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Hon N A Brown, QC
C/- Constitutional Change
Legal and Culture Branch
Department of the Prime Minister and Cabinet
BARTON ACT 2600

Dear Mr Brown

Introduction
I appreciate the opportunity to make a submission arising from certain issues raised in the *Resolving Deadlocks* discussion paper on section 57 of the Constitution. Normally, I do not make submissions of this kind, as I believe that it does a disservice to the profession of clerk to a legislature to make public pronouncements or media statements on topical issues. However, given my belief in the service to the nation that the discussion paper and the consultative group have made on the issues raised on the matter, and the fact that an invitation to provide observations has been made, I have decided to make an exception to my normal custom. I have consulted extensively with the staff of the Department of the House of Representatives in the preparation of this submission.

Misconceptions
I would like to commence by setting aside some of the assertions that have been made about section 57 that are not based on fact. Much has been made of the restrictive effect the section has on parliamentary procedure. The following assertion was made before the Senate Standing Committee on Finance and Public Administration on 3 November 2003[1]: "As a purist, I take the view that it is not open to the two houses to authorise [a joint sitting] for any purpose other than under section 57 of the Constitution." This assertion was repeated in an article in the *Sydney Morning Herald* shortly afterwards[2]. Of course, joint sittings of the Senate and the House of Representatives have occurred for purposes other than under section 57 of the Constitution. Under the Commonwealth Electoral Act, joint sittings were held in 1981 to elect Mr McMullan to a casual Senate vacancy and again in 1987 to elect Mrs Reid. No question has ever been raised as to the first election of then Senators McMullan and Reid. The Electoral Act still provides for joint sittings for casual Senate vacancies in Territories other than the ACT and the Northern Territory if necessary in the future.

This concept is important, I feel, because my belief (and one that I think has been adopted by previous Clerks of both Houses as well) is that prohibitions should not be invented to restrict the legislature that one serves. Advisers on parliamentary practice should be looking for facilitating procedures, not using them as an obstructive tactic. The dead hand of supposed procedural knowledge should not be unveiled to prevent a house of parliament doing anything that is not otherwise precluded. This becomes important in assessing valid suggestions of dealing with a procedural consideration. As I will discuss subsequently, the standing orders of both the Senate and the House of Representatives contain provisions for resolving deadlocks such as the appointment of a conference of managers from both Houses. Provision for the appointment of conferences is not contained in the Constitution. While the procedure has currently fallen into disuse, it has happened in the past and its validity has never been questioned. The procedure also shows that those who initially forged our procedures were principally interested, not in ongoing obstruction, but in the resolution of differences.

[1] Clerk of the Senate, Senate *Hansard* F&PA 14 and 15.
[2] "The Shadow Opposition", *SMH* 5/11/03, p 12.

Responsible government

As indicated in the discussion paper, it was the view of the 1959 Joint Committee on Constitutional Review that section 57 needed to be amended in such a way as to maintain the principle of responsible government and to ensure the precedence of national interests over other interests[3]. The observation was made in the Boilermakers case that probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations. The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of the separation of powers. [4] Australia accepts a **notion** of the separation of powers, but also maintains, because of responsible government, the welding together, or overlapping, of certain of the elements. However, for reasons fully expanded in the discussion paper, the Senate has set itself as a power base equivalent to a principal arm in a quasi-American separation of powers approach. Frequently, it has identified the Executive as being the arch opponent, rather than a part of its own parliamentary system. This is evident from Senate publications, which discuss the effect of potential section 57 action, not in the terms of the Constitution as the Senate and the **House** adopting a particular position, but rather that the Senate and the **Government** take certain action. Such a description is as inane as stating that the **Senate** does not amend Bills or make requests for amendments; rather it is the **Opposition, Democrat and Greens** who take this action. However, such descriptions are used, and they are deliberate, or at best, Freudian slips. Usually, they are made by those who have never been in a position to make a decision of Executive proportions, and making decisions of this kind is not as simplistic as is often made out.. Such assertions reveal a biased approach.

I have suggested that the Constitution is in need of reform at least partly because the whole basis on which it rests (the federal imperative) has been overtaken by the development not envisaged when the Constitution was being drafted, that of the supremacy of party politics in Australia. The fact that the Senate now largely represents political parties rather than the States is significant in the development of a combative rather than a consultative approach to resolving differences. This is at the heart of the need to reconsider the deadlock provisions.

The discussion paper quotes the 1959 report of the Joint Committee on Constitutional Review's conclusion on the impact of the operation of the Senate on the principle of responsible government:

> "The Committee considers it to be quite inconsistent with the principle of responsible government at the Commonwealth level that a party or coalition of parties returned with a clear majority in the House of Representatives and, for that reason, fully entitled and expected to form an effective Government, may almost at once be unable to give effect to its policies because of party political Opposition in the Senate, unless it either threatens or obtains a double dissolution."[5]

The discussion paper also quotes from the Committee that '[the]weapon of rejection has …always been in party hands."[6] I served as the committee secretary on the 1984 Joint Select Committee on Electoral Reform, the recommendations of which resulted in the increase of the Parliament to its current size, and my observation is that both situations described by the Joint Committee have intensified as a result. The Senate today is truly the House of the political parties in our parliamentary system. The recommendations of its committees are usually predictable on a party political basis before the taking of evidence has begun. The legislative process in relation to proposals taken to the electors by a government or by an opposition about to form government has been increasingly frustrated, and the concept of responsible government has been severely diluted.

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[3] *Resolving Deadlocks*,p7.

[4] The Queen v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 at 275. I am grateful to Professor Geoffrey Lindell for drawing attention to this in *The Authority for War*, in *About the House* May/June 2003, pp23-4and p36.

[5] Resolving deadlocks, p35.

[6] Ibid, p14.

It should be remembered that Members of the House of Representatives are subject to three-year maximum terms. In this, our 40th Parliament in just over 100 years, Members of the House have faced the electors on average once every two and a half years. Only the Territory Senators are elected with the same frequency. The extreme dilution of the principles of responsible government is being taken by and large by Senators who stand for election once every six years.

Supreme position of the House
In establishing the mechanism for resolving deadlocks, the supremacy of the House of Representatives was established in section 57:

- It only relates to legislation initiated in the House of Representatives;
- Proposed legislation after a double dissolution election must be reintroduced in the House;
- Limitations of time for its use are set with regard to the House (not within six months of expiry by effluxion of time);
- The House has the power to decide whether or not to incorporate amendments made or suggested by the Senate.

Currently[7] there are before the Parliament a number of items that are potential simultaneous dissolution :triggers". The following Bills have met the constitutional requirements to serve as "triggers":

- ❖ Family and Community Services Legislation Amendment (Disability Reform) (No.2) 2002;
- ❖ National Health Amendment (Pharmaceutical Benefits – Budget Measures) 2002;
- ❖ Trade Practices Amendment (Small Business Protection) 2002;
- ❖ Workplace Relations Amendment (Fair Dismissal) 2002;
- ❖ Workplace Relations Amendment (Secret Ballots for Protected Action) 2002;
- ❖ Migration Legislation Amendment (Further Border Protection Measurement) 2002.

Another two Bills are currently before the Houses which have begun the second phase as provided in section 57:

- ❖ Workplace Relations (Termination of Employment) 2002 [No.2], currently before the House, is identical to a Bill previously rejected by the Senate;
- ❖ Broadcasting Services Amendment (Media Ownership) 2002 [No.2], currently before the Senate, is identical to a Bill previously rejected by the Senate, but now incorporates Senate amendments agreed to by the House in June 2003.

(The use of square parentheses in the official documents of the House indicates a Bill's particular status as it passes through the Houses in relation to section 57 of the Constitution).

This is a significant list, given that the Parliament will not have achieved the end of its second year until February 2004. It reinforces the points made in the discussion paper. Given the supremacy of the position of the House recognised in section 57 of the Constitution, a number of the options proposed in the discussion paper would not be inappropriate.

Resolving deadlocks
As I indicated earlier, Australian parliamentary practices were forged so as to process legislation and to establish workable ways to **resolve deadlocks**, rather than perpetuate **obstruction**. The whole legislative process, where there is not agreement, is to try to isolate the areas of disagreement in proposed legislation and to attempt to reach a common position in relation to the disagreement. For example, when the Senate returns a Bill with amendments, and seeks the agreement of the House, only the amendments are open for consideration, not the whole Bill as previously agreed, unless there is something elsewhere in the Bill that is consequential upon the Senate amendments. There can be an exchange of messages between the Houses on three occasions, before the Bill must be laid aside, or a conference requested.

The same process of negotiation is different in respect of Bills which the Senate is not permitted to amend (financial legislation), but may only request the House to make suggested amendments. The Senate has no right to press requests for amendments in this process. On occasion the Senate has done so, and the House has kept its options open. Sometimes the House has declined to consider the

[7] As at House rise on 5 December 2003.

purported pressed requests; on other occasions it has taken the view that the fact that the Senate is acting inappropriately should not prevent it from doing whatever it chooses, including making the amendment requested on a second or subsequent time, without prejudicing its constitutional position. The House does not recognise the three-time limit on the number of times it can return a Bill that is the subject of an improper pressed or further pressed request. The approach is that if the Senate is behaving outside of constitutional requirements, the House should have the option of maintaining its position, or changing it, if it sees fit.

The matter of the absence of a Senate right to press requests for amendments has some relevance to the consideration of section 57 of the Constitution, in that the section also makes provision for the mechanism to be invoked if the Senate **fails to pass** a Bill [*emphasis added*]. During the course of the 32nd Parliament, as indicated in the discussion paper, the Fraser Government did not command the support of a majority in the Senate, and 13 proposed laws were twice rejected by the Senate or failed to pass the Senate. Among these were nine sales tax amendment bills, part of the 1981 Budget measures, in relation to which the Senate in 1981 purported to press requests. The House declined to deal with the matter, and the Senate action was considered to be a failure to pass the Bills in the terms of section 57 of the Constitution. The nine Bills were included in the Governor-General's proclamation dissolving both Houses before the March 1983 elections.

The standing orders of the House provide that a Bill may be laid aside at any time[8]. However, it is usual for the House to attempt to negotiate with the Senate before taking this action. In 1951, the Senate's reference of the Commonwealth Bank Bill to a select committee was taken to have been a failure to pass the Bill. However, the reference to the committee occurred on the second phase of consideration under section 57, the Senate having previously amended the Bill in a manner that was not acceptable to the House.

Conferences

The standing orders of both Houses provide for the holding of conferences to deal with disagreement over legislation. Managers are appointed for each House from among their membership, and the reaching of a settlement is attempted. When the conference is over, the managers for each House report proceedings to their respective Houses. Two formal conferences have been held, both initiated by the House of Representatives. These occurred in 1930, and the procedure has now fallen into disuse. The only way that I would imagine it being employed in current circumstances would be if the Houses had reached the limit of the stages of negotiation on a Bill by message, but there was a desire by both Houses to keep the measure alive, a conference could be called rather than laying the bill aside. However, the fact that there is provision for such "mini-joint-sittings" (subject to endorsement by the separate Houses) in current parliamentary practice indicates that to explore some of the solutions the discussion paper identifies is not to depart from the vision of parliamentarians of an earlier time who were truly focussed, not on obstruction, but on resolving deadlocks.

It is to be noted that the existence of such provisions in the standing orders of each House is entirely consistent with the provisions of section 50(ii), which refers to each House making rules and orders with respect to '….The order and conduct of its business and proceedings either separately or jointly with the other House'. It also implies no reflection on the significant role of each house to note that, while the establishment of a very powerful second chamber was a vital feature of the federal compact (and indeed that bicameralism was apparently something of a constant assumption during the convention debates — Bennett *The Making of the Commonwealth*, page 112), key provisions of the Constitution refer to "The Parliament". Section 1 vests the legislative power of the Commonwealth "in a Federal Parliament", and sections 51 and 52, dealing with the law making powers, each start " The Parliament shall…"

It is consistent with such terminology when Members of each House, despite their separate responsibilities, think in the terms of "The Parliament", and not in terms of "my house". I am sure that many parliamentarians over the years have indeed thought of themselves as "Members of the Federal Parliament", as much as, if not more than, as "Senators" or "Members of the House of Representatives".

When such thinking is allowed to grow, the prospects of the resolution of deadlocks, and indeed a practical approach to other matters may be facilitated. It would also be welcomed by citizens who may be

[8] SO250

impatient with too ready a resort to notions of the sanctity of one House and who may think that their Parliamentarians should be working to resolve national problems.

Impact of section 57 on the Senate
The Australian Senate is one of the most powerful second chambers in the world. There is, however, one significant chink in its power, and that resides in section 57. The discussion paper mentions that there have been occasions when section 57 was used simply as a trigger for an election.[9] In the simultaneous dissolution sought by caretaker Prime Minister Mr Fraser, there was no doubt that the 21 Bills that formed the basis for the dissolution would not be introduced if Mr Fraser was successful in the ensuing elections, and if the deadlock continued into the next Parliament, as it was the coalition parties whose rejection of the Bills had made them section 57 "triggers" in the first place.

The Governor-General possesses discretion as to the granting of a request for an election for half of the Senate or for House general elections– for example, an alternative to a request early in a parliament by a Prime Minster who no longer enjoyed the confidence of the House would be to seek an alternative leader in the House. However, it seems that if the circumstances for simultaneous dissolutions under section 57 of the Constitution are legally established, it is very difficult to imagine a situation in which any such discretion could be exercised. While it is a major risk for any government to call a double dissolution, the possibility of doing so does place the matter of timing more within a government's control. It would seem to me to be more profitable for those who seek to preserve the power of the Senate to look for viable options for the reform of section 57, to remove the current risk of having the Senate dissolved. The discussion paper indicates that the option of calling a double dissolution election would remain available to the government of the day[10]. This is understandable, given the record of legislative frustration, particularly in recent years. The proposals relating to a joint sitting without elections require an absolute majority, not of Senators and Members present, but of the total number of those entitled to vote. This is never an easy feat. If agreement for possible freeing up of legislative deadlocks was agreed, the double dissolution option could become negotiable. This possibility has already been recognised in the variation of Option 2 in the discussion paper, of a House general election or a House general election plus a half Senate election. From a personal point of view, I would find either of the options incorporating any of the variations to be preferable to the current situation. My personal preference would be for option 2, because an election for the House, or (as would probably be the case, for the House and half the Senate) would allow an element of voter input before a measure was submitted to a joint sitting.

Nexus
The discussion paper indicates that it does not seek to break the nexus between the Senate and the House of Representatives, given the failure of the 1967 referendum. However, it seems to me that a course of action along those lines may have considerable merit. If the nexus requirement was removed and the size of the Senate reduced to 10 Senators from each original State, with four Territory Senators, and the size of the House of Representatives fixed at 150, the total composition of the Parliament after a normal half Senate election would more closely reflect the wishes of the people. I understand that the 1967 referendum suffered from a media campaign of an affirmative vote resulting in more politicians. The suggestion I have made would mean less politicians. Perhaps our political leaders could commit to a plebiscite (if, for example, the Northern territory warrants additional representation in the future, or if a move to rectify the lack of community representation for indigenous people was envisaged).

Other proposals
My comments in this paper have largely centred on the proposals advanced by the Government. The consultative group would be aware of alternative proposals advanced by the Opposition and the Greens. I understand the Opposition proposals to support review of section 57, adding in removal of the Senate's power to block supply and fixed four-year terms[11]. From a practical viewpoint, I do not think that the budget bills could themselves provide a section 57 trigger because of the time lapse and the need for public funding. In 1975, the relevant Bills were vital to the process, but they were not themselves subject to section 57. I would support any move to prevent Senate obstruction of principal

[9] *Resolving Deadlocks*, p.24.
[10] Resolving Deadlocks, p38.
[11] *Constitutional Reform and the Resolution of Parliamentary Deadlock*, the Hon Simon Crean, MP [then] Leader of the Opposition and Robert McClelland MP [then] Shadow Attorney-General, October 2003.

budget Bills. However, I believe that considerations such as these could be tackled after the section 57 situation was rectified.

The Greens proposals appear to be centred on a previously published policy of proportional representation for the House of Representatives[12]. My comment on this proposal, advocating one vote, one value, is made by a party whose political leader is a Senator from Tasmania. I also note that the policy paper supports the abolition of the States. I am not sure that this would encompass a major constitutional reform establishing 60 Senate electorates containing roughly equal numbers of electors (with some flexibility to account for community of interest) still elected on a proportional representation basis. The argument has been advanced that, under a system of this kind, the Senate would then still represent political parties, but it would have a democratic, representative basis.

Conclusion

I congratulate those involved in the preparation of the Prime Minister's discussion paper, and members of the consultative group to the positive contributions made, currently or previously, on the issues raised by section 57 of the Constitution. Some of the harshest criticisms of the current proposals or options have been characterised by negative comments without advancing alternative options. I am heartened by the membership of the consultative group, as I know they will be conscious of the fact that some of the criticisms of the proposals for change have come from areas with a vested interest in ensuring that there is not a government majority in the Senate. I express gratitude to the Prime Minister and those who advise him for raising these important issues for consideration, and to the Opposition and the Greens for advancing alternative considerations. I compliment the members of the Consultative Group for the meetings to raise awareness they have conducted and for agreeing to consider submissions. I wish you and the other members of the group well in considering the various issues that Australians from all walks of life no doubt have made or will make to the group, and look forward to seeing your conclusions.

Yours sincerely

I C Harris
Clerk of the House

[12] Greens Policies in brief: *Democracy*, http://www.greens.org.au/