question is to ask how often the Senate meets (or, in parliamentary terms, how often it 'sits'). So let's first look at some numbers.

Table 2 presents the average number of sitting days per year for each decade since Federation and for both the Senate and the House of Representatives. If we put aside the first decade, when there was so much to do to get the new Commonwealth up and running, we find several clear and interesting patterns in the data. First, there hasn't been much variation from decade to decade in how often the House of Representatives has met; the averages for all but that first decade range only from a low of 58.4 days to a high of 70.8 days. So it seems that the House has gone about its business at a fairly steady pace. Second, there's been more variation in the frequency of Senate meetings. During the decades between 1911 and 1970, the Senate never met on as many as 60 days per year, on average, and it met for less than an average of 50 days per year during the 1930s, 1940s, and 1950s. Then the average number of sitting days per year jumped to 70 or more during the 1970s, 1980s, and 1990s. And third, the data in Table 2 show that the House met more often than the Senate for each of the decades from 1911 through 1970, but then the Senate met more often than the House during each of the next three decades, from 1971 through 2000.

Table 2

Average Number of Sitting Days Per Year, 1901–2007

	Senate	House of Representatives
1901–1910	71.2	94.9
1911–1920	51.4	70.8
1921–1930	50.8	67.4
1931–1940	42.6	58.4
1941–1950	42.1	70.0
1951–1960	47.8	62.6

1961–1970	58.9	62.3
1971–1980	70.5	68.7
1981–1990	75.5	59.7
1991–2000	73.0	63.2
2001–2007	54.4	63.4

Source: ‘Number of sitting days by year,’ at www.aph.gov.au/senate/work/statistics/days_hours/year.htm.

These patterns aren’t very surprising. The responsibilities of the House of Representatives and its relations with government didn’t change in any profound way after the Commonwealth had become established. The Senate, on the other hand, was not the same place in the final decades of the Twentieth Century that it had been earlier in the century. Until senators were elected by proportional representation, beginning in 1949, governments sometimes enjoyed such huge majorities in the Senate that some dismissed it as an irrelevancy. And it wasn’t until the 1970s that non-government majorities in the Senate posed regular challenges to governments of the day.

The data in Table 2 are consistent with these developments. The Senate met relatively infrequently, compared with the House of Representatives, during the decades from 1911 through 1970, but then more often, and more often than the House, during the three decades that followed. I would guess that the Senate was more active during the closing decades of the century because its non-government majorities enabled it to make more of a difference, if and when it chose to do so, in enacting laws and monitoring the activities of government.

But notice the last line of the table, with the annual averages for 2001 through the end of 2007. The frequency of House sittings has continued unchanged, with the average of 63.4 sitting days per year falling in the middle of the averages for the preceding nine decades. Not so in the Senate, however. During the current decade, the Senate has been meeting on an average of 54.4 days per year, less than the House for the first time since the 1960s and almost 20 days per year less often than the Senate met during the previous two decades.

Of course the numbers can’t explain why this has happened, but they certainly do show that the Senate hasn’t been meeting as often in recent years as it met on average during the three prior decades. Unless the Senate suddenly has discovered how to dramatically increase its efficiency and productivity, or unless there has been less that the Senate could usefully have been doing, one conclusion we might draw is that the Senate isn’t working as hard as it did even ten years ago.⁷⁸

A second way to examine the same question is to ask how often the Australian Senate has been meeting in comparison with other ‘senates’. Table 3 provides some answers by presenting the number of sitting days per year, for each of the last twenty years, for the Australian Senate, the Canadian Senate, the US Senate, and the British House of Lords.

⁷⁸ As recently as 1999 and 2000, the Senate met on 79 and 71 days respectively.

Following the year-by-year data are two averages, first for the entire twenty-year period of 1988–2007 and then for the most recent ten-year period, 1998–2007.⁷⁹

What do we learn from this table?

First, although there are year-to-year variations, Australia’s Senate has been meeting less than the Canadian Senate whose members all are appointed, not elected, and which frequently has been the subject of criticism and ridicule and even demands for its abolition. Between 1988 and 1997, the Australian Senate met more often than its Canadian counterpart in eight of ten years. During the next ten years, however, the situation was reversed, with the Canadian Senate meeting more often in eight of those years. And second, and more dramatically, the Australian Senate has been meeting less than half as often, on average, as either the US Senate in Washington or the House of Lords in London.

It certainly can be argued that the US Senate is quite a different thing than the Australian Senate. In fact, their legislative powers are almost the same, but they exercise them in very different constitutional contexts. Still, if US Senators, some of whom have to travel even further to Washington than the distance between Perth and Canberra, can manage to meet on more than 150 days each year, is there some compelling reason why Australian senators have met less than 40 per cent as often since 1998? As for the House of Lords, none of whose members are elected of course, their Lordships met more often than the Australian Senate in every year but one between 1988 and 2005.⁸⁰

Table 3

Number of Sitting Days for Selected Upper Chambers, 1988–2007

	Australian Senate	Canadian Senate	United States Senate	United Kingdom House of Lords
1988	89	90	137	153
1989	92	48	136	147
1990	59	107	138	137
1991	83	69	158	74
1992	76	71	129	194
1993	53	47	153	142
1994	80	62	138	142
1995	78	69	211	136
1996	71	67	132	79
1997	82	66	153	228
1998	57	69	143	154

⁷⁹ The data for the House of Lords are for only 18 years, through 2005.

⁸⁰ Most hereditary peers lost their seats under the terms of the *House of Lords Act 1999*.

1999	79	77	162	177
2000	71	61	141	76
2001	52	85	173	200
2002	60	69	149	174
2003	64	67	167	157
2004	49	70	133	63
2005	57	73	159	206
2006	58	62	138	
2007	41	76	190	
Averages:				
1988-2007	67.55	70.25	152.00	146.61
1998-2007	58.80	70.90	155.50	150.88

Note: The data for Australia, Canada, and the United States are for calendar years. The data for the United Kingdom are not exactly comparable because they are for sessions, and extend only to 2005:

A session of Parliament runs from the State Opening of Parliament—usually in October/November—through to the following October/November. However, if there is an election, the session begins after the election and runs to the autumn of the following year, eg May 1997 through to November 1998.
www.parliament.uk/faq/lords_calendar.cfm#call.

Sources:

For Australia, 'Number of sitting days by year' at www.aph.gov.au/senate/work/statistics/days_hours/year.htm;

For Canada, 'Sitting Days of the Senate by Calendar Year' at www2.parl.gc.ca/Parlinfo/AboutParliamentIndex.aspx.

For the United States, 'Resume of Congressional Activity' at www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm.

For the United Kingdom, 'House of Lords FAQ: sitting day figures' at www.parliament.uk/faq/lords_sittings.cfm.

Table 4**Number of Sitting Days for Selected Upper Chambers, 2000–2007**

	Australian Senate	French Senat	Brazilian Senado	Indian Rajya Sabha	Irish Seanad	Japanese House of Councillors	Dutch Eerste Kamer	Belgian Senat
2000	71	107	175	85	74	223		48
2001	52	95	177	81	79	226	40	46
2002	60	80	146	82	49	249	36	49
2003	64	125	186	73	83	214	32	36
2004	49	127	202	51	88	211	40	53
2005	57	110	225	84	82	242	34	35
2006	58	128	252	77	81	235	38	38
2007	41	93	243	65	64	280	39	29
Average	56.50	108.13	200.75	74.75	75.00	235.00	37.00	41.75

Note: The data for Brazil, Ireland, India, and Japan are for calendar years. The data for France, the Netherlands, and Belgium are not exactly comparable because they are for sessions which do not now coincide with calendar years. For France and Belgium, therefore, the data for 2000 actually are for 1999–2000, the data for 2001 actually are for 2000–2001, and so on. Similarly for the Netherlands, the data for 2001 actually are for 2000–2001, and so on.

Sources:

For Australia, see Table 2.

For France, ‘Nombre et Duree des Seances du Senat Depuis 1959’ at www.Senat.fr/plateau/tableaux_bord/48ans5.html#toc16. Thanks to Nicolas Simonet of the Senat du France.

For Brazil, ‘Relatorio da Presidencia,’ at www.senado.gov.br/sf/atividade/RelPresi/. Thanks to Walderez Maria Duarte Dias of the Biblioteca Academico Luiz Viana Filho of the Senado Federal. For Ireland, thanks for providing the data to Rachel Breen of the Seanad Office.

Table 4 extends this comparison beyond Canada, the US and the UK to seven other well-established upper houses for which data were available for the current decade and that I chose without any pre-conceived notion of what we would find.⁸¹ During the current

⁸¹ It would be misleading to include the German upper house, the Bundesrat, in these comparisons because it is composed of state government officials who meet infrequently in plenary sessions:

The Bundesrat membership usually comprises states’ prime ministers, their federal affairs ministers ... finance ministers, and as many others as are required to match the number of votes to which the state is entitled ... its members also have to fulfill their demanding state government obligations. The number of plenary sessions is therefore kept as low as possible, about fifteen per year ... All the chamber’s important work is done by its committees ... The central role of committees in the legislative process means that plenary sessions mostly involve the taking of votes and the issuance for the record of political declarations. Werner Patzelt, ‘The Very Federal House: The German Bundesrat’, in Samuel Patterson and Anthony Mughan (eds.). *Senates: Bicameralism in the Contemporary World*. Columbus,

decade, the Australian Senate has been meeting roughly half as often as the French Senat, less than one-third as often as the Senado of Brazil, and almost 20 days per year less often than either the Indian Rajya Sabha or the Irish Seanad.⁸² The Japanese House of Councillors has met four times as often on average as the Australian Senate.

It's true that Australia's Senate has been meeting more often than its Dutch and Belgian counterparts. However, neither of these upper houses has the same powers and responsibilities as the Australian Senate. In the Netherlands, the 75 members of the Eerste Kamer are elected by the twelve provincial councils and they are not expected to serve on a full-time basis:

Members of the House of Representatives are full-time politicians, whereas members of the Senate are part-timers who often hold other positions as well. They receive an allowance which is about a quarter of the salary of the members of the House of Representatives.⁸³

In Belgium, where only 40 of 71 senators are directly elected by the people, the two chambers of the parliament have the same legislative powers with respect to bills that might affect the delicate relations between the country's French- and Dutch-speaking communities. On all other matters, however, the Chamber of Representatives dominates the legislative process.⁸⁴ To say, then, that the Senate in Canberra meets more often than these two bodies is not to say very much.

Do Australia's senators have other responsibilities that prevent them from spending more time in Canberra? If so, those responsibilities are not found in the Constitution, nor is it obviously true that senators have a compelling political need to spend most of the year at home. It's the members of the House of Representatives who are elected from individual constituencies and whose re-selection can depend on keeping in regular touch with the party faithful at home. Senators, on the other hand, are elected from party lists in each state. With more than nine of every ten Australians voting 'above the line' in Senate elections, senators' prospects for re-election depend largely on how popular their national party is and how high their names appear on their party's list of candidates. In other words, Representatives usually have far better reason than senators to spend time at home, yet the House of Representatives has met more often than the Senate in every year since 2000.⁸⁵

Ohio, Ohio State University Press, 1999, pp. 68, 71, 73. Thanks to Dr. Albrecht Walsleben of the Bundesrat's information office for the information and data he provided.

⁸² There was one year, 2002, in which the Seanad met on 11 fewer days than the Australian Senate, but that was a year in which elections to the Seanad took place.

⁸³ www.eerstekamer.nl.

⁸⁴ www.senate.be/english/SenateCompetencesEN.html and www.senate.be/english/SenateCompoEn.html.

⁸⁵ To be fair, one observer reports that the parties have begun encouraging their senators to take on constituency work:

The Labor Party, for example, now has a well-developed system for sharing constituency work among Senators. Members of the upper house will be encouraged to site their state office in a constituency which Labor aspires to gain in the House of Representatives. The Senator will then act as a proxy Labor MP—taking up cases on behalf of constituents, circulating information about his or her parliamentary achievements and appearing regularly in the local press ... The Liberal party operates a similar system Meg Russell. *Reforming the House of Lords: Lessons from Overseas*, p. 190.

Furthermore, US senators who, like Australian senators, serve six-year terms, have to run for re-election as individuals. Their personal reputations at home frequently matter more than their party label in determining whether or not they will return to Washington for another six years. Yet the US Senate manages to sit more than twice as many days each year as the Australian Senate—more than four times as often in 2007, 190 days compared with 41 days—and their attendance record is quite good.⁸⁶

An alternate explanation for how infrequently the Senate has been meeting, especially in our new century, might be that service in the Australian Senate, like service in the Dutch second chamber, is not expected to be a full-time job. After all, if Australian senators are expected to serve only on a part-time basis, it would be unfair to ask more of them. However, the Parliamentary Library in Canberra has published three reports that demonstrate the implausibility of this possible explanation.⁸⁷ Senators certainly aren't paid only for part-time work. In fact if being a Senator is supposed to be part-time employment, every Australian should want the job.

To summarize what these reports tell us, every senator received a basic annual salary (sometimes called an 'annual allowance'), as of mid-2007, of \$127 060. Since 2000, this salary amount has been adjusted upward each year, so it may very well be higher by the time you read this. The salary, and annual changes in it, are set by a Remuneration Tribunal and are linked to senior public service salaries. However, Parliament can disapprove, change, or postpone the Tribunal's annual recommendations. Between 1999 and 2007, annual senatorial salaries increased by 48.6 per cent in current dollars or by 16.4 per cent in real terms (in other words, adjusting the annual increases to reflect inflation during the same period). A serious argument can be made that a senator's salary is not as much as the responsibilities of the office would justify, and perhaps not as much as some or most of them could make in other occupations. Still, no one would seriously argue that \$127 060 per year is not a living wage.⁸⁸

But that's not all. In addition, senators each receive an annual 'electorate allowance' of \$27 300, to reimburse them for 'costs necessarily incurred in providing services to their

Even so, and however old-fashioned and even naïve it may sound, the principal responsibility of a senator or any other legislator is to serve as a senator, not to increase their chances of being re-elected (or the chances that a fellow partisan will be elected). On how different election systems can affect constituent-representative relations, see Pippa Norris. 'Are Australian MPs in touch with constituents?' A paper prepared in 2004 for the Democratic Audit of Australia and available at <http://arts.anu.edu.au/democraticaudit/categories/auditpapersfrm.htm>.

⁸⁶ Unless, of course, they're running for president.

⁸⁷ All were written by Leanne Manthorpe of the Library's Politics and Public Administration Section. They are: 'The annual allowance for senators and members', 'Superannuation Benefits for Senators and Members', and 'Parliamentary allowances, benefits and salaries of office'. Ms Manthorpe is in no way responsible for how I've used her scholarship here. Senators' allowances, benefits, and other perquisites also are summarized in *Senators' Handbook: a guide to services, entitlements and facilities for senators*, published periodically by the Senate for the use of senators.

⁸⁸ Backbenchers in the House of Representatives receive the same annual salary, but ministers and some parliamentary office-holders receive more. As of late 2007, the prime minister received 260 per cent of the annual allowance of senators and members. In the Senate, the Leader of the Government received 187.5 per cent of the regular salary, the President of the Senate received 175 per cent, and the Leader of the Opposition received 157.5 per cent.

constituents, 'and either the use of a 'private-plated vehicle', to be used for parliamentary, electorate, or official business, or an additional annual allowance of \$19 500 instead. Senators also are entitled to certain benefits for telephone service, official stationery and printing, offices and supplies, staff, and various kinds of domestic and international travel. For example, one of the Parliamentary Library reports explains that, for overseas study trips, 'expenditure is capped at the equivalent cost of one first-class around-the-world airfare for a parliamentarian and spouse in the life of each Parliament.' This limit apparently does not apply to additional overseas travel by senators as members of parliamentary delegations, or to represent the Government with the prime minister's approval.

But that's still not all. Senators who were first elected before the October 2004 election pay into a retirement system and then receive a 'defined benefit' pension that isn't affected by changes in markets and returns on investments.⁸⁹ This can get quite complicated, but let's say that a senator who was first elected before 2004 served in the Senate for eight years—which usually means that he or she was re-elected once—and then either retired voluntarily at age 60 or left involuntarily because the senator lost at the next election or was denied the chance to run at that election by his or her party. That senator is rewarded with an annual pension, known as a 'retiring allowance', of one-half of the senator's final annual salary (or 'annual allowance'). As of mid-2007, that would amount to more than \$60 000 per year for life, and for only eight years of Senate service. Senators who have served 18 years or more receive an annual pension equal to 75 per cent of their final salary, and these allowances increase in line with increases in the salaries of sitting senators.

Elected politicians in democracies always are being criticized for earning too much and for spending too much. Too often citizens believe, mistakenly, that they can enjoy representative democracy on the cheap. Nonetheless, this brief summary of senators' salaries, benefits, and pensions eliminates any doubt that they are paid for full-time service, and so it also disposes of any suggestion that the Senate doesn't meet more often than it does because it's only a part-time place.

More difficult to dismiss are arguments that the number of sitting days really doesn't reflect how hard most senators work. Just because the Senate is sitting, that doesn't mean that all senators are present in the chamber or that they need to be there. On the other hand, the fact that a senator is not in the chamber doesn't mean that he or she isn't working. Formal committee meetings and plenary sittings account for only a fraction of a senator's actual workload. Also, the number of meeting days may be less important and revealing than the number of meeting hours, both in plenary sessions and in committee and other meetings. On the other hand, the same certainly can be said for the US Senate and its members, and probably for the other upper chambers, and their members, that are represented in Tables 3 and 4. Are the demands on Australia's senators systematically greater than the demands on the members of these other assemblies? During every year between 2002 and 2006, the Australian Senate met on fewer days than national assemblies

⁸⁹ A 'defined benefit' pension typically is based on the number of years of service and a percentage of salary. This is in contrast to the increasingly popular 'defined contribution' plans in which the employer promises only to make a certain contribution each year to an employee's retirement fund, which then typically is invested in some combination of stocks, bonds, and cash equivalents. Senators first elected at or after the 2004 election have their retirements funded under a different scheme.

in Botswana, the Cook Islands, Ghana, Kenya, New Zealand, and Zambia, and that's just among the nations that are members of the Commonwealth Parliamentary Association.⁹⁰

Let's take stock, then, by doing some simple arithmetic. One thing on which we all can agree is that there usually are 365 days in the year. To get a realistic sense of how many work days there are in a typical year, let's first deduct 104 days to account for 52 two-day weekends. Then let's deduct an additional 20 days, which is a generous deduction for national holidays. Next let's recognize that senators are people too, and they need personal holiday time like everyone else. So let's give them four weeks, or 20 days of paid holiday time. That leaves us with 221 potential working days available for senators during the year:

$$\begin{array}{r} \mathbf{365 \text{ days less}} \\ 104 \text{ days for weekends} \\ 20 \text{ days for national holidays} \\ 20 \text{ days for personal holidays} \\ \mathbf{= 221 \text{ days remaining}} \end{array}$$

Now we saw in an earlier chapter that, in 2006, the Senate's eight policy committees met on an average of less than 42 days. We've also seen in Table 2 that so far during this decade (2001–2007), the Senate has held plenary meetings on an average of not quite 55 days per year. So if we add together 42 days for committee meetings and 55 days for plenary meetings—and if we make the unrealistically generous assumption that committee and plenary meetings never occurred on the same day—we can account for 97 of the 221 potential working days.⁹¹ And our arithmetic still leaves us with 124 weekdays, or well over five months each year, for which we can't account.

I've already been told that this calculation under-estimates the number of days that senators devote to committee work. In one respect, my calculation actually is an over-estimate because, as I've just said, I assume that committee meetings never occur on the same day as Senate plenary meetings, and this assumption is simply wrong.

On the other hand, it certainly is true that some committees meet more often than the average (also meaning, of course, that others meet less often), and most senators serve on more than one committee. Furthermore, a senator who isn't a full member of a committee may choose to become a 'participating member', who can participate fully in the committee's meetings but may not vote. However, the fact that a senator is a participating member of a committee tells us absolutely nothing about how often that senator actually does attend and participate.

More important, senators aren't required to attend all the meetings of their committees, and they don't. Recall that eight senators serve on each policy committee. According to the Senate's Standing Order 29, however, each committee can meet and conduct its

⁹⁰ These are the only years for which I have data. Thanks to Shem Baldeosingh of the CPA for providing these data, and to Ian Harris, Clerk of the Australian House of Representatives, for putting me in touch with him. Mr Harris is in no way responsible for the use to which I've put his kind introduction.

⁹¹ This assumes no overlap between committee and plenary days—that is, that there never were both committee and plenary meetings on the same day.

business if as few as two of its eight members are present, so long as one of the two is a government senator and the other is from the Opposition.

Attendance records documenting which senators actually attended which meetings are not readily available. I'm told, however, that it's rather unusual for a committee meeting to be attended by more than half its members, and it's not at all unusual for no more than two or three of a committee's eight members to attend a meeting. Attendance will vary, of course, depending on the purpose of the meeting and when it's being held. I'm sure it can be argued that, in many cases, it really doesn't matter how many senators are present because the committee can do what it needs to do so long as one government and one Opposition senator are there. For our purposes, though, what's important is just because a committee had a meeting, we can't assume that all its members were there.

So some upward adjustment in our calculation in the number of committee meeting days clearly is necessary, but how much should our current figure of 42 be increased? Any answer is essentially an informed guess, unless some brave soul has the stamina to calculate how many times there were meetings of all the committees on which each senator served, and how many of those meetings the senator actually attended. Until then, I think it would be fair and generous to guess that, although the Senate's policy committees met on an average of 42 days in 2006, the average senator attended one or more committee meetings on 100 days during that year.

If so, we now can calculate that, of the 221 available work days during 2006, 155 of them were devoted to Senate plenary and committee meetings. And that still leaves us with 56 weekdays, or just about 2 ½ months, for which we still can't account.

So finally, I propose that the Senate meet more often—in plenary sessions, in committee meetings, or, most likely, in both. Furthermore, senators who are interested in strengthening their institution should see to it that there is at least one division on something the government or the Opposition cares about on every day the Senate meets. That practice will tend to ensure that party leaders will insist that their senators are present. Senators should not have to resist the temptation to be absent on sitting days if they think no one will notice. Meeting more often will not guarantee a more vigorous and assertive Senate, but it will make it possible for the Senate to do more and do it better, and I think the burden of proof must rest with anyone who would argue against more sitting days on the ground that it just can't be done. As I hope I've made clear, there's more than enough for the Senate to do.

What's the problem?

To summarize, I propose these modest but constructive reforms for the Senate:

First, that Question Time each day be devoted solely to questions from non-government senators and responses from government ministers;

Second, that each government minister in the Senate be required to respond to questions on only one day each week, except for the Leader of the Government in the Senate as the spokesman for the prime minister;

Third, that the length of Question Time be fixed at one hour each day, unless the Senate votes otherwise or the Opposition abbreviates it;

Fourth, that the chairmanships of the eight policy committees be divided equally among government and non-government senators;

Fifth, that the Senate's policy committees be empowered to set their own priorities and agendas as they routinely review all bills and legislative proposals affecting the subjects for which they have responsibility, subject to ultimate direction by the Senate.

Sixth, that to this end, the Selection of Bills Committee be replaced by a Legislative Planning Committee to review how and when the policy committees plan to act on the bills referred to them after their first reading and, when necessary, to make alternate recommendations to the Senate.

Seventh, that the Senate give priority to its policy committees' recommendations for amending bills when the Senate considers those bills in detail during plenary sessions.

Eighth, that the Senate insist on having House ministers agree to requests that they testify before the Senate's committees about their work as ministers;

And ninth, that the Senate meet more often.

These are not revolutionary proposals. For example, even the committees of the Canadian Senate—which, recall, is wholly appointed, not elected—have, for decades, received all bills and testimony from ministers. In these committees:

Ministers and their officials can and do appear and may give evidence and answer questions. Over the past thirty years it has become standard practice to refer all public bills to one or other of the standing committees and to hear evidence both from Ministers and officials concerned and from unofficial interests who may wish to appear. Indeed, on a good many public bills, appearance before a Senate standing committee is the only opportunity unofficial interests have to be heard. Advantage is often taken by Ministers or officials concerned to propose amendments to their own legislation while it is before a Senate committee. There can be no doubt that this practice of referring public bills to standing committees has greatly improved liaison between the Senate and the administration as well as giving the interested public further, if not the only, opportunities to be heard.⁹²

Nothing that I've proposed would fundamentally change the nature of the Senate or the way it works. My proposals won't require any major changes in the Senate's organization or procedures. None of them will require a constitutional amendment; in fact, none of them even will require any change in law. The Senate's non-government majority can

⁹² Robert A. Mackay, *The Unreformed Senate of Canada*. rev. ed., Toronto, McClelland and Stewart Limited, 1963, pp. 69–70. And recall the practices of the New Zealand and Scottish parliaments that I described earlier.

adopt all but one of them unilaterally. Only the appearance of House ministers before Senate committees will require the acquiescence of the House of Representatives and the government in what will amount to a modification of an existing convention governing relations between the two halves of Parliament. Taken individually and collectively, however, these changes in the Senate should make it a more active and effective institution—one that does a better job at reviewing the government’s program for enacting new laws and its track record in implementing existing laws. That’s why I call them reforms.

Reform, however, always is in the eye of the beholder. In 2003, Prime Minister Howard released a report that purported to ‘reform’ the Senate, but in ways that would have significantly weakened its position in relation to the government.⁹³ Fortunately, his proposals were dead on arrival. In this essay, I trust I’ve left no doubt that my intention is the opposite: it is to strengthen the Senate. Doing so may make life more complicated and difficult for the government and the House of Representatives, but so be it, because that’s the price required to enable the Senate to make government more accountable to the Australian people. That should be the goal of Senate reform, not to make life more comfortable for the Government, whatever its political persuasion.

At the same time, I want to reiterate that what I’ve proposed here by no means exhausts what could be done to strengthen the Senate. My ambitions have been limited to proposing only a handful of reforms that the Senate can adopt and implement without the need to change the laws or amend the Constitution. That doesn’t mean that these reforms will be easy to implement. First, to those who lack imagination or for whom the status quo is comfortable and convenient, even these modest reforms may seem revolutionary and unthinkable. Second, the devil always is in the details, so careful thought will be required as to how best to incorporate these reforms into the Senate’s standing orders and to anticipate any related or compensatory changes that may be required. And third, implementing these proposals will require a degree of determination and institutional self-regard that the Senate doesn’t always demonstrate.

Why didn’t the Senate act years ago to adopt reforms such as these? If I could think of them, surely these reforms and others like them must have occurred to senators over the years. I think the answer becomes clear if we look at the political interests of the various groups within the Senate.

We have to expect that the current government or any future government will oppose any reforms that would strengthen the Senate in any significant way, at least so long as the Senate is expected to continue having non-government majorities most of the time. After all, the whole point of strengthening the Senate is to enable it to be a more effective participant in the legislative process and to empower the Senate to do a better job at holding the government accountable for its actions and decisions. Lurking behind any specific criticisms the government may make of these or similar reform proposals always will be the calculation that anything making the Senate stronger will make the government weaker. We’re as likely to see snow in Cairns at Christmas as we are to see an Australian government championing the kinds of reforms that I’ve proposed here.

⁹³ Department of Prime Minister and Cabinet, *Resolving Deadlocks: a Discussion Paper on Section 57 of the Australian Constitution*. Canberra, Commonwealth of Australia, 2003.

On the other hand, independent and minor party Senators should be natural supporters of a stronger Senate. These senators have little realistic prospect of becoming government ministers. For them, serving in the Senate almost certainly is the pinnacle of their political careers, so they should accept that strengthening the Senate is in their own interests. The Senate is the one place where their views can make a real difference and where they have their only realistic chance to affect the nation's policies. As the Senate becomes stronger, so will their influence grow, as long as their votes can continue to decide who wins and who loses in Senate divisions.

That leaves the Opposition. As long as the Senate has non-government majorities, the future of the Senate will continue to lie in the hands of the Opposition, whether that's a Labor or a Coalition Opposition. By joining forces with independent and minor party senators, the Opposition should have ample opportunities in coming years, as it does today, to build the majorities needed to change the Senate's organization and procedures, and to convince government that resisting reform (such as by refusing to permit its House ministers to testify before Senate committees) would come at too high a price.

However, there have been such opportunities for most of the past several decades, and we'd be hard-pressed to find evidence that, during that time, the Opposition in the Senate truly has championed the cause of Senate reform. Why? I suspect that there are at least two reasons.

First, I suspect that many senators of all parties don't share my understanding of Australia's political system, as I summarized it in the introduction. They may think that Australia has, should have, and always was intended to have a parliamentary system of government, a system in which the Senate's role should remain very much a subsidiary one. If so, strengthening the Senate would not be such a good idea because doing so would enable and encourage it to pose more of a challenge than it does today to their understanding of responsible party government.

Second, I also suspect that Opposition senators, whether Labor or Coalition, try to convince themselves that the defeat of their party at the last election for the House of Representatives was a regrettable mistake that the voters are sure to correct at the next election. They expect, therefore, to be back in government in less than three years. If so, the Opposition's attitude toward strengthening the Senate may not be much different from that of the government. If government senators oppose a stronger Senate because it would complicate their party's ability to govern today, Opposition senators may fear that the same reforms would complicate their party's ability to govern in a foreseeably short time.

These are reasons why I'm skeptical that the impetus for significant changes in the Senate's organization, procedures, and practices will originate from within Parliament House. And that's why I've written this not for senators nor for political scientists, but for interested and informed Australians who appreciate why, as I said at the very beginning, a vigorous and assertive Senate is necessary for the continuing health of Australian democracy.

One final thought: what you've just read has benefited from the reactions and advice of quite a few people, most of them in or near to the Senate. Normally, a polite and appreciative author thanks all of them by name. In this case, however, I'll allow them to preserve their anonymity, just in case anyone might assume that any of them agree with

anything in particular that I've written here. In fact, each of them probably disagrees with some of my ideas, and it's quite possible that some of them disagree with all of my ideas.

Like most other people, I'd prefer that everyone agree with me all the time. In this case, however, I can live with their disagreement comfortably if not happily. What's most important is to change the direction of the debate: from how to 'reform' the Senate by weakening it, to how to reform the Senate by strengthening it. Once we're asking the right question, healthy disagreements over how to reach our shared goal are well and good. If there are better answers than mine to the problems I've identified, so much the better.