

Former Clerk Harry Evans was a wonderful man and I admired him enormously. We hit it off because we were both parliamentarians. Harry emphasised the vital importance of the Senate to the health and integrity of our democracy. He fearlessly and sometimes fiercely promoted the Senate as an institution. The clarity of Harry's thought gave considerable thrust to his arguments. He knew that there is a continuing need to defend, explain, promote and advance the cause of the Senate not just because of its vital national, constitutional and democratic role, but because of the forces opposing it.

The Senate is an integrity institution. I first thought of the Senate in those terms some years ago when I read a paper by the Hon. James Spigelman AC QC, the former Chief Justice of New South Wales, on a distinct and institutionally separate fourth branch of government he called 'the integrity branch of government'.<sup>1</sup> To attract legitimacy and trust, an integrity institution must itself have integrity, but it is more than just an institution that has integrity.

An integrity institution has as its prime purpose an obligation to ensure that institutions, organisations or individuals over which it has oversight or power, themselves operate with integrity. Paraphrasing Spigelman, it must act to ensure that governmental institutions exercise the powers conferred on them in the manner in which they are expected and/or required to do so, and for the purposes for which those powers were conferred.<sup>2</sup>

Spigelman's paper identified the ways in which existing integrity institutions ensure institutional integrity elsewhere. He identified the committees of Parliament, audit offices, independent corruption commissions, royal commissions, and ombudsmen as fulfilling an integrity function. Of those institutions Spigelman identifies, only the

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\* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 20 September 2019. Author's note: 'My thanks to the Clerk of the Senate for asking me to deliver the annual Harry Evans lecture. I consider it an honour'.

<sup>1</sup> James Spigelman, 'The Integrity Branch of Government', *Australian Law Journal* 78, no. 11 (2004): 724.

<sup>2</sup> The abstract of Spigelman's paper reads in part: 'The recognition of a functionally distinct and institutionally separate fourth branch of government is occasionally proposed in the constitutional law literature. The paper proposes the recognition of such a branch, termed the integrity branch. At a high level of generality, the purpose of the integrity branch is to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose'. Spigelman, 'The Integrity Branch', 726–729.

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committees of Parliament are by election and not by appointment. I never heard Harry use the term ‘integrity institution’ but he certainly believed in that notion. He knew that the Senate’s integrity role was hard won, and that the Senate would have to continue to struggle to assert that role.

The struggle is twofold. Firstly, for the Senate to retain the character of an integrity institution, complete with the support, legitimacy, trust and culture that such standing demands. Secondly, to counter the forces that continue to seek to delegitimise, deny, reduce or resist the powers and authority necessary to the functioning of the Senate as an effective integrity institution. Hence the title of this paper, ‘The Senate—the struggle continues’. The title was prompted by my memory of the rallying cry used during the Mozambican War of Liberation, *A luta continua*—the struggle continues.<sup>3</sup>

It is natural for observers of the Senate to see it in the ‘now’ and to judge it accordingly. It is also human nature to focus on its faults, not its strengths. The present matters, but it is the Senate’s past that points the way to its future. The birth of the Senate was a struggle, but once given life and meaning by the Australian Constitution, its struggle thereafter has been to grow stronger and to stay strong. The Senate’s strength has been and will always be tested. That is because the Senate is in a competition for money and power. Its role is not to acquire it, but to guard and monitor it.

The Senate’s constitutional duty is to check or restrain others, and often to encourage others, in order to ensure the proper use of money and power. The struggles of the past and present have been for the Senate’s independence, for the principles of accountability, transparency and responsibility, and for the further advances needed in integrity.

The constitutional framers intended the Australian Senate to be a necessary and powerful foil to the executive, the House of Representatives and the bureaucracy. The Senate’s status as a powerful bicameral house with its own representational federal franchise stands on firm constitutional foundations, with the central institutional check of ensuring that all legislation should have a double majority.<sup>4</sup>

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<sup>3</sup> The full Portuguese saying is ‘*A luta continua, vitória é certa*’ meaning ‘*The struggle continues, victory is certain*’. Mozambique was a colony of Portugal for over four centuries. The Mozambican war of independence between Portugal and the Mozambique Liberation Front (FRELIMO or Frente de Libertação de Moçambique) started in 1964 and ended with a ceasefire in 1974, followed by negotiated independence in 1975.

<sup>4</sup> For an exposition on the merits of a double majority see Glenn Ryall and Jessica Stout, ‘Scrutiny Committees: A Vehicle for Safeguarding Federalism and the Constitutional Rights of Parliament’, *Papers on Parliament* 67 (May 2017): 131.

Stanley Bach was right to say that ultimate legislative authority lies with the House,<sup>5</sup> but the executive must be ever mindful that while it may have the numbers in the House it needs to work to get the numbers in the Senate. This is not a one-way street. The Senate, in turn, has to work to get the numbers in the House.

Some believe the constitutional founders intended the Senate to be a house of review but the Constitution itself is silent on that point. However, the Senate was given the powers to become one and review is now an absolutely vital part of its work.<sup>6</sup> While the legislative and policy struggle between the houses is perennial, other Senate struggles since 1901 have been periodic. They are struggles because getting the executive to agree, accept, reform or change does not come easily and resistance continues. Nevertheless there have been tremendous strengthening advances for the Senate since 1901. These advances interlock but can be summarised as:

- asserting and advancing independence from the executive, including through Senate reform. The 1949 introduction of proportional representation for Senate elections meant that governments thereafter found it hard to attain their own Senate majority
- increasing the Senate's power and resources to make that independence meaningful, for instance it now controls its own budget, and has access to the research expertise of the parliamentary library and parliamentary budget office
- effectively exercising power in restraining government from abuses or fault, principally through the committee system and the estimates hearings process
- insisting on scrutiny and review of legislation, delegated legislation, and expenditure—this became more effective and enduring after standing committees were established<sup>7</sup>
- introducing the use of discovery, particularly orders for the production of documents, and the Murray Motion,<sup>8</sup> albeit limited by the invoking of executive privilege, restrictions on freedom of information requests and by secrecy orders. The accompanying power to call witnesses is powerful, but is constrained by an inability to call ministers from the House or ministerial advisers

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<sup>5</sup> 'If and when push finally comes to shove, the Constitution favours the ultimate legislative supremacy of the House of Representatives'. Stanley Bach, *The Platypus and the Parliament: The Australian Senate in Theory and Practise* (Canberra: The Department of the Senate, 2003), 29.

<sup>6</sup> See Stanley Bach's discussion on 'why the concept of the Senate as a House of Review has remained so unclear', *ibid.*, 153–156.

<sup>7</sup> Chief Justice Robert French referred to this function as 'parliamentary quality control' in his speech, 'Adding Value to Law Making', delivered at the Australia–New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century (Canberra, 6 July 2009), 1.

<sup>8</sup> The 2001 Senate Order on Entity Contracts is also known as the '*Murray Motion*'. It requires the government to place essential details of its contracts on the internet.

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- enhancing the power of veto over delegated legislation<sup>9</sup> through the restricted ten-year life of legislative instruments<sup>10</sup>—delegated legislation constitutes over half of all federal law by volume in Australia<sup>11</sup>
  - thoroughly investigating environmental, social, economic and other national issues<sup>12</sup>
  - defending rights and freedoms—as the Senate puts it, avoiding laws that unduly trespass on personal rights and liberties<sup>13</sup>
  - insisting on transparency, so making government and parliamentary processes and information open and accessible
  - insisting that the executive, the bureaucracy and the Parliament itself are accountable, and enforcing that accountability. Accountability accelerated following the 1970 introduction of a range of Senate standing committees and estimates public hearings
  - making efforts to attend to integrity in office and function so that the Parliament and its members stay true to purpose and exhibit honesty, trustworthiness, fairness and ethics in conduct and performance. Integrity is the subject of more recent attention.

These often fierce struggles continue. Harry knew there would always be unfinished business. Of his twenty reform proposals submitted to the 2020 Summit in 2008, there has only been movement on five.<sup>14</sup>

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<sup>9</sup> Under the *Acts Interpretation Act 1904*, the Senate has the legal authority to disallow delegated legislation.

<sup>10</sup> The *Legislation Act 2003* formerly the *Legislative Instruments Act 2003*.

<sup>11</sup> *The Table*, Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments, 78 (2010): 30.

<sup>12</sup> See, for example, previous inquiries by the Senate Standing Committees on Community Affairs, Environment and Communications, [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Completed\\_inquiries/2016-19](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2016-19); the Senate Standing Committees on Community Affairs, [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Completed\\_inquiries/2016-19](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2016-19); and the Senate Standing Committees on Economics, [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2016-19](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2016-19).

<sup>13</sup> It is interesting to note that rights but not freedoms are in the titles of the 1976 International Covenants on Civil and Political Rights, and on Economic Social and Cultural Rights, and the 1986 Australian Human Rights Commission, although they are in the text.

<sup>14</sup> Harry Evans, *Parliamentary Reform Proposals for the 2020 Summit*, tabled at Budget estimates 2008–2009, Senate Standing Committee on Finance and Public Administration (Canberra: Department of the Senate, 26 May 2008), [www.aph.gov.au/Parliamentary\\_Business/Senate\\_Estimates/fapacte/estimates/bud0809/parliament/index](http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/fapacte/estimates/bud0809/parliament/index). See also, Harry Evans, ‘Time, Chance and Parliament: Lessons from Forty years’, *Papers on Parliament* 53 (June 2010), [www.aph.gov.au/sitecore/content/Home/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/pops/~/link.aspx?\\_id=4EEB6147E0874E338DEB3EC4D4740A0F&\\_z=z](http://www.aph.gov.au/sitecore/content/Home/About_Parliament/Senate/Powers_practice_n_procedures/pops/~/link.aspx?_id=4EEB6147E0874E338DEB3EC4D4740A0F&_z=z); ‘Harry Evans: Selected Writings’, *Papers on Parliament* 52 (December 2009); *Papers by former Clerk of the Senate Harry Evans*, [www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/The\\_Biographical\\_Dictionary\\_of\\_the\\_Australian\\_Senate/Papers\\_by\\_former\\_Clerk\\_of\\_the\\_Senate\\_Harry\\_Evans](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/The_Biographical_Dictionary_of_the_Australian_Senate/Papers_by_former_Clerk_of_the_Senate_Harry_Evans).

Let us put our Senate into a larger context. Ideology is a system of ideas and ideals governing political theory and practice. That definition makes democracy itself an ideology. As a form of government and politics, democracy competes with other systems and ideologies. To survive competition, to survive attack, you have to defend and thrive.

Competition can be deadly. Wars are the worst of it. In the first five decades following federation in Australia there were two world wars and the Great Depression to contend with, surges in authoritarian sentiment, attractions to the extremes of various ‘isms’, including racism, communism and fascism, and internally a serious campaign for secession in Western Australia. The next five decades were calmer, but still with war, periodic bouts of turmoil and challenges to our peace, security and prosperity.

There have always been anarchists, terrorists, radicals, reactionaries and revolutionaries living within democracies—including ours—whose societal effect is greater than their numbers and is occasionally catastrophic. There have always been those who hanker after a winner takes all approach—the tyranny of the majority—assailing the very foundations of successful democracy, which accommodates opposing opinions and interests.<sup>15</sup>

Such winner takes all attitudes can be devastatingly counterproductive.<sup>16</sup> Defence is needed against these various assaults. Thriving socially and economically counters democracy’s critics. Institutional integrity considerably helps that thriving. People struggling with life will sometimes remark that it is better than the alternative. Churchill is credited with making a similar remark about democracy and its alternatives.<sup>17</sup>

Australia is invariably and correctly described as a liberal democracy, albeit not a perfect one.<sup>18</sup> Liberal democracy’s ideological strength and health has been bolstered firstly by its successful absorption of the theories and practices of other appealing

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<sup>15</sup> This theme is well developed by Lord Sumption in the Reith lectures. See Jonathan Sumption, ‘Rights and the Ideal Constitution’ (*The Reith Lectures*, no. 4, BBC Radio 4, 15 June 2019), [www.bbc.co.uk/programmes/m0005t85](http://www.bbc.co.uk/programmes/m0005t85).

<sup>16</sup> Senator Andrew Murray speaking on the Workplace Relations Amendment (Work Choices) Bill, Senate debates, 2 December 2005: 212–213, [parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2005-1202%2F0121;query=Id%3A%22chamber%2Fhansards%2F2005-12-02%2F0008%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2005-1202%2F0121;query=Id%3A%22chamber%2Fhansards%2F2005-12-02%2F0008%22).

<sup>17</sup> Sir Winston Churchill MP, *House of Commons Debates*, 11 November 1947, vol. 444, columns 203–321, [api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill](http://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill).

<sup>18</sup> A common description of a liberal democracy is one of a representative system of government in which individual rights and freedoms are recognised and protected, and the exercise of political power is limited by the rule of law.

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ideologies (for instance conservatism, socialism and liberalism),<sup>19</sup> and secondly by what it provides its adherents—freedoms and rights, prospects and prosperity, welfare and wellbeing. Many more people in the world live under alternative systems of rule than under a liberal democracy—illiberal democracies, theocracies, dictatorships, monarchies and systems born of oppressive ideologies like communism.<sup>20</sup>

A threat to democracy comes from those who actively seek other systems of rule or government, or from those who want to ‘change society’. It also comes from those who are disengaged, an increasing trend.<sup>21</sup> One survey has it that an amazing one in three Australians surveyed thought that ‘in some circumstances a non-democratic government can be preferable’ or ‘it doesn’t matter what kind of government we have’.<sup>22</sup>

Defence of democracy requires a forthright assertion of its values. In a 1966 speech in decidedly illiberal and only partially democratic South Africa, Robert Kennedy gave an impassioned defence of the freedom of speech, of protest and the press:

The enlargement of liberty for individual human beings must be the supreme goal and the abiding practice of any Western society... The essential humanity of men can be protected and preserved only where government must answer not just to the wealthy, not just to those of a particular religion, or a particular race, but to all its people.<sup>23</sup>

With less passion but equal force, The Right Honourable Lord Sumption, former Justice of the Supreme Court of the United Kingdom, said in his 2019 BBC lectures that there are two essential and fundamental human rights—the right to a basic measure of security to life, liberty and property, and the right to freedom of expression, assembly and association.<sup>24</sup> We are surely all aware of how strong the

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<sup>19</sup> In the European Parliament, which is home to 751 members and 28 member states, they have organised themselves into eight political groups or political families, broadly relating to particular ideological streams—the biggest three are conservatism, socialism and liberalism.

<sup>20</sup> Freedom House, *Freedom in the World 2018: Democracy in Crisis*, [freedomhouse.org/report/freedom-world/freedom-world-2018](https://freedomhouse.org/report/freedom-world/freedom-world-2018).

<sup>21</sup> See, for example, Mark Evans, Gerry Stoker and Max Halupka, *Trust and Democracy in Australia: Democratic Decline and Renewal*, Democracy 2025, Report no. 1 (2018), [www.democracy2025.gov.au/documents/Democracy2025-report1.pdf](http://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf).

<sup>22</sup> Table 23 of the Lowry Institute survey shows that in the period from 2012 to 2018 between 18 per cent and 26 per cent of people surveyed thought that ‘in some circumstances a non-democratic government can be preferable’ and between 12 per cent and 16 per cent responded that ‘it doesn’t matter what kind of government we have’. Alex Oliver, *2018 Lowry Institute Polling* (Sydney: Lowry Institute, 20 June 2018), [www.lowryinstitute.org/publications/2018-lowry-institute-poll#sec35296](http://www.lowryinstitute.org/publications/2018-lowry-institute-poll#sec35296).

<sup>23</sup> Robert F. Kennedy, ‘Day of Affirmation Address’ (Speech, University of Cape Town, South Africa, 6 June 1966).

<sup>24</sup> Sumption, ‘Rights and the Ideal Constitution’.

attacks on these essential rights are in Australia and elsewhere in the democratic world.

By its design and purpose the Senate can deal with legislation and significant issues with integrity, meaning that it does so on a well-informed independent basis, honestly and with consistency. The committee system encourages cross-party participation and cooperation, a great virtue in any democratic system. There are pressures that affect our Parliament and how it conducts itself—which in turn challenge the Senate's ability to steer the steady institutional course required of it.

Countering terrorists or radicals or malicious foreign powers is not just costly but results in unfortunately necessary restrictions on our freedoms and rights. Governments and bureaucrats sometimes push the limits on these restrictions and they are permanent in effect. There are seldom sunset clauses on such restrictions. It is the Senate that is needed to ensure these restrictions do not go too far. More broadly, others less violent or dangerous seek to erode our freedoms and rights when they assail academic freedom and free speech to assert other values. The Senate must not be passive on these fronts. Strong criticism and distaste for democratic parliaments and governments can be generated by fear and frustration. The Senate has an essential role in using reasoned argument to deal with these.

In my twenties there was widespread and justified concern about the danger of nuclear war, the threat of communism, and the Club of Rome's predictions.<sup>25</sup> For a minority these concerns morphed into apocalyptic fears—we see the same happening today on climate. A source of strong criticism arises from the frustration felt by particular groups who believe their problems and issues are not being adequately addressed. Then there is the criticism that has many supporters—those authoritarians who want the political party in power to prevail without a Senate check—the 'get out of our way and let us govern' mob.

John Rawls saw one of the roles of political philosophy as to 'discover grounds for reasoned agreement in a society where sharp divisions threaten to lead to conflict'.<sup>26</sup> In my view that is best done when democracy flourishes, freedom of speech and thought prevails, where integrity in conduct is a given, where respect is shown for persons and arguments, and where the minority is represented and is not oppressed or

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<sup>25</sup> Founded in 1968 at Accademia dei Lincei in Rome in Italy, the Club of Rome consists of current and former heads of state, high-level politicians, government officials and bureaucrats, diplomats, scientists, economists, and business leaders from around the globe.

<sup>26</sup> Stanford Encyclopaedia of Philosophy, *John Rawls* (9 January 2017), [plato.stanford.edu/entries/rawls/#FouRolPol](https://plato.stanford.edu/entries/rawls/#FouRolPol). John Bordley Rawls (1921–2002) was an American moral and political philosopher in the liberal tradition.

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disadvantaged. It is also best done when issues of concern to the populace are seriously and competently addressed by parliaments and governments.

Rawls said another role of political philosophy is ‘probing the limits of practicable political possibility’,<sup>27</sup> achieving enduring and ‘workable political arrangements’,<sup>28</sup> and allowing for ‘reconciliation...to calm our frustration and rage against our society’.<sup>29</sup> One of the great virtues of democratic systems is that it internalises its critics—they are represented within its political class. The integrity of the Senate is displayed when those competing tensions are successfully accommodated.

My use of ‘political class’ rather than ‘members of parliament’ is deliberate. The political class here means those who engage in political activity to further their ideological, policy or special interest ends, and includes many in the media.<sup>30</sup> Maintaining a healthy strong democracy can be likened to maintaining the integrity of a complex structure. Structural integrity or institutional integrity means holding together and preserving its function without it breaking or deforming. It is self-evident that helping ensure our democratic structure does not break or deform requires the Senate itself to retain and indeed enhance its institutional integrity.

Professor Charles Sampford writes that ‘a national integrity system encapsulates the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life’.<sup>31</sup> He also argues that integrity systems are ‘a form of risk management’.<sup>32</sup> The structural or institutional integrity of the Senate rests on the Australian Constitution and constitutional law, supported by such instruments as the *Parliamentary Privileges Act 1987* and Senate rules, precedents, practice, conduct and culture.

The maintenance of Senate institutional integrity is not solely a matter for senators—it depends on the culture, conduct, behaviour and values of senators, the Clerk and Senate departmental staff and the other members of the political class working in

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<sup>27</sup> John Rawls (Samuel Freeman ed.), *Lectures on the History of Political Philosophy* (Cambridge and London: The Belknap Press of Harvard University Press, 2007), 10–11.

<sup>28</sup> Stanford Encyclopaedia of Philosophy, *John Rawls*.

<sup>29</sup> Rawls, *Lectures on the History of Political Philosophy*, 10.

<sup>30</sup> Wikipedia tells us that ‘political class’ is a concept in comparative political science originally developed by Italian political theorist Gaetano Mosca (1858–1941) to refer to the relatively small group of activists that is highly aware and active in politics, and from whom the national leadership is largely drawn. Mosca examined the mechanisms of renewal of the ruling class, the characteristics of politicians, and the different forms of organisation developed in their wielding of power. The political class could include subject-matter policy specialists, aided by permanent staff.

<sup>31</sup> Charles Sampford, ‘Parliament, Political Ethics and National Integrity Systems’, *Papers on Parliament* 55 (February 2011): 9.

<sup>32</sup> *Ibid.*, 16.



Parliament. Individual integrity must be present to preserve institutional integrity. Individual integrity requires individuals to be honest and truthful in their dealings and true to their values.

It does not require people to be perfect, but being imperfect does not excuse bad conduct, or unnecessary and shrill censoriousness and absolutism, or those who insist on conformity of their choosing. Such conduct offends the essence of the ‘fair go’ and ‘live and let live’ doctrine that allows for democratic tolerance and compromise. Having said that, the passion, humanity, imperfection and variety our democratic representational system throws up is to be celebrated. Totalitarian or conformist systems do not allow that.

The integrity of an institution does not require everyone who is a part of it to have integrity, but it does require most to have integrity. It particularly requires leaders to have integrity. It requires those who respect and understand the integrity expected of that institution to defend and advance that integrity. Institutional and individual integrity affects faith and trust in our political system. Faith and trust is essential to ongoing support for our liberal democracy and to avoid criticism moving to disaffection. Trust in our democratic institutions is often thought to be at a low ebb, largely apparently because of the way in which members and senators conduct themselves.<sup>33</sup>

There are current reports of less respect within modern democracies for democracy itself and its institutions.<sup>34</sup> Yet there is recent research on attitudes that indicates that ‘Australians have a huge appetite to reboot and to renew their democracy’.<sup>35</sup> Australians as a whole want to be assured that their political class and political institutions will keep them safe and secure, uphold the rule of law, preserve their rights and their freedoms, address issues of concern and competently advance their prospects and wellbeing. And will behave in a manner that befits their office.

How do Australians regard institutional and individual integrity in politics? In balance sheets there are valuable assets known as intangibles—assets like the reputation of brands or goodwill. In accounting an intangible is known and understood, even though it cannot be touched, is difficult to describe and difficult to value. In politics

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<sup>33</sup> Jenny Wilkinson, *Fiscal Transparency and the Parliamentary Budget Office* (address at the launch of the Open Budget Survey for Australia, Canberra, Australian National University, 20 March 2018).

<sup>34</sup> Table 23, Oliver, *2018 Lowy Institute Poll*; Andrew Markus, *The Scanlon Foundation Surveys 2018*, 31–39, scanlonfoundation.org.au/wp-content/uploads/2018/12/Social-Cohesion-2018-report-26-Nov.pdf; Sarah M. Cameron and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2016*, 74, australianelectionstudy.org/.

<sup>35</sup> Dr Travers McLeod, ‘Trust and Current Challenges’ (transcript of proceedings, Australasian Study of Parliament Group 2018 Annual National Conference, Brisbane, 19 July 2018), 19.

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there are intangibles that are known and understood too, such as the reputation, standing and sense of worth a nation and its institutions enjoy.

The intangibles are of great importance to the Australian people looking at the Parliament and making judgements on its integrity and culture. It may be very unfair but a relatively common view on the streets and in the media seems to be that the political class are self-interested, untrustworthy liars, with the exception, people will say, of the ones they know personally, who are surprisingly nice people. I believe Australians once distinguished the conduct of individuals from the reputation of institutions, so the Parliament was more respected than the politician and likewise the media more than the journalist. Institutions in general seem more on the nose—how can that be otherwise when banks debit the dead and churches protect paedophiles.<sup>36</sup>

We live completely different lives to our ancestors, but—and history bears me out—human nature has not changed. Human nature can, however, be corralled within power and societal structures, and be guided by society’s customs, culture and what is regarded as acceptable behaviour. Right from the start rules and laws have sought to curb the worst in us. The simple list of Ten Commandments has expanded every century until we get to today’s Criminal Code, buttressed by myriad laws, codes of conduct and rules about multiple facets of our lives. The best in us has never needed much rule and law, and freely exhibits itself daily in individuals and in institutions that act with integrity.

Non-democratic systems give power and control to an elite, and rule and law is oppressive. Democracy is intended to give power and control to the people. Our democratic system is based on the rule of law delivered through legitimate and widely accepted decision-making processes, and on power controlled by institutional checks and balances.<sup>37</sup> Bicameralism is one of those controls and is designed to provide a powerful check on government.

Why is it, when we are all drawn from the same human pot, that surveys show that those in the health and teaching professions are highly regarded by Australians, and

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<sup>36</sup> The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>37</sup> According to Geoffrey de Q. Walker ‘most of the content of the rule of law doctrine can be subsumed in two propositions:

(1) that people [including, one should add, the government] should be ruled by the law and obey it, and

(2) that the law should be such that people will be able [and, one should add, willing] to be guided by it’.

See Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton: Melbourne University Press, 1988), 21.

those in the media, unions and politics are not? The *Roy Morgan Image of Professions Survey 2017* is instructive. Nurses were rated as ‘high’ or ‘very high’ at 94 out of 100, ministers of religion and bank officials at a terrible 34 and 33, and newspaper journalists, union leaders and federal MPs at an awful 20, 17, and 16 out of 100 respectively.

I have read no better synopsis of the causes of the low opinion people have of the political class than Professor Lewis’ paper to the Australasian Study of Parliament Group 2018 Annual National Conference.<sup>38</sup> It is unlikely that better human beings than the rest of us populate nursing and teaching professions, or that individuals in those professions have intrinsically greater integrity and higher standards than individuals in other professions.

The answer to the wide gulf between high and low regard must lie partly in the very different nature of the work being done in each profession, partly in the different laws, rules and standards that apply to each, and particularly in the different ethics and culture in each. Such entrenched attitudes as shown in that survey are unlikely to change and have a long history. Any historian can find instances of such disregard and full-blown abuse going back centuries. Nevertheless we should heed current concerns. Public distaste for the standards of conduct in democratic politics makes it harder for defenders of the virtues of democracy.

Outgoing British Prime Minister Theresa May is reported to have said that vile abuse and perpetual strife was corroding democratic values in British politics and around the world.<sup>39</sup> Her remarks reflect distress at a decline in the value placed on professional standards, courtesy and civility in parliamentary and public discourse. Lord Sumption remarks that there is a ‘mounting tide of hostility to representational politics’.<sup>40</sup> There are those who are profoundly pessimistic. Paul Kelly reports that Professor Jonathon Haidt believes that ‘the liberal, multicultural, secular model of Western politics is not a natural phenomenon for human beings’ and says that ‘there is a very good chance that American democracy will fail’.<sup>41</sup>

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<sup>38</sup> Colleen Lewis, ‘Trust and Current Challenges’ (*Proceedings of Australasian Study of Parliament Group 2018 Annual National Conference*, Brisbane, 19 July 2018), 20–23.

<sup>39</sup> Nick Miller wrote in *The Sydney Morning Herald* that ‘Theresa May...used her last major speech as Prime Minister to warn the “politics of winners and losers, of absolutes and of perpetual strife” has taken hold, “and that threatens us all”. The descent of political debate into “tribal bitterness” and vile abuse was corroding democratic values in British politics and around the world, May said’. See ‘The World is Heading to a “Darker Place” of Hatred, May Says in Last Major Speech’, *The Sydney Morning Herald*, 18 July 2019, [www.smh.com.au/world/europe/the-world-is-heading-to-a-darker-place-of-hatred-may-says-in-last-major-speech-20190718-p5288y.html](http://www.smh.com.au/world/europe/the-world-is-heading-to-a-darker-place-of-hatred-may-says-in-last-major-speech-20190718-p5288y.html).

<sup>40</sup> Sumption, ‘Rights and the Ideal Constitution’.

<sup>41</sup> Paul Kelly ‘America’s Uncivil War on Democracy’, *Weekend Australian*, 20–21 July, 2019, 15. Jonathon Haidt is a social psychologist and author and the Professor of Ethical Leadership at New York’s Stern School of Business.

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Does it matter that journalists and members of parliament are so poorly regarded? Worldwide haven't they always been? The answer to both questions is yes. Perceptions and the judgement of the political class and of political institutions are derived from experience and observation. Those who lie or exaggerate greatly to further their cause (a common fault), or who do not act in the public interest, or who hide, conceal or deceive, or who are incompetent make Australians fearful, nervous, insecure and untrusting, and damn the reputation of other politicians and the parliamentary institution as a whole. It is particularly an issue when leaders of the political class behave in this way.

These are not new issues. In its 1992 report, the Royal Commission into Commercial Activities of Government and Other Matters in Western Australia said:

Ministers have elevated personal or party advantage over their constitutional obligation to act in the community's interests. Public funds have been manipulated to partial ends. Personal associations and the manner in which electoral contributions were obtained could only create the public impression that favour could be bought, that favour would be done.<sup>42</sup>

Nevertheless, our system is mostly producing the goods. Without diminishing justified concerns with significant national shortcomings and failures, overall Australia is a well-off, peaceful, enlightened, progressive liberal democracy operating under a fair rule of law. It is protected by a universal suffrage, strong political institutions and high standards of governance. That being said, Australia's political culture and political integrity needs improving and the principles and freedoms of a liberal democracy need defending.<sup>43</sup>

There have been a growing number of integrity initiatives. In 2017, a Senate select committee usefully reviewed both them and integrity institutions.<sup>44</sup> With regard to the Parliament, these initiatives seem to have had little effect yet on culture, and not enough on conduct, to change press and public opinion of senators and members.

In recommendation 5 the committee recommended the Parliament 'appoints a Parliamentary Integrity Commissioner to provide advice on matters of ethics to

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<sup>42</sup> *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, vol. 6, no. 1 (1990), 27 – 3 [27.2.3].

<sup>43</sup> Transparency International produces a Corruption Perceptions Index measuring public sector corruption. The 2018 CPI scores 180 countries and territories from 0 (highly corrupt) to 100 (very clean). The highest score (Denmark) was 91—Australia ranked 13th with a score of 79.

<sup>44</sup> Senate Select Committee on a National Integrity Commission, *Report* (Canberra: Department of the Senate, 13 September 2017), [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/National\\_Integrity\\_Commission/IntegrityCommissionSen/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report).

senators and members'.<sup>45</sup> Such a person has long been called for—there has always been a need to address a parliamentary and party culture that will tolerate slippery standards and conduct.<sup>46</sup> Many resist efforts to improve their conduct. I remember what a struggle it was for me to get the first ever audit done on parliamentary entitlements in 100 years.<sup>47</sup>

Of course no integrity measure works if it is not reported and enforced and if the punishment is inadequate. As an example, the Senate has criteria for establishing contempt. Integrity requires a senator to be true to their conscience. The Senate rules recognise that senators may not be improperly influenced:

A person shall not, by fraud, intimidation, force or threat of any kind, or by other improper means, influence a senator in the senator's conduct as a senator...<sup>48</sup>

If anyone thinks the threat of losing preselection has not been used to pull senators into line, they are living on another planet. The Senate is alert to the problem in both houses. In 2017, the Select Committee on a National Integrity Commission recommended more diligence in privileges committees,<sup>49</sup> and on breaches of ministerial standards.<sup>50</sup> As far as I can see, things have not improved on either front.

I wish to suggest a few matters selected from a number that would contribute to the integrity of the Senate as a vital national integrity institution. Incremental improvement taken together should make a difference—I use 'should' not 'will' advisedly.

### **Concerning government and governance as a whole**

Ending decades of calls for such a body, in December 2018 the government announced that it will establish an independent statutory Commonwealth Integrity Commission to strengthen integrity arrangements across the public sector and to detect, deter and investigate corrupt conduct. That is a good thing. In my independent

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<sup>45</sup> Ibid., 221.

<sup>46</sup> The government announced in December 2018 that it would establish a Commonwealth integrity commission as an independent statutory agency led by a commissioner. A public consultation process closed in February 2019. Attorney-General's Department, *Commonwealth Integrity Commission*, [www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx](http://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx).

<sup>47</sup> Australian National Audit Office (ANAO), *Parliamentarians Entitlements: 1999–2000*, Audit Report no. 5, 2001–02.

<sup>48</sup> Rosemary Laing, ed., *Odgers' Australian Senate Practice*, 14th edn (Canberra: Department of the Senate, 2016), 791.

<sup>49</sup> Senate Select Committee on a National Integrity Commission, *Report*, 222.

<sup>50</sup> Ibid., 223.

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2008 report undertaken at the request of the Finance Minister, I recommended that the government establish a public sector regulator.<sup>51</sup> There is no public sector regulator equivalent to the Australian Securities and Investments Commission (ASIC).<sup>52</sup> I doubt whether that function can be incorporated into the proposed National Integrity Commission or into the Public Service Commission as presently constituted.

A primary tenet of good governance is that of a professional public service in which its leadership exercises its powers and responsibilities effectively and ethically and is held to account when transgressions occur. The accountability gap in the existing enforcement mechanisms detailed in my 2008 report demonstrated the need for a public sector regulator focussed on financial administration and management matters.

This regulator would need sufficient flexibility to carry out an enforcement function by way of a range of enforcement options in order that the seriousness of the offence and best way to address a contravention is taken into account. It would be a mistake to assume that such a regulator need be as costly or large as ASIC. Despite further improvements in public sector governance, such as the introduction of independent audit committees,<sup>53</sup> I remain of the view that a public sector regulator is worth considering.

My report, *Review of Operation Sunlight: Overhauling Budgetary Transparency*, recommended:

That the Government establish a Public Sector Regulator focussed on financial administration and management matters, with strong and comprehensive enforcement powers that promote an efficient regulatory system for the public sector. Persuasion, education and encouraging compliance through negotiation, settlement and adverse publicity should be the primary enforcement mechanisms. Prosecution resulting in civil or criminal penalties should be a last resort.<sup>54</sup>

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<sup>51</sup> Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008), 81–83 (recommendation 37).

<sup>52</sup> Australian Securities and Investments Commission founded in 1998.

<sup>53</sup> For instance, rules issued under the *Public Governance, Performance and Accountability Act 2013* include requiring departments and agencies to have an audit committee where independent members are in the majority and the CEO and CFO are excluded from membership (see Rule 17 of the Public Governance, Performance and Accountability Rule 2014). That is a step in the right direction.

<sup>54</sup> Murray, *Review of Operation Sunlight*, 83 (recommendation 37).

### **Concerning the political class**

Democracy is itself a safeguard on character—if elected politicians are later found to lack integrity and to have weak principles they will be subject to scrutiny by our free press and to the judgement of voters. That is after the event. At the outset, can we improve the functioning and integrity of political parties that select candidates and can we improve the ability of the voters to make informed choices?

It is the members of the Senate who guard its integrity, that determine Senate activity and decide contested legislation. That makes who becomes a senator vital. The most fundamental democratic principle of all is that the members elected to the Parliament should genuinely reflect the voting intention of the electorate. A very important reform was to ensure Australians did not get senators they did not vote for.<sup>55</sup> The 2016 double dissolution election ended the practice of preference harvesting and backroom negotiations delivering senators by a dodgy lottery.

It is obviously preferable that a vote is an informed one. That becomes harder in a multi-party, multi-candidate system. Below-the-line voters select Senate candidates and not political parties. Senate elections produce very large numbers of contesting candidates, registered political parties and registered groups. Try looking up Senate candidates to assess their attributes. It is impossible, even on the websites of the established parties. Having an open field is a fundamental democratic principle. There are already restraints in place that limit the field somewhat. I do not propose more. What I do propose is that in the nomination process the Australian Electoral Commission (AEC) should be provided with a minimum profile of each candidate that it publishes on its website.

More important is reform of the money flow in politics, both direct and indirect. Politics is the contest of interests, ideas and commitments, inevitably realised through money and power. The possession or desire for money and/or power can corrupt morals and affect personal integrity. There are also those so impassioned by their cause that they conclude the end justifies any means. That is why those who possess and use money and/or power in our political system need restraint, to be watched and held to account. As do the unscrupulous.

I have campaigned at length on political donations and refer you to that work.<sup>56</sup> I was delighted to see one of my long campaigns on outlawing foreign donations

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<sup>55</sup> *Commonwealth Electoral Amendment Act 2016*.

<sup>56</sup> Andrew Murray and Marilyn Rock, 'The Dangerous Art of Giving', *Australian Quarterly* 29, (2000): 29–33; submission to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2007 Federal Election* (Canberra: Parliament of Australia, April 2008); Andrew Murray, submission in response to the Australian Government Electoral Reform Green Paper, *Strengthening*

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finally realised.<sup>57</sup> I continue to be alarmed by the system and nature of political donations. The law as it stands permits some political parties to seek to rise to power or influence outcomes on the strength of political advertising and ‘fake news’ that is fraudulent. A lax attitude to truthfulness fosters a culture within political circles that regards deception as simply part of the political game, rather than the serious attack on the integrity of the political system that it is.

The private sector is already required by law not to engage in misleading or deceptive conduct under section 18 of the Australian Consumer Law.<sup>58</sup> The *Commonwealth Electoral Act 1918* should be amended to prohibit inaccurate or misleading statements of fact in political advertising which is likely to deceive or mislead.<sup>59</sup> There is no plausible justification for permitting political advertising to make statements of fact that are demonstrably false. Such advertising has long been outlawed in South Australia. The Commonwealth should follow suit.

Political governance is weak. In a 2009 paper I asked the question ‘Can better political governance give Australia an improved political class?’<sup>60</sup> Improving the internal governance arrangements of political parties is part of the answer to strengthening the institutional integrity of the Parliament. Over time perhaps it could even improve parliamentary culture. Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability.

The Commonwealth Electoral Act should be amended to require standard items to be set out in a political party’s constitution for the party to gain registration, similar to the requirements under corporations law for the constitution of companies. Party constitutions should be required to specify:

- the conditions and rules of party membership
- how office bearers are preselected and selected

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*Australia’s Democracy* (November 2009); Andrew Murray, submission no. 5 to the Australian Government Electoral Reform Green Paper, *Donations Funding and Expenditure* (2009); Andrew Murray, submission no. 3 to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2010 Federal Election and Matters Related Thereto* (Canberra: Parliament of Australia, January 2011).

<sup>57</sup> The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018 became law on 30 November 2018, requiring ‘wholly political actors to verify that donations over \$250 come from an organisation incorporated in Australia’.

<sup>58</sup> The Australian Consumer Law is set out in schedule 2 of the *Competition and Consumer Act 2010*.

<sup>59</sup> Senator Andrew Murray, Second reading of the Electoral Amendment (Political Honesty) Bill 2003, Senate debates, 27 March 2013: 10323.

<sup>60</sup> Andrew Murray, ‘Can Better Political Governance Give Australia an Improved Political Class?’, *Agenda: A Journal of Policy Analysis and Reform* 16, no. 3 (2009): 63–67.



- how preselection of candidates is conducted
- the processes for the resolution of disputes and conflicts of interest
- the processes for changing the constitution
- processes for administration and management.

Party constitutions should also provide for the rights of members in specified classes of membership to take part in the conduct of party affairs—either directly or through freely chosen representatives—to freely express choices about party matters, including the choice of candidates for elections, and to exercise a vote of equal value with the vote of any other members in the same class of membership.<sup>61</sup> Party constitutions should be open to public scrutiny on the internet. The AEC should be empowered to investigate any allegations of a serious breach of a party constitution and be able to apply an administrative penalty.

Then there is section 44 of the Constitution. Section 44 has been a major problem for decades, but the costly and distracting mayhem during the last Parliament was unprecedented and annoyed Australians no end. The two most contentious paragraphs of section 44 state that ‘a person who holds or is eligible for dual citizenship cannot nominate as a candidate and serve in Parliament’ and ‘an employee in the public sector must resign their employment to nominate for election’.<sup>62</sup> Section 44 has been the subject of multiple inquiries and recommendations,<sup>63</sup> but reform was unlikely until the issue of dual citizenship was clarified for all Australians. In 2002, the law changed to allow Australians to actively acquire foreign citizenship without losing their Australian citizenship.<sup>64</sup>

The resolution of section 44 problems was again addressed in 2018 by the Joint Standing Committee on Electoral Matters (JSCEM).<sup>65</sup> The committee reported that section 44 ‘is no longer operating to effectively ensure its principal intent of parliamentary integrity and national sovereignty’ and that it ‘acts as a deterrent for many Australians who are considering actively participating in politics’.<sup>66</sup> Shockingly, the committee estimated that over half of all Australians would have barriers to nomination<sup>67</sup> under section 44 paragraph (i), because 46 per cent of the

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<sup>61</sup> Senator Andrew Murray, amendments to Electoral and Referendum Amendment (Prisoner Voting and other measures) Bill 2004, Senate debates, 12 August 2004: 26576, [parlinfo.aph.gov.au/parlInfo/search/display/displayw3p;query=Id%3A%22chamber%2Fhansards%2F2004-08-12%2F0448%22](http://parlinfo.aph.gov.au/parlInfo/search/display/displayw3p;query=Id%3A%22chamber%2Fhansards%2F2004-08-12%2F0448%22).

<sup>62</sup> Joint Standing Committee on Electoral Matters (JSCEM), *Excluded: The impact of section 44 on Australian democracy* (Canberra: Parliament of Australia, May 2018): xxi.

<sup>63</sup> *Ibid.*, 8 [1.44] and 20 [2.29].

<sup>64</sup> *Ibid.*, 38 [3.21].

<sup>65</sup> *Ibid.*, xix.

<sup>66</sup> *Ibid.*, 104 [5.41–5.42].

<sup>67</sup> *Ibid.*, 49 [3.62], [3.64] and 50 [3.67].

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population were born overseas,<sup>68</sup> and eight per cent would have barriers to nomination under paragraph (iv) because they work in the public sector.<sup>69</sup> That is an unpalatable breach of the principle of universal suffrage and cries out for reform.

The minimalist position would be to just delete paragraphs (i) and (iv) and leave the other three paragraphs and section 45 alone. However the committee ‘believes that sections 44 and 45 should be repealed in their entirety, or amended to mirror section 34 and include ‘until the Parliament otherwise provides’.<sup>70</sup> It wants a referendum to be held ‘to once and for all fix the problems with section 44’.<sup>71</sup> The implication of the report is that a referendum should be held in this term of Parliament.

I was a member of JSCEM for twelve years and am on the record as supporting reform of section 44. Only one in five referendums succeeds. I am not a pessimist about either of the 2018 committee propositions quoted above passing, but given public distrust of the political class it would be wise for a draft bill to be drawn up beforehand, on at least a bipartisan and hopefully multi-party basis, so that Australians can see exactly what replacement legislation would propose as the barriers and qualifications for sitting as a member or senator, particularly with respect to the issue of conflicts of interest.

### **Concerning the Parliament, and in particular the Senate**

The most significant and meaningful advance in recent years in enhancing the Senate’s role has been the establishment of the independent Parliamentary Budget Office (PBO) in 2011. As with all major reforms, many years of campaigning preceded it. The PBO has brought more rigour, depth and accuracy into parliamentary and political discourse on budgets and costings. The Australian National Audit Office (ANAO) reported in 2014 that the PBO had ‘made a significant contribution to levelling the playing field for all parliamentarians, as for the first time all have access to independent policy costing and budget expertise during all periods of the Parliamentary cycle’.<sup>72</sup> The ANAO found that the PBO had ‘contributed to greater transparency about the fiscal and budgetary framework’.<sup>73</sup>

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<sup>68</sup> Ibid., 50 [3.67].

<sup>69</sup> Ibid., 49 [3.64].

<sup>70</sup> JSCEM, *Excluded*, 98 [5.6]. Section 45 is dependent on section 44 for its operation.

<sup>71</sup> JSCEM, *Excluded*, x.

<sup>72</sup> Australian National Audit Office (ANAO), *The Administration of the Parliamentary Budget Office*, Audit Report No. 36 (2013–14), 101.

<sup>73</sup> Ibid., 117.

Our laws have four components:

- primary legislation
- delegated or subordinate legislation that flows from the primary legislation
- the bureaucratic rules, standards, practices and institutions that accompany its administration
- any jurisprudence that is provoked by the primary or delegated law.

The vital Senate Scrutiny of Bills and Regulations and Ordinances committees do an often effective job of scrutinising the first two components, and Senate references committees sometimes address the latter two at a later date.

It is not just the law that requires examination, but the cost it carries with it. The Senate's legislation committees, in considering estimates of proposed annual expenditure, perform an essential job in examining new appropriations and programs,<sup>74</sup> and at my initiative, the annual tax expenditures statement.<sup>75</sup>

Recently there has been a determination to address expenditure via delegated legislation, which is long overdue.<sup>76</sup> For significant long-standing legislation that has no termination date, and/or large annual expenditures, formal periodic review is needed. In my independent 2008 report undertaken at the request of the Finance Minister I recommended that the government include sunset clauses in all future standing appropriations.<sup>77</sup> This has not happened. There is a precedent for sunseting. All legislative instruments, i.e. delegated legislation, are automatically repealed ten years after registration.<sup>78</sup> There are exemptions.<sup>79</sup>

Special (or standing) appropriations are monies that are appropriated by Acts of Parliament other than the annual appropriation Acts and which appropriations continue for longer than a financial year, sometimes in theory forever. Their accumulated aggregate quantum is very considerable. Approximately 70 to

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<sup>74</sup> Stand-alone estimates committees operated between 1970 and 1994. Department of the Senate, *Senate Brief No. 5 – Consideration of Estimates by the Senate's Legislation Committees*, (July 2019), [www.senate.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Senate\\_Briefs/Brief05](http://www.senate.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief05).

<sup>75</sup> Senator Andrew Murray, Senate debates, 2 December 2003: 18692, [parlinfo.aph.gov.au/ParlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2003-1202%2F0125;query=Id%3A%22chamber%2Fhansards%2F2003-12-02%2F0208%22](http://parlinfo.aph.gov.au/ParlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2003-1202%2F0125;query=Id%3A%22chamber%2Fhansards%2F2003-12-02%2F0208%22); Laing, ed., *Odgers*, 478.

<sup>76</sup> Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation* (Canberra: Department of the Senate, 3 June 2019): 111.

<sup>77</sup> Murray, *Review of Operation Sunlight* (June 2008), 29–32 (recommendation 11).

<sup>78</sup> *Legislation Act 2003*, s. 50.

<sup>79</sup> Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 143 (recommendation 19).

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80 per cent of all government expenditure is of this nature.<sup>80</sup> Insufficient scrutiny is given by the Parliament to the constant procession of bills containing standing appropriations and virtually none to those already in operation. Little consideration is given as to whether standing appropriations in particular bills are appropriate in the longer term. Such a practice may be administratively convenient, but for many reasons it is unwise not to revisit such laws.

Where the legislation itself does not have an appropriate independent review process, a manageable and workable selective review of significant ongoing legislation and its standing appropriation needs to be devised by the Senate or be delegated by it. It is doubtful that sunseting all primary legislation appropriations at ten years would be prudent, but no appropriation should be forever either. Sunseting to twenty five years might be the appropriate standard.

Bringing past legislation into the sunseting regime would need to be staggered and attended to each year, starting with any standing appropriations still applying for the first twenty years of federation. It would take ten years to clean up most standing appropriations from the period between 1901 and 2001 if it were done on a 20, 20, 10, 10, 10, 10, 5, 5, 5, 5 year basis.

In theory the presence of political parties and members of the government in the Senate should fatally undermine the prospects of it acting effectively as an integrity institution. That is because the possibility of political parties gaining advantage or benefit, or of senators gaining personal advancement or benefit or higher office, or of using their position to advance partisan or personal interests, produce a conflict of interest.

At times political parties have been able to use their place in the Senate to advantage, but to assert that a demonstrated conflict of interest for individuals is common is wrong. In practice the record shows that over the decades, senators as a whole have done their duty and fulfilled their constitutional obligation and role. Resolving or managing actual and potential conflicts of interest is undoubtedly greatly assisted by regular elections, public and media scrutiny, transparency and accountability, the combativeness of opposing parties and the values and integrity of individual senators.

One area where conflict of interest has triumphed over integrity is in appropriations for the ordinary annual services of government. The Senate Appropriation and Staffing Committee has long railed against impropriety here. The Senate Scrutiny of

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<sup>80</sup> Department of Finance, *Appropriations: Constitutional Background* (31 July 2019), [www.finance.gov.au/resource-management/appropriations/rmg-100-guide-to-appropriations/appropriations-constitutional-background/](http://www.finance.gov.au/resource-management/appropriations/rmg-100-guide-to-appropriations/appropriations-constitutional-background/).

Bills Committee has reported on appropriations bills since 2014, commenting that inappropriate classification continues to undermine the Senate’s constitutional functions. Parties large enough to form government have united to ensure that new expenditure on new programs can still masquerade as ‘the ordinary annual services of government’. In 2018, responding to unsuccessful amendments to the appropriations bills to reclassify policy items as new expenditure, the Coalition and Labor both restated their support for an executive compact that supports the current flawed classification.<sup>81</sup>

I am one among a number over the decades that have tried to deal with this matter but, apart from achieving some significant remedial housekeeping of redundant appropriations, I too failed.<sup>82</sup> In a 2017 paper, Anne Twomey took up the vexed question of an eternally slippery executive using authorised appropriations and expending them contrary to the purpose of the original proposal.<sup>83</sup> In my 2008 report to the Finance Minister,<sup>84</sup> I wrote:

The constitutional imperative is governed by two Constitutional provisions: section 83 – appropriation must be made by law; and section 53 – restricting the powers of the Senate to amend bills imposing taxation or providing for the *ordinary annual services of the Government*. A corollary of these provisions is that an appropriation bill *not* for the ordinary annual services of the government may be directly amended by the Senate.

In addition, section 54 provides that an appropriation bill for the ordinary annual services of the government must contain only those appropriations.<sup>85</sup>

I also wrote that the executive’s abuse of these sections ‘is a direct challenge by the executive to the unambiguous intention of the Australian Constitution’.<sup>86</sup>

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<sup>81</sup> Senator Mathias Cormann, Senate debates, 19 March 2018: 1489, [parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0183;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0183;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22); Senator Don Farrell, Senate debates, 19 March 2018: 1489, [parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1f259955-aacf-4c95-81a8-eff720fa60a3%2F0184%22).

<sup>82</sup> Murray, *Review of Operation Sunlight*, 11–16 (recommendations 4 and 5).

<sup>83</sup> Anne Twomey, ‘Wilkie v Commonwealth: A Retreat to Combat over the Bones of Pape, Williams and Responsible Government’, *AUSPUBLAW*, 27 November 2017, [auspublaw.org/2017/11/wilkie-v-commonwealth/](http://auspublaw.org/2017/11/wilkie-v-commonwealth/).

<sup>84</sup> Murray, *Review of Operation Sunlight*, recommendation 37 and supporting text, 11–16.

<sup>85</sup> *Ibid.*, 11.

<sup>86</sup> *Ibid.*, 13, referring to section 53 of the Australian Constitution.

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Having failed to achieve a satisfactory outcome to this impasse for decades, perhaps it is time for the Senate to resolve as a first step (using Spigelman’s concepts) that appropriations are approved for the purposes and in the manner envisaged at the time of parliamentary authorisation and for no other purpose. However, the High Court decisions in *Wilkie v Commonwealth* and *Australian Marriage Equality Ltd v Cormann* in 2017 and in *Combet v Commonwealth of Australia* in 2005 mean that the only way to enforce compliance with the constitutional intent has to be through prescriptive legislation.<sup>87</sup> A Senate resolution will not suffice, but perhaps as a first step it will stiffen the Senate’s back somewhat. On past form neither major party is likely to have sufficient integrity to contemplate a legislative solution.

The government response to part of my recommendations to the Minister of Finance noted that ‘the Government will consider including formal review clauses in special appropriation legislation, requiring governments to review and report to Parliament on a periodic basis on the continuing need for the legislation and whether the existing focus of the legislation remains valid’.<sup>88</sup> A decade later it seems that no such review clauses have been included in new standing appropriation provisions.

In this paper I have tried to put the Senate in context as an institution, to give a broad perspective on the issues, and to propose a non-exhaustive list of advances that need to be made in the interests of integrity and democracy. The Senate’s ongoing struggle to effectively serve Australia will and must continue.



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<sup>87</sup> *Wilkie v Commonwealth and Australian Marriage Equality Ltd v Cormann* [2017] HCA 40; *Combet v Commonwealth of Australia* [2005] HCA 61.

<sup>88</sup> Australian Government, *Commonwealth Government response to Review of Budget Transparency*, (June 2008), 7, [www.finance.gov.au/sites/default/files/official-government-response-to-murray-report\\_0.pdf](http://www.finance.gov.au/sites/default/files/official-government-response-to-murray-report_0.pdf).

**Question** — The Charter of Budget Honesty, which was introduced in 1998, used to include the structural Budget figures which give a true estimate of the state of the Budget. Prior to the 2007 election, the Parliamentary Budget Office put out a paper detailing the structural Budget figures which showed that the finances were not nearly as strong as the government claimed. Should the structural Budget figures be reinstated?

**Andrew Murray** — As I said human nature has not changed and does not change. Essentially those with money and power always want to hang onto it and do not want to give it up and do not like controls over what they can do with their money and power. That is the essential problem underlying all these debates. In my 2008 report [*Review of Operation Sunlight: Overhauling Budgetary Transparency*] I made a recommendation to the Joint Standing Committee on Public Accounts and Audit that they review the Charter of Budget Honesty because it continually needs to be updated to address the ways in which people will try and get round it, which is what you are referring to. Tackling that does not require a speech in the Parliament or a set of questions at Estimates because that will not solve the problem. You actually need to enforce it through principles or rules which are established through the Charter of Budget Honesty. If people are serious about that they have to take it to a committee which has standing, which can review it properly and can produce an outcome which will change matters permanently.

**Question** — I would like your views on the unrealised potential of the Senate to be not just a house of review but a house where debates can be highlighted and can help resolve longstanding and difficult issues like climate change. Both the Senate and the House of Representatives declined to pass resolutions stating that there is climate change emergency. Can the Senate help lift public debate on such difficult issues?

**Andrew Murray** — The short answer is yes. I refer you to the great American Liberal philosopher John Rawls who I quoted as outlining the importance of reasoned argument in resolving issues of great conflict and controversy. The difficulty we have with great debates, such as the matter to which you refer, is that there are those at either ends who are so impassioned by their cause that they exaggerate the issues and therefore lose the confidence of the people in what they say. So the case for reasoned argument and for debate which informs is one in which the Senate can help.

It may be an odd transference but I refer you to the reports the Senate did on children in institutions. Long before that, there were attempts to push those issues under the carpet, to suppress those matters. The Senate inquiries brought forward reasoned arguments, if you like, about what had happened and identified the issues associated with and consequences of institutionalisation. This eventually led to the Royal Commission into Institutional Responses to Child Abuse on which I sat.

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The Senate can take matters of great importance to the Australian people or of great importance to Australia and can indeed make a huge difference. It depends on the nature of the people in the Senate and on their capacity to persuade, but I think if we can improve the variety and range of senators we might see an advance such as you want.

**Question** — You spoke of the enormous difficulty you had in conducting an audit of travel entitlements for parliamentarians. Why has it been so difficult to achieve a system of rules and regulations which governs and prevents the abuse of travel by federal politicians? Many years ago a Western Australian senator came to Queensland to give an address to a party that was not his own but on a topic which meant a lot to him. He told the audience he was not really entitled to have his trip paid for by the taxpayer but because the rules were so loose he did it because everyone else did.

**Andrew Murray** — I come back to a central theme—human nature does not change. So where people have a set of rules and arrangements that benefit them or benefit the institutions they serve, they do not want that interference. It interferes with their freedom of operation—and by the way there is a very interesting thesis by a political scientist called Joo-Cheong Tham who says that Australia does not suffer much individual corruption in public life but there is institutional corruption. We all know that self-regulation is dangerous and wherever that applies you have difficulties. That is why legislation has been introduced to remove self-regulation.

It is no accident that of all the mighty forces that exist in Australia—and I use the word mighty deliberately because politics of course governs our lives, our laws, our policy, the funds we raise and the funds we spend—politics is the least constrained by regulation, law and control. It is why I attend to the issue of political governance. It just requires long-term campaigning by those who want integrity, which by the way includes many people within the political parties themselves. There are plenty of people who would argue exactly as you argue—for more integrity on these matters—but the few always affect the many. This is another point I make about human nature, it does not matter if you are a judge or a gravedigger there is always a percentage of humanity who will do the wrong thing. Three or five politicians who do the wrong thing affect the other two hundred and twenty-two who do not.

**Question** — I have three questions. Firstly, if the United Kingdom ignores the outcome of the Brexit referendum what will this mean for Australia? Secondly, at the end of the day who is the ABC answerable to when they can influence an election quite dramatically? Thirdly, I would like to hear your comments on free speech.

**Andrew Murray** — Your first question is one I cannot answer. Just briefly, I do not think democracy should only express itself in one way, namely through elections.



The Swiss very effectively use referenda in defined circumstances, and plebiscites are an expression of the people's voice without being attached to a legislative intention. So I do support plebiscites and referenda on a popular basis. By the way, Australia is well-served by having compulsory attendance at the polls—if Britain had had compulsory attendance at their polls I wonder if the result of their plebiscite would have been different.

On the ABC, I simply say a national broadcaster has only two reasons to exist—either for propaganda purposes or because there is market failure. So you must come to your own view surrounding that. There is market failure in certain respects in the communications market, and there is a need for propaganda, namely with respect to our voice in the broader Pacific, but those are the only two reasons you should ever have a national broadcaster.

The third matter, freedom of speech, well here we are! I am all for it. I cannot abide the attacks on academic freedom and free speech. One of the very best decisions that Australians made way back in the forties and fifties was not to ban the Communist Party because those idiots could only be exposed if they were given more and more licence to speak freely. Do not suppress voices you disagree with. Let them speak because the populace at large will just see them for the fools they are.

