

Can Responsible Government Survive In Australia?

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Published by
The Department of the Senate
Parliament House
Canberra ACT 2600 Australia

First published 1994
This edition, revised by the author in 2001, published 2004

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*National Library of Australia
cataloguing-in-publication data*

Hamer, David
Can responsible government survive in Australia?

Bibliography
ISBN 0 642 71433 9

1. Parliamentary practice—Australia.
2. Representative government and representation—
Australia. 3. Australia—Politics and government.
4. Canada—Politics and government. 5. Great Britain—
Politics and government. 6. New Zealand—Politics and
government. I. Australia. Parliament. Dept. of the
Senate. II. Title.

320.30994

Printed by the Department of the Senate, Canberra.

Foreword to the second edition

This book was originally published in 1994. The author had just completed work on a second edition when he died in January 2002. At the request of his widow, Mrs Barbara Hamer, the Department of the Senate undertook to edit and publish the manuscript. We did so because *Can Responsible Government Survive in Australia?* has proved to be an invaluable and unique repository of comparative information about the powers and practices of twenty legislatures in Britain, Australia, Canada and New Zealand. I know of no other book like it.

David Hamer, apart from his career as a great parliamentarian, was an enthusiastic and colourful writer and a man of firm opinions. Needless to say, in publishing this book neither the Senate nor its staff endorses all the author's views. Much of the content is historical in nature and the overwhelming majority of the text does not suffer greatly from the fact that it does not cover events since January 2002. To have brought it up to date would have required not only the updating of facts but also the modification of some of the conclusions and judgements that the author had made on the basis of the facts as they stood in 2002. It was considered best therefore to leave the text, apart from copy editing, largely as David Hamer left it. We have also retained the author's original introduction and the foreword to the first edition by Professor Don Aitkin.

HARRY EVANS
CLERK OF THE SENATE

Foreword to the first edition

David Hamer is one of a small band of politicians who have had experience in both houses of the Australian Parliament. The passage between chambers is best known in the movement from the Senate to the House, and usually occurs when an aspirant for the highest executive office moves to the only house in which a prime minister can now expect to sit. David Hamer's movement was in the opposite direction, and perhaps it is not surprising that one outcome of such a political experience is this thoughtful and important book on 'responsible government', a phrase much used at times of political drama, but not well understood.

The focus of the book, understandably, is on the institution of parliament. But it is worth saying something about the people for whom, by whom and of whom the parliament is constituted—the citizens, or the electorate. It is common to blame parliamentarians for their sins of commission and omission. Since they have all in some sense been elected, however, some responsibility surely lies also with the electors.

What we know of Australian electors, through survey and other evidence, is that they are not schooled in the history or philosophy of responsible government. They do have a strong belief in the virtues of voting, and they see their power as negative in character rather than positive—that is, their job is to put governments in and let them get on with the job; if a government does its job badly they will eventually 'turf it out' and put the other lot in. They are practised voters, and believe not only that they themselves should vote, but that all other electors should also vote. Although compulsory voting was instituted by parliamentarians who wanted cheaper elections for their parties, it is undoubtedly supported by the electors themselves and is in no serious danger of being dismantled.

The other plainly important characteristic of electors is that they are partisan: they prefer (and vote for) one party rather than another, and their preference tends to be a continuing one. It is that which is largely responsible for the great stability of the Australian party system, which shows little sign of change, despite wars hot and cold, depressions and recessions, immigration, environmental concerns and the changing balance between the sexes.

Partisanship and frequent elections are the conditions in which the Australian Parliament operates. Australian politics is in every way as good an example as manufacturing of the division of labour that so characterises western societies. The electors rely on the parliamentarians to do the job they have been elected to do. Having followed their partisanship and flexed their electoral muscles, Australian citizens return to their absorbing lives after election day with the satisfaction of those who think they have done a good day's work. Politics for them is not a matter of daily concern.

In all of this they are not very different from British, American, Swedish or Belgian citizens. The twentieth century did not produce the nineteenth century dream of a lively citizenry continually occupied with the great questions both of the day and of existence. Paradoxically, that makes the task of parliament, and the business of parliamentary reform, even more urgent. David Hamer's long experience of the Parliament's two chambers, and his obvious capacities for analysis and reflection have combined to produce a book of great importance, not just to the parliamentarians themselves, but to all of us who care that our society constantly gets better, not just economically, or musically, or gastronomically, but in the way it governs itself.

DON AITKIN
Vice-Chancellor
University of Canberra
April 1994

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Introduction

The political system known as responsible government, under which the executive government is chosen by, is answerable to, and may be removed by, the popularly elected house of parliament, emerged in Britain during the nineteenth century. The power and prestige of Britain caused its system of government to be widely copied around the world, though with some variations.

In this book I look at the history, recent performance, and defects of the Westminster system of responsible government in the United Kingdom and in the three countries—Canada, Australia and New Zealand—which follow that system most closely. In all, twenty parliaments are examined, including those of six states in Australia and ten provinces in Canada.

The features of the Westminster system were first delineated by Walter Bagehot in 1867, and it is necessary to look in some detail at what he said, for politicians are surprisingly conservative when it comes to procedural change and Bagehot's work is something of a bible for politicians, whether they have ever read it or not.

Nevertheless, there have been considerable changes in each of the twenty parliaments since Bagehot's day. The growth of party discipline, in particular, has destroyed some of Bagehot's assumptions. This has been helpful in one of the key roles of the lower houses of parliament—choosing the government. Unlike the American electoral college, which is dissolved after it has chosen the President, the Westminster equivalent—the lower house—remains in existence, and lives, in Bagehot's words, 'in a state of perpetual potential choice; at any moment it can choose a ruler and dismiss a ruler.' Few would feel that such instability would result in good government, for a government constantly concerned about its survival will have little energy to spare for policy and administrative work; the experiences of minority governments in the UK and Canada during the 1970s are illuminating examples. Party discipline adds some necessary stability here.

One might ask, however, whether it is compatible with the other roles of parliament such as legislation? When there is a majority government, party discipline dictates that the cabinet is answerable not to the parliament but to the caucus of the majority party; have any of the twenty parliaments we are concerned with been able to combine majority government and tight party discipline with an effective

legislature? Or has tight party discipline resulted in elective dictatorship, with the legislature being effective only when there is an unstable and ineffective government, and usually not even then?

The handling of legislation proposed by the executive government it has chosen is not the only business of the lower house. Examination of the performance of the twenty parliaments reveals that control of delegated legislation—laws made by the government or its agents under the authority of an act of parliament—is virtually non-existent in many of the twenty parliaments, and inadequate in all of them. Parliamentary supervision of government business enterprises and other non-departmental government activities is derisory. Desirable parliamentary investigations into government activities are often frustrated by party line voting. No lower house has been able to be both the decisive chooser of a government and an effective critical scrutineer of the administration of that government. Non-parliamentary structures have had to be set up to extract essential information from governments, to protect human rights, to inquire into serious administrative failures by the government, and to obtain fair treatment from the bureaucracy for individuals and organisations. These are all matters for which the government is supposed to be responsible to the parliament, but which the various parliaments have proved unable to handle.

Upper houses, where they survive, can put some controls on an elective dictatorship, but they have generally proved frail barriers. There are now only eight surviving upper houses in the twenty parliaments, and it is the constant aim of governments, if they cannot abolish them, to reduce their ability to frustrate the will of the ‘democratically elected government’. The performances, the strengths and the weaknesses, of these eight upper houses are examined in some detail in this book, for they may hold the keys to some otherwise insoluble problems.

There is no perfect system of democratic government, but serious flaws are appearing the Westminster system. These concerns are not new. Lord Bryce, writing more than 70 years ago about the decline in the power of legislatures, concluded that this was not a problem in Australia or Canada. Their standards had never been high enough, he thought, for there to be any possibility of a decline. We can hardly afford to be so cynical. My purpose in examining the twenty parliaments is to find out what reforms are needed to preserve the vital features of democracy. Since I am an Australian, and an ex-member of the Australian national Parliament (with service in each house), my focus is ultimately on what can usefully be learned from the other nineteen parliaments, and what in turn the Australian Parliament can offer them; but it will not be hard to see how the other national, state or

provincial systems could with benefit reshape some of their institutions and procedures. Most important of all is to identify problems for which there are no current working solutions, and to see if any remedies can be proposed.

In this final task it is important to remember political realities. Voters may be disenchanted with politics and political systems, but they are not likely to accept dramatic changes. Any changes will have to be subtle and incremental, reversing the decline of the Westminster system, not destroying it.

Part 1

The beginnings of
the Westminster system

The origins of responsible government

There are not many democracies in the world today, though the number depends heavily on how the term is defined. One thing is quite certain: if the country is defined as a 'democratic republic', it will be neither democratic nor a republic.

One well-known, though rather ponderous, description of a democracy is that it is a form of government rooted in 'the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live.' This definition comes from the Declaration of Commonwealth Principles, 1971, though less than half the Commonwealth nations would even approach that standard. A country such as Switzerland, which did not give the vote to women until 1971, was by this definition until then undemocratic, although other aspects of Switzerland's political system were admirably democratic.

If one takes a crude and not too demanding criterion for democracy—that there should be regular opportunities for a reasonably representative cross-section of a nation to remove a government with which it is dissatisfied, and to install an alternative—even then it is difficult to find more than 40 democracies among the members of the United Nations.

The 40 or so democracies fall into three broad categories:

1. those with a rigid separation of executive, legislative and judicial powers, as in the United States, where the president is in no way responsible to Congress, though the Congress can remove the president by impeachment for and conviction of 'treason, bribery, or other high Crimes and Misdemeanors'. In 1868 President Andrew Johnson escaped conviction by one vote and President Nixon resigned in 1974 rather than face impeachment. In December 1998 President Clinton was impeached by the House of Representatives for 'high crimes and misdemeanors' but was acquitted by the Senate in February 1999;
2. those which have responsible government, whereby the executive ministry depends on the support of the lower house of the legislature;

3. those with hybrid systems—a combination of responsible government with a president who can, in certain circumstances, overrule the responsible government.

The Westminster system of responsible government, under which ministers must be members of the parliament, is seen by many people as the most developed and the most democratic. Not all countries with responsible government require ministers to be members of parliament. The Netherlands, Sweden and Luxembourg have responsible government, but their constitutions bar ministers from being members of parliament.

But is the Westminster system still the same, in concept and execution, as it was when it was so eloquently expounded more than a century ago by Walter Bagehot? For many, what he wrote is still holy writ, but it is high time we had a critical look at how the Westminster system of responsible government is faring, and where it is heading. It may be that today the reality is as far from the theory as it was when Bagehot pointed out the way the system was actually working in his day.

It may be that the former British colonies who inevitably inherited the British system of responsible government should look at other countries which have responsible government, without some of the details of the Westminster system. It seems very unlikely that Canada, Australia or New Zealand will move away from some system of responsible government. Even when the question of a change to a republic was being debated in Australia, there was no serious suggestion of a move towards the American presidential system.

In this work, it is intended to examine the development of responsible government since Bagehot's day in the United Kingdom, Canada, Australia and New Zealand. All profess to practise the Westminster system of responsible government, but there are differences. The United Kingdom is the prototype; Canada and Australia are federations, with inevitable American influences; and New Zealand ceased to be a federation in 1876 and has been, since 1950, unicameral. The purpose is to compare the Australian Federal Parliament with the other nineteen national, provincial and state parliaments, to see what the Australian Parliament can learn from the others, and to identify problems which the Australian Parliament will have to solve for itself, if it has the will.

United Kingdom

Let us look first at responsible government as Bagehot described it, though Bagehot in fact used the expression 'responsible government'

rarely, usually referring to cabinet or parliamentary government. His seminal work, *The English Constitution*, was first published in nine parts in the *Fortnightly Review* between 1865 and 1867, and in the latter year appeared in book form. A second edition appeared in 1872, the last to be revised by Bagehot himself.

Bagehot constantly referred to the ‘New Constitution’, which he seemed to date from the passage of the First Reform Act in 1832, before which, as he said, a ‘large and preponderant majority of the House of Commons were, in one way or another nominated by noblemen and gentleman; and only a minority were elected by popular constituencies.’¹ The First Reform Act almost doubled the electorate, from 400 000 to over 700 000, but half the middle class and all the working class were still voteless. The Second Reform Act of 1867 increased the voters from one million to over two million, and ensured a fairer distribution of seats. All the middle class and most of the urban working class could now vote—in all, nearly a third of the adult male population; there were of course no female voters. Bagehot thought that the passage of the Second Reform Act might radically change cabinet government, but that (in 1872) it was too soon to see what the effects would be.

Yet responsible government was of course not new. Since the resignation of Walpole in 1742 it had been clear that the Crown could not continue to govern for any prolonged period without the support of ministers who had the confidence of a majority of the House of Commons, but Bagehot’s thesis was that the popular concept of the nature of the British system of government no longer matched the reality. In the popular concept, executive power was exercised by the Sovereign through ministers; the legislative power, exercised by the two houses of parliament, was separate. Bagehot dismissed this system, based on the settlement of 1688, as having been superseded; Britain had outgrown its institutions 30 years ago, he wrote, and was now cramped by them. What had evolved since the First Reform Act was something quite different. The executive power was not held by the Sovereign, but by a committee (the Cabinet) appointed by the House of Commons; this committee was removable by the Commons; its tenure depended on its conduct. Bagehot claimed that the House of Commons ‘is a real choosing body; it elects the people it likes. And it dismisses whom it likes too.’

¹ This and subsequent quotations from Bagehot are taken from *The Collected Works of Walter Bagehot*, edited by Norman St John-Stevan, vols 5 and 6, *The Economist*, London, 1974.

Bagehot did not think that all the members of the Cabinet should necessarily be members of the House of Commons. He thought that peers were ‘a valuable reservoir of Cabinet Ministers’. Although there was no formal requirement in the UK for a minister to be a member of one of the houses of parliament, Bagehot thought it essential. ‘Statesmanship—political business—is a profession’, he wrote, ‘which a man must learn when young; and in England the House of Commons is the only school for acquiring the necessary skill, aptitude and knowledge.’

The key to the system described by Bagehot was responsibility. The Cabinet was responsible to the Commons, and the Commons responsible to the people. But the Commons was much more than an electoral chamber. It was of course a legislature, but in Bagehot’s view it had four other functions: an expressive function—it should express ‘in characteristic words the characteristic heart of the nation’; a training function—it was to educate the people by ensuring ‘that it [the nation] is forced to hear two sides’; an informing function—it should keep the executive in touch with informed opinion; and a scrutiny and review function, ‘watching and checking’ government ministers.

Bagehot thought that parties, loose though they might be, were essential for the orderly passage of legislation, the vital requirement of representative government. ‘If everyone does what he thinks right’, he wrote, ‘there will be 657 amendments to every motion, and none of them will be carried or the motion either.’ Bagehot nevertheless deplored parties made up of strong partisans, doing all that their orators had proposed. If that happened, responsible government would, he thought, become the worst of governments—a sectarian government. There was a danger that ‘we shall have less and less of a deliberative House of Commons—more and more a body producing a mere reflex of the popular cry.’ Just like the American Congress, he thought.

Bagehot’s concept of a political party is far removed from the modern reality. He thought, for instance, that in the Commons ‘the moderate people of every party must combine to support the government which, on the whole, suits every party best.’ He believed the power of a prime minister to secure a dissolution of parliament to be the key to maintaining some sort of party discipline.

The House of Lords was given only grudging approval. ‘With a perfect lower house it is certain that an upper house would be scarcely of any value ... beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary.’ Bagehot claimed that the power of the House of Lords had declined greatly since the First Reform Act; it was a chamber with (in most cases) a power of delay and (in most cases) a power of revision over legislation, but with

no other rights or powers. 'Their veto is a sort of hypothetical veto', he wrote. 'They say: "We reject your bill for this once, or these twice, or even these thrice; but if you keep sending it up, at last we won't reject it."' He was far from impressed with the political wisdom of most of the peers, and was a strong advocate of the creation of life peers, as J.S. Mill had been before him (life peers were finally introduced by the Macmillan Government in 1958). 'Not only does the House of Lords do its work imperfectly', Bagehot wrote, 'but often, at least, it does it timidly ... being only a section of the nation, it is afraid of the nation.' He recorded the remark of a 'severe though not unfriendly' critic that 'the *cure* for admiring the House of Lords was to go and look at it.'

Bagehot felt that the power of the monarchy had also changed. 'The Old Constitution of England [presumably pre-1832] gave a sort of power to the Crown which our present Constitution does not give.' Bagehot pointed out that there was no explicit statement as to what the Queen could do, but claimed that, under the New Constitution, the Crown had three rights—the right to be consulted, the right to encourage, the right to warn—and should want no others. 'It is fiction of the past', he wrote, 'to ascribe to her legislative power.'

Bagehot thought the monarchy was necessary as something an uneducated public could revere, and 'we must not let daylight in upon magic.' Educated people, he thought, would not give reverence but with such people it would not be necessary. He was an advocate of constitutional monarchy because it 'enables our real rulers to change without needless people knowing it. The masses of Englishmen are not fit for an elective government.' Bagehot was not himself a great admirer of the monarchy. 'It has been said', he wrote, 'not truly, but with a possible approximation to truth, that in 1802 every hereditary monarch was insane.'

The monarch, of course, retained some personal prerogatives. In 1871 Queen Victoria (acting on the advice of the government) used her prerogative to abolish the purchase of army commissions after the Lords had rejected the relevant bill, but such a use of the prerogative was very unusual. Bagehot focussed attention on four other situations where the use of the Crown's reserve prerogative might arise:

1. If a party had a clear majority in the Commons, and an acknowledged leader, that leader must be offered the prime ministership. But if no single party had a clear majority or the majority party had no accepted leader, the Crown had to have discretion.
2. If the Cabinet requested an election, did the Crown have discretion to refuse? This was a matter that was to trouble responsible governments in both Canada and Australia. Bagehot was not quite definite, admitting there were vestiges of doubt. This Cabinet 'power to dissolve' was, to

Bagehot, an essential feature of responsible government, and central to maintaining party discipline.

3. The Crown had a personal prerogative in the creation of new peers to overcome resistance in the House of Lords. Although new peers could be created only on the advice of ministers, Bagehot thought that the Crown had the right to refuse that advice.
4. Finally there was the question of the conduct of foreign affairs, including the making of treaties. This was (and remains) a Crown prerogative exercised by the government. Bagehot was, on balance, in favour of requiring parliamentary approval of treaties (as is required of the United States Senate where a two-thirds majority is needed). This step has not been taken in any of the countries we are considering.

It must be admitted that Bagehot was not, from the viewpoint of a century later, much of a democrat. He thought that sectional interests should have some representation in parliament. 'There ought to be some special constituencies in parliament', he wrote, 'for each such special type of thought—some for the shipowner, some for the manufacturer, some for the landlord, some for the clergy', but he added that there must be a vastly greater number of constituencies which simply represented 'the common voice of educated men'. He was opposed to women voters, unless they were independent ratepayers and unmarried: 'women—one half the human race at least—care fifty times more for a marriage than a ministry.' He thought that the 'mischievous and monstrous' Second Reform Act went much too far, for 'the working classes contribute almost nothing to our corporate public opinion, and therefore, the fact of their want of influence in parliament does not impair the coincidence of parliament with public opinion.' Bagehot also argued strongly against secret voting in 1859, but by 1871 he had changed his mind.

Bagehot was far from alone in his opposition to the extension of the vote to the working classes. When the question of a Second Reform Act was first raised by Lord John Russell in the 1850s, Palmerston wrote that he could not 'be a party to the extensive transfer of representation from one class to another ... We should by such an arrangement increase the number of Bribeable Electors [Palmerston had about a hundred voters in his constituency] and overpower Intelligence & Property by Ignorance and Poverty.'

Bagehot's description of the working of the British Constitution as it was in about 1870 is at odds with contemporary reality in a few respects. For example, he seriously underestimated the power (and stupidity) of the House of Lords, as we shall see. One might also think he was excessively generous to Queen Victoria, who certainly went far beyond the three rights he assigned to the Sovereign: 'interfering

busybody' might be thought to be a fair description of her performance in politics, particularly when she was acting under the influence, real or remembered, of the Prince Consort. Victoria's predecessor, King William IV, frequently interfered with prime ministers and Cabinets, arbitrarily selected Lord Melbourne as leader of the Whig Party, and in 1834 imposed and maintained Peel as prime minister despite Peel being several times defeated on crucial votes in the Commons; and Queen Victoria kept Melbourne and the Whigs in office for two years, despite the loss of their majority. She later constantly schemed to keep Gladstone out of office, and claimed odd powers such as the right to approve or disapprove of the choice of a Foreign Secretary (this was aimed at Palmerston). Queen Victoria clearly did not understand the British Constitution as it had developed.

Nevertheless, Bagehot's writings have been almost universally accepted as an accurate account of how things were politically in Britain in about 1870, though later writers such as Dicey and Jennings elaborated on his views. Before we trace what has happened to responsible government since Bagehot's day, let us look briefly at the state of government in 1867 in our other three selected countries—Canada, Australia and New Zealand—where British concepts of responsible government were taking root.

Canada

On 29 March 1867 the British North America Bill finally passed the House of Commons. A Nova Scotian who was present in the gallery was critical of the utter indifference of most of the MPs and what he described as their lazy contempt for the bill. Yet a Canadian confederation was, on both sides of the Atlantic, felt to be urgent. There had been expensive railway and canal ventures, which had left the colonies in serious financial difficulties. Previously protected British markets were being lost and trade with America was threatened, since British sympathy for the Confederates during the Civil War had deeply offended the victorious Unionists. The scattered settlements in British North America were felt to be very vulnerable to Yankee revenge. At the time the settlements were Canada (later divided into Ontario and Quebec) and the four Maritime Provinces (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland). A new colony called British Columbia had just been established on the west coast and there were scattered settlers in the vast area called Rupert's Land, between the Great Lakes and the Rocky Mountains. The total population was about 3.5 million, of whom some 100 000 were native Indians and Eskimos.

The British North America Act of 1867 (almost always called the BNA Act) established a new dominion of Canada, created from the confederation² of Canada (to be divided into the provinces of Ontario and Quebec) and the provinces of New Brunswick and Nova Scotia. The chief architect of confederation, John A. Macdonald, wanted to adopt the name of Canadian Kingdom, but was overruled by the UK government, which preferred a more modest—and less potentially separatist—title. The Act provided that Newfoundland, Prince Edward Island and British Columbia could join the confederation ‘on Addresses from the Houses of Parliament of Canada, and from the houses of the respective [provincial] legislatures’. (British Columbia was to join in 1871 and Prince Edward Island in 1873; Newfoundland did not join until 1949.) For the vast regions of Rupert’s Land and the North-Western Territories, the arrangements for the creation of new provinces were effectively left to the Canadian Parliament.

The BNA Act was the work of delegates from the four provinces who were to be initially in the confederation, at a series of meetings between 1864 and 1866 in Charlottetown, Quebec and London. Seeking to learn from the problems that had caused the American Civil War, they aimed to produce a powerful central government. There were to be two parliamentary chambers, an elected House of Commons and an appointed Senate. There was no distinction made in the power of the two chambers, except for the requirement that ‘Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the [Canadian] House of Commons.’

Limited and specific powers were given to the provinces, and all remaining powers were assigned to the central government. Macdonald, not only the principal author of the BNA Act 1867 but also the first prime minister of the new dominion, said this made for a ‘strong central government—a great central legislature’. Not only did the central government have the umbrella clause empowering it to ‘make laws for the Peace, Order and Good Government of Canada’, it also had the power to appoint and remove the Lieutenant-Governor of each province, and could disallow any provincial law within a year of its passage. In 1868 Macdonald sent the provinces a list of provincial acts on which the dominion Minister of Justice would have to report: those which were illegal or unconstitutional, either wholly or in part; in cases

² The difference between federation and confederation is becoming somewhat arcane. To some, particularly in the USA, ‘confederation’ means a union of sovereign states with a stress on provincial independence; ‘federation’ stresses the supremacy of the central government. In recent years, ‘confederacy’ has come to mean a temporary union. On both counts, Canada is a federation, though in 1867 it was usually referred to as a confederation.

of concurrent jurisdiction (agriculture and immigration) those which clashed with dominion legislation; and those which affected the interests of the dominion generally.

There was never any doubt that the new dominion would have responsible government, since all the provinces already had it; but, as had happened with the New Zealand Constitution, and was to happen with the Australian one, responsible government was nowhere defined. All the BNA Act said on the matter was that the executive government, and command of the naval and military forces, were vested in the Queen. This was taken to mean responsible government. There was not even a requirement (such as later appeared in the Australian Constitution) that ministers should be members of parliament. The Governor-General, acting on behalf of the British government, retained control of foreign affairs and international trade agreements.

The Canadian provinces had had a stormier passage to responsible government, and the transition had been accompanied by more violence, than in any of the other three countries we are considering. Quebec had been a French colony from 1608 until the end of the Seven Years War in 1763, when it was ceded to Britain by the Treaty of Paris. The population at this time was almost entirely French, but after the American Revolution there was loyalist immigration to the area which is now Ontario and to the Maritime Provinces, particularly Nova Scotia (the Maritime Provinces had been British since the Treaty of Utrecht in 1713). In 1791 Quebec was divided into two colonies—Upper and Lower Canada. Each colony had a Governor or Lieutenant-Governor, an appointed Legislative Council and an elected Assembly with a heavy property qualification for voters, though the franchise was in fact much wider than England's even after the First Reform Act. There was even a provision for the creation of peers who would have an hereditary right to be members of the upper house. The executive was a council directly chosen by the Governor, and this council had all executive power, and was able to collect revenues such as customs without consulting either the Legislative Council or the Assembly. There was no regular relationship between the executive and the legislature such as had been developing in England for more than a century. This unstable and undemocratic system lasted for 50 years, but there was constant friction, culminating in unsuccessful rebellions in both Upper and Lower Canada in 1837.

In 1838 Lord Durham was sent to investigate conditions in Canada, and as the result of his report Upper and Lower Canada were united in a single colony called the Union of the Canadas, with the two parts renamed Canada East and Canada West. Unfortunately the same political structure was continued, though some assemblymen were now

appointed to the executive and leading figures in the Assembly were consulted by the government. There was an additional point of friction created by the provision that Canada East and Canada West should have equal numbers in the Assembly, although from the 1850s the English-speaking Canadians in Canada West increasingly outnumbered the French in Canada East. Responsible government was conceded during the governorship of Lord Elgin (1847–54), but the East-West problem remained and was resolved only by confederation.

The four Maritime Provinces (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland) developed quite separately from the Union of the Canadas, and had an altogether easier passage to responsible government. The Colonial Secretary, Lord Grey, had in November 1846 instructed the Governor of Nova Scotia to ‘entrust his government to those who have the confidence of a majority of the Assembly.’ As a result, in January 1848 Nova Scotia had the first responsible government outside the UK, as demonstrated when the executive council resigned after it lost a vote of confidence. In March there was a similar event in the Union of the Canadas. By 1860 all four Maritime Provinces had what might be called the standard pattern—a governor, an elected legislative assembly, and an appointed Legislative Council, with the executive being chosen by the Assembly. The tiny province of Prince Edward Island was to be an exception, for in 1862 it made its Legislative Council elective.

In the 1860s there was a move for a union of the provinces of Nova Scotia, New Brunswick, Prince Edward Island and possibly Newfoundland, but this was diverted by the new confederation proposal. The decisive influence was probably a change of attitude by the British Colonial Office late in 1864. The Colonial Office had previously supported the idea of a union of the Maritime Provinces, but the perceived American threat persuaded the Colonial Office to change its attitude, and great pressure was brought to bear on Nova Scotia and New Brunswick to join the confederation. ‘Her Majesty’s government can give no countenance to any proposals which would tend to delay the confederation of all the provinces.’ Some in the Maritime Provinces were not impressed. ‘Federal union was only sought as a means of separating the Canadas’ was the expressed opinion of the New Brunswick government; an election there early in 1865 resoundingly rejected the confederation proposal. The situation looked hopeless for confederation, but responsible government in New Brunswick was still fragile, and the Governor was able to override public opinion. He dissolved the provincial parliament, against the wishes of the prime minister, and in the ensuing election, against all expectations, the winners were the pro-confederalists. There were many factors in this

surprise result: the strong support for confederation by both government and opposition in Britain; a timely raid into Canada from the United States by the Fenians, a secret Irish-American revolutionary group; and the loyalty of voters to British wishes, many of the voters being descendants of loyalist refugees from the American Revolution.

Things went much more easily in Nova Scotia. The scheme of confederation provided that the sanction of the British and local parliaments was necessary. Despite general opposition in Nova Scotia to the idea of confederation, a majority of the Assembly was induced to vote in favour of it. Nevertheless, at the first federal election, of the nineteen MPs Nova Scotia sent to the new national Parliament in Ottawa, eighteen were pledged to the repeal of confederation. But it was too late. The BNA Act made no provision for provincial secession.

There was a story that Queen Victoria had chosen the site for the national capital by stabbing at a map with a hatpin. The site selected was a remote lumber town called Bytown, to be renamed Ottawa. A very impressive parliamentary building was erected overlooking the Ottawa River. The new House of Commons comprised 181 members (82 from Ontario, 65 from Quebec, fifteen from New Brunswick and nineteen from Nova Scotia). The qualifications of electors were those in force at the time in the various provinces. The number of MPs from each province was based on population, thus removing the key source of friction in the Union of the Canadas. The political campaign in Canada West for 'rep by pop' had finally triumphed.

The Senate comprised 72 members who were appointed by the executive, based on four divisions, with 24 senators from each of Ontario and Quebec and 12 from each of New Brunswick and Nova Scotia. A senator had to be resident in the province he represented, had to be aged at least 30 and have a net worth of at least four thousand dollars. These qualifications were put in because, in the words of John Macdonald, the Senate was to be 'the representative of property'. It is worth noting that, despite the American precedent, there had been no significant pressure for equal representation for the provinces in the Senate. The primary role of the Senate was thought to be to protect the provinces, and also to prevent 'any hasty or ill-conceived legislation'. It was supposed to provide 'representation and protection of several minorities: the people of the less populous provinces, the French, or English, speaking people of Quebec, and people with property'. The Senate was basically conceived as an anti-democratic, anti-republican body, but one which would avoid the main defect of the House of Lords, because membership would not be hereditary.

There was a rather clumsy mechanism for resolving deadlocks between the two houses. The British government could be asked to

allow one or two additional senators from each of the four divisions to be appointed. In 1873 the Mackenzie Liberal Government asked the British government to agree to the appointment of additional senators to overcome a Conservative majority in the Senate. The British government refused, on the grounds that there was no real dispute. There were no formal requests after that, though there were tentative enquiries in 1900 and 1912. British involvement in this provision has now lapsed, but in 1990 the Canadian government used its power under the 'patriated' Constitution of 1982 to appoint eight additional senators to ensure passage of the controversial goods and services tax, an action which survived a challenge in the Supreme Court. This increased the Senate's size to 112 senators, but retirements and deaths soon brought it back its normal 104 members.

On confederation, the Conservative Party was the dominant force, and in fact remained in power until 1896, except for a brief period (1874–78). In some ways this was curious because the old Tory and Conservative parties in the Canadas had been opponents of responsible government, which had been fought for by the Reform Party, with strength in Canada East and West. By the 1850s the Reform Party was disintegrating on religious and other policy issues, and the Conservatives had come to accept both responsible government and the desirability of federation. A new Conservative Party (initially called Liberal-Conservatives) was formed from the union of the French Canadian reformers and some other moderate reformers with the Tories and Conservatives. All that was left of the Reform Party was a small liberal group, called the Rouges, in Montreal, and a larger group, called the True Grits, in Western Ontario. These two groups later formed the basis for the Liberal Party in federated Canada.

Australia

In 1867 the Australian continent was divided into six separate British colonies, five of them with some form of responsible government. British occupation began with a convict settlement (at Sydney, in 1788), but population growth was slow until the discovery of gold in 1851, almost simultaneously in New South Wales and Victoria, followed by the rapid development of the wool industry. The population trebled, from 405 000 in 1850 to 1.4 million in 1867 (together with about 70 000 Aborigines, who then and for a century afterwards were not counted in censuses).

New South Wales was the first colony to be settled, and indeed in the early days covered the whole eastern half of the continent. By the 1840s it was moving towards representative government. In 1850 the

British Parliament passed the Australian Colonies Government Act,³ which separated Victoria from New South Wales and gave that colony a Legislative Council on the same basis as New South Wales—that is, two-thirds elected and one-third appointed by the Governor. The act permitted the existing legislatures in Van Diemen's Land and South Australia to be modified on similar lines, and envisaged such a legislature for Western Australia. The act also gave the various legislative councils, when reformed, the power to alter their colonial constitutions, subject to royal assent. A strong hint was given that bicameral legislatures were desirable.

The British government was not prepared to grant the colonies control over land policy and revenue from the sale of land until they were economically self-supporting. This was dramatically achieved by the discovery of gold in 1851, and in 1855 the British government agreed, with minor amendments, to the Constitution proposed by the New South Wales Legislative Council. There was no dispute about the Assembly, which was elected on a fairly wide male franchise, soon changed to manhood suffrage. A group led by Wentworth attempted to establish an hereditary upper house—the bunyip aristocracy, it was sarcastically called—but had to be satisfied with a house the members of which were appointed for life on the advice of the Assembly. By 1867 the New South Wales system was working reasonably well.

Tasmania was the second colony to be settled, a penal colony being founded in Hobart in 1803. Even by 1867 Tasmania had a population of only 95 000; the Tasmanian Aborigines were almost extinct. After transportation to the rest of Australia was ended, Tasmania became the receptacle for convicts from Britain, India and the other colonies. This system was stopped in 1853, the colony (previously Van Diemen's Land) was renamed Tasmania, and representative institutions were introduced, culminating in responsible government in 1854. The upper house was elected by voters with the requisite property or educational qualifications. There was a lesser property qualification for the lower house.

Settlements were established at Perth and Fremantle in 1829, but the surrounding land was poor, and migrants were scarce. In 1867 Western Australia was the only colony still receiving convicts, who had been asked for in 1850 to overcome the labour shortage. (Transportation was to stop in 1869, under pressure from the other colonies.) In 1867

³ This was the popular name for the Act, though at this time British Acts did not have short titles. The long title was 'An Act for the better Government of Her Majesty's Australian Colonies'. It was officially given the short title 'Australian Constitutions Act (No. 2)' in 1896.

Western Australia had no effective representative organisations, and was not to achieve responsible government until 1890.

Victoria was settled from Tasmania in 1834. It shared in the great gold and wool booms of the 1850s, and its development to responsible government moved with that of New South Wales, with one significant difference. From 1856, the Victorian Legislative Council was elected, rather than appointed, and had a separate electoral roll, with a heavy property or educational qualification. There was a much smaller property qualification for voters for the Legislative Assembly. Sixty thousand men could vote for the Legislative Assembly in 1856, but only ten thousand for the Legislative Council. Adult male franchise for the Assembly came in the following year. As one of the great issues for the colonial government was land development, the scope for conflict between the two houses was immense. In fact, in 1865 and again in 1867 the Legislative Council rejected the annual appropriation bill. The Council was probably technically in the right, for the Legislative Assembly had on each occasion incorporated in the appropriation bill a contentious provision that would not otherwise have been passed by the Council ('tacking' it was called). Great confusion and bitterness had resulted.

Bagehot was obviously thinking of Victoria when he wrote scathingly about responsible government in Australia, which he said did not work as well in the Australian colonies as in North America:

The lower classes there are mixed, convicts came first, and gold diggers followed ... there is a rich class which has little power, which is subject to a lower class, unfit to govern even itself, and still more unfit to govern those above it ... there is no such respect among the uneducated as would induce them to accept the judgement of the educated.

It was a happier picture in South Australia, founded in 1836 as one of the Wakefield colonial schemes (there were also five in New Zealand). Edward Gibbon Wakefield (1796–1862) produced a colonisation scheme designed to attract skilled migrants; land values were to be deliberately kept high, and the revenue used to entice further suitable migrants. He produced his scheme while in prison for the abduction of an heiress. The South Australian Colonization Act of 1834 had promised self-government when the population reached 50 000. In 1850, when the population was 63 000, a legislative chamber of eight crown nominees and sixteen elected representatives was created, as provided for in the Australian Colonies Government Act. Six years later South Australia achieved responsible government on the Victorian model, though with a smaller property qualification for the upper house.

South Australia was a leader in democratic developments. It had adult male suffrage, one man one vote, for the lower house from 1856.

It was the first to have triennial parliaments. It created secret voting by ballot, thereafter usually called the Australian ballot. And, although it had little to do with democracy, it produced a simplified system of transfer of land titles (the Torrens title) which was copied in many countries.

The last Australian colony to be formed was Queensland. Though it had been settled in 1826, it had been separated from New South Wales only in 1859, when its population (not counting Aborigines) was about 20 000. The new colony of Queensland was immediately granted self-government and parliamentary institutions on the 1856 New South Wales model.

The idea of an Australian union of some kind surfaced periodically. The Secretary of State for the Colonies, Earl Grey, had back in 1847 recommended a single assembly to deal with matters of common Australian interest, but despite its support by a committee of the Privy Council, the proposal was stillborn. There is no doubt it was premature. Worse still, the colonists had not been consulted, and Australians were already starting to show that odd and rather unappealing combination of an almost fawning desire to have the approval of the 'home' country coupled with a fierce resentment of any apparent attempt by that country to dictate to them. Nevertheless the Colonial Office did not completely give up. In 1851, after the separation of Victoria from New South Wales, the Governor of New South Wales was given the additional title of Governor-General of Australia, but he had no power in that role, and the appointment made no difference.

Although there was resistance to the imposition by Britain of a system of inter-colonial co-operation, opinion in the colonies was beginning to stir. In 1852 the Presbyterian cleric, Dr Lang, clamoured for an American-style federation with two legislative chambers (coupled with independence from Britain, which rendered his advocacy ineffective in the climate of the times). A year later a committee of the New South Wales Legislative Council and a Victorian constitutional committee each talked vaguely of an Australian general assembly, but there is no evidence that they seriously faced the problem of how they could combine, in a single chamber, reasonable equality of representation of individual voters together with arrangements ensuring that the smaller colonies need not fear domination by the larger. The latter provision was essential if there were to be any chance of a federal scheme being accepted.

The idea of a federal assembly, apparently a single chamber and always with very limited powers, recurs over the years, as for instance in Wentworth's *Memorial* of 1857 and a report of a New South Wales select committee of the same year. There were numerous colonial

conferences from 1863 onwards but it was to be a quarter of a century before real progress towards federation was made.

New Zealand

In 1867 New Zealand was a very young colony indeed, and a small one too. Its population was about 250 000 Europeans and 50 000 Maoris. The number of Europeans had been sharply boosted by the discovery of gold in the South Island in 1861, though the gold did not last very long. As recently as 1833 the number of Europeans was a mere 2000 or so, but such was the level of lawlessness, and violent friction with the Maoris, that the British government had reluctantly been forced to appoint a Resident. This could not last, and in 1839 Captain William Hobson was sent to annex the country to New South Wales by peaceful arrangement with the Maoris. In 1840 the Treaty of Waitangi was signed with the Maoris, which it was hoped would cover the orderly acquisition of land for the European settlers. The South Island, where there were few Maoris, was merely annexed by 'right of discovery', narrowly forestalling a French colonising expedition. There was no dispute at the time about the annexation, but there have been recent claims over land in the South Island based on the Treaty of Waitangi.

For the next twelve years the new colony was governed dictatorially by a succession of British governors (appointed, of course, by the British government), but the rising number of European settlers, who reached 32 000 by 1852, forced the passage of a New Zealand Constitution Act.⁴ Although this was an Act of the UK Parliament, it was largely drafted by the Governor, George Grey, and provided for a federal system.

A unitary system was probably impracticable in the 1850s, for communications were very bad. As a result New Zealand was divided into six provinces, and neighbouring provinces sometimes heard no news of each other for months at a time. The first MPs from the South Island travelled to Auckland via Sydney. The Constitution provided for certain powers, such as coinage, customs, crown lands and justice, to be reserved for the central government, with the remaining powers given to the provinces. Yet laws of the central government overrode any repugnant provincial ordinances, and the central government had the power to establish new provinces and to change the powers of the

⁴ The title of the 1852 Act was 'An Act to grant a Representative Constitution to the Colony of New Zealand'. The short title was given in 1896. An earlier Constitution Act had been passed in 1846, dividing New Zealand into three provinces, New Ulster, New Munster and New Leinster. That Act came into effect on 1 January 1848 but was suspended on 7 March.

provincial councils. In 1857 an amendment to the Constitution was passed by the UK Parliament giving power to the New Zealand Parliament to amend large sections of the Constitution, including the abolition of provinces.

The central government comprised a governor (appointed by the Crown), and a parliament comprising an elected House of Representatives initially of 37 members with five year terms, and an upper house, a Legislative Council of appointed members. The appointments to the Legislative Council were made by the Governor and were for life, and from 1862 there was no limit as to numbers. The two houses were officially called the General Assembly, but met separately.

There was a brief struggle before responsible government was achieved. Governor Grey left at the end of 1853 without having summoned the new parliament. Before the arrival of the new Governor, the Administrator was unwilling to agree to any new arrangements not in the constitution. Frustrated, the New Zealand House of Representatives sent an address to the Queen in September 1854, asking for immediate responsible government. The British government was sympathetic, and Gore Brown, the Administrator, was directed to introduce it. This he did, but he retained exclusive power over foreign affairs and trade and Maori land, though the New Zealand Parliament had the right to refuse to pass proposed laws and additional expenditure for the Maoris. The Parliament could not pass laws repugnant to British laws, and the UK Parliament could legislate for New Zealand and could override New Zealand laws. New Zealand had secret voting and adult male suffrage, with a small property qualification, which meant that voting could be plural if the voter possessed the necessary property in more than one electorate. The property qualification effectively excluded the Maoris because of their system of tribal land holding. This problem was tackled in 1867, after the 1860–65 Maori wars which began as disputes over land ownership. The solution was the establishment of four separate Maori seats, elected by Maori manhood suffrage, though the voting was not secret.

By 1867 the system was settling down, though the Maori wars,⁵ which continued sporadically until 1869, caused considerable strain. There were seven prime ministers in the first ten years of responsible government. Federal relations also were not working very well. The six provincial councils, each of nine elected members presided over by an elected superintendent, were in constant dispute with the central

⁵ The term 'Maori wars' is not popular now. 'New Zealand wars' or 'land wars' are preferred.

government over finances and land development. In the early days of the new colony, the provincial councils bulked much larger in the eyes of the settlers than did the central government. After all, the provinces controlled immigration, education, public works and land policy. The financial agreement of 1856 was also helpful to the provinces, particularly in the South Island, where there were no Maori land claims, for the agreement provided that, after paying certain debts, and contributing to a fund for buying Maori land, the revenue from land sales went to the provinces. This left tariffs as the only substantial source of central government revenue. Moreover it was normal for provincial superintendents to be elected to the House of Representatives; in 1856 all six were MPs. If they were not elected to the lower house, they were usually appointed to the Legislative Council. Naturally their principal aim was the benefit of their provinces. There were groupings in the Parliament called Centralists and Provincialists but, although their methods might be different, their aim was the same: more benefits for their provinces. There were no political parties to offer an alternative object of loyalty. It was to be 30 years before most people thought of themselves as New Zealanders rather than citizens of their province.

Though all the colonies in Canada, Australia and New Zealand maintained a loyalty to the Crown, there was resentment, particularly in Australia, at alleged British interference in colonial affairs. The solution was the passage by the UK government in 1865 of the Colonial Laws Validity Act, which gave validity to laws unless they were repugnant to British statutes, and gave the colonial parliaments power to amend their constitutions, and, if they desired, to prescribe the manner and form of passage of such amendments.

That is where the parliaments of our four countries stood in 1867. In the years since there have been many developments, sometimes different ones in different countries, and it is time to turn to these.

The development of the Westminster system

In all the four countries being considered the most important change since 1867 has been the growth of the party system. Nearly all members of the lower houses are now elected as representatives of political parties. Party discipline in all the parliaments has been greatly strengthened, and in some of the parliaments it is almost unknown for an MP to fail to support the agreed party position—that is, the position agreed by a majority of the parliamentary party. In some of the parties, an MP may be expelled from the party for failing to support the party line.

Nevertheless, there have been differences in the ways the various parliaments have developed, and it is worth looking at these before considering the performances of the various parliaments in their key roles.

United Kingdom

Three big developments in the political system of the UK since Bagehot's day have been the emasculation of the House of Lords, the devolution of power to Scotland and Wales (without any move towards the UK becoming a federation), and the loss of sovereignty resulting from membership of the European Union.

The House of Lords

The Lords turned out to be far from the politically timid body that Bagehot had described. In 1893 Gladstone's Liberals, aided by most of the Irish members, carried a bill to give home rule to Ireland. The bill was rejected by the Lords, but no action was taken against them, for it could be said that they were reflecting popular opinion more accurately than were the Commons.

The situation was very different in 1909. The Liberal government had become increasingly restive as the Conservative-dominated Lords rejected or mutilated its bills. The Chancellor of the Exchequer, Lloyd

George, skilfully manoeuvred the Lords into rejecting the 1909 budget. Two elections were held in 1910, the first to give authority to force through the 'people's budget' (the Lords yielded), and the second to end such struggles between the two houses. The Parliament Act of 1911 provided that bills which had passed the Commons unaltered in three successive sessions would become law after two years even if the Lords did not agree, and all power of the Lords over money bills was effectively lost, being reduced to a mere one month's 'suspensive veto'. The Lords very reluctantly agreed, but the alternative was the creation of perhaps 400 or 500 new peers, who *would* pass the bill. In 1949 the delaying powers of the Lords were further reduced from two years to one and from three sessions to two, as a result of the Lords delaying a 1947 proposal of the Attlee Labour Government to nationalise the steel industry.

Of course there have been many inquiries into the role and composition of the Lords. Russell produced a reform scheme in 1869 and Rosebery in 1884 and 1888. The Lords themselves tried in 1907. The preamble to the Parliament Act of 1911 announced the intention of making the upper house elective, 'constituted on a popular instead of an hereditary basis', and the Bryce Conference was appointed in 1917 to produce a scheme, but nothing came of it. In 1968 an all party plan was produced for a nominated upper house with a six-months suspensory veto. Nominations were to be controlled so that the government of the day had a narrow majority over the opposition, with the balance of power held by Independents. In 1958 life peers had been introduced, a measure advocated by Bagehot a century earlier. Before this change—and it took some time to have an effect—the Lords met for only 60 days a year, rarely for more than three hours a day, and only about 60 members attended at all regularly. It seemed to be dying, peacefully, in its sleep. But the influence of the life peers was eventually decisive. There were Labour peers, and thus some party conflict. The 'crossbench' Independent peers played an important role, and there were now 'working' peers, once almost a contradiction in terms. The result was a much livelier house, prepared to challenge the government—whether Labour or Conservative—where there was evidence of strong public support. The quality of inquiries by the Lords also improved, as did the pool of potential ministerial talent, the latter particularly important for a Labour government, which could expect to find few supporters among the hereditary peers.

In May 1997 the Labour Party, led by Tony Blair, won an overwhelming victory in the general election. The new Lord Chancellor tried to modernise the dress of his office. 'I feel that ... the days of breeches, tights and buckled shoes should go', he told a parliamentary

committee, but the House of Lords was still very conservative on matters which seemed to erode its dignity and power. Eventually the Lord Chancellor was allowed to jettison his half-pants, stockings and slippers in favour of ordinary black trousers and well-polished black shoes, but when he was presiding over the Lords he still had to wear his long, heavy robe and his long, heavy wig.

One of the promises in the 1997 Labour manifesto was the removal of the right of the 758 hereditary peers to sit in the House of Lords, but some negotiations were necessary to get the bill through the Lords, for the Conservative Party opposed reform, the House of Lords being one of their only effective forums of opposition. Eventually a deal was struck with Lord Cranborne, the Leader of the Conservatives, that 92 hereditary peers, elected by their colleagues, would remain in the Lords as an interim measure. Lord Cranborne was sacked by the leader of the opposition, William Hague, for negotiating the agreement.

This was only the first stage in the Lords reform for, as Tony Blair said, the government was 'perfectly prepared to agree that in the first stage one in ten hereditaries stays, and in the second stage they go altogether.' A royal commission was set up to make recommendations by December 1999 on full-scale reform of the upper house. The Blair Government promised that a reformed upper house would be in place by the next general election, but this election was held in 2001, without the reform of the House of Lords being completed.

The House of Commons

Bagehot thought that the effects of the 1867 Reform Act would take some time to become evident, but in fact there were almost immediate changes. The 90 per cent increase in the number of voters completely changed the relationship between a member and his constituents. To gain the support of such a number of voters there had to be a mass organisation, and the Conservative National Union was formed in 1867 and the National Liberal Federation in 1877 to meet this need. These new organisations had to offer the voters some policies, and to offer some prospect of the promises being kept. This in turn necessitated a disciplined parliamentary party which would support the government in implementing the promises, and MPs began to be elected as representatives of a party rather than as individuals. The change in voting patterns in the House of Commons was dramatic. In 1860 in only 6 per cent of the divisions were there party votes, normally defined as one where at least 90 per cent of a party voting in a division do so on

the same side.⁶ This rose to 35 per cent in 1871, 47 per cent in 1881 and 76 per cent in 1894. By 1967, a hundred years after Bagehot wrote, party discipline was taken for granted, and many thought that MPs were mere robots and that the possibility of significant cross voting was negligible.

The House of Commons now consists of 659 members, from single member constituencies with roughly-equal numbers of voters, the boundaries being drawn by independent commissioners. Yet it took a long while to get there, and in all the changes the UK lagged years behind the more developed of its colonies. It will be remembered that in 1867 less than a third of the adult male population could vote, and voting was in public. The secret ballot was introduced in 1872, and in 1884 the electorate was increased from three to five million by enfranchising rural workers, but voters still had to be householders. In the following year there was an attempt to redistribute electoral districts so they would be equal on a population basis and each have one MP. However, some universities and a score of towns retained two MPs.

Electoral systems

Women had a very difficult time gaining the vote. From 1903 onwards the suffragettes fought with increasing vigour, but the decisive event was the First World War. After the success of women in performing jobs previously exclusively done by men, they could scarcely any longer be regarded as incompetent to vote. The Representation of the People Act of 1918 gave the vote to women over 30 who were local government electors (or whose husbands were) and also effectively gave adult male suffrage. These changes increased the electorate from eight million to 21 million. Women were given the vote on equal terms with men in 1928, and as a result there are now more women voters than men. Until 1948, second votes were possible for university graduates and for owners of business premises, and in 1950 the last of the double-member constituencies were abolished. The voting age was lowered to eighteen in 1969.

Since 1944 electorate boundaries have been adjusted regularly by independent commissions with the intention of ensuring equality of representation. The populations of Scotland, Wales and Northern Ireland have been falling in comparison with that of England. Because the distribution of seats between the four countries is done by act of parliament and changes are always controversial, Scotland, Wales and Northern Ireland have been able to resist reductions in their numbers of

⁶ The statistics in this section are taken from Philip Norton, *Dissension in the House of Commons 1945–74*, London, Macmillan, 1975.

seats and are relatively over-represented while England is under represented.

The voting has always been first-past-the-post⁷ and voluntary, though there has been some recent pressure for proportional representation. In its manifesto for the 1997, election the Blair Labour Government promised to set up an independent commission 'to recommend a proportional alternative to the first-past-the-post system.' This was done, and the commission reported in October 1998, with a proposal which the commission described as 'alternative vote with top-up members'. Each elector would have two votes, the first for choice of a constituency MP, the other either for individuals or a party list. The commission envisaged that 80–85 per cent of the MPs should be constituency members, the remaining 15–20 per cent should be the top-up members.

When the report was debated in the House of Commons in November 1998, there was a great deal of criticism. The Conservatives were strongly opposed to the whole idea, and the Labour Party had a range of views. The only significant party strongly supporting the report was the Liberal Democrats. Winding up for the government, George Howarth said that 'the people should make the decision. It is appropriate that there will be a referendum at the right time'. The right time has evidently not yet arrived.

Devolution of power to Scotland and Wales

The 1997 Labour election manifesto also contained promises to give Scotland 'a parliament with law-making powers' and Wales an assembly to 'provide democratic control of the existing Welsh Office functions'. Referendums on these matters were held in September 1997. In Scotland, 60 per cent voted and of these 74 per cent were in favour of a Scottish Parliament, and 63 per cent were in favour of that Parliament having the power to vary taxes imposed by Westminster. The Welsh voted a week later, and narrowly supported their new assembly. Only just over 50 per cent of those eligible voted, and 50.3 per cent of these were in favour of the assembly, a margin of less than 7 000 votes. The Blair Government nevertheless decided to proceed with both the Scottish Parliament and the Welsh Assembly, and the bills duly passed the UK Parliament.

Elections for the Scottish Parliament were held in May 1999, for a single house. The 129 members were elected in two different ways,

⁷ In first-past-the-post voting, each elector has a single vote. The winner is the candidate with the most votes, however small a proportion of the total votes this may be.

broadly on the lines recommended by the Proportional Representation Commission for the UK Parliament. The majority (73) were elected by a 'first-past-the-post' system from constituencies which were broadly the same as those for the UK Parliament, while the remaining 56 members were elected by proportional representation, seven of them from each European parliament constituency. Elections will be held every four years.

The powers of the Scottish Parliament were 'devolved' from the UK Parliament, and in these areas the Scottish Parliament is allowed to make laws for Scotland. It can legislate on a wide range of matters of importance to the people of Scotland, including law and order, local government, support for industry, education, health and the promotion of tourism and exports. A devolution could of course be revoked at any time by the UK Parliament if it was felt that the actions of the Scottish Parliament were unacceptable, though this revocation might present political difficulties. The main source of revenue of the Scottish Parliament is a block grant from the UK Parliament, although it has the power to vary the basic rate of income tax by up to three percentage points either side of what is charged south of the border.

Wales too has a single house, the Welsh Assembly, with 60 members elected for a four year term. It is chosen on a similar system to the Scottish Parliament, with 40 members elected from constituencies by the 'first-past-the-post' system, topped up with four members elected by proportional representation from each of the five European Parliament constituencies. The Welsh Assembly however has very much less power than the Scottish Parliament. It cannot pass acts dealing with Welsh matters, which remain the responsibility of the UK Parliament. It does have a secondary legislative capacity, being able to draw up different orders and statutory instruments to those which apply in England, but these will have to be in conformity with the acts passed by the UK Parliament. Really what the Welsh Assembly has done is to take over the administrative functions of the Welsh Office in Westminster, and with an annual budget of over seven billion pounds a year will take decisions on issues such as education and the health service in Wales, agriculture, transport and roads and the environment. The size of the annual block grant is decided by the UK government, and the Welsh Assembly has no power to vary taxes, an open invitation when voters are fretful to pass the blame to London for providing too little cash.

Northern Ireland Parliament

There was some feeling that these constitutional changes, particularly the establishment of the Scottish Parliament, were a dramatic

breakthrough. In fact, Britain had already had 50 years' experience of a similar parliament. A parliamentary system modelled on Westminster was established in Northern Ireland in 1921, following the separation of the Irish Free State. There were two houses, a Senate with 26 members and a House of Commons with 52 members. There were two ex-officio senators, the Mayors of Belfast and Londonderry, and the remaining 24 were elected by the Commons by proportional representation. The 52 members of the Commons came from single member constituencies. The powers of the Northern Ireland Parliament were similar to those now given to the Scottish Parliament. Most powers were transferred to the Northern Ireland Parliament, but Westminster kept control over such matters as constitutional and security issues, law and order, policing and relations with the European Union.

The Northern Ireland Parliament lasted for 50 years, but in 1972 the level of sectarian violence persuaded the Heath Government in London to prorogue the Northern Ireland Parliament and impose direct rule. There were sustained efforts to restore self-government to Northern Ireland, which eventually achieved something in June 1998, when a 108-member Assembly from eighteen six-member constituencies was elected. There were delays in restoring self-government, but in December 1999 power was returned to the elected Assembly, with a ten-strong Cabinet voted in by the Assembly, and containing three ministers from each of the Unionists and the Irish-nationalist Social Democratic and Labour Party, and two each from the pro-Irish and militant Sinn Fein and the hardline Ulster Unionist Party. Unfortunately this lasted for only a very brief time before problems over disarming the militants caused direct rule from London to be reimposed, but after three months, when the IRA had agreed to disarm, self-government was restored. But the IRA proved very reluctant actually to give up their weapons, and the situation remains uncertain. The Northern Ireland problem is religious, and religious wars are always the most difficult to solve.

There is no serious pressure towards the United Kingdom becoming a federation. There seems to be no desire in England, except possibly in the north-east, for the establishment of regional parliaments. The Irish are encouraging moves towards independence for Scotland and Wales. Dublin's motive seems to be a belief that if those two countries become independent countries in the European Union, it will become almost impossible for England to retain control of Northern Ireland. But independence is a long way off for Wales.

It is too early to say how effectively the Scottish Parliament and the Welsh Assembly will work, but it seems certain that if they do not satisfy their constituents the pressure will be for the devolution of more

powers, not the return of the present powers to Westminster. Scotland may move towards becoming an independent country in the European Union, though whether they would then retain the British monarch as their head of state is very doubtful.

Heads of state

Looking at the performance of the British heads of state, Queen Victoria's successors have been much more meticulous in observing the limitation of the rights of the monarch to the right to be consulted, to encourage and to warn. There have been no occasions on which a prime minister's or Cabinet's request for a dissolution has been refused, a discretion which Bagehot thought rested with the sovereign. George V was prepared to agree to Prime Minister Asquith's request for the creation of perhaps 500 peers in 1911, though it is far from certain that Edward VII, had he survived, would have been so acquiescent.

This is not to say that there has not been a need for royal decisions, for the selection of a prime minister was difficult if no party had a majority: there were no less than eight minority and two coalition governments during Victoria's reign. The Labour Party has always had an elected leader, but the Conservative leader was, until 1964, supposed to 'emerge'. On one occasion no one did clearly emerge as leader of the Conservatives. In 1923 Conservative Prime Minister Bonar Law resigned, mortally ill, too ill to be consulted about his successor. The party was split between Stanley Baldwin and Lord Curzon. Although there was much consultation, the final selection was King George V's, and he chose Baldwin, finally ending any thought that a prime minister could come from the House of Lords. On other occasions, such as Macmillan's succession to Eden, or Douglas-Home's succession to Macmillan, although the royal prerogative was used, in fact the process of consultation and elimination had resulted in a single name emerging.

Election of parliamentary leaders

The Conservative method of choosing party leaders was, though, a confusing and in fact undemocratic process, and was replaced by the formal election of a Conservative parliamentary leader by the party members in the House of Commons. To win on the first ballot a candidate had to obtain a simple majority of the number of Conservative MPs *and* have a lead of at least 15 per cent over his or her nearest challenger. If a winner did not emerge from the first ballot a second ballot was held, for which fresh nominations were called. Two

leaders (Heath and Thatcher) were removed by this system.⁸ In the Labour Party, until 1982 the parliamentary party had elected the leader. In that year the responsibility was transferred to an electoral college of MPs (30 per cent), party members (30 per cent) and block votes from the trade unions (40 per cent). After a bitter fight the block votes from the trade unions were eliminated by the Labour Party Conference in 1993, and a one-member-one-vote system introduced, with voting by mail. Something nevertheless had to be done to weight the votes, for there were four million trade unionists paying the political levy⁹ as compared with 270 000 individual party members and only a few hundred MPs at Westminster and in the European Parliament. The final solution was that the votes would be weighted so that a third came from trade unionists (voting as individuals), a third from local party members and a third from the MPs and MEPs.¹⁰ The first leader to be elected under this system was Tony Blair.

The European Union

Before we leave the United Kingdom to look at developments in Canada, Australia and New Zealand, it is necessary to mention one change which has limited the sovereignty of the UK Parliament. On 28 October 1971 the House of Commons approved the terms for entry into the European Economic Community (which has been known since 1993 as the European Union). In effect they were voting to join an embryo federation, with the federal government having designated powers, which could be expanded by agreement, and the member nations retaining the remaining powers. There is a parliament, but there certainly is not responsible government. Citizens of any EU country have the right to live and work and be educated anywhere within the Union, and are entitled to medical treatment there.

The EU now has fifteen members, and has membership applications from twelve more countries, ten of them from Central and Eastern Europe; the other two are Cyprus (the Greek part only, at the moment) and Malta. Five of them have been short-listed, and may join as early as 2004. And when the twelve have been dealt with, there will be another queue of similar length. Before membership negotiations can start, the EU has to be satisfied that the applicant has met the political requirements of 'democracy, the rule of law, human rights and ...

⁸ The system was later changed, and in the 2001 vote for the leadership of the Conservative Party for the first time all party members—more than 300 000 of them—were entitled to vote.

⁹ In the 1994 election only 19 per cent of the eligible trade unionists voted.

¹⁰ MEP is the short title for a Member of the European Parliament.

protection of minorities'. Turkey would like to join the EU, and has had a preliminary agreement since 1963, but as it has not yet met the political requirements, membership talks have not yet begun.

As far as the sovereignty of the UK Parliament is concerned, European Union membership means that EU laws can override British laws in areas within the EU's powers, and disputes over law-making powers are decided in the EU's own court of justice, thus limiting the traditional sovereignty of the UK Parliament. The UK Parliament has no direct power over proposed EU legislation, but committees of the Lords and Commons examine drafts of important proposed laws and make recommendations to their respective houses, who in turn may give advice to the UK minister who will be attending the EU Council of Ministers. The amendment of UK laws rendered inappropriate by EU legislation is left to the government, which usually does it by statutory instrument, as authorised by the European Communities Act of 1972. As an additional measure, to avoid problems in the courts, which would be interpreting human rights under local law, the EU Convention on Human Rights has been incorporated into English and Scottish statute law.

The UK Parliament has no direct influence on EU policies, and the European Parliament, based in Strasbourg, has proved to be not very effective, although its members have more practical opportunity to influence the content of European legislation than the members of the UK House of Commons has over its legislation. Its influence on the EU's budget, too, is much greater than the UK Parliament has over its national budget. Prime Minister Tony Blair has proposed a second chamber, where the European Union nations would be equally represented, so as to prevent the major nations dominating the smaller ones, but there is no sign of this second chamber being set up.

European Union voters have shown little interest in voting for the European Parliament, and the MEPs are surprisingly unreliable in their attendance at parliamentary sessions, particularly as weekends approach.

The bureaucracy, the European Commission, is based in Brussels, and has 16 000 professional staff. The commissioners who head it are nominated by national governments, but are supposed to be independent. The European Commission has the sole right to propose legislation for the EU, though it is for the Council of Ministers and the European Parliament to decide what is enacted. The European Commission was becoming very corrupt in the 1990s, and the European Parliament, using one of its few effective powers, managed to have the sixteen commissioners removed.

The governments of the EU member countries have become more involved as the power of the European Commission was restrained, particularly as the EU moved into new areas such as a common currency and foreign and defence policy. The European Council is composed of the heads of government of the member countries, with the chairman chosen from among them on a six-month rotating basis. The Council provides only broad guidelines. Detailed policy aspects are dealt with by councils of ministers comprising appropriate representatives of the member nations, the membership depending on the subject matter: thus trade ministers discuss trade, farm ministers agriculture, and so on. Some policies are decided by a majority vote of member countries, others require unanimity. There is a General Affairs Council of Ministers, made up of foreign ministers, which is supposed to co-ordinate the activities of the various councils of ministers, but it does not work very effectively.

The question of whether member countries should have power of veto over EU policies is very divisive in Britain. The Blair Labour Government says that there is a good case for reducing the policy areas in which governments have a veto. It is hard enough, it is argued, to achieve unanimity among the present fifteen countries. Achieving it among twenty could prove impossible. For instance, the Blair Government suggests that European court procedures, transport, and even changes to the EU's fundamental treaty, should be decided by majority voting, though issues such as economics and defence and foreign policy should be subject to national veto. The Conservatives, on the other hand, oppose the extension of majority voting and the enlargement of common policies. They also want member countries to be able to opt out of new EU legislation.

The EU became a single market on 1 January 1993, and the Maastricht Treaty, negotiated in 1991 and finally ratified in 1993, was intended to move towards a common currency by 1999, the establishment of an EU bank, and the formulation of common foreign and defence policies. The new currency, the euro, was introduced for electronic and paper transactions in 1999, and in 2002 notes and coins will replace national equivalents. When monetary union was introduced, eleven member countries joined but Britain stayed out, together with Sweden, Denmark and Greece. Greece wanted to join, but was delayed until it could meet the economic criteria. Public opinion in Sweden and Denmark seems to be swinging in favour of joining the monetary union. Prime Minister Blair has promised a referendum before the next election, but this may not happen if public opinion remains strongly against joining. Governments do not like the humiliation of losing referendums. Britain may find itself the solitary

outsider, though it might be joined by several of the EU applicant countries.

The development of common foreign and defence policies has not moved as fast as monetary union, but after NATO's war in Kosovo the leading EU countries began to feel strongly that they should possess a capability for collective military action which was independent of NATO, and did not necessarily depend on the military leadership of the United States. British Prime Minister Tony Blair has declared his support for this, departing from the previous British position that such moves should be resisted for fear of damaging NATO. There have also been formal moves for the development of a common foreign and security policy for the EU, though this will take some time to be effective, with ancient national prejudices to be overcome. It will not be easy, for Britain and France are used to being in a position of power, as both permanent members of the UN Security Council and as nuclear powers, and will not yield their influence easily, particularly as an increasing number of EU members, such as Sweden, Finland, Ireland and Austria, are becoming neutral.

As an indication of the declining power of the European Commission, the EU governments handled monetary union themselves, instead of consigning it to the European Commission. So they wrote the rules for the new currency, and set up a new independent central bank to manage it. Governments have reserved to themselves the development of the EU defence structure, and the common foreign and security policy.

The Scottish government has followed the example of other autonomous regions of the EU by establishing an office in Brussels, to represent Scottish interests on devolved matters, and to ensure the implementation in Scotland of EU obligations which concern such matters. Westminster is beginning to find out what it is like to be a provincial parliament.

Canada

In the new dominion of Canada several constitutional problems emerged over the years: the status and method of amendment of the Constitution; disputes over the status of the Province of Quebec; the composition and role of the Senate; and the removal of the power of the British Privy Council to interpret the Canadian Constitution.

The Constitution

The *Constitution Act 1867*¹¹ (usually referred to as the BNA Act) was an Act of the UK Parliament, and could be amended only by that body. Unlike New Zealand from 1857 onwards, the Canadian Parliament had no power to amend the national Constitution. It was not that the British made any difficulties. If a proposed constitutional amendment was passed by the Canadian Parliament (House of Commons, Senate and Governor-General) the necessary new Constitution Act was passed at Westminster without delay, or much interest. On no occasion did a Governor-General refuse to approve, or Westminster fail to enact, a constitutional amendment passed by the two Canadian houses. In 1949 both the UK and Canadian parliaments passed the BNA (No.2) Act which gave the Canadian Parliament the power to amend the Constitution in matters lying solely within federal jurisdiction.

Yet the position remained anomalous, particularly as the Statute of Westminster in 1931 had made Canada otherwise completely independent. The UK Parliament grew increasingly uneasy about the exercise of its remaining power. What if one or more of the provincial governments objected to a constitutional amendment requested by the Canadian Federal Parliament? After all, the Constitution was supposed to be a pact between the federation and the provinces. How many provinces had to object before the UK Parliament should take notice? When the Trudeau Government first approached the UK government to have the Canadian Constitution amended and 'patriated', eight of the ten provinces lobbied Westminster MPs against the proposal. It seems certain that the UK Parliament would not have passed the necessary act, but the issue was resolved by the Canadian Supreme Court, which ruled that constitutional convention required that there must be substantial support among the provinces for such a change to the Constitution to be accepted. Trudeau was forced to modify his proposals, and managed to get the final version approved by nine of the ten provinces, Quebec of course being the dissenter. It was with some relief that the UK Parliament passed the act and relinquished the remainder of its power over the Canadian Constitution.

The Constitution Act of 1982 contains several amending formulas, depending on the subject matter. Typically a constitutional amendment has to be passed by the House of Commons and authorised by at least two-thirds of the provincial legislatures, representing at least half of the

¹¹ The *Constitution Act 1867* was originally called the British North America Act (nearly always referred to as the BNA Act). It and the various amending BNA Acts were renamed Constitution Acts when the Canadian Constitution was 'patriated' in 1982.

total population of all the provinces, but some amendments have to be unanimous, some can be agreed by a majority of provinces, and others which affect only some of the provinces may be agreed by the legislatures concerned. A provincial legislature can exclude its province from the operation of a constitutional amendment which affects the powers of provinces. The Senate was given only a 180-day suspensive veto over constitutional amendments, though it retained all its existing rights over other legislation. The Constitution Act also incorporated a Charter of Rights and Freedoms.

The successful formula was the result of the accord signed by the federal government and the provinces, with the exception of Quebec, in November 1981.

Quebec

Quebec was the second of the constitutional problems of the dominion. It was not easy to incorporate a province of largely different language, religion and social attitudes, particularly as the province did not wish to be assimilated. There were 'two nations warring in the bosom of a single state,' as Lord Durham put it. The original confederation settlement had given a unique status to Quebec, permitting it to preserve its own civil law and to retain the use of the French language. The other original provinces received no such special privileges, though provinces which later joined the confederation were sometimes able to make special deals. Manitoba, for instance, received a guarantee of the protection of religious education and the French language, and special land was set aside for the Métis (the offspring of French fur-traders and native Indian women).

The Meech Lake Accord was an attempt to induce the province of Quebec to accept the Constitution Act of 1982, by which Quebec is legally bound, despite refusing to ratify it. Quebec produced five proposed constitutional changes, which, if accepted, would persuade it to accept the whole Constitution. The proposed changes covered the special status of Quebec, a provincial veto on constitutional changes affecting a province, a voice for the provinces in Supreme Court and Senate appointments, increased power for the provinces over immigration, and limits on federal spending in areas of exclusive provincial jurisdiction. These conditions were agreed by Prime Minister Mulroney and all the provincial premiers at Meech Lake in 1987, and were passed overwhelmingly by the House of Commons. However, ratification required unanimous agreement by the provincial legislatures, and in 1990 Manitoba and Newfoundland refused to do so, basically because they did not agree with the special advantages for Quebec and francophones.

After the collapse of the Meech Lake Accord, another attempt was made to hold Quebec in the federation by reforming the Senate and offering other baits to Quebec. In July 1992, under the Charlottetown Agreement, the other provinces offered Quebec a 'Triple E Senate—Elected, Equal, Effective'. Each province would elect eight senators, and there would be no ministers in the Senate. The Senate would have only a 30-day suspensive veto over money bills, but Ontario (which, like Quebec, would have had to accept a reduction in the number of its senators from 24 to eight) also insisted that a 70 per cent Senate majority be required before ordinary legislation could be rejected. Whether this is compatible with an effective Senate is very debatable. The baits for Quebec were provisions that Quebec would be recognised as a 'distinct society' with some special privileges, that federal legislation dealing with French culture and language would have to be approved by a majority of French-speaking senators, and the giving to each province of a veto over any future changes to federal institutions, thus returning to Quebec a veto power it had lost in 1982. There was also recognition of the inherent right of aboriginal self-government. The Quebec government was involved in the constitutional negotiations, for the first time in two years, and accepted the Charlottetown offer, though it insisted on more seats in the House of Commons to compensate for the lost senators.

The agreement was put to the voters in a non-binding referendum. A major problem was that the referendum asked the voters to approve 50 pages of proposals covering everything from Senate reform to aboriginal self-government. Many voters had to find only one proposal they disagreed with in the 50 pages of the document for them to be persuaded to vote 'no'. The referendum was defeated, both nationally (with 54 per cent of the voters against the agreement) and in six of the ten provinces (including Quebec). The idea of a constitutional amendment was dropped.

Of course the Quebec problem did not go away. In October 1995 there was a referendum in Quebec province on the question: 'Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership ... ?' The referendum was narrowly defeated by a vote of 50.6 per cent to 49.4 per cent. There was an extraordinarily high participation rate of 94 per cent of eligible voters. It may be, though, that the result of this referendum did not really represent the number of Quebec voters who wanted to secede from the Canadian federation. There was considerable misrepresentation in the 'yes' campaign about the consequences of secession. A poll conducted at the end of the campaign revealed that 80 per cent of the Quebec voters who were planning to vote 'yes' were

under the impression that Quebec would continue to use the Canadian dollar after secession; 90 per cent thought that economic ties with Canada would be unchanged, and 50 per cent thought that they would be able to use Canadian passports. More than 25 per cent of 'yes' voters believed that Quebec would continue to elect members to the Parliament in Ottawa. Of course none of these would have automatically continued after secession.

After the referendum, Prime Minister Chrétien kept a promise he had made during the referendum campaign, and introduced a package into the Parliament which included recognition of Quebec as a 'distinct society', and giving a veto over constitutional changes to four regions (Quebec, Ontario, the Western Provinces and the Atlantic Provinces). The package was passed, though Quebec dismissed it as meaningless, and British Columbia successfully campaigned for its inclusion as a fifth veto area.

The legal right of Quebec to secede was challenged in the Supreme Court in 1997. The government of Quebec boycotted the proceedings, so the Supreme Court appointed a 'friend of the court' to argue Quebec's case. In its judgment the Supreme Court ruled that Quebec did not have the right to secede unilaterally under either the Canadian Constitution or international law, but it also ruled that should a future referendum in Quebec produce a clear majority on a clear question in favour of secession, then the federal government and the other provinces would have a duty to enter into negotiations with Quebec on constitutional change.

The momentum for secession seems to be failing. In the Quebec election in November 1998, although the Parti Québécois won government, the Liberal Party, which is opposed to secession, won a larger share of the vote. Premier Bouchard admitted after the election that the voters 'are not prepared to give us the conditions for a referendum right now.' So far there have been no further referendums.

The Senate

The original composition of the Senate had been in part an attempt to soothe Quebec's fears. One of the key figures of confederation, George Brown, said that Quebec had 'agreed to give us representation by population in the lower house, on the express condition that they could have equality [with Ontario] in the upper house. On no other condition could we have advanced a step.'¹² Although the Quebec representation (originally 24 out of 72 senators) has been maintained, its influence has

¹² P.B. Waite (ed.), *Confederation Debates in the Provinces of Canada*, Toronto, McClelland & Stewart, 1963.

been reduced as new provinces have joined or been created, and have been granted an entitlement to Senate positions. Manitoba was created in 1870, British Columbia joined in 1871 and Prince Edward Island in 1873, Alberta and Saskatchewan were created in 1905, and Newfoundland joined in 1949. The Senate now has 104 members, so that Quebec's representation has dropped from one-third to less than a quarter. Not that it matters much, for the Senate has become almost totally ineffective and is another unsolved constitutional problem.

In the early days of confederation the Senate did exercise a significant legislative role. There were five senators in Macdonald's first cabinet, and senators have held most important cabinet posts, including the prime ministership. But since the early days the Senate's importance has greatly diminished. The reason is of course the non-elective character of the Senate, which has usually led it to back away from any direct confrontation with the Commons. The Senate's lack of prestige has been exacerbated by its highly party political nature. Senators appointed since 1965 retire at 75, but before that they were appointed for life. The appointments are in the gift of the prime minister, and prolonged rule by one party causes serious imbalances in the Senate, since appointments are usually made to reward loyal party service. Worse still, from the point of view of Senate prestige, the prime minister sometimes does not even bother to fill vacancies.

Under the Meech Lake Accord, new senators were to be chosen from lists of names provided by the provinces. There was a vacancy for a senator from Alberta, and that province held a Senate election in October 1989 in an attempt to speed up reform of the Senate. The winner was appointed to the Senate, but after the collapse of the Meech Lake Accord Prime Minister Mulroney announced that he would not be bound by such elections in future. Alberta did not happily accept this, and in 1998 the provincial government announced its intention to elect two 'senators in waiting', available to fill Alberta vacancies in the Senate as they arose. A vacancy arose just before the election was due, and Liberal Prime Minister Chrétien, who had never supported the concept of the election of senators, named a replacement without waiting for the election. The premier of Alberta regarded this as a 'slap in the face for Albertans', but in fact it is unrealistic to think that the Constitution can be changed by piecemeal acts by individual provinces.

Although the Senate is under severe criticism, it is not because it does nothing. It provides occasional ministers, usually because there is not a suitable member of the Commons from a particular province. The Senate reviews complex bills, and sometimes suggests amendments. It conducts public inquiries, many of them useful, and it helps to watch over delegated legislation. But in the mid-1980s things changed

dramatically. In 1984 the Progressive Conservatives under Brian Mulroney were swept into power in Ottawa, after more than half a century of Liberal rule, broken only by the very short term of John Diefenbaker and the even shorter one of Joe Clark. As a consequence there was a substantial Liberal majority in the Senate, and this majority was used when the Mulroney government endeavoured to pass a bill to ratify the free-trade pact with the USA. The Liberal-dominated Senate refused to pass the bill until there had been an election on the issue. This was held, the Mulroney Government was returned with a comfortable majority, and the bill was re-introduced and speedily passed by both houses.

Things became even more dramatic a few years later, when the Mulroney Government introduced a bill to implement a goods and services tax. When it reached the Senate it was referred to its Standing Committee on Banking, Trade and Commerce. The committee toured Canada hearing witnesses, who of course were largely opposed, as voters nearly always are when new taxes are proposed. The Liberal senators on the committee saw a wonderful opportunity to exploit the political situation, and the committee, by a majority, duly recommended the rejection of the tax bill.

The Mulroney Government clearly had to do something about the Senate, for not only was the Goods and Services Tax Bill held up, but so were two other important tax bills. There were fifteen vacancies in the Senate, and Mulroney filled them with Progressive Conservative supporters. Even then his party was still in a minority in the Senate, which had 46 Conservative senators, 52 Liberals and six senators not supporting either of the major parties.

Mulroney then used the deadlock-breaking power, by which he could ask the Queen of Canada to authorise the Governor-General to appoint either four or eight more senators. He chose eight, and as they were of course nominated by him, the Progressive Conservatives gained an effective majority in the Senate. The three bills were duly passed, after an astonishing filibuster by Liberal senators.

These events brought Senate reform to the forefront of the political debate, but there were still great difficulties, for there was no general agreement on what should be done. Nearly everyone agrees that there should be a Senate. Nearly everyone agrees that it should be elected. Everyone agrees that its original role as protector of property interests is no longer desirable. Everyone agrees that it should have no power to remove a government. But there agreement stops. What are to be the Senate's powers? Are provinces to be represented equally, or on a population basis? Would a suspensive veto enable the Senate to perform a useful role? Are senators to be elected by voters or by

provincial parliaments, and what is to be the method of election? Should there be a requirement for two majorities, both overall and of francophones, for legislation dealing with linguistic matters? It will be a long time, it seems, before there will be sufficient agreement for a constitutional amendment to have any chance of success.

In the abortive Charlottetown Agreement, it was proposed that senators should be elected, with the same term as the House of Commons. There were to be six senators from each province and one from each territory, with the possibility of additional senators from the aboriginal peoples. Elections could be either by the voters or by provincial legislatures.

According to a government pamphlet:

the Senate would be able to block key appointments, including the heads of key regulatory agencies and cultural institutions. It would also be able to veto bills that result in fundamental tax policy changes directly related to natural resources. In addition, it would have the power to force the House of Commons to repass supply bills. Defeat or amendment of ordinary legislation would lead to a joint sitting process with the House of Commons. At a joint sitting a simple majority would decide the matter.¹³

These Senate reforms sank with the rejection of the Charlottetown Agreement.

The Privy Council

The other original constitutional problem has disappeared. Since the various Constitution Acts were enacted by the UK Parliament, appeals on constitutional matters lay with the judicial committee of the Privy Council in London, via the Canadian Supreme Court, after its establishment in 1875. In a federation, the division of powers between the various governments is a frequent source of dispute, and in the early years the Privy Council showed a remarkable bias towards the provinces, creating some surprising consequential powers to add to the specific powers given to the provinces under the 1867 Constitution. Nevertheless on one occasion at least the Privy Council had a benign influence, when in 1929 it overturned a decision of the Canadian Supreme Court which held that women were not 'persons' under the Constitution, and therefore could not be appointed to the Senate. The first woman senator was appointed in 1930.

The 'patriation' of the Canadian Constitution in 1982 ended appeals to the Privy Council.

¹³ *Our Future Together*, Minister for Supply and Services Canada, 1992, pp. 4–5.

The Governor-General

The Governor-General, in the beginning, exercised power over foreign affairs and international trade on behalf of the British government, but it was a sign of the times when the first prime minister of Canada, Sir John Macdonald, was one of the British negotiating commission which signed the Treaty of Washington in 1871. By the 1870s Canada was imposing protective tariffs and trying to negotiate trade agreements with the United States. The British declaration of war in 1914 automatically involved Canada, but the war changed things. The Imperial War Conference of 1917 decided, largely at Canadian insistence, that after the war there should be 'a full recognition of the dominions as autonomous nations of an Imperial Commonwealth', and that the dominions and India should have 'an adequate voice in foreign policy'. Canada signed the Versailles Treaty as an independent nation and became an inaugural member of the League of Nations. As early as 1920 the right to separate Canadian diplomatic representation was established, though it was not until 1926 that the first legation (in Washington) was opened, to be followed by one in Paris in 1928 and another in Tokyo in 1929. At the 1926 Imperial Conference it was declared that the dominions and Britain were equal in status, bound together only by an allegiance to the Crown, an arrangement which was formalised in 1931 by the Statute of Westminster.

Governors-General have generally been punctilious in following the principles set out by Bagehot, with two notable exceptions. In 1873 Lord Dufferin was prepared to dismiss the prime minister (Sir John Macdonald) over allegations of electoral bribes. The crisis was averted when the prime minister resigned. In 1926 Lord Byng refused a request for an election by Prime Minister Mackenzie King, who had lost the confidence of the House of Commons. Byng commissioned the leader of the opposition to form a government, but this collapsed after three days and an election was unavoidable. Unfortunately for Byng, Mackenzie King won the election.

Since 1952 the Governor-General has always been a Canadian. The Governor-General is the representative of the Queen, but the selection is made by the Canadian prime minister, the Queen merely rubber-stamping the name put forward to her.

Federal elections

Seven provinces have joined the federation since 1867, an expansion not without pain. There were two civil wars between the English-speaking settlers and the Métis in what is now Manitoba in 1879–80 and in what is now Saskatchewan in 1885. As new provinces joined, or

the population increased, the number of members of the House of Commons was increased from 181 in 1867 to 301 in 2000. The total number of members is now determined by parliamentary commissions which review the decennial census figures and adjust electorate boundaries and the number of electorates accordingly, with the proviso that no province should have fewer MPs than it has senators.

Most Canadians have always voted in single member constituencies, on a first-past-the-post basis. The last two-member constituencies were abolished in 1966. Some of the provinces tried, but abandoned, preferential voting (the single transferable vote). The secret ballot was introduced federally in 1874, but until 1917 the federal franchise was determined by the various provinces, except for the 1885–1898 period. This of course resulted in variations between the provinces, though in all provinces in the early days the vote was confined to adult males who met income or property requirements, which meant that only about 15 per cent of the population could vote. The franchise restrictions were gradually lowered and women were given the vote in four provinces in 1916–17. Women in the armed forces and close female relatives of servicemen were given the federal vote in 1917. In 1920 the electoral law, now under federal control, was changed to universal adult suffrage with a minimum voting age of 21. The voting age was lowered to eighteen in 1970.

The maximum federal parliamentary term is five years. This provision is entrenched in the Constitution with the proviso that 'in time of real or apprehended war, invasion or insurrection' the Parliament may, provided there is a two-thirds majority in the House of Commons, extend the life of the House indefinitely.

There are many unusual features about Canadian elections. The long-term stability of the two main political parties, the Conservatives and the Liberals, is remarkable. They were there in the early days of federation, and are still there, though the Conservatives were nearly wiped out in the 1993 federal election and have still not recovered. Then there is the remarkable turnover of members of the House of Commons, there being, by international standards, very few 'safe' seats. A study has shown that only 23.6 per cent of seats in the Canadian House of Commons are secure for a particular party, compared with 77 per cent in Britain. This estimate seems much too high for Canada, for in the 1993 election the Progressive Conservatives retained only two of their 157 seats, and the New Democrats only nine of their 44.

The resultant parliamentary inexperience of many Canadian MPs has a significant effect on all the activities of the House of Commons. The bulk of MPs (over three-quarters) is likely to have served less than

seven years, and the proportion of new MPs in a parliament averages about 40 per cent, with a peak of 68 per cent in 1993. After the 1993 election, the new prime minister, Jean Chrétien, delayed the first meeting of the new parliament on the grounds that '200 members are brand new ... and have to do their homework to be ready ... The same thing is true for the cabinet.' This a very different pattern to that of the other countries we are considering. In Britain, 70 per cent of MPs are likely to have served for at least ten years, and the proportion of new members after an election is rarely greater than a fifth.¹⁴

The longevity of governments is also unusual. The Conservatives ruled from 1867–73 and 1878–96, and the Liberals from 1896–1911 and 1935–58. This was perhaps a factor in the development of widespread political patronage. In 1871 Prime Minister Macdonald claimed that there was a constitutional principle that whenever an office was vacant it belonged to the party supporting the government. This principle is still adhered to, though since 1910 with less rigour. It was still a major issue in the 1984 election, when the Liberals were ousted by the Progressive Conservatives. Finally, perhaps the most unusual of all is the failure to develop a nationwide party system. Parties tend to be based in particular provinces or groups of provinces, with very little strength elsewhere. A group such as the Bloc Québécois can be formed to represent the interests of a particular province, and may be strong enough to become the official opposition for a time. A government may have no MPs at all in half the provinces. This does not make for national unity.

The Canadian provinces

Provincial upper houses

There are no surviving upper houses in the Canadian provinces, which has removed an important restraint on the behaviour of provincial governments. The heads of states, the lieutenant-governors, are appointed by, and responsible to, the *federal* government. On joining the dominion, the provinces had various parliamentary structures. Each, of course, was given a lieutenant-governor appointed by the federal government. All had elected lower houses, called legislative assemblies. Of the four original provinces, Nova Scotia and New Brunswick were authorised by the BNA Act of 1867 to retain their existing structures, which contained nominated upper houses called legislative councils. On their partition in 1867 Quebec and Ontario took different paths. Ontario chose not to have an upper house in order to

¹⁴ C.E.S. Franks, *The Parliament of Canada*, University of Toronto Press, 1987, p. 74.

eliminate resistance to the Cabinet, and for reasons of economy. Quebec chose to have a Legislative Council, primarily to protect the English-speaking minority.

Of the provinces to enter the Confederation after 1867, British Columbia (1871) had never had an upper house. Manitoba was granted an upper house by the Act creating the province and admitting it to the Confederation, while Prince Edward Island was the only province to have an elected Legislative Council, which it retained. Alberta and Saskatchewan, created in 1905 and joining the dominion at the same time, have never had upper houses. Newfoundland proved reluctant to join the dominion of Canada. It had been annexed by England in 1583, was granted responsible government in 1855, and had an upper house. In 1869 the voters rejected the idea of joining the Canadian Confederation:

Hurrah for our native isle, Newfoundland.
Not a stranger shall hold an inch of its strand.
Her face turns to Britain, her back to the gulf—
Come near at your peril, Canadian wolf!

Economic reality eventually forced a modification of these views. Newfoundland became bankrupt in 1933, responsible government was suspended, and for sixteen years the country was governed by an autocratic commission, aided by British subsidies. Responsible government, without an upper house, was restored in 1949 so that Newfoundland could join Canada.

There are now no provincial upper houses. The reasons for abolition have been their lack of prestige caused by party political appointments, the dislike of governments at having their will frustrated, and economy. Abolition was by no means always easy, for the Legislative Councils had veto power over the legislation necessary to abolish themselves. Success was achieved in various ways. In New Brunswick and Nova Scotia the government-appointed legislative councils had unlimited numbers, and it was possible for the government to 'swamp' the councils by appointing new members pledged to vote for abolition. In Manitoba sufficient members of the Council were bribed, by being offered comparable salaries elsewhere in the government service. In tiny Prince Edward Island the two houses were merged into a single Assembly. The rights of property were protected by having two members from each electoral district, an assemblyman and a councillor. Voters for the assemblymen had to have a small property qualification, designed merely to deny the vote to transients, whereas to vote for a councillor required substantial property. These property requirements have only recently been removed. The last Legislative Council to

disappear was that of Quebec. There had been intermittent smouldering disputes with the Quebec government, and the Legislative Council was abolished in 1968 by the simple expedient of offering councillors annual pensions equal to their salaries.

Lieutenant-governors

Lieutenant-governors are appointed by the federal government for a five year term, and are expected to heed its instructions. By the BNA Act of 1867 the federal government could veto any provincial bill within a year of its passage. As Sir John Macdonald put it in 1873: 'if a bill is passed which conflicts with the Lieutenant-Governor's instructions or his duty as a dominion officer, he is bound to reserve it, whatever the advice tendered to him [by the provincial government] may be.' Seventy provincial bills have been vetoed since 1867, the last being in 1961. The power of veto in fact became increasingly difficult to use, as advocates of provincial rights managed to focus the debate on the question of interference by Ottawa in local matters. Disputes over jurisdiction are now settled by the Supreme Court, and the power to veto provincial legislation has become politically unusable.

In the early days after Confederation, lieutenant-governors often took an active role in politics, in such ways as refusing assent to bills and dismissing ministers. They no longer do so, but between 1867 and 1903 five provincial governments were dismissed, and before 1945, 27 provincial bills were refused assent. Lieutenant-governors may refuse a request for a dissolution from a premier who has lost the support of the Legislative Assembly if another leader is likely to have the support of the Assembly. Such refusals were fairly common in the early days, but lieutenant-governors have been more wary since the furore over Governor-General Byng's action in 1926, and there have in fact been no refusals of requests for dissolutions since that date.

Electoral systems

The provincial electoral systems have gradually changed to universal suffrage for all those aged over eighteen. The electoral districts in all provinces are organised with a strong rural or remote area bias. In the 1999 election in New Brunswick, for instance, one riding had 13 786 eligible voters while another had only 3444. In 1995 the province of Ontario adopted the federal electorates for the provincial parliament, reducing the number of seats from 130 to 99 by means of the 'Fewer Politicians Act 1996'. The federal electoral system has a strong rural bias, and a rural vote in Ontario is worth as much as six urban votes.

The number of registered voters in 1996 in the largest riding was 129 108 and the smallest 19 406.

The development of responsible government in the provinces has been caustically criticised by Professor Mallory, who has written that:

the chaotic politics of British Columbia, which has never cheerfully accepted a two party system on national lines, has modified from time to time the normal operation of cabinet government. In British Columbia, as in Manitoba, coalition governments have eroded the clear lines of collective responsibility which cabinet government requires. In the prairies the powerful impact of agrarian reform movements with their distrust of party politicians and firm belief in constituency autonomy has undermined party discipline and authority of cabinets. In the Atlantic provinces, politics still wears the raffish air of the eighteenth century. The scent of brimstone hangs about the hotel-rooms and caucus-rooms of politicians who have yet to receive the gospel of political reform. In Quebec, even among French Canadians, the phrase 'boss-rule' is in common currency. Ontario has had, within the last twenty years, a regime at once radical, demagogic and corrupt, in which it was difficult to distinguish the sober lineaments of the British cabinet system.¹⁵

This was written in 1957, but the situation does not seem to have changed very much since then. The Liberals, the Reform Party and the Progressive Conservatives have not been organised nationally, and give virtually no assistance or direction to their provincial organisations. This has led to the emergence of provincial parties. In Quebec the separatist Party Québécois is a potent force. In Alberta there was an extraordinary 36 year dominance by the Social Credit Party from 1935 to 1971, but the party has since virtually disappeared, winning only 0.8 per cent the vote (and no seats) in 1986. A Social Credit Party (the Socreds) survived in British Columbia until the 1990s, ruling that province almost continuously from 1952, but has since almost disappeared, and since then the battle has been between the New Democrats and the Liberals.

The Progressive Conservatives and the Liberals contend for power in Ontario and the Maritime Provinces, though there are special features. In Prince Edward Island, policy differences are hard to find, for 'each has advocated and opposed everything, depending on whether it was the party in power or in opposition at the time.'¹⁶ New Brunswick politics tend to concentrate on personalities rather than issues. One successful Progressive Conservative premier who had lasted for four

¹⁵ J.R. Mallory, 'Cabinet Government in the Provinces of Canada', *McGill Law Journal*, vol. 3, no. 2, Spring 1957.

¹⁶ Martin Robin (ed.), *Canadian Provincial Politics*, 2nd edn, Scarborough, Ontario, Prentice-Hall, 1978.

terms was defeated in 1987 because of allegations of a liking for drugs and parties with young boys, the Liberals winning all 58 seats. It is difficult to make responsible government work if there is no opposition.

Australia

The great change in Australia since Bagehot's day has been the federation of the six colonies. Australia is one of the few countries to achieve a federation by negotiation rather than as the result of violence. Responsible government was adopted, although the Constitution never actually said so. As Australia became effectively independent of the UK, there was increasing pressure to become a republic, but this question is still unresolved.

Federation conferences

The first timid step towards Australian federation was taken by the UK Parliament in 1885 when it set up the Federal Council of Australasia. This had two representatives from each self-governing colony and one from each crown colony, but it had no executive powers and no revenue, and was of very limited effectiveness. A contemporary wrote that it was little more than a debating society. Neither New South Wales nor New Zealand ever joined it and South Australia was a member only from 1888 to 1890. Perhaps it may have helped the federal idea but by 1890 it was clear that an Australian federation would not grow from the Federal Council of Australasia. The Council met for the last time in January 1899 and thereafter disappeared unmourned.

In 1889 the veteran premier of New South Wales, Sir Henry Parkes, proposed a national convention to devise a scheme of federal government, which he thought 'would necessarily follow close on the type of the dominion government of Canada.' Such a conference was held in Sydney in 1891, with delegates from all six Australian colonies and observers from New Zealand, and a draft Constitution was produced, composed largely by Sir Samuel Griffith. The Canadian model was substantially modified. There was to be a House of Representatives representing the people, and a Senate (with equal powers except over some money matters) representing the states. The states were to have equal representation in the Senate. Specific powers were given to the federal Parliament, some were given concurrently to the federal and state parliaments, and all remaining powers left to the states—the opposite to the Canadian model. There was deliberately no mention of responsible government. Griffith wanted the matter left open.

After success, anti-climax. It is not necessary here to trace the events of the next few years and to try to apportion blame between the various forces which delayed federation: the decline of the political power of Parkes, the rise of the Labor Party, the devastation wrought by the economic depression of the 1890s and the resentment of the colonial parliaments at being asked to approve a constitution in whose drafting most of them had had no hand.

Federation was recovered from the grave, or perhaps from limbo, largely by the activities of the Australian Natives Association¹⁷ and the Federation Leagues. A conference of premiers in 1895 agreed that federation was 'the great and pressing question'. More importantly, they agreed to a procedure that would make the convention they proposed likely to be effective. The lessons of 1891 had not been forgotten. The convention was to consist of ten representatives from each colony directly chosen by the electors, and they would have the duty of framing a draft federal constitution. The convention would then adjourn for not more than 60 days so that there would be an opportunity for changes to the draft constitution to be proposed by interested people. The constitution finally agreed by the convention would then be put to the voters of each colony for acceptance or rejection by direct vote, and if passed by three or more colonies would be sent to the Queen, with the request that the necessary act be passed by the UK Parliament. Colonial parliaments would not be able, by mere inaction, to stop the process after it had begun.

In a series of conventions in Adelaide, Melbourne and Sydney in 1897–98 the constitution, largely based on the 1891 draft, was finally hacked out. Responsible government was extensively discussed by the conventions. Most delegates wanted it, but some doubted whether it was compatible with a federation and a powerful Senate. The smaller colonies were insisting on a strong Senate, and they also wanted responsible government, though one delegate did say that he would rather kill responsible government than federation. It was implicit in the arguments of those fighting for the combination of responsible government and a strong Senate that the Senate would restrict its use of its power so as not to imperil responsible government. In the event, there was no mention in the draft constitution of responsible government—or a Cabinet, or a prime minister—the only clue being the provision that a minister must be or become a member of one of the houses of Parliament.

¹⁷ The 'natives' were Australian-born white citizens, not Aborigines.

The Constitution

What emerged was a House of Representatives of 75 members, elected for three year terms, and apportioned among the states on a population basis (excluding Aborigines), though each state had to have a minimum of five MPs. The provision continues to this day and Tasmania has always fought against an increase in the number of Representatives, because it diminishes Tasmanian influence. Even now, when there are 148 Representatives, Tasmania is over-represented with five MPs.

The senators were elected on a state-wide basis for six year terms, with half elected every three years. The state-wide electorate was a change from the 1891 draft, by which senators were to have been selected by state parliaments, the system generally in use at that time in the United States of America. State-wide elections were not universally adopted there until 1913, when the Seventeenth Amendment to the US Constitution was ratified.

The powers of the two houses were almost identical, except in financial matters where the Constitution provided that appropriation and taxation bills must originate in the lower house. The Senate, although it could reject bills for the ordinary annual services of the government, could not amend them. It could only request that the Representatives make amendments. It was soon established, in the First Parliament, that the Senate could press its requests after rejection by the House of Representatives. The distinction between requests and amendments became almost invisible.

The Constitution was passed by referendum in Victoria, South Australia and Tasmania. It also had a majority in New South Wales, but the New South Wales government had inserted a new condition—a minimum number of affirmative votes—which was not met. New South Wales then used the opportunity to press for some changes to the draft Constitution, which were considered at a special premiers' conference in January 1899. Eight changes were agreed, on matters such as adjusting the arrangements for solving deadlocks between the two houses over legislation, easing the way for Queensland to join the federation, and permitting the federal Parliament to make financial grants to any state 'on such terms and conditions as the parliament thinks fit'. This last change, although it was not realised at the time, paved the way for the financial dominance of the federal government over the states. The referendum on the revised Constitution was passed in all states except Western Australia, which did not put it at this time.

To be sure, there were still difficulties. A delegation had to visit Britain to discuss objections raised by the imperial government. After all, the Australian Constitution was to be an act of the UK Parliament, and eyebrows were raised there at giving the new Australian Parliament

power over 'external affairs'. Surely this was a matter for the imperial government. They had some reason for concern, too, for only seventeen years earlier, in 1883, Queensland had actually annexed the eastern half of New Guinea, to forestall what it saw as German (or possibly French) expansion in the south-west Pacific. Westminster had first rather huffily annulled the annexation, and then agreed to accept Papua, the south-eastern portion, as a protectorate. The Germans soon seized the remainder of the eastern half of the island.¹⁸ But the imperial spirit was changing, and the British government eventually agreed to all the powers being sought, the only significant change being over the right of appeal to the Privy Council in certain cases. Western Australia tried fruitlessly to induce the British government to insist that if Western Australia entered the federation as an 'original state' it should be allowed to levy its own tariffs for five years. This proposal was resisted by the other colonies, and by a referendum in September 1900 Western Australia finally decided to join as an original state on the terms laid down in the Constitution.

The Constitution, after enactment, proved much more difficult to amend than its authors had expected. Unlike the BNA Act of 1867 and the New Zealand Constitution Act of 1852, the method of amendment was laid down in the Constitution itself. Amendments could be made only if passed in a referendum approved by an overall majority of votes and by a majority of votes in a majority of states (four out of six). There have been eighteen attempts to amend the Constitution, with 42 questions being submitted to the voters. Nearly all were to give increased power to the federal Parliament, but only eight have been successful. The successful ones were Senate elections (1906), state debts (1910), state borrowings (1928), social services (1946), Aborigines (1967) and Senate casual vacancies, referendums and the retiring age of judges (1977).

Australia is not unique in making infrequent amendments to its Constitution. Since 1901 the US Constitution has been amended nine times compared with Australia's eight times. The only amendments to the US Constitution which gave increased power to the federal government were the Sixteenth and Nineteenth Amendments, which gave power to impose income tax, and power to enforce Prohibition. The latter power has since been withdrawn.

¹⁸ In 1888 Papua became a dependency controlled by Queensland, and on federation became effectively an Australian colony. German New Guinea was conquered in 1914, and was given to Australia as a League of Nations mandate in 1919. In 1975 Papua New Guinea was granted independence. It is still independent, still a democracy (though with some difficulties) and still the biggest recipient of Australian overseas aid.

As the Australian Constitution was an act of the UK Parliament it could, in theory, have been amended by that Parliament. Such action was never taken, though in 1916 the wartime Australian government passed a resolution in the House of Representatives asking the UK Parliament to extend the life of the Australian Parliament. The idea was dropped when it became evident that the Senate would not support it. In 1933, during the Great Depression, Western Australia voted to secede from the federation in a referendum organised by the state government. The federal government took no notice, and a request to the UK Parliament was pigeon-holed by being referred to a committee of the two houses, which (after two years) declared itself incompetent to consider the Western Australian petition.

In fact, decisions by the High Court have made greater changes to the Constitution than have been achieved by referendums. The High Court has given the federal government control over taxation, tying the states to the chariot wheels of the federal Parliament (as Prime Minister Deakin once wrote, anonymously). The interpretation of the external affairs power by the High Court, by which the negotiation of an international agreement gives the federal Parliament the necessary power to implement the agreement, even in areas which are state powers under the Constitution, also has the potential for enormously increasing federal power. There have been some restraints on the use of this power since the establishment of the Joint Standing Committee on Treaties in the federal Parliament in 1996. These matters are discussed in more detail in Chapter 4.

The unwritten understanding about restraint in the use of Senate powers was put to the test on a few occasions. There were successful attempts in 1974 and 1975 by the Senate to force the government to a premature election by threatening to block supply, though in each case the technical grounds for the election were deadlocks between the two houses over other bills. There were similar actions by the legislative councils of Victoria in 1947 and 1952, South Australia in 1912 and Tasmania in 1949. These events are discussed in more detail in Chapter 8.

The number of members of the House of Representatives is determined by the Parliament, with a constitutional proviso that the number of Representatives must be as nearly as practicable twice the number of senators. An attempt in 1967 to remove this 'nexus' was rejected at a referendum, despite being supported by all the major parties. The original Parliament comprised 75 representatives and 36 senators. This was increased to 125 representatives and 60 senators in 1949, and 148 Representatives and 76 senators in 1983. The six original states have maintained equal numbers in the Senate. Two senators from

each of the Northern Territory and the Australian Capital Territory were added in 1975.

Electoral system

The voting for the First Parliament was necessarily done under state legislation and one of the early tasks of the new federal Parliament was to lay down its own rules. All non-Aboriginal adults, male and female, were given the vote, after some displays of male chauvinism. But, after all, women already had the vote in South Australia and Western Australia and attempts to achieve it had been made in all the other states except Queensland. Preferential voting was introduced in 1918 and the vote was made compulsory for non-Aborigines in 1924. The voting age was lowered to eighteen in 1973.

Although it is much used, the description 'compulsory voting' is not strictly accurate. It is compulsory to register, to attend at a polling place (or apply for a postal vote), and to receive a ballot paper. What is written on the ballot paper is up to the voter.

Racism was evident in discussions on Aborigines, with remarks like 'halfwild gins living with their tribes' being made. The final compromise was to give Aborigines the vote in states where they already had it, which did not include the states (Queensland, Western Australia and South Australia) where most of them lived. All Aborigines were given the right to enrol in 1962, but enrolment was not made compulsory. It was not until 1984 that the voting rights and responsibilities of Aborigines were made the same as the rest of the community.

At normal Senate elections, each state elected three senators (increased to five in 1949 and six in 1983). There was an early proposal for proportional representation in the Senate, but this was howled down as an instance of 'new-fangled notions for which the great majority of the people of the Commonwealth have no knowledge', although proportional representation was already in use in Tasmania, for the lower house. First-past-the-post voting was rapidly adopted, to be changed in 1919 to preferential voting. This change did nothing to stop the radical swings in party numbers in the Senate, and sometimes overwhelming majorities: 35 to 1 in 1919, 33 to 3 in 1934 and again in 1946 are examples. The solution finally adopted in 1949 was proportional representation, which has had the predictable result of making the major parties evenly balanced and making it possible for minority groups to gain Senate seats. Indeed, in the first 50 years of proportional representation in the Senate, the government has had a majority for only twelve years, and it seems unlikely that in the

foreseeable future *any* government will have a Senate majority. This creates obvious problems, and, as we shall see, opportunities.

The Governor-General

The position of the head of state was clarified in 1973 with the statutory declaration of Elizabeth II as Queen of Australia. The early appointments of governors-general were made by the UK government, and were English or occasionally Scots. They were never Welsh or Irish. They were rarely of the first rank, though perhaps rather better than suggested by Hilaire Belloc:

Sir! You have disappointed us!
We had intended you to be
The next Prime Minister but three ...
But as it is! ... My language fails!
Go out and govern New South Wales!

Since the 1930s the appointment of the Governor-General has rested with the federal government, and the Governor-General is now always an Australian. At one time an exception might have been made for a royal appointment, but that now seems inconceivable. The governors-general have generally followed Bagehot's principles, with four notable exceptions: the refusal, in 1904, 1905 and again in 1908 of a prime minister's request for a dissolution after being defeated in the House, the Governor-General believing, correctly in each case, that an alternative government could be formed. Even more dramatic was the dismissal of Prime Minister Whitlam in 1975, because he would not recommend a general election when the Senate refused to pass his budget.

Australian independence

Australia gradually moved to an independent foreign policy, though the Statute of Westminster was not ratified until 1942. As late as 1939 Prime Minister Menzies could say: 'Great Britain is at war; as a result Australia is at war.' As with New Zealand, the Second World War dramatically changed such attitudes.

The *Australia Act 1986* and corresponding state and UK Acts, passed at the request of the state and federal parliaments, removed any residual power the UK Parliament had to make laws affecting Australia, any residual executive power, and any remaining avenues of appeal from Australian Courts to the Privy Council.¹⁹

¹⁹ The High Court can, under s. 74 of the Constitution, still grant a certificate to the Privy Council on certain constitutional questions. This power has not been used since 1912.

The republic issue

The question of Australia becoming a republic was first publicly raised by a prime minister when Paul Keating, who had just taken over the office from Bob Hawke, raised it in a speech of welcome to the Queen at a parliamentary reception in Canberra in February 1992. Keating spoke of Australia being 'necessarily independent', and his words were interpreted as giving, as Liberal leader John Hewson put it, 'a tilt in favour of republicanism in front of the Queen'. Keating was of Irish descent, and had no great regard for British institutions.

Keating's proposal was for a minimal change, with the president exercising the power of the Governor-General. He wished the prime minister to have the right to select the president, though his selection would have to be agreed by both houses of Parliament. In a speech to Parliament in 1995 he proposed a national referendum during the next Parliament, aiming for a republic to be achieved by 1 January 2001, the centenary of federation.

Although he was personally opposed to a republic, as the leader of the opposition John Howard had to respond to Keating's campaign. He promised that the next coalition government would set up a convention to consider the republic issue, and if they recommended a republic the matter would be put to a referendum.

With the victory of the Coalition in the 1997 election, a Constitutional Convention was held in February 1998 to consider the question of Australia becoming a republic. There were 152 delegates, half elected by a voluntary national postal-ballot and the other half nominated by the government, 36 of them non-parliamentary. The convention considered three questions: whether Australia should become a republic; if so, which republican model should be put to the voters; and the time frame of any change.

The convention supported, in principle, the idea of Australia becoming a republic. The method of election of the president they recommended was controversial. In the proposal to be put to the voters, anyone could be nominated for the post. The prime minister, after discussions with the leader of the opposition, would put forward a single name to a joint sitting of the two houses of Parliament, where it would have to be agreed by a two-thirds majority of the joint sitting.

The powers of the president were not defined, being left as they were for the Queen and Governor-General in the existing Constitution. Of course these are sweeping powers, most of which the president was not expected to use except on advice from the government.

The question of the dismissal of the president was also the subject of debate. The Republic Advisory Committee, set up by Prime Minister

Keating, reported that they had encountered an almost universal view that the head of state should not hold office at the prime minister's whim, and that he must be safe from instant dismissal to ensure appropriate impartiality, but because of the fear that the president *might* use some of the enormous powers he would have under the existing Constitution, the proposal put to the voters was that the prime minister should be given the power of instant dismissal of the president, the president's position then being taken by the senior state governor until a new president could be elected. The prime minister's action would have to be approved by the House of Representatives within 30 days. It should be noted that the approval of the prime minister's action would have come from the House of Representatives, normally controlled by the government, not by a joint sitting of both houses who appointed the president. Even if the House of Representatives disagreed with the dismissal the dismissed president could not be reappointed. He could stand for re-nomination, but it is inconceivable that the prime minister who dismissed him would nominate him.

In all the existing republics with a separate head of state and head of government, none gives the head of government the power to dismiss the president.

The convention recommended a referendum in 1999 on the proposed changes to the Constitution, and that if the changes were accepted the republic should come into effect on 1 January 2001. Although public-opinion polls showed that the voters were in favour of a republic by a narrow majority,²⁰ this did not necessarily mean that all the republicans wanted *this* republic. With the well-established difficulty in amending the Constitution, the republican objectors believed they would be stuck with the republican model being presented, and that it would prove impossible to amend. The main objection was the method of selection of the president, which many republicans thought should be by nationwide vote. Some objected to the failure to set out clearly the powers of the new president, and others objected to the power given to the prime minister to dismiss the president. Still others objected to the failure to tackle the problems that had emerged with the 100 year-old Constitution, feeling that if the opportunity was not seized when making the major transition to a republic the chance would be lost for ever. These republican objectors, plus the royalists and the many voters who did not understand the issues

²⁰ Newspan surveys have shown considerable consistency in community attitudes on the question of a republic. About 52 per cent are strongly or partly in favour of a republic, and 35 per cent strongly or partly in favour of the present system. The undecided are 13 per cent.

but had the stalwart habit of voting no on such matters, were enough to reject the proposed republic.

The referendum failed with a 54.87 per cent 'no' vote, losing in all six states and in one of the two territories, the Australian Capital Territory being the odd one out. It was interesting that there was a clear correlation between the average education-level of voters in an electorate and the voting for a republic in that electorate, the better the average education the higher the 'yes' vote. For instance, in John Howard's electorate the voting was strongly 'yes', despite the fact that Howard was opposed to the republic, while in Kim Beazley's electorate the voting was strongly 'no', despite the leader of the opposition's campaign in favour of the republic. Rural and regional electorates showed little interest in Australia becoming a republic.

It seems that the republican issue is dead for the moment. But with the strong support in the community for a republic, it seems certain that the issue will not lie down. When leader of the opposition, Kim Beazley, suggested an indicative referendum on a republic, followed by a new convention to develop the necessary constitutional changes, a second plebiscite to determine the preferred republican model and mode of appointment of the head of state, and finally a constitutional referendum based on the outcome of the two plebiscites. This might work if the convention is given plenty of time to work out the constitutional changes, and consults frequently with the community (by indicative referendums if necessary) to ensure the model being produced has majority community support. After all, it took seven years and four conventions to produce the present Constitution.

The Australian states

It will not be necessary to trace the political histories of the states. All that is needed is a sketch of the background to events which have influenced or illuminated the development of responsible government, so that events discussed in later chapters can be seen in perspective.

Unlike the Canadian provinces, five of the six states have upper houses. Queensland is the exception, and most of the time has been an excellent example of an elective dictatorship. Tasmania is the only one of our twenty parliaments to use proportional representation for the lower house, which has caused inevitable instability in government.

State constitutions

Even after the Statute of Westminster was ratified by the Commonwealth in 1942, the Australian states continued to be excluded from its provisions. The Colonial Laws Validity Act and certain other

UK Acts still applied to the states, and continued to do so until the passage of the Australia Act in 1986.

Unlike the Canadian provinces, only one of which has an entrenched written constitution—and that an incomplete one—all six Australian states have written constitutions. In four of the six states amendments are made by referendum, after the terms of a proposed amendment have been agreed by the Parliament. In the other two states amendments are totally in the hands of the Parliament.

Upper houses

At federation all the states had two houses of parliament. Queensland abolished its appointed upper house in 1921 by ‘swamping’ the Legislative Council with new councillors who would vote for its abolition. Swamping was used after the abolition proposal had been five times defeated in the Council, and a referendum had also failed. New South Wales also made attempts to abolish its upper house, but failed three times, in 1925, 1930 and 1959. So five of the six states still have upper houses.

The upper houses had been seen largely as defenders of the rights of property, with legislative councillors either appointed by the government or elected by voters with a substantial property qualification. The property qualification for voters in upper house elections has been abandoned in all states, South Australia being the last to do so, in 1973. All upper houses are now elected by the same voters who choose the lower house. New South Wales held on for some time with an appointed upper house, only changing to an elected model in 1933. Proportional representation was used, but even then they would not trust the ordinary voters, preferring to have the current members of the two houses as the electorate. It was not until 1978 that a change was made. Now the New South Wales Legislative Council consists of 42 members, with fourteen elected by state-wide proportional representation at each election for the lower house.

Electoral systems

One of the most difficult electoral problems in all the states has been the heavy concentration of the populations in the capital cities. In most states more than half of the population are resident there. The country voters, who regard themselves as the real wealth-creators, feel threatened by this city dominance, while a secondary problem is the enormous area of some remote electorates. The improvement in communications has reduced this second problem, and all the states

except Western Australia and Queensland now have reasonably numerically-equal electorates for the lower house.

Queensland is a special case. Not only does it have no upper house, but until 1992 it had an electoral system so skewed that a vote in western Queensland was worth four times as much as one in Brisbane. The result was a quarter of a century of dictatorial rule by the rural-based National Party, first in coalition with the Liberals, later on its own. Parliament met as infrequently as possible, and was used as a rubber stamp, denied even such fundamental scrutiny bodies as a public accounts committee.

Since 1909 Tasmania has had proportional representation for its lower house. Until 1989 this did not have the usual effect of giving the balance of power to minor parties and Independents, but the rise of the environmental movement caused a change, and there was a succession of minority governments. The Tasmanian government proposed to reduce the total number of MPs, ostensibly for economy reasons but really to reduce the number of minor party members and Independents in the lower house. In November 1993 Liberal Premier Ray Groom introduced a measure to reduce the size of the lower house from 35 to 30 and the upper house from nineteen to fifteen.²¹ The bait for MPs was a 40 per cent increase in their salaries. The lower house passed the bill, but the upper house rejected the new scheme, though the members were prepared to accept the pay rise.

After this failure, there were several inquiries into whether the number of parliamentarians should be reduced, and if so, how. To the surprise of many, in July 1998 Liberal Premier Rundle, who had been heading a minority government, announced that he would recall Parliament for a special two-day session to pass an act reducing the number of assemblymen from 35 to 25 (that is, five from each electorate instead of seven) and reducing the upper house from nineteen to fifteen members, to be achieved over three years. The passage of this Act was to be followed by an election, which was in fact eighteen months early. The Act was formally passed by both houses, and the election results partly justified Rundle's action. With only five members from each electorate instead of seven, the quota of votes required to be elected was increased from 12.5 per cent to 16.7 per cent. The Greens (the environmental party) had held four seats, and the

²¹ The Tasmanian upper house is elected from single member electorates and each MLC has a fixed six year term. The Legislative Council is never dissolved, and (when there were nineteen Councillors) in May each year three MLCs were elected, with a fourth elected every sixth year.

balance of power, in the previous Parliament. They were reduced to one seat, and lost the balance of power.

To dramatise the intention to eliminate the minor parties, the cross benches were actually removed from the lower house at the time of the election. The one Green who did manage to be re-elected brought a folding chair into the chamber so that she would not be obliged to sit with either government or opposition. The trouble for Liberal Premier Rundle was that it was the Labor Party, not his Liberals, who gained the absolute majority, with fourteen seats out of 25.

It has not only been Tasmania that has had minority governments in the 1990s. Four of the other five states have had that experience, Western Australia being the only exception. Perhaps the most interesting was Queensland. In the July 1995 election the Goss Labor Government's majority was reduced to one, with 45 of the 89 seats. The Labor government was paralysed when the Court of Disputed Returns declared that in a seat in Townsville, held by a Cabinet minister, there had been voting irregularities and that there was to be another election for that seat. The government lost the seat, and the situation in the Parliament was 44 Labor, 44 Liberal-National Coalition, and one Independent. The Independent supported the Coalition, and the government was out. The situation was reversed after the June 1998 election, when the Labor Party won 44 of the 89 seats and formed a government with the support of an Independent (a different member to the one who decided the issue in 1995).

State governors

State governors are now appointed by the Queen of Australia on the advice of state premiers, though until the passage of the *Australia Act 1986* the state governments had the curious practice of approaching the Queen of Australia through the UK government.

The state governors, anyway this century, have generally followed Bagehot's principles. There has been only one occasion when a Governor has refused a premier's request for an election. This occurred in Victoria in 1952. The upper house had blocked supply, and the Governor refused the premier's request for an election because supply was not secure. The leader of the opposition was then made premier and he too was refused an election. The original premier was then reinstated, and granted an election, supply having been passed.

In 1926 the Governor of New South Wales, Sir Dudley de Chair, refused the request of Premier Jack Lang for the creation of a new batch of life members of the Legislative Council so that they could vote to abolish it, four of a previous batch having changed their minds after receiving life appointments. The Governor relied on his royal

instructions which included the direction that 'if in any case he shall see significant cause to dissent from the opinion of the [Executive] Council, he may act ... in opposition to the opinion of the Council.'

More controversial was the 1932 decision of another Governor, Sir Philip Game, to dismiss the same premier because 'I cannot possibly allow the Crown to be placed in the position of breaking the law of the land.' In fact, this action was the culmination of a period of disastrous financial mismanagement by Lang, with government cheques being dishonoured, the budget for 1931–2 still not passed by the lower house, the government surviving through temporary supply bills, and ministers lining up at the Treasury for their salaries because the government did not dare to use the banks for fear the federal government would seize the funds. Game was in frequent contact with the Dominions Office in London, but personally took the decision to dismiss Lang. Game used the authority given in Letters Patent issued in 1879, but still in force: 'The governor may, so far as we ourselves lawfully may, upon sufficient cause to him appearing, remove from his office ... any person exercising any office ... in the State.' Game was lucky that the opposition won the ensuing election.

State governments

It cannot be said that Australian state governments are generally held in high regard. At the start of the last decade of the twentieth century a royal commission in Queensland had recently ended, having revealed widespread corruption in the National Party government, with three former ministers already having been sentenced to jail, and with more former ministers (including the former premier) awaiting trial. In Victoria and South Australia royal commissions had been appointed to investigate disastrous losses by state-owned banks. In Western Australia another royal commission was uncovering corrupt business involvement by the state Labor government, and extortion of hefty party donations from businesses seeking contracts with government agencies. In Tasmania yet another royal commission was investigating an attempt to bribe a Labor MP to change sides. It was a very depressing picture. The state parliaments concerned had obviously been unable, or unwilling, to restrain gross abuses of power by governments which were supposed to be responsible to them.

There was a very interesting state election in Victoria in 1999, which showed that the voters could respond effectively to abuses of power. The Liberal state premier, Jeff Kennett, had been very successful in restoring and developing Victoria's economy, but he was becoming increasingly arrogant. Worse still, he was dismantling the

checks there should be on any democratic government, sharply restricting the powers of the Auditor-General to investigate government activities. He was narrowly defeated in the election, despite two very effective terms in office.

New Zealand

New Zealand does not have an entrenched constitution, for it can be amended by a vote in the House of Representatives. It is also the only one of our four national parliaments to have abolished its upper house. It was a world leader in the development of democratic voting systems, and has now adopted a partly-proportional system for the election of its MPs. There is no serious move in New Zealand towards republicanism.

The Constitution

The New Zealand Constitution Act, passed by the UK Parliament in 1852, was amended in 1857 to give the New Zealand Parliament power to amend or repeal all but 21 sections of the Act, though any bill taking such action had to be reserved for Crown (that is, UK government) approval. These entrenched sections were gradually whittled away by amending acts of the UK Parliament, until full powers of amendment, without reservation, were given to the New Zealand Parliament in 1947.

A Constitution Act which can be amended by a unicameral legislature by a simple majority is of course not entrenched. There has been an attempt to entrench provisions covering such matters as the life of parliament, the electoral redistribution provisions, the adult franchise, and secret ballots. By an Electoral Act passed in 1956 these important provisions cannot be repealed or amended except by a 75 per cent majority of the House of Representatives, or by a majority of the electorate at a referendum. Despite the Act being passed unanimously, these provisions are not fundamentally entrenched. No parliament can bind its successor, unless it is prepared to enact a complicated double entrenchment procedure.²² Such entrenchment as there is comes from fear of the wrath of voters at a subsequent election.

Before the passage of the 1956 Act, parliament had no such inhibitions. The abolition of the provincial governments in 1876 was probably inevitable. They were altogether too parochial, and in any case

²² The question of how far existing parliaments can 'entrench' acts by requiring that they can be amended or repealed only in certain ways is a fertile field for lawyers (see, for example, G. Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?', *Federal Law Review*, vol. II, no. 2.). On this question, the problem arises of whether a head of state should approve legislation which a future parliament would find impossible to amend.

it is unlikely that any federation will survive unless provincial rights are effectively entrenched in the constitution. The provincial governments were replaced by a 'confused multitude of road boards, rabbit boards, drainage, harbour, hospital and education boards, borough, country and city councils.'²³

There was a slow movement towards full responsible government in the early days. The New Zealand government took over complete responsibility for Maori affairs after the Maori wars, with some reluctance because the New Zealanders did not want to pay for the wars. Foreign affairs and overseas trade lagged far behind. There were attempts, in 1868–73, and again at the first Colonial Conference in 1887, to give the New Zealand government the right to negotiate trade agreements with foreign countries, initially with the United States. The proposals were firmly rejected by the British government, although there was a minor concession so that tariffs could be negotiated with the Australian colonies.

The upper house

Originally the members of the upper house, the Legislative Council, were appointed for life, but this was reduced to seven years in 1891, and in 1950 the Legislative Council was abolished, the necessary support being obtained by the usual technique of 'swamping'. It was not clear whether the abolition was to be temporary or permanent. 'Let's see how we get along', said Prime Minister Holland. Over the next decade there were many proposals to re-establish an upper house, but there was no agreement on its composition or its powers. Worse still, there was very little public interest. Attention shifted to trying to make the unicameral system work better.

Voting systems

There have also been substantial changes to voting rights. The secret ballot was adopted in 1869, though not for the Maori electorates until 1937. In 1879 the term of parliament was reduced from five to three years and the property qualifications for voters were abolished. Nevertheless plural voting continued, for ownership of property entitled an adult man to be placed on the electoral roll in every electorate in which he owned property. This multiple voting—later changed to a choice of where to vote—was finally abolished in 1893. In the same

²³ Keith Sinclair, *A History of New Zealand*, Harmondsworth, UK, Penguin, 1980, p. 154. The confusion continues, though it is diminishing. There were 350 local authorities until there was a major review in 1989, when the number was reduced to 89.

year women were given the vote. The only women to have the vote before the New Zealanders were those of the American State of Wyoming, the Isle of Man, and the tiny British colony of Pitcairn Island. In the case of Pitcairn Island, the vote was granted in 1838 under the island's first constitution, and the voting age for both sexes was eighteen.

It was not until 1919 that women were permitted to be MPs, but since then women have advanced further than in any other country. In the year 2000 the prime minister, the leader of the opposition, the Governor-General, the Chief Justice and the Attorney-General were all women.

Until recently, voting has been voluntary and first-past-the-post, and typically over 90 per cent of electors now vote. In the elections of 1908 and 1911 there were provisions for a second ballot where no candidate gained an absolute majority on the first ballot. But by the 1980s New Zealanders were becoming concerned at the lack of representation of substantial minor parties in their single house. For instance, in 1978 the Social Credit Party won 16 per cent of the vote but only one out of 92 seats and in 1984 the New Zealand Party won 12.3 per cent of the vote without winning a seat. A royal commission in 1986 recommended that New Zealand adopt the West German Additional Member System, which it called the Mixed Member Proportional System, usually shortened to MMP. In 1993 a referendum was narrowly carried to adopt this system, which was first used in the 1996 election. The consequences of the adoption of this system will be described in Chapter 3.

Foreign policy

In foreign affairs New Zealand has been less innovative. The first overseas post, in London, was opened in 1871. From the 1880s until the First World War New Zealand pressed ineffectively for imperial federation. A loose federation it would certainly have been, for the New Zealanders wished to retain their autonomy. Their real aim was to have some influence on British foreign policy. The idea of having a foreign policy of their own was not yet an option they would consider. New Zealand was an original member of the League of Nations, and occasionally took an independent stand on such matters as sanctions, but remained essentially a political satellite of Britain. The change of New Zealand's title in 1907 from colony to dominion made no real difference, although New Zealand began timidly conducting its own foreign policy in 1935. It was not until 1942 that New Zealand opened its first legation in a foreign country (in Washington) and an embryo Foreign Affairs Department was set up in 1943, though negotiation of

foreign commercial treaties had started in the 1920s. The 1931 Statute of Westminster, which gave formal independence to New Zealand, was not ratified by the New Zealand Parliament until 1947.

Since the Second World War New Zealand has pursued an independent but pro-Western foreign policy. New Zealand was reluctant to join the ANZUS Treaty with Australia and the United States unless Britain also joined, and other signs of New Zealand's former dependence occasionally surfaced. The dramatic banning of visits by nuclear-powered or nuclear-armed ships, which caused New Zealand to be suspended from membership of the ANZUS Treaty, was out of character, though it is now generally accepted in New Zealand. As Britain moved into the European Community New Zealand argued for favoured treatment because of a special economic relationship with Britain. This was successful for a time, but New Zealand is favoured no longer, and is now facing the problem of having First-World living standards while the exports to finance these living standards have to come largely from primary products for which the traditional markets have substantially disappeared.

After this brief historical background on responsible government in our four chosen countries, it is time to turn to a more detailed examination of how it has actually worked in modern times, from 1970 until the end of the century. Let us look first at how these parliaments have performed what Bagehot regarded as their fundamental duty: choosing a government.

Part 2

The performance of the Westminster
system parliaments in the United
Kingdom, Canada, Australia and
New Zealand, 1970–2000

Choosing a government—lower houses as electoral colleges

Prolonged post-election turmoil, with minority governments or unstable coalitions, does not sit well with the public in any of our four countries. Nor do voters appreciate too-frequent elections to resolve political instability. Voters want a stable government with the power to implement the broad policies on which it has been elected. This does not mean that voters necessarily support all the items in a government's election policy—the so-called 'mandate' much beloved by politicians—but they do want a clear election result and a government which is preferred by a majority of voters, and we should look first at how successful the various electoral systems have been at achieving this.

The first issue is whether the country has been fairly divided into equal electorates, and also whether the voting system produces the desired result. The question of public financial support for election campaigns should also be considered, to ensure that in these days of mass media, victory is not almost automatically to the richest party.

Of course elections will not always be decisive, and sometimes MPs prefer minority governments to another election. Some of these minority governments have been surprisingly successful.

The parliament of course retains the power to remove a government by passing a vote of no confidence in it. Parliament has less say in a change of prime minister or premier, with the decision being left to the government party.

The twenty parliaments we are considering have various terms, varying from three years to five. It is worth looking at the various terms to see which is best. Then there is the question of the desirability of a fixed term for the parliament, removing the power of the prime minister or premier to cut short the term for political advantage.

Then there is the possible role of the upper house in forcing an unwanted election on the lower house. How and when (where it exists) could this power be used?

Finally, what is the role of the head of state in appointing or dismissing the prime minister or premier, and also in approving the dissolution of parliament?

The US model

In the United States the role of choosing the president (who is both head of government and head of state) is not normally performed by the legislature, the Congress, but by a separately-elected body called the Electoral College. In the Westminster system, the electoral college role in the choice of head of government is performed by the lower house of the legislature.

The original concept of the American Electoral College was that delegates from each state should meet, discuss and choose the most suitable individual to be president, but inevitably candidates soon began standing for the Electoral College pledged to vote for a particular individual. In most of the states there is not even the pretence of voting otherwise. There are 538 electors, each state having a strength equal to the number of its senators and congressmen, and the District of Columbia, which has no voting representation in the Congress, has three Electoral College votes. The election in each state is on a 'winner takes all' basis, that is, the presidential candidate who gets the most votes in a state is deemed to have all that state's Electoral College votes. There is no central authority conducting the elections. There are 50 quite independent state electoral authorities, all operating under different laws and supervising various methods of casting and counting votes, which concern not only the presidential elections but also elections for Congress, state governors and legislatures, and local legislatures. Most of the states have passed the responsibility for the voting systems down to the counties and cities, some 3000 of them, who have to pay for the voting methods they choose.

A presidential candidate needs 270 Electoral College votes to be elected. If no presidential candidate has that many, and cannot gain them by negotiation, the election is decided by the House of Representatives from among the top three candidates, each state having one vote. Because of the way in which the Electoral College delegates are chosen, it is possible for someone to gain the presidency with fewer nationwide votes than another candidate. This occurred in the 2000 presidential election, when George W. Bush won a majority of votes in the Electoral College after prolonged legal disputes, but was 500 000 behind the other major candidate, Al Gore, in the nationwide vote. This has happened on only three other occasions—John Quincy Adams (1824), Rutherford B. Hayes (1876) and Benjamin Harrison (1888).

The use of the House of Representatives to resolve a deadlock in the Electoral College has been necessary three times, in 1800, 1824 and 1876. Occasionally there have also been electors who have broken their voting pledge (this has happened six times in the past ten presidential elections) but it has never affected the result.

One further point should be made. Because neither voting nor even registration as a voter is compulsory (and the latter is sometimes administratively tedious), voter turnout is rarely more than 50 per cent. The 64 per cent turnout in 1960 was the highest in modern times.

So much for the American system. Turning to the Westminster system, Bagehot thought that choosing the executive was the most important task of the lower house of parliament. Let us look then at how well the various lower houses have performed this task between 1970 and 2000.

A fair and decisive result?

Most voters in the four countries we are considering seem to want the result of an election to be a decisive choice of government, and it is obviously desirable that the government chosen should, if possible, be one preferred by a majority of voters. It is also important that the voters should have sufficient information, particularly in the financial area, to enable them to judge the performance of the incumbent government and its future plans. Governments often suppress such information, and sometimes issue grossly misleading forecasts.

United Kingdom

There were eight elections between 1970 and 2000. Seven of them were won by a party with a workable majority in the House of Commons, together with the largest percentage of the national vote. There was one minority government after an election. In February 1974, Labour won 301 seats out of 635, the Conservatives 297, the Liberals fourteen, Ulster Unionists eleven, Welsh and Scottish Nationalists and others three. Labour was in fact 0.8 per cent behind the Conservatives in the national vote. The Wilson Labour Government was not immediately challenged in the Parliament, because no party wanted another election so soon. Wilson held on for eight months before he obtained a dissolution in October 1974. He managed to win an absolute majority of only three, despite being 3.4 per cent ahead of the Conservatives in the national vote.

There were no coalition governments during the three decades, nor were any seriously contemplated as a means of dealing with a minority government or one with an unworkably small majority. It is true that

Conservative Prime Minister Edward Heath (1970–74) negotiated with the Liberals before resigning after losing the February 1974 election, and there was a Liberal-Labour pact to support the October 1974 Labour government after it lost its narrow majority. This pact lasted from March 1977 until May 1978. The Liberals gained no ministerial offices from the pact, but perhaps benefited slightly from regular consultations with ministers. In any case neither Labour nor the Liberals wanted an election.

It is worth noting that none of the eight governments won more than 50 per cent of the national vote. The highest was 46.4 per cent by the Conservatives under Heath in 1970 and the lowest 37.1 by Labour under Wilson in February 1974. The reason is of course the presence of the Liberals and the various national parties. The Social and Liberal Democrats are the result of the merging of the Social Democratic Party (a right wing breakaway from the Labour Party) and the Liberals. The nationalist parties are the Plaid Cymru (in Wales), the Scottish National Party and the Ulster Unionists. The Ulster Unionists have close links with the Conservative Party.

The voting peak for the Liberals and Social Democrats was 25.4 per cent of the vote in 1983 (which gave them 23 seats) and for the nationalist parties 6.7 per cent in October 1974 (which gave them 26 seats). The Liberals always suffered in representation because their support, though sometimes substantial, was always diffused. Moreover the percentage of votes won by the minor parties is misleadingly low, because they do not contest all seats. The major parties, on the other hand, are becoming more geographically concentrated, with Labour the party of Scotland, Wales and Northern England, while the main strength of the Conservatives is in the south.

It cannot be said that the House of Commons performs very well as an electoral college making a decisive choice of government which reflects the wishes of those interested enough to vote. After all, since 1970 there has been one elected minority government and one with such a narrow majority that it soon became a minority. On the credit side, voter involvement is much higher than in the United States, where only about half those eligible actually vote. In the UK the typical figure is three-quarters, ranging from a post-war high of 84 per cent in 1950 to a low of 71.5 per cent in 1997. In the 2001 election the figure fell even further, to 59 per cent, the lowest since 1918. Undoubtedly the overwhelming support for the Blair Government was the key factor in voter apathy, but it must be a worry when an MP can be elected on a voter turnout of 39 per cent, as happened to a Labour MP in Shropshire, and when nearly eighteen million of Britain's 44 million registered

voters abstained. Fewer than one in four eligible voters under 25 cast a ballot.

Canada

Although the Canadian House of Commons is elected for a five year term, there were seventeen elections between 1945 and 2000, so the average life was little more than three years. Of these seventeen elections four were inconclusive, with no party having an absolute majority. When this arises the custom has been followed that if the incumbent government is the largest party after the election it remains in office and faces the House of Commons, while if the opposition is the largest party, the government resigns and the leader of the opposition is invited to form a government.

The parties in the House of Commons are numerous, and tend to be geographically based. The Liberal Party's political philosophy has been middle-of-the-road, trying to project an image of competence, and to appeal to the middle class of Ontario and Quebec, and to francophones. The Progressive Conservatives are basically a conservative party, with the progressive part of the name the result of an earlier amalgamation. Their power base used to be Ontario and the prairies, but they were almost annihilated in the 1993 election and are recovering slowly. The Reform Party (now the Alliance Party) was established in 1987. It is a right wing populist party, anti-French and anti-Ottawa. Its power base is the western provinces, and it is taking many votes from the Progressive Conservatives. There have been moves to unite with the Conservatives, but so far these have come to nothing. The Social Credit Party owes little to the fundamentalist economic policies of Major Douglas, and is now conservative both socially and economically. The New Democrats (CCF/NDP) Party is the equivalent of the Labour parties in the other countries, though perhaps rather more left wing. The Bloc Québécois represents the interests of Quebec only, and was sufficiently strong to become the official opposition for a time.

An inconclusive election obviously offers a wonderful opportunity for deals between the major and minor parties, but Canada has developed some unique ground rules. There is never a suggestion of a coalition between the major parties. There is never a suggestion of a minor party going into coalition with a major party to form a government. Instead, the minor parties look to influence the government program so as to achieve some of their political objectives. Finally, the minor parties and Independents are aware that in an election to resolve a hung parliament the voters tend to look to the major parties, and the minor parties suffer. This given them a strong incentive not to force a premature election.

The Canadian government has an unusual discretion in deciding the date of a by-election to fill a casual vacancy in the House of Commons. A seat may remain vacant for many months if public opinion is running against the government. Prime Minister Trudeau once called fifteen by-elections on the same day.

In the 1957 election the long Liberal reign came to an end. From then until 1968 there was much instability, with no less than four more elections. Some stability returned in 1968. In that year Liberal Pierre Trudeau succeeded Lester Pearson as prime minister, and called an early election. The Liberals gained 155 seats to the Progressive Conservatives 72, the New Democrats 22 and the Quebec version of Social Credit fourteen. Such stability could not last, and the 1972 election saw the Liberals and the Progressive Conservatives again neck-and-neck, 109 seats to 107, with the New Democrats holding the balance of power with 31 seats. It was touch and go which of the major parties would have the greater number of seats, one riding (the Canadian description of an electorate) being won, after recounts, by only four votes. The Liberal government faced the House and was sustained for sixteen months, though losing eight out of 81 votes, before being defeated on a vote of confidence. At the ensuing election (1974) the Liberals won an absolute majority.

Again it could not last, and the 1979 election returned to the indecisive pattern. The House of Commons was enlarged to 282 members, but the largest party, the Progressive Conservatives, won only 136 seats, and 35.9 per cent of the popular vote. Either the New Democrats (26 seats) or Social Credit (six seats) could have given the Progressive Conservatives a majority—only just in the latter case—but both would have been needed to sustain a Liberal government. In the event, the Liberal government resigned immediately after the election, and a Progressive Conservative government tottered on for a few months. The prime minister, Joe Clark, did not face the House for five months after the election, and two months later was defeated on a vote of confidence.

The Liberals won an absolute majority at the 1980 election, and set the pattern for the next four elections—Progressive Conservatives in 1984 and 1988, and Liberals in 1993 and 1997, though only the Progressive Conservatives, with 50 per cent in 1984, won a majority of the popular vote.

The 1993 election was dramatic, with the governing Progressive Conservatives being reduced from 151 seats to *two*. It also marked the defeat of Mrs Kim Campbell, Canada's first woman prime minister. She had held office for only a few months, after the resignation of her predecessor, Brian Mulroney. The Liberals gained a massive majority,

gaining 177 seats in the 295 seat House of Commons. The Liberals swept Ontario and Atlantic Canada, winning all but one seat in each of them, and won an unprecedented number of seats in the west. The election marked the rise of two new regional parties, the Bloc Québécois with 54 seats, and the Reform Party with 51 seats, all but one in the west and mostly taken from the Progressive Conservatives. The Bloc Québécois, as the largest non-government party, became the official opposition. The party leader gave an undertaking that the Bloc would not be obstructive in the House just to show that Quebec would be better off as a sovereign state because federalism did not work. Neither the Progressive Conservatives nor the New Democratic Party achieved the twelve seats required for recognition as official parties in the House.

The general election in 1997 saw the Liberal Party win a second consecutive majority government, but the Liberals were reduced from 177 to 155 seats, giving them only a narrow majority in the 301 seat House of Commons. The Liberals' strength came largely from Ontario, and many seats were lost in Atlantic Canada, where the seats held fell from 31 to eleven out of 32 available. Two Cabinet ministers lost their seats, and all the Liberal seats in Nova Scotia were lost. The Reform Party increased its numbers to 60, all from the west, and became the official opposition. The Bloc Québécois fell from 54 to 44 seats, and from 49 to 38 per cent of the vote in Quebec, which meant that they won less than half of the votes of the francophones. The Progressive Conservatives staged something of a recovery from their 1993 disaster, and won 19 per cent of the popular vote and twenty seats, chiefly in Atlantic Canada. The conservative vote in the west mostly went to the Reform Party.²⁴ The New Democratic Party also staged a comeback, increasing its numbers from nine to twenty.

Canada has made a decisive choice of government in each election of the last two decades of the century, but the lack of effective nation wide parties competing for government is damaging to national cohesion.

Australia

All the 22 national elections in Australia between 1946 and 2000 were fought out between the Labor Party and the Liberal-National Party Coalition, with the exception of the 1987 election when the Coalition

²⁴ In March 2000 the Reform Party became the Canadian Reform Conservative Alliance, more commonly known as the Canadian Alliance. In the 2001 election the Alliance once again captured most seats in Western Canada, but was limited to two seats in Ontario and none further east, and the Liberals won a decisive victory.

split, and lost an election it should have won. The Liberal Party is roughly equivalent to the British Conservative Party, and the Labor Party (the ALP) to the British Labour Party. The National Party (formerly the Country Party) is a very conservative rural party, in favour of considerable government involvement in rural marketing. There have been occasional Independents and minor party MPs, but since 1943 they have never held the balance of power in the House of Representatives. Each election has resulted in an absolute majority, and none of the governments has had any real difficulty in getting its legislation through the House, even when there was only a narrow majority, as there was in 1961–63, when the coalition government had only a one seat majority. Such is the power of party discipline.

Unlike Canada, the major parties are nation wide. The balance between Labor and the combined Liberal and National Party votes is remarkably consistent around Australia. But although decisive electoral results are expected, it is not the case that the combination of single member electorates and preferential voting has always produced the government desired by a majority of voters. In 1954, 1961, 1969 and 1998, when the Coalition won the elections, a narrow overall majority of voters would have preferred a Labor government, and in 1990 the Coalition was just preferred by the voters, but Labor won government with a safe eight seat majority. Single-member electorates disadvantage parties such as the Australian Labor Party, which tends to have excessive numbers of voters (many more than are needed to win) concentrated in electorates in industrial areas. Parties such as the Australian Democrats, with a relatively small number of widely scattered voters, are also disadvantaged.

An interesting new party emerged in 1996. Pauline Hanson had been selected as the Liberal candidate for the safe Labor seat of Oxley, in Queensland. During the campaign she wrote an anti-Aboriginal letter to the local newspaper, and she was disendorsed by the Liberal Party. She continued as an Independent, and won the election, which she never would have done as a Liberal. The reason for her success was that she advanced ideas which were firmly held by many country people, but which were unacceptable both to Labor and the Coalition. She campaigned against more Asian immigration, and for fewer benefits for Aborigines, cheaper loans for struggling farmers, and no tightening of the gun ownership laws. Her position as an Independent in the House of Representatives was used to form the One Nation Party, but as the party developed and began to produce broader policies—on taxation, for example—the intellectual limitations began to appear. Nevertheless One Nation managed to win eleven seats and gained 23 per cent of the vote in the Queensland state election in 1998, and in the federal election

later in the same year, although Mrs Hanson was not re-elected and her party did not win any seats in the House of Representatives, they did manage to elect a senator from Queensland, taking a seat from the National Party. Across the country, One Nation won 8.4 per cent of the vote, considerably more than the Nationals (5.3 per cent) and the Democrats (5.1 per cent). It was typical, though, of the highly centralised and generally incompetent management of the party that the successful Senate candidate turned out to be ineligible, because she was not an Australian citizen. Her place was taken by the second candidate on the One Nation list.

Problems soon emerged in Queensland. One of the One Nation MPs resigned only four months after he was elected, and the state Labor government won the by-election, turning it into a majority government. Soon afterwards five other One Nation MPs left the party and sat as Independents, leaving only five One Nation MPs. Then the courts ruled that One Nation had not been properly registered for the 1998 state election, and had to refund the electoral funds it had been given, driving the five surviving One Nation MPs to leave One Nation and form their own party.

But the issues which led to the sensational rise of the One Nation Party have not disappeared, and it may well be a significant influence in future elections.

The federal government has taken action to ensure that the voters are properly informed on fiscal matters before an election. After winning the 1996 election it issued a 'Charter of Budget Honesty', to ensure 'that no other government in the future behaves in the way the Labor government behaved in the March 1996 election', when it 'assured the Australian public that the accounts were in balance when in fact, as the outcome for that year showed, the government deficit was \$10 billion.'

To achieve this goal, the secretaries of the treasury and finance departments are required to prepare a pre-election report providing assessments of the fiscal and economic outlook. This report is to be released within ten days after the announcement of an election. Such a report would certainly prevent the government from making unrealistic promises, and could help the opposition in developing its plans.

New Zealand

All the elections between 1935 and 1993 resulted in a clear win for either the Nationals or Labour, though the 1993 election was a very close-run thing, with the Nationals finishing with a one seat majority. Otherwise the only two elections when the party strengths were close were 1957 and 1981. In 1957 Labour had a majority of two over the

Nationals, and in 1981 the Nationals had a majority of two over the combined numbers of Labour and Social Credit. Labour Party discipline in New Zealand is such that no real difficulty was experienced by the 1957 government, and the Parliament ran its usual term. National Party discipline is slightly, but only slightly, more relaxed. In 1983 two National MPs voted against key clauses of an industrial relations bill, causing a government defeat on the issue. Prime Minister Muldoon called for a pledge from party members not to cross the floor in 1984, an election year. One MP qualified the pledge by saying she would not accept the party policy on disarmament, visits by nuclear ships, and rape. Muldoon immediately called a snap election, which he lost.

The single member electoral districts and first-past-the-post voting did not always award power to the party preferred by the majority of the voters. Of the seventeen elections between 1946 and 1993, nine were clearly won by the more popular party. In the other eight elections neither of the two major parties had an absolute majority of the votes cast, minor parties receiving a substantial proportion of the votes, such as 20.6 per cent for Social Credit (and two seats) in 1981 and 12.2 per cent (but no seats) for the New Zealand Party in 1984. In the 1978 and 1981 elections the Nationals won government with an absolute majority of seats, despite having smaller shares of the overall vote than Labour.

The National Party is conservative but more rurally influenced than the Australian Liberal Party. The Labour Party is very similar to the Australian Labor Party. The Social Credit Party's main strength was among the poorer farmers of the North Island; in all except financial matters (where it was populist) the party was ultra conservative. It was renamed the Democrats Party in an attempt to broaden its appeal, and in 1991 formed the Alliance Party by merging with the Greens, New Labour and the Maori Party. The New Zealand First Party was formed by Winston Peters after he was dismissed from the National ministry in 1991, but the party held the balance of power after the 1996 election, and Peters was re-admitted to the Cabinet only to be dismissed again. The party split, but still survives. The ACT Party is a party to the right of centre.

Concern over the lack of representation of significant minor parties led to the adoption by referendum in 1993 of the West German Additional Member System, which the New Zealanders called the Mixed Member Proportional System, usually shortened to MMP. MMP was first used in the 1996 election. The size of the House of Representatives was increased to 120 members, 65 members from individual electorates (six of them Maori), and 55 from party lists. Under the MMP system, electors had two votes. One was by first-past-

the-post voting to choose a member for their particular electorate. The other vote was for a party list. Party list votes are calculated nationally and parties are allocated seats from their lists so as to make their total number of MPs equal to their percentage of the national party list vote. Parties which win less than five per cent of the national party list vote are not allocated any seats.

As was inevitable, neither of the major parties won an overall majority in the 1996 election, and the smaller parties won substantial numbers of seats. There were no less than nine parties represented in the Parliament, as well as four Independents. The National Party had 44 of the 120 seats and the Labour Party 37. The largest of the smaller parties was the New Zealand First Party, and other significant ones were the left leaning Alliance Party and the right wing ACT. After eight weeks of negotiations the ruling National Party managed to achieve an alliance with the New Zealand First Party, which gave them a majority. This was despite the fact that New Zealand First had been bitterly opposed to the Nationals during the election campaign.

Such an alliance could not last. In August 1998 the leader of the New Zealand First Party, Winston Peters, at that time Deputy Prime Minister and Treasurer, led his party members in a walk-out from a Cabinet meeting called to decide on the terms of the sale of the government shares in Wellington International Airport. The outcome was the dismissal of Peters from the Cabinet, and the dissolution of the coalition. Although four of Winston Peters' former colleagues rejoined the government as Independents it still had only 48 of the 120 seats, relying on sufficient votes from minor parties and Independents to enable it to survive on votes of confidence.

New Zealand went to the polls for the second time under the MMP system on 27 November 1999. On election night the Labour Party and its ally the Alliance Party seemed to have won, and a formal coalition agreement was signed on 6 December and a Cabinet of twenty ministers (sixteen Labour and four Alliance) was announced. (A great improvement on the nine weeks it took to form a government after the 1996 election.) There were some delays in finalising the vote counting, because of recounts, some irregularities in procedure, and the additional work of vote counting for two citizens-initiated referendums. The Green Party's overall vote eventually rose above 5 per cent, entitling it to have additional seats to bring its strength up to its share of the national vote. This gave the Greens seven seats, and reduced the Coalition to 59 seats in the 120 seat House of Representatives. Although the Coalition was technically a minority government, it could rely on support from the Greens on every important issue.

Summary

It can be seen that the election results for the four national parliaments have been erratic. They have by no means always produced a decisive result, which causes either a minority government or a post-election coalition. Even when they have produced a decisive result, it has not always been a decision which reflected the wishes of a majority of the voters. There are two factors which must be considered here. Are the electorate boundaries fairly drawn, without gerrymandering or malapportionment? And is the voting system employed one which is most likely to produce a fair and decisive result? Let us look at these problems in turn.

Distribution of electorates*Introduction*

Eighteen of the twenty lower houses we are considering now use single member electorates as the source of their MPs. The odd ones out are Tasmania, which has used proportional representation since 1909, now with five members being elected from each of five constituencies; and New Zealand, which since 1996 has used the MMP system, a mixture of single member constituencies and proportional representation. Whichever method is used, the fairness of the drawing of constituency boundaries is important.

It is claimed that in 1812 Governor Gerry of Massachusetts, a Republican-Democrat, endeavoured to have the state electoral boundaries redrawn so as to concentrate the opposition federalist vote in a few districts. One of the electoral districts was so oddly shaped that it was claimed that it looked like a salamander, and the process was named 'gerrymander' after the Governor. It worked. The Republican-Democrats won the election in terms of seats, in a landslide 29–11, although the federalists won more votes. It later emerged that Gerry was actually opposed to the re-distribution.

Gerrymanders survive. The US Supreme Court recently ruled that a famous Z-shaped congressional district in North Carolina was not unconstitutional because it had been gerrymandered for political rather than racial reasons.

Gerrymanders are not the only way to distort election results. Another way is to have different numbers of voters in different electorates. There is always pressure from rural electorates to be given a smaller quota of voters, partly because of the vast size of some rural electorates, and partly because country people regard themselves as the true creators of wealth. The process of varying the number of voters in

electorates to meet political pressures or gain advantages is called malapportionment by the Americans.

United Kingdom

It cannot be said that the British system of drawing constituency boundaries works very well. There are four boundary commissions, one each for England, Scotland, Wales and Northern Ireland. Each has a judge as *de facto* chairman, two other members, usually barristers, and is assisted by the registrar-general and the surveyor-general. A commission's first task is to recommend the total number of seats for the country for which it is responsible. This apportionment has continued to be badly skewed. The 1986 Parliamentary Constituencies Act laid down that the number of constituencies in Scotland should not be less than 71 and in Wales not less than 35, while in Northern Ireland the number should not be greater than eighteen or less than sixteen. If one allowed a uniform electoral quota throughout the United Kingdom, thirteen Scottish seats and six Welsh ones would be abolished. Alternatively, it would be possible to avoid any decrease in the number of seats for Scotland and Wales by increasing the size of the House of Commons to 783, with 129 new seats going to England, a solution which seems very unlikely.

When the Scottish Parliament was established in 1998 the Parliamentary Constituencies Act was amended to remove the guarantee of 71 seats for Scotland at Westminster, though nothing was done about the Welsh or Northern Irish quotas. The amendment also provided that the English quota should apply in deciding the number of seats for Scotland, though the Commission is required to take into account the boundaries of local government areas and geographical considerations (the amendment to the Act specifically directed that Orkney and Shetland should remain a separate constituency). It seems certain that the next review will result in fewer seats for Scotland, though the Scots will undoubtedly fight hard against any serious reduction. In any case, the Commission will not report until some time between 2003 and 2007.

The commissioners have regarded the avoidance of crossing county and London borough boundaries, and geographical considerations, as being higher priorities than achieving an equal number of voters in each constituency. The result has been that the constituency with the highest number of voters (the Isle of Wight, with 101 680 electors in the 1997 election) has nearly five times the number of the constituency with the fewest (22 938, in the Western Isles of Scotland). Moreover, redistributions are infrequent—eight to twelve years after the presentation of the previous report—and have to be approved by

Parliament, with much opportunity for political manoeuvring and delay. There may be a great deal of voter movement between a commission beginning its investigation and Parliament approving the result.

Canada

Canada has had great problems in producing a fair system of distributing parliamentary seats. There must be some limit on the number of MPs in relation to population, but on the other hand provinces with a falling proportion of the national population do not like to have their number of MPs reduced, and the smaller provinces have successfully fought to retain a minimum number of MPs.

The number of federal seats for each province is determined by a complicated formula based on the decennial census population (excluding the population of the three territories) to establish the average population per seat (about 90 000). The appropriate number is then assigned to each province. The three territories each have one MP. The system is complicated by the constitutional requirement that no province shall have fewer MPs than it has senators, and the statutory requirement that no province will lose seats by a redistribution. The result has been a slow rise in the size of the House of Commons.

Redistributions normally take place every ten years to take account of shifts in population, and one was due during the rule of the 1993 Liberal government. Faced with the prospect of changes which would increase the number of MPs from 295 to 301, the increase being in Ontario and the western provinces (not a good area for the Liberals), the Liberal government introduced legislation to defer the process until after the next election. This was blocked by the Senate, a popular move which restored some of the Senate's tarnished reputation.

The redistribution system does have anomalies. Because of the senatorial rule, Prince Edward Island has nearly three times as many seats as its population would justify, and the other Maritime Provinces are advantaged to a lesser degree. Canadian opinion seems to be that these are distortions that can be tolerated in the interests of having all the regions effectively represented in the House of Commons.

The distribution of the seats allocated to each province is done by independent provincial boundary commissions. Each of the commissions is chaired by a judge, selected by the Chief Justice of the province, and there are two members selected by the Speaker of the House of Commons. These two members cannot be MPs. The commissions are intended to produce electoral districts of equal population, but in special circumstances may vary them up to 25 per cent either way. The special circumstances include such matters as

density or growth of population, and community or diversity of interests. The drawing of the boundaries and the use of the population discretion naturally excite fierce controversy, particularly from MPs who may criticise the commissions, but cannot overrule them. The process is lengthy, and a redistribution may take three years or more.

The Canadian provinces

In the past, there have been allegations of electoral gerrymandering in some of the provinces and of malapportionment in all of them. There have also been suggestions that provincial parliaments have been slow to make redistributions when population shifts have occurred. By the end of the 1990s, all but one of the provinces had taken some steps to reduce the likelihood of a gerrymander by appointing as chairman of the electoral boundaries commission a judge, a retired judge or (in Quebec) the chief electoral officer, though many feel there is still substantial gerrymandering.

The rural and remote area bias has been the subject of a long-running debate in Canada. The appeal of an equal value for votes, 'rep by pop' as it is called, is strong. On the other hand, many feel that the regions need special representation, and in the absence of upper houses the only way this can be done is by a regional bias in the assemblies. The situation was complicated by the adoption in 1982 of a Charter of Rights and Freedoms as part of the Canadian Constitution. As far as voting is concerned, the Charter provides that 'every citizen of Canada has the right to vote in an election of members of a ... legislative assembly', that 'every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law' and also that the right is 'subject only to such reasonable limits prescribed by law as can demonstrably be justified in a democratic society.'

A number of disputes over whether electoral boundaries meet the requirements of the Charter have been taken to the courts. In 1987 the Chief Justice of British Columbia held that there was no requirement for absolute voter parity and that the provincial parliaments had the right to permit deviations, but that limits should be set and the permissible reasons for variations should be laid down. It has also been held by the Supreme Court of Canada that the right to vote includes:

- (a) the right to cast a ballot;
- (b) the right not to have the political force of one's vote unduly diluted;
- (c) the right to effective representation; and

- (d) the right to have the parity of the votes of others diluted, but not unduly, in order to gain effective representation, or in the name of practical necessity.

Most of the provinces now follow these rules, and stay within plus or minus 25 per cent of the mean numerical size of electorates. Typical factors to be considered by the boundaries commissions are density of population, accessibility and community of interests. British Columbia and Quebec permit the 25 per cent to be exceeded in ‘special [or exceptional] circumstances’, or ‘when necessary or desirable’, and Saskatchewan permits 50 per cent variance in the north of the province. The effect can be considerable. Moreover, the discretion of the boundaries commissions is limited in some provinces by instructions in the Act that there are to be a specified number of seats in particular areas. In Alberta, for instance, the Electoral Boundaries Commission Act provides for 83 seats in the Alberta legislature, of which 43 are to be allocated to seven cities which account for more than 60 per cent of Alberta’s population. In Newfoundland and Labrador there must be special consideration given to the aboriginal people in Labrador, and to those affected by the inaccessibility of the coast of Labrador and the south-west coast of Newfoundland. Difficulty may arise if the population balance changes, for an amending Act would be required, and this might not be forthcoming.

Ontario uses the federal electorates for the provincial parliament, so that they are regularly reviewed every ten years. The maverick provinces are New Brunswick, Nova Scotia and Prince Edward Island, where the legislative assemblies make up the rules whenever there is a redistribution, which is not very often. In Nova Scotia in the 1999 general election 17 939 votes were cast in one electoral district and 6169 in another. Until the 1998 election Prince Edward Island had sixteen dual member electorates, but this was changed at that time to 27 single member electorates. It is clear that in all the Canadian provinces the effectiveness of the provincial parliaments as electoral colleges is reduced by the rural and remote area over-representation, but the distortion seems to be in accordance with the wishes of the voters, or at least accepted by them, though if the distortions are excessive it seems inevitable that there will be legal challenges under the Charter of Rights and Freedoms.

Redistributions generally occur either every ten years or after every second general election, though Quebec has a redistribution after every election. Again, Nova Scotia, New Brunswick and Prince Edward Island are different, for they have a redistribution only when the government thinks one is necessary, which is not very often.

Australia

Under the Australian Constitution the number of members of the House of Representatives from each state or territory must be in proportion to its population, with the proviso that no state shall have fewer than five members. To maintain the two-to-one ratio between the House and the Senate, the formula is that the 'population quota' is the combined population of the six states divided by twice the combined number of senators from those states. This population quota is then divided into each state's and territory's population to calculate the number of members to which each state and territory is entitled.

Early in each parliament there is an examination of the latest census figures to determine whether the entitlement of any state or territory has changed. If it has, the number of members from that state or territory is amended, and a redistribution is required in that state or territory. Otherwise redistributions are carried out every seven years, or earlier in any state or territory where a third of the electorates in that state or territory are beyond the permissible 10 per cent variation from the average.

The Electoral Commission appoints a Redistribution Committee for each of the states, the membership including the Electoral Commissioner himself and the state Surveyor-General and the state Auditor-General (or their nominees or deputies). The committees must draw electoral boundaries so that the number of voters in each electorate is within 10 per cent of the average for the state or territory, and must endeavour to ensure that three years after the redistribution the number of voters in each electorate will be within 3.5 per cent of the state or territory average. The committees hold public hearings, and they must 'give due consideration' to such things as the means of communication and travel, community of interests and existing electoral boundaries. The rules for the committees are laid down in the Electoral Act, which of course could be amended by parliament, but otherwise parliament has no role in the timing or result of redistributions. The Electoral Commission's decisions are final. They cannot be challenged in any court.

The Australian states

There is little modern evidence of gerrymandering, though in a redistribution in Queensland in the 1980s an Aboriginal reserve (whose inhabitants would vote overwhelmingly Labor) was excised from a marginal National Party seat and placed in a neighbouring safe Labor seat. (The government was National Party.) Such cases are rare. Much more common was malapportionment, which was achieved by using a

system of electoral zones, with numerically much smaller electorates in the country. The justification for the electoral zones was that it was very difficult for an MP to service a far-flung electorate, and also the (usually unspoken) feeling that primary producers had a ‘stake in the country’ and therefore deserved greater political power. All the states except Western Australia and Queensland have taken action to make their electorates equal in voter population, and to keep them so with regular redistributions. Tasmania has been exemplary in this respect. Its House of Assembly is now made up of 25 members, with five elected by proportional representation from each of the five federal electorates, which are maintained in equality of numbers by the Federal Electoral Commission.

In Queensland, after the long-serving National Party government was ejected in disgrace in 1989, action was taken to reduce the malapportionment. But the 1992 Act did allow for a decrease in the number of enrolled voters in electorates of more than 100 000 square kilometres, which applied to five enormous electorates in Western Queensland. They have only two-thirds of the average number of voters in the other electorates.

Western Australia has a unique problem. The remote communities are as likely to be mining settlements (and therefore Labor voting) as they are to be rural areas (and therefore Liberal voting—the Nationals are weak in Western Australia). There is therefore no real pressure from any party for voter equality. The distances, too, are immense, and vast areas are barely inhabited. The federal electorate of Kalgoorlie, for instance, in order to reach its quota of voters has to cover an area of more than two million square kilometres. State electorates have fewer voters, but some still cover enormous areas. In the 1994 redistribution, Perth electorates had an average of 22 370 voters, whereas remote rural and mining areas averaged only 11 887. It seems likely that electoral zoning will persist in Western Australia for the foreseeable future.

New Zealand

New Zealand used single member constituencies as the sole basis for the House of Representatives until the 1993 election. In the 1996 election the system was changed to be partly proportional, partly single member electorates. There were 65 members elected from single member electorates (five of them Maori) and 55 members elected by nationwide proportional representation. The system of drawing electorate boundaries remained the same. A seven-member commission (from which MPs are excluded) draws new boundaries after each five yearly census. The commission has to aim for equal size electorates, but

is allowed a 5 per cent leeway, to take into account existing electoral boundaries, community of interest, communications and topography. Neither Parliament nor the government has any control over the result.

Voting systems

The seven Australian parliaments use preferential, compulsory voting. The other thirteen parliaments use optional voting, and the voting system is first-past-the-post in all of them, except for the 55 members of the New Zealand Parliament elected by proportional representation.

The advantages of first-past-the-post voting are that it is easily understood and the results can be promptly announced. The voters choose a single candidate, and the one who gains the most votes is the winner. The disadvantages of such a voting system are that two or more candidates may take votes from each other, and another candidate who certainly would not have been the preferred choice of the majority of voters may win. At various times the UK has toyed with the idea of preferential voting, but nothing has come of the proposals. Preferential voting overcomes the problems of first-past-the-post, but it is complex and the result of an election may take some time to become clear. If not distorted by party deals, it may allow similar candidates to offer themselves to the voters without risking both of them being losers—a variant of the American primary system. But party organisers do not like such contests, so they rarely happen. The more complex the voting system, the more it tends to be controlled by party organisers. Voters are usually required to indicate their order of preference for all the candidates, and many of the voters, particularly the reluctant ones, may be marking large parts of their ballot papers in blind ignorance. To overcome this, party workers usually distribute ‘how to vote’ cards at polling places, showing their supporters where to place each sequential number on the ballot paper, with the sequence designed to maximise the vote of their party candidate as the preferences are distributed, and disadvantage the principal opponent. Frequently there are deals done between candidates (or usually between the party machines) to exchange preferences. It all increases the power of the party machines.

Compulsory voting

A bill to introduce compulsory voting passed the Australian Federal Parliament in very casual fashion in 1924. At this time Queensland was the only state to have compulsory voting, though compulsory enrolment was general. A backbench government party senator introduced a private member’s bill to bring in compulsory voting for federal elections. Only five senators spoke in the debate and only three MPs

when it reached the House of Representatives. No party leaders spoke on it at all, yet the bill was passed, without divisions in either house. The effect of compulsory voting, which is now used in all federal and state elections in Australia, is to relieve party workers of the tasks of inducing voters to enrol and to go to the polling place. Parties concentrate on the swinging voters, which has the effect of pushing the major parties towards the middle ground.

The argument advanced in 1924 for compulsory voting was that if eligible voters were forced to vote, they would have to consider political issues and become better informed voters as a result. There is no evidence that this has happened. Making the vote compulsory when using the complicated preferential voting system has also introduced a random distortion. Between two and three per cent of the voters, uninterested in the result and nicknamed 'donkey voters', number their votes from top to bottom of the ballot paper. A much smaller proportion number their votes from bottom to top, and others scatter their numbers around the ballot paper. The scatterers have no effect on the outcome, but there is a considerable advantage for a candidate being higher up on the ballot paper than his or her principal opponent. The names of candidates used to be listed in alphabetical order, and this gave parties a strong incentive to find candidates with advantageous surnames. To overcome this, candidates now draw lots for positions on the ballot paper, but the result is that a significant advantage, which could be decisive in a marginal seat, is given by random chance to whichever of the two strongest candidates draws a higher position on the ballot paper. This defect could be removed by the use of Robson rotation, which is described when proportional representation is considered.

One of the great benefits of compulsory voting is that it prevents pressure groups from having excessive influence. Such pressure groups can often persuade nearly all of their members to vote, and if the total number of voters were only 50 per cent of those eligible, the voting power of the pressure group would be doubled. With compulsory voting, when typically more than 96 per cent of those eligible do vote, the strength of the pressure group is put in proper perspective.

Compulsory voting is not unique to Australia. Other countries which use compulsory voting are Argentina, Belgium, Brazil, Greece, Italy, Liechtenstein, Luxembourg, Singapore and Venezuela.

Proportional representation

Proportional representation is widely used in democracies around the world, but only two of the twenty parliaments we are considering use it for their lower house elections. There are many varieties of proportional

representation, but all follow one of two alternatives—the party list method or the quota-preferential method.

Under the party list method, the voter is offered several party lists of candidates from which to choose one list. Seats are usually allocated to the parties in proportion to the number of votes their lists received, and the winning candidates are usually selected in the order in which their names appear on the party lists. This method, of which the best known is that of d'Hondt, is favoured by party organisations, which control the names on the list, the order of election, and the filling of casual vacancies. The voters have no say in any of these matters. The party list method is much used in continental Europe and in South America. A refinement which advantages the major political parties is to require a certain percentage of the vote—5 per cent is used in Germany—before a party is entitled to a seat.

In 1993 New Zealand adopted the party list method for the 1996 and subsequent elections, when the voter chose, on a second ballot paper, the 55 members not elected from single member constituencies. New Zealand adopted the German requirement for a party to get 5 per cent of the vote on the party list, or win a single member constituency, to qualify for consideration for additional party list members. MPs were selected from the party lists so that the total number of MPs (those elected in single member constituencies plus those from the party list) fitted the pattern of the party list voting.

In the quota-preferential method, voters list the candidates in the order of their preference. A quota is set, according to the number of seats to be filled. Each candidate gaining a quota is elected and any surplus votes are distributed according to the second preferences. If all seats are not filled at the end of this process, the candidate with the lowest number of votes is eliminated, and his or her next preferences distributed, and so on, until all the vacancies are filled. Casual vacancies are filled by a recount of the vote, with the vacating member eliminated. Unlike the party list method, this procedure does not require a minimum quota to keep out Independents and tiny parties, for the size of the quota is determined by the number of seats to be filled. The quota-preferential method, which was developed independently by Carl Andrae in Denmark in 1856 and Thomas Hare in England in the following year, gives the voter wide freedom of choice, and is therefore not at all to the liking of the major party organisations. All sorts of devices have been developed to make its outcome more like the party list method. One was to change the method of filling casual vacancies, so that it is filled by the parties, not the voters, thus eliminating the need for a party to nominate more candidates than it can hope to elect. To control the voters, how-to-vote cards are distributed to voters, guiding

them how to fill in their ballot papers in accordance with the wishes of their political party. As a refinement of this, there is pressure for voters merely to have to tick a 'party box' on the ballot paper, and their ballot paper will be counted in accordance with their party's wishes.

Tasmania is the only one of our twenty parliaments which uses the quota-preferential method of election for its lower house. To its credit it has resisted much of the pressure from party organisations to reduce the effective choice of individual voters. Casual vacancies are filled by a recount of voters' ballots, not by a decision of the political party concerned. There is no marking of 'party boxes', and how-to-vote cards have been rendered pointless by a system called Robson Rotation. Under this system ballot papers are printed in batches, each batch having the names of the candidates in a different order. The ballot papers are shuffled and distributed at random, so that each candidate gets equal exposure in key positions. Everyone seems to agree that the result is fair. The important point is that how-to-vote cards are useless, because party workers have no way of knowing which version of the ballot paper a voter will receive. The result is that voters wishing to vote for a particular party have the ability to choose which of that party's candidates they want to see elected. In a way, they are combining the roles of an American primary election and the election for the actual seat.

Nevertheless Tasmania has not been immune from effective party political pressure. In 1998 the number of members from each electorate was reduced from seven to five (and the quota increased from 12.5 per cent to 16.7 per cent) in a blatant, and successful, attempt to reduce the number of MPs elected from minor parties.

A consequence of the electoral system is that Tasmanian assemblymen are even more involved than other politicians in attempting to achieve benefits for their electorates and even busier attending functions and knocking on doors. The reason is that although Tasmania has about the area of Scotland, it has only 330 000 voters, and is very parochial. Tasmanians tend not to follow party tickets, but rather to vote for those they know and like, or at least have heard of. Some Tasmanian state politicians therefore spend more of their time campaigning against their colleagues than against the opposing party.

The only other use of proportional representation for full lower house elections was in New South Wales between 1920 and 1926. The quota-preferential method was used, with five-member electorates in the city and three-member electorates in the country. Unfortunately the system was not well worked out—there was initially no procedure for the replacement of members who died or resigned, for instance—and there was general relief, anyway from the major parties, when the

system was dropped. Three Canadian provinces, Alberta, Manitoba and British Columbia used the Hare system of proportional representation for a few multi-member ridings, but proportional representation has not been used since 1956.

Although proportional representation is probably the best way of choosing a representative *legislature*, it is not so clear that it is the best way of choosing a *government*. The normal consequence of proportional representation is that no party has an absolute majority, and the smaller parties and Independents are substantially represented. There are often prolonged post-election negotiations—sometimes up to six months—to try to put together a majority coalition. The resultant government might well be one which would not have received a majority of the votes if put to the voters at the time of the election.

Minority governments

If the result of an election is not a decisive win for a party or a coalition, there are several options. A major party can attempt to form a new coalition with minor parties and Independents which would give them a majority, or if this is not possible, to attempt to reach an agreement of support on votes of confidence and budget bills with sufficient MPs to make the government secure. If this also is not possible, a government may soldier on as a minority government, hoping for the best, possibly waiting for a suitable issue on which to call an election.

A good example occurred in Ontario. After 32 years in office the Progressive Conservative government failed to gain an absolute majority at either the 1975 or 1977 provincial elections, but remained in power until it regained its majority in 1981. The other two parties—the Liberals and the New Democrats—were roughly equal in strength, but one or the other always supported Conservative Premier Davis in confidence motions, so the elections were held when the premier wanted them to be held. Premier Davis was the man in the middle and was able, by negotiating sometimes with one, sometimes with the other opposition party, to pass most of his legislation without unacceptable amendments. Indeed, he was sometimes able to use his minority situation to head off unwelcome demands for legislation from zealot supporters.

In the early days of a hung parliament, it is usually fairly easy for a minority government to reach some sort of accommodation with those holding the balance of power, for a very early election would focus attention on the major parties at the expense of minor parties and

Independents, who would tend to be blamed for the instability. As time passes, this fear declines.

Minority governments have been not uncommon in the four national parliaments in the 30 years since 1970. There have been none in Australia during that period, unless one counts the minority Fraser Government of 1975, appointed by the Governor-General after he had dismissed Labor Prime Minister Whitlam. After Fraser had been in office for only a few hours an election was called, which he won by a landslide.

In Canada federally there have been two minority governments, both in the 1970s. Elected in 1972, a minority Liberal government lasted for sixteen months before being defeated on a vote of confidence. The Liberals easily won the resultant election. In 1979 a minority Conservative government lasted for seven months (not facing parliament for the first five) before being defeated on a vote of confidence. The Liberal opposition won the election.

In the 1993–96 Parliament in New Zealand, when it was known that MMP voting would be used for the next election, some members broke away from the major parties and formed splinter groups. The National Party lost its majority and continued until the 1996 election as a minority government, with a guarantee of basic support from a minor party, the United Party. Parliament passed out of government control, and a Business Committee, with the Speaker as chair, was set up to take control of parliamentary business. Some private members' bills were passed, including one which was opposed by the government at all stages. In the two general elections held in New Zealand since MMP was introduced, no party has held an absolute majority, but on each occasion it has proved possible for the largest party to form a coalition with one or more minor parties to give it a majority, though in August 1998 the National Party's coalition partner, the New Zealand First Party, walked out of the coalition, leaving the National Party as a minority government until the election in the following year, which was won by the Labour-Alliance Coalition, but it too was a minority government.

At Westminster there have been three minority governments in the past 30 years, under Wilson from February to October 1974, under Callaghan from March 1976 until March 1979, and under Major in the last months of the 1992–97 Parliament. Wilson survived for a few months because none of the non-government parties wanted another election so soon, and Callaghan because of an agreement with the Liberal Party (the 'Lib-Lab Pact') which kept Labor in office as a minority government, but the Liberals eventually ended the agreement and voted with the Conservatives and Scottish Nationalists to throw the

Labor government out. After the 1992 election Major's Conservatives had a small majority over the Labour Party, but this was whittled away by defections and by-election losses. He was never in serious danger of defeat on a confidence motion because of the support of the Conservative defectors and the Ulster Unionist Party on such motions, but he had no reliable majority for his legislation, particularly on the deeply divisive European Union issues.

The only examples of minority governments in the Canadian provinces during this period were the 1975–81 and 1985–87 Ontario governments, 1988–90 in Manitoba and 1998–99 in Nova Scotia. The 1975–81 minority governments in Ontario have already been described, but the 1985–87 government was nearly as interesting. After the 1985 election the Progressive Conservatives were the largest single party, but did not have a majority. Two weeks after the start of the new Parliament the other two parties combined to defeat the Progressive Conservative government's motion for an Address in Reply to the Speech from the Throne. The premier resigned without asking that Parliament be dissolved. The Lieutenant-Governor then accepted a formal 'Accord' between the Liberals and the New Democrats, based on an agreed program, and promising that the New Democrats would ensure the survival of a Liberal government for two years. This they did, and in the 1987 election at the end of the two year period the Liberals won an overwhelming victory.

Five of the six Australian states have had minority governments at some time during the past 30 years. The only exception is Western Australia. As might be expected with proportional representation, Tasmania has had the most, with minority governments in 1969–72 (Liberal), 1981–82 (Labor), 1989–92 (Labor) and 1996–98 (Liberal). Minority governments in the other states occurred in New South Wales (1991–95), Victoria (1999–2003), South Australia (1975–77, 1990–93 and since 1997), and Queensland (1996–98).

Some of the ways minority governments won office and survived are interesting. In Tasmania in the 1989 election the Labor Party won only thirteen seats in the 35-member House of Assembly, with the Liberals winning seventeen and the Greens five. The Labor leader managed to do a deal with the Green Party so that he could form a single party minority government. The price was high. The Greens had 100 conditions for the accord with the Labor government, including the cancellation of a major new project to use waste timber from sawlog operations, the setting up of new parliamentary committees, a register of the pecuniary interests of members, public disclosure of election donations, and the 'abolition of subsidised liquor to members'. The Greens were also given equal status with the Liberal Party in the

chamber, and were guaranteed consultation on legislation and public service appointments. The arrangement lasted for a little over two years, but the parties then parted acrimoniously. The Liberals won an absolute majority in the resultant election.

In South Australia, after the 1990 elections the Labor government had only 22 seats in the 45-member lower house. There were three Independent members, all with Labor Party backgrounds, and Premier Bannon arranged that one Independent should be Speaker, and another should be Chairman of Committees. In 1992, when Labor numbers had fallen to 21, the third Independent was offered the chair of the Economic and Finance Committee. When Bannon resigned in 1992, his successor gave ministries to two of the Independents, and left the third as Speaker. 'Independent' had taken on a new meaning.

There are also sometimes 'minority oppositions', when no party is clearly entitled to the role. There are considerable advantages in being the official opposition, for the Leader usually receives the same benefits as a minister, as well as extra funds to run the Leader's office. In the House, the opposition asks the first question during question time, and has the opportunity to respond first to the budget and to ministerial statements. As well, the chairs of important committees may fall to the official opposition.

But what is to be done when two non-government parties are of identical size, and have no wish to go into coalition? This happened after the election in Nova Scotia in 1999. The Progressive Conservatives won a majority government with 30 seats, and the non-government parties had eleven Liberals (the previous government) and eleven New Democrats (the previous opposition). The Speaker decided that there should be no official opposition, and that the procedural advantages in the House should be alternated between the Liberals and New Democrats. The financial benefits would be split between the two parties. The Speaker's decisions seem to have been accepted.

Public financial support to political parties for election campaigns

United Kingdom

In the UK there is no public financial support to the political parties for election expenses, though each side in the 1975 referendum on membership of the EU received £125 000. Limits are put on how much each candidate may spend in an election campaign, though it is a matter of judgement as to what constitutes an election expense, for the law has not been tested since 1929.

Canada

In Canada there is no annual funding of registered political parties at the federal level, though it is done in the provinces of New Brunswick, Prince Edward Island and Quebec. On the federal scene, candidates who receive at least 15 per cent of the valid votes cast in their ridings in a federal election or by-election are entitled to a reimbursement from the government of 50 per cent of their election expenses. All candidates are entitled to a full refund of their one thousand dollar deposits. Registered political parties who obtain at least 2 per cent of the total valid votes cast, or 5 per cent of the valid votes in the ridings where they have candidates, have the right to a reimbursement of 22.5 per cent of their election expenses. The Income Tax Act provides for tax credits to individuals or organisations for financial contributions to candidates and registered political parties up to a maximum of five hundred dollars in any one calendar year.

Most of the provinces supplement these arrangements; the only ones who do not are Alberta and Manitoba. Even in the provinces which do provide support it varies quite markedly, in some cases providing support for the general expenses of registered political parties, while in others the support is limited to provincial election expenses. In British Columbia, for instance, registered political parties may claim tax deductions for contributions, but there is no particular assistance for electoral expenses. In Saskatchewan, if a candidate in a provincial election or by-election receives not less than 15 per cent of the valid votes, the candidate receives an amount from the government which is equal to one-half of the eligible election expenses, though there is a limit as to how much is allowed. In Ontario there is partial reimbursement of the election expenses of candidates in elections or by-elections if they receive 15 per cent of the valid votes, and registered political parties may have part of their electoral expenses reimbursed if they receive an aggregate of 15 per cent of the valid votes in the electoral districts in which they have candidates.

During a federal election every broadcaster is required to make 62 hours of airtime available for purchase by registered political parties. The Broadcasting Arbitrator allocates the available time among the registered parties based on their performance at the last general election.

Australia

In Australia, the first federal election campaign for which there was public funding for the parties was in 1984, under the Hawke Labor Government. To qualify for the funding a candidate or Senate group

must obtain 4 per cent or more of the formal first preference votes in the electorate contested. The scales were initially set at 66 cents for each House of Representatives vote and 33 cents for each Senate vote, but the rates were indexed to inflation, so that following the 1993 election the political parties received nearly fifteen million dollars in public money.

There was a dramatic increase in 1995, when the funding went up to one dollar and fifty cents for each House of Representatives or Senate vote. Using this system (indexed for inflation) the funding payments for the 1998 federal election reached nearly thirty-four million dollars. Two of the states, New South Wales and Queensland, provide similar support. The New South Wales scheme was introduced in 1981, three years before the federal scheme, and was in fact used as the model for that scheme. Queensland introduced a similar scheme in 1994.

There is little support given through the income tax system. Donations of up to one hundred dollars by individuals to registered political parties are tax deductible, and that is it.

New Zealand

In New Zealand the only assistance given by the government to political parties is the provision of some free broadcasting on radio and television during election campaigns. This is given only to political parties which were registered at least three months before the dissolution of Parliament for a general election, and who are contesting at least five seats. The Electoral Commission allocates the available time, on the basis of the votes of the parties at the previous election and the current number of MPs, and also makes financial grants to the parties on the same basis to pay for the production costs of broadcasts and the costs of the broadcast time.

Recall of members of parliament

In 1994 the Legislative Assembly of British Columbia passed an act which enabled the voters to remove a sitting member during his elected term. The Act was passed by the Legislative Assembly, reluctantly, as a result of an overwhelming vote in its favour in a referendum. Forty per cent of voters in the relevant electoral district have to vote in favour of a petition asking for the member's removal for it to be successful, and a petition cannot be initiated within eighteen months of a member's election. The initiator of the petition has 60 days in which to collect the required number of signatures, and if the signatures meet the requirement the Chief Electoral Officer declares the seat vacant, and a

by-election is held. The recalled member can be a candidate in the by-election.

As might be expected, the recall procedure has been often used for blatantly political purposes. If the government has a narrow majority, the procedure can be used in an attempt to force by-elections which the government might lose. It can also be used to mock the parliament. The first seven petitions fell into these categories, with reasons given for the recall such as 'we can't blame everything on El Nino' and 'they desire recall so that they may elect someone less boring.' All failed to reach the necessary number of signatures.

The eighth petition was less trivial. It was established that a member of the Legislative Assembly had written a number of letters to the newspapers, using fictitious signatures, in which he criticised opponents and praised himself. The petition was heavily supported, and the member resigned without waiting for the official dismissal.

None of the other parliaments has followed the example of British Columbia.

The power of parliament to 'dismiss a ruler'

Of course the role of a lower house as an Electoral College does not end with the choosing of a government after an election, as happens with the American Electoral College. As Bagehot wrote, the British House of Commons 'lives in a state of perpetual potential choice; at any time it can choose a ruler and dismiss a ruler.'

In fact the potential choice has not been exercised much recently. Since 1970 there has been only one occasion on which the UK House of Commons has removed a government by a vote of no-confidence. The Labour government's three seat majority (319 out of 635 seats) after the October 1974 election was lost by 1976 in by-elections and defections. The Labour Party was deeply divided over membership of the European Community, and there were serious economic and union problems and difficulties over Scottish and Welsh devolution. The Callaghan Labour Government was kept in office by the thirteen Liberals in 1977 and 1978, but in March 1979 the Liberals joined with the Conservatives and Scottish Nationalists to throw it out. No alternative government would have been possible in that House, so there was no dispute about Prime Minister Callaghan's request for an election. He lost, to Margaret Thatcher.

In Canada federally there have been two occasions since 1970 on which a government has been 'dismissed' by the House of Commons. After the 1972 election, a minority Liberal government survived for sixteen months before being defeated on a vote of confidence. This

proved to be a serious error of political judgement, for the Liberals won the consequent election with an absolute majority. In 1979 a minority Progressive Conservative government lasted for seven months (not facing the parliament for five of them), sustaining itself with thirteen billion dollars' worth of special warrants, which do not require parliamentary approval. The government was voted out soon after meeting the House of Commons, and the Liberals easily won the ensuing election.

There have been no 'dismissals' since 1970 by the Australian or New Zealand Houses of Representatives.

Changes of prime minister

While the lower house has the power, even if little exercised, to 'dismiss a ruler', it normally has no say in the choosing of a new prime minister should this become necessary before the parliament's term is up. This important task is left to the majority party.

United Kingdom

Since 1970 there have been two changes of prime minister, other than as a result of a General Election. On the Labour side Callaghan replaced Wilson in April 1976, and John Major replaced Margaret Thatcher as Conservative prime minister in 1990. Wilson retired voluntarily, and his successor was elected by the Parliamentary Labour Party, a system which was used from 1922 to 1981. At a special conference in January 1981 an election system for the Leader and Deputy Leader was adopted by which they should be re-elected each year with 30 per cent of the vote allocated to the parliamentary party, 40 per cent to the trade unions and 30 per cent to the constituency parties. This was changed in 1993 to allot one-third of the votes to each of the three groups.

Although Wilson went quietly, Margaret Thatcher had to be forced out. The Conservatives were doing poorly in the polls, there had been resignations of important ministers, including the deputy prime minister, Sir Geoffrey Howe, and she was challenged for the leadership by Michael Heseltine, a former Defence Secretary. The Conservative leader is chosen by the parliamentary party, by a body called the 1922 Committee. When the Conservatives are in opposition the 1922 Committee includes the entire parliamentary party, while in government only backbenchers are eligible for membership. If there is no clear winner on the first ballot (defined as being 15 per cent clear of the next candidate), the election goes to a second ballot. If no one gets more than 50 per cent of the votes, it goes to a run-off between the top

candidates. Thatcher won the first ballot, but not with the 15 per cent margin over Heseltine which she needed to be proclaimed leader. She withdrew from the second ballot, new nominations were called, and it was won by one of her supporters, John Major. He defeated Heseltine and Hurd, but did not get 50 per cent of the votes. Heseltine and Hurd then withdrew from the race, and Major was proclaimed leader, although by Conservative Party rules there should have been a third ballot. In the cases of both Wilson and Thatcher the election of the new prime minister was made by the party members in the House of Commons. From the point of view of responsible government, it should be noted that the House of Commons as a whole was in no way involved in either of these proceedings, not even being asked to give a formal vote of confidence in the new prime minister.

The rules for a challenge to an incumbent Conservative leader were changed after the 1997 election defeat, and 15 per cent of the parliamentary party must now endorse such a challenge before an election can be held.

Canada

Because of the method of choosing a party leader it is difficult to replace a Canadian prime minister in office. In both the Liberal and Progressive Conservative parties, the parliamentary leader is chosen, not by the parliamentary party, but by a national convention. The conventions consist for the most part of delegates elected at public meetings in the various ridings, with the addition of senators, provincial assemblymen and some appointed delegates-at-large from the provinces. The parliamentary party has no role in the matter. The only prime ministers to be replaced in office since 1970 were Pierre Trudeau in 1984 and Brian Mulroney in 1993. Both retired voluntarily.

Australia

Since 1970 two Australian prime ministers have been replaced, apart from those who lost office as the result of electoral defeat. John Gorton, of the Liberal Party, took office in 1968, and soon alienated some of his colleagues by a high-handed and sometimes lackadaisical attitude to administration, and an open liking for centralisation. The leadership of the Liberal Party is decided by the Liberal members of the two houses, and in 1971 Gorton was in trouble, facing the probability of a no-confidence motion in the House, and with his deputy, William McMahon, industriously trying to organise a coup. A motion of confidence in Gorton was moved in the Liberal Party room. The ballots were secret, but, by party decision, were counted on the table in front of

the prime minister, and the vote was tied. When a recount confirmed the tie, Gorton used his casting vote against himself. In many ways this was typical of Gorton—dramatic, noble, but ill-founded, for the chairman of a meeting has a second and casting vote only if the rules of the meeting give him one, which the rules of the Liberal Party's meeting did not do. The MPs, other than the Liberals, first heard that their new prime minister was William McMahon from the media.

During the Hawke Labor Government from 1983 to 1991, the Treasurer was Paul Keating. Keating was ambitious, but had no ambition to be leader of the opposition. He wanted to be prime minister before the life of the Labor government had expired. In 1988 Hawke promised Keating, his deputy leader, in the presence of two witnesses, that he would resign in favour of Keating at a decent interval after the next election. In return, Keating was in future to come to Cabinet meetings on time and was to be polite to his Cabinet colleagues.

Labor won the 1990 election, but Hawke showed no sign of honouring his commitment to resign after a decent interval. (Whether Keating honoured *his* two commitments has never been made clear.) Hawke believed that he alone could win the next election, his fifth in succession, and his promise to Keating was void. Keating organised a leadership challenge in the Labor parliamentary caucus (comprising both MPs and senators) in June 1991, but lost by 66 votes to 44. Keating retired to the backbench.

Things began to go badly wrong for Hawke. Keating's successor as Treasurer, John Kerin, was not a success, and was removed by Hawke in December 1991. Unemployment rose each month, and the economy was dormant. In November 1991 the opposition released a dramatic policy statement, proposing major economic reforms. The response of Hawke and Kerin was grossly inadequate, and Labor members were desperately missing Keating's force and power of analysis. Hawke's support was evaporating, and in December he resigned, leaving Keating to take over.

New Zealand

Since 1970 prime ministers in office have been changed five times—twice by resignation, three times by party room coups. Both the resignations were of long-serving prime ministers who had established their deputies as their successors. The three coups were dramatic. As in most of the other parliaments, the leader is elected by the parliamentary party. David Lange (Labour) became prime minister in 1984. For the first three years he worked apparently amicably with his reformist finance minister, Roger Douglas, as New Zealand embarked on a

program of radical economic reform, but he eventually became worried at the pace of change, rising unemployment and departure from traditional Labour principles. There was also probably an element of pique at playing second fiddle to Douglas. In any event, the two fell into open conflict, and Lange dismissed his finance minister. Six months later the Labour caucus, which elects the ministry, voted to reinstate Douglas in the Cabinet, against Lange's wishes. Although it is probable that most of the caucus wanted Lange to continue as prime minister, his position was untenable and he resigned.

It was August 1989 and an election was due in little more than a year. The caucus chose Geoffrey Palmer as the new prime minister, but Labour's electoral prospects continued to deteriorate as unemployment rose. In desperation, the caucus replaced Palmer with the more aggressive Michael Moore, but it was too late, despite some last minute dramatic changes of policy. The Labour government was trounced.

The winning prime minister was the National Party's James Bolger, and he lasted for seven years. There was however growing dissatisfaction with his leadership by 1997, and while he was in Britain at a Commonwealth Heads of Government meeting a coup was organised. The fifth-ranked cabinet minister, Jenny Shipley, had the numbers and threatened to force a vote at the regular caucus meeting after Bolger returned. Eventually, to avoid the political uproar of such a contest, he agreed to resign, but after a few weeks to make it more dignified. On 8 December 1997 Jenny Shipley was sworn in as New Zealand's first woman prime minister.

As in the other countries, the New Zealand Parliament played no role in the change of prime minister.

How long a term?

If the lower house is to perform efficiently as an electoral college, its membership must be changed at reasonable intervals so that it, and the government it chooses, are representative of community opinion. On the other hand the intervals must not be too short, for this would make for ineffective government. Of the 139 parliaments listed in 1999 with the Inter-Parliamentary Union in Geneva, only seven have terms of three years while another three have shorter terms, leaving the remaining 129 with terms of four years or more. Of the four countries being considered, Australia and New Zealand have three year terms, Canada, the Canadian provinces and the United Kingdom five years. All the Australian states except Queensland now have four year terms. The other countries to have three year terms are Congo, El Salvador, Libya, Mexico and the Philippines.

Three year terms, even if they are completed (and they rarely are in Australia), are really too short. The benefits of many desirable new government programs frequently take some time to become evident, and a government facing an imminent election will almost certainly be forced into short term measures. This rarely makes for good government. The problem is exacerbated because parliaments rarely see out their full term, occasionally because of defeat of the government in the lower house, usually because of the use by prime ministers or premiers of their power to call elections at dates which suit their political advantage.

United Kingdom

Of the fourteen elections in the UK since 1945, only one was held at the end of the term of Parliament. The Parliament elected on 8 October 1959 lasted until 15 October 1964, the first peacetime Parliament to run its full term since 1722. The 1992–97 Parliament lasted until it was within twenty days of its full term, almost certainly because Prime Minister Major was desperately hanging on, hoping that something favourable would turn up. It didn't. Three of the early elections might be thought to have been justified because there was either a minority government or an unworkably small majority. The Wilson Labour Government was in a minority from February to October 1974. The governments which held very small majorities were Wilson (October 1964 to March 1966) and Attlee (February 1950 to October 1951), although Attlee maintained control of the Commons throughout.

That leaves ten other early elections to be accounted for. The 1979 election was forced by the Commons themselves, but the other nine parliaments were shortened by an average of eleven months by the decisions of the incumbent prime ministers. It seems clear that the motive in each case was to take advantage of what was thought to be a favourable electoral climate which might not last if the parliament went its full term. Of course the prime ministers did not say this. The reasons they gave varied from Anthony Eden seeking a mandate as a newly installed prime minister (1955) to Edward Heath asking the people to choose whether they wanted the trade unions to govern (1974). The people narrowly voted for the unions, or anyway against Heath. One could make a case that *every* prime minister who was not chosen as a result of a general election should seek a mandate as Eden did, but no other prime minister similarly chosen has done so, and Eden did not really want a mandate. He wanted an extended period of secure government.

Canada

Since 1945 the average life of a Canadian Federal Parliament has been little more than three years. Even when the government had an absolute majority, no parliament saw out its full five years. With the exception of the 1988 election, there is no evidence of any motive other than party political advantage in the calling of the early elections. The 1988 election was a quasi-referendum on the free trade treaty with the United States, after the Senate threatened to hold up the bill until an election was held. It may have been a mere coincidence that the election was called when the government was leading in the polls for the first time in nearly three years.

Australia

The maximum term of the House of Representatives is three years, the term starting from the first sitting of the House after an election. Only four of the 21 parliaments since the Second World War have run to their full term or near it. These were the parliaments of 1946–49, 1969–72, 1990–93 and 1993–96. It is no coincidence that the government was in three cases defeated in the election, and in the fourth (that of 1993) won a surprise victory. Public opinion was running strongly against the government of the day, which held on grimly to the end, hoping that something would turn up.

The motive of a prime minister in calling an early election is always party political advantage, whatever he may say publicly. An Australian prime minister has, however, a unique problem in exploiting this. Senators have fixed six year terms, with half retiring every three years, and the Senate election must be held in the last year of the retiring senators' term. It is usual for the elections for both houses to be held simultaneously, for a separate Senate election is treated by the voters as a by-election, and the government vote suffers. A prime minister will think very carefully before he calls too early an election.

He has a way out. The Australian Constitution provides for a method of resolving legislative deadlocks between the two houses. If the Senate rejects or unacceptably amends a bill passed by the Representatives, and if after an interval of not less than three months the same thing happens again, there may be a dissolution of both houses. If the deadlock persists after such an election it may be resolved by a joint sitting of the two houses. Before 1951 the double dissolution procedure was used only once, but it has been used much more since then. In 1951 there was a double dissolution over the Senate's failure to pass a bill to dissolve the Communist Party. This was probably the only genuine use of a double dissolution as a means of resolving a legislative

deadlock, though even then there was political advantage seen in fighting a premature election on such an issue. The 1974 and 1975 double dissolutions came about because of the failure of the Senate to vote supply, though the ostensible grounds were deadlocks over other legislation.

It seems that prime ministers now view double dissolutions not as a means of resolving deadlocks over legislation but rather as a method of removing a restriction on the calling of elections whenever they choose. There is no obligation to call an election within any prescribed period after a deadlock has been established, and a government can, if it wishes, store up one or more deadlocks for exploitation at a convenient moment. There is, however, one problem a prime minister must consider. At a double dissolution, all of the twelve senators from each state are up for election and, with quota-preferential proportional representation, the quota for election is only 7.7 per cent. This offers a real chance for minor parties—the Australian Democrats, environmentalists, anti-nuclear groups and so on—to elect senators who may hold the balance of power in the Senate. A prime minister must consider who such groups would favour. Generally they are more likely to favour Labor than the Liberal-National coalition.

Turning back to the nineteen parliaments since 1945 which have not run their full term or near it, if one disregards the five double dissolutions called to resolve legislative deadlocks between the two houses, and the 1963 election which could be argued, with some difficulty, to have been necessary because of the government's narrow majority, one is still left with thirteen short term parliaments. Three lasted less than two years, one as little as fifteen months. The average was 29 months, seven months shorter than the prescribed period. It is difficult to see any justification for this constant pattern. It seems to be generally agreed that three year parliaments are really too short, yet Australia is doing much worse.

The complex voting system used in Australia poses another problem. The new Parliament cannot meet until the writs are returned, and there is inevitably a substantial gap between polling day and the return of the writs to permit the counting of the votes (including absentee and postal votes) and the distribution of preferences and quotas. Since 1970 the average interval between polling day and the first meeting of the new federal Parliament has been 58 days. Limits on the intervals between the issue of the writs, closing of nominations and polling day, and between polling day and the return of the writs, are set by an act of Parliament, but in practice the nation may be without a parliament for four months, and the responsible government with no one to be responsible to. This system subverts the intention of the

Constitution to keep to a minimum the time the nation would be without a parliament, but the authors of the Constitution did not envisage the voting systems now employed.

This problem should be kept in mind by politicians considering the theoretical advantages of various voting systems. An extreme example occurred during the first election of the Legislative Assembly of the Australian Capital Territory in 1989. A modification of the d'Hondt system of proportional representation was used. The ballot paper was a metre wide, and it took more than two months to count the votes and distribute preferences. The result was indecisive.

New Zealand

New Zealand has had the most orderly electoral college of any of the countries, states and provinces we have considered. With two exceptions the elections have been called meticulously at regular intervals in November of each third year. The two exceptions were the 1951 and 1984 elections. The 1951 election was called only 21 months after the previous election because of a disastrous waterfront strike which had crippled the economy, and the election in 1984 was called four months early because of a threatened defection by a National Party MP. Until 1986, however, the New Zealand Parliament did not have to meet at any prescribed time after an election. The only limit was that it had to meet before 30 June, when supply runs out. It was quite common for Parliament not to meet for six months after the election, so that the actual life of the Parliament was often less than two-and-a-half years. The Constitution Act of 1986 now requires the Parliament to meet within six weeks of the day appointed for the return of the election writs.

Fixed terms for lower houses

Except in New Zealand and Western Australia, prime ministers and premiers have been ruthless in their exploitation of their power to call elections whenever they see a window of political opportunity. The power to determine the date of an election is obviously a great advantage to an incumbent, but why should such an advantage be given? It has a downside, too, for a year or more before the end of a parliamentary term speculation starts about when the election will be held, the uncertainty frequently causing economic damage. Often the speculation has been stirred by the prime minister or premier, who then calls an early election to end the uncertainty.

So far the only parliament to adopt a fixed term is New South Wales. In 1992 the New South Wales Parliament passed an act adopting

a fixed four year term for its Parliament, and this was endorsed by three-quarters of the electorate at a referendum in 1995. The Parliament can be dissolved earlier only if a motion of no confidence is passed, or the Legislative Assembly rejects or fails to pass a supply or appropriation bill, and a government which has the confidence of the Legislative Assembly cannot be formed within eight days. A similar act was passed by Tasmania for the 1992–96 Parliament only, and it has not been re-enacted. Because the upper house—the Legislative Council—has the power to block money bills, the Tasmanians also provided for a dissolution of the lower house if *either* house failed to pass the necessary funds for the ‘ordinary annual services’ of the government, thus continuing to make it possible for the upper house to force a premature election on the lower house.

Why should not all our parliaments have fixed terms? Such a step would remove a great deal of unnecessary uncertainty, reduce the excessive frequency of elections, and take away an unwarranted advantage given to incumbent governments. There would of course have to be an early election if no government possessing the confidence of the lower house could be formed.

Objections have been raised to the fixed term concept, but they seem to have little substance. Bagehot thought that a prime minister’s power to order an election was essential to party discipline, and the idea was put in modern terms by David Butler when he wrote that ‘if government MPs know that a defeat on a major issue will lead the prime minister to dissolve parliament, they have a powerful incentive to ensure to vote loyally on key occasions.’ There is no evidence that any modern prime minister has called an election for such a reason, and any such threat would be simply not credible. It is true that Harold Wilson, in March 1967, warned the Parliamentary Labour Party that votes against the government might result in their ‘dog licences’ not being renewed, and the chief whip later told a meeting of the parliamentary party that failure to carry the Industrial Relations Bill would mean a dissolution. Wilson claims that he gave the chief whip strong advice to the contrary, which is reasonable, because whatever bluff a prime minister might use to try to discipline party members, including calling for a vote of confidence, a premature election with the party in a state of turmoil would not be an attractive option. Instead, finding some Labour MPs bitterly opposed to the legislation, Wilson modified it substantially, as many prime ministers have done in the past and many more will do in the future. A desperate prime minister might call for a vote of confidence in the House, which if lost would result in an election, but this possibility is covered by the fixed term concept.

The second argument advanced against fixed terms is that the election date is not flexible, and may fall on an inconvenient date, perhaps during a grave crisis. This is undoubtedly true, but the danger can be exaggerated. In Australia, for instance, if elections had been held at three year intervals after the first election on 31 March 1901, on no occasion would the election date have been politically inconvenient, whereas at least one date chosen by a prime minister was very awkward. Australia was in the middle of an election campaign when the First World War broke out.

It is true that as a parliament's term draws to a close, great events may be happening which would render an election most inopportune, but this would apply whether there was a fixed or flexible term. The New South Wales fixed term can be cut short by up to two months if it would fall 'at the same time as a Commonwealth election, during a holiday period or at some other inconvenient time'. National governments may have more serious problems. In both World Wars Britain avoided elections by extending the life of the House of Commons, which can be done by a simple act of Parliament. Canada has a constitutional provision that 'in time of real or apprehended war, invasion or insurrection' the House of Commons may, by a two-thirds majority, extend the life of the Parliament indefinitely. Under New Zealand's Electoral Act an extension of the life of the Parliament can be obtained either by referendum or a vote of three-quarters of the members of the House of Representatives. There is no limitation on the duration or purpose of the extension. To extend the life of the federal Parliament in Australia would require an amendment to the Constitution. This would have to be passed by a referendum which, in the crisis situation envisaged, would probably be nearly as disruptive as an election campaign.

Although it is clearly desirable that national parliaments should have some power to defer elections in time of crisis, there should be some control over the method of extension and the acceptable purposes. The Canadian model seems suitable, though the New Zealand three-quarters majority is better than the Canadian two-thirds, for it is far from unknown for a government to have two-thirds of the members of a lower house. It is important that both government and opposition should be in favour of the extension. It should be noted that these controlled arrangements for extending the life of parliament are desirable whether the normal term of the parliament is fixed or flexible.

The only other apparently cogent argument against fixed terms is that they would prevent a government from obtaining an electoral mandate for a substantial change in the policy on which it was elected. As an opponent of fixed terms put it, a government 'may wish to make

a serious change of policy, but may wish to seek the endorsement of the electorate, surely not an undemocratic thing to do.²⁵ This sounds admirable, but is not in fact what happens. If a government makes an abrupt change of policy and the prime minister calls an election, it is because he believes the issue will help him to win the election. If there were an abrupt change of policy which was *not* well received by the public, no prime minister would contemplate holding an immediate election. He would hold on, hoping that the benefits of the new policy would be apparent by the time an election was inescapable.

To look at the UK, dramatic developments or changes of policy which might be claimed to have required a mandate include the dismantling of the Indian Empire (1947), the decision to produce an atom bomb (1948), the involvement in the Korean War (1950), Suez (1956), the Falklands (1982), and entry into the European Economic Community (1971). A mandate was not sought for any of these at the time of the decision. Moreover, an election is not a very satisfactory method of determining public opinion on a single issue. Other issues have a tiresome habit of intruding, and sometimes the issue on which an election is ostensibly called is barely mentioned during the campaign. An example is the 1987 federal election in Australia which was called to resolve a deadlock over the proposed introduction of a national identity card. The identity card played no significant role in the election campaign. The Labor government was returned, but this was in no sense an endorsement of the identity card, which remained very unpopular with the public.

If one really wants to know what the public thinks on a particular issue, public opinion polls are available. If one wants a more formal expression, referendums are available. Both public opinion polls and referendums have limitations, the principal one being the difficulty of explaining complex issues to some of the voters, but as measures of public opinion on single issues they are far superior to general elections.

One other possible ground for arguing against fixed terms must be mentioned, if only to be dismissed. There have been many occasions when a prime minister or premier has been replaced, because of death, resignation or a party coup. Should the voters not have the right to register their approval or otherwise of the replacement at a general election? The only replacement British prime minister to call an

²⁵ E.A. Forsey and G.C. Eglinton, 'The Question of Confidence in Responsible Government', unpublished manuscript held in the Parliamentary Library, Ottawa [nd].

election was Anthony Eden, in 1955.²⁶ He claimed to be seeking a mandate, but in fact was seeking to exploit the electoral honeymoon which is usually granted a new prime minister. The same thing has happened twice in Canada, in elections called in 1968 by Pierre Trudeau, and in 1984 by Trudeau's successor, John Turner. Trudeau judged the electoral climate correctly, but Turner was decisively beaten.

Under the present system, the decision whether or not to call an election has nothing to do with principle, but is a matter of political judgement. If a new prime minister fears his electoral honeymoon is not sweet enough to ensure an electoral victory, there is no way an election would be called. There seems to be no general feeling that a new prime minister should *have* to ask the voters for a personal mandate, and that being so, it is surely wrong to permit an incoming prime minister to cut short the term of parliament to exploit a political opportunity.

The final argument against fixed terms seems to consist of setting up a straw man and then knocking him down. The straw man is the claim that a fixed term could not work because of the possibility of the lower house being unable to agree on a government. In fact, those who advocate fixed terms agree that there must be an election if a government with the confidence of the lower house cannot be formed. Such dissolutions would be limited, for a defeated prime minister or premier would have no *right* to a dissolution if he lost the confidence of the lower house, for the head of state would have the duty to see if another government which possessed the confidence of the house could be formed. This is the established position in Australia, both federally and in the states. It seems to be the position in the United Kingdom, New Zealand, Canada and the provinces, though it has not been tested in any of these parliaments since 1926. It would be helpful if it were clearly spelt out, in each Constitution or Electoral Act, that a dissolution after a government lost the confidence of the lower house would be granted only if no other government could be formed.

Upper houses forcing elections

There were seven cases in the twentieth century of upper houses forcing premature elections, all but one of them in Australia, the only place where upper houses still have such power.

²⁶ None of the four subsequent changes, Eden/Macmillan, Macmillan/Home, Wilson/Callaghan, and Thatcher/Major were the cause of a general election.

United Kingdom

The behaviour of the House of Lords with regard to the 1909 budget, and the consequences of its actions, have already been described in Chapter 2.

Canada

Although the Canadian Senate technically has the power to reject a budget, such action has never been contemplated, anyway in modern times. The lack of prestige of the Senate and its unelected character mean that it would be almost suicidal for it even to discuss such an idea seriously. Besides, the Senate could not force an election. The Canadians have destroyed a vital part of responsible government by passing the Financial Administration Act, by which the Governor-General may, on the advice of the government, issue special warrants authorising expenditure not approved by Parliament. So, if the Senate blocked supply, the government could simply prorogue Parliament and finance itself by special warrants.

New Zealand

The New Zealand Legislative Council was abolished in 1951, but it was moribund for some time before that and there was never any suggestion of it blocking supply in order to force an election.

Australia

There were two occasions during the 1970s on which the Australian Senate interfered with the electoral-college role of the House of Representatives, by refusing to pass supply unless an immediate election was held. The financial year runs from 1 July to 30 June of the following year. At that time the budget for that financial year was not introduced until August (the procedure was to be changed in 1994), and although the passage of the budget through the Representatives was a formality it was not normally passed by the Senate until October or November, after hearings by estimates committees. As the Australian government, unlike the Canadian, cannot spend any money not approved by Parliament, the government was given an advance before the Parliament rose for the winter recess. The amount was of a size sufficient to see the government through for about five months, by which time the budget should have been passed and the amount advanced absorbed in it.

In April 1974 the Whitlam Labor Government had been in office for seventeen months. It faced a hostile Senate, where the balance of power was held by the Democratic Labor Party, a right wing breakaway group

from the Labor Party and a ruthless opponent. The Senate had twice rejected six government bills, giving ample grounds for a double dissolution. When the pre-budget supply bills were presented they were threatened with rejection unless Whitlam agreed to an immediate election. Whitlam accepted the challenge, obtained a double dissolution and won the election, but only narrowly. He did not win control of the Senate.

Eighteen months later, with the Whitlam Government in even worse trouble, the Senate deferred consideration of the 1975–76 budget unless Whitlam agreed to a general election. Whitlam decided to tough it out. Supply would last until the end of November, after which government administration would be in chaos. He did investigate the possibility of borrowing from the banks to carry on the business of government, but such borrowings would certainly have been unconstitutional, and nothing came of the plan.

The Governor-General, Sir John Kerr, was in an awful dilemma. He had been advised by the Chief Justice (Sir Garfield Barwick) that he had the constitutional power to dismiss the prime minister, but such power had never been exercised by any of his predecessors. Whitlam made it clear to Kerr that he would never resign or advise an election for the House of Representatives or a double dissolution (the Senate had already given the grounds for a double dissolution), and that the only way an election could be obtained would be by his dismissal, so Kerr did just that. He dismissed Whitlam and installed Fraser, the leader of the opposition, as caretaker prime minister, on the understanding that he would obtain supply and recommend a double dissolution, though whether the Governor-General has the power to impose pre-appointment conditions on an incoming prime minister that he will tender certain advice is very doubtful.

Kerr has been much criticised for his dismissal of Whitlam, though in his defence it must be asked whether a Governor-General, faced with an apparently insoluble political confrontation which was going to result in administrative chaos, did very wrong in asking the voters what they wanted. Very clearly the voters wanted to be rid of the Whitlam Government. On the other hand, the determination of the opposition senators was weakening as public opinion moved sharply against them, and it is most unlikely that they would have held firm as social chaos developed. Whitlam would have. Besides, Kerr's plan should not have worked. It depended on Fraser being able to secure the passage of the budget through the Senate as an essential preliminary to a dissolution. Whitlam failed to tell his Senate ministers of his dismissal. On the other hand, the Liberal and National Party senators were fully aware of the situation. When the Senate met at 2 pm on 11 November 1975 the

Labor Senate Leader almost immediately moved the adoption of the budget as a matter of urgency, and to his astonishment in four minutes it was passed. Of course by now it was Fraser's budget, and Fraser had his key requirement. The Coalition easily won the election but there was unprecedented bitterness.

The other four supply-blocking incidents occurred in the states, but there have been none in the past 50 years. It is difficult to think of anything to recommend such actions, or any motive other than the desire for political power. The problem is how to dissuade upper houses from forcing premature elections without destroying themselves as effective legislatures. The New South Wales Constitution has a unique provision by which the upper house cannot reject or amend any bill dealing with 'the ordinary annual services of the government'. There are some problems with the New South Wales approach, which will be dealt with when upper houses are discussed in Chapter 8, but there is no doubt that it is totally effective in preventing the upper house from forcing a premature election.

The Victorian and South Australian parliaments have taken a different approach by adopting a partially fixed term. When their constitutions were amended to provide for four year parliamentary terms, the power of the premier to ask for an election during the first three years of a parliament were effectively limited to circumstances where the lower house had passed a vote of no confidence, or where there was a legislative deadlock between the two houses. Nothing was done directly about the blocking of supply, but it is now a much less attractive option during the first three years of a parliament. It must be assumed that any future government would adopt the Whitlam 'toughing it out' tactics, but it could not be assumed that a governor would act like Sir John Kerr. As the state drifted towards administrative chaos, the opposition would have to bear the political odium, which would be compounded if the only way there *could* be an election was for the government to pass a vote of no confidence in itself. In the fourth year of a parliament, with an election pending, an opposition scenting victory would be extremely rash to risk throwing it away by blocking supply in the Legislative Council. It seems most unlikely that any future Victorian or South Australian oppositions will block supply, no matter how unpopular the government.

There has been less progress on the federal scene. In the bitter aftermath of the 1975 dismissal of the federal government, rational debate has been difficult. Two proposals to amend the Constitution have been put forward. From the left there was a push to remove the Senate's power over money bills. This would seriously diminish the Senate as a legislature, which is of course the purpose. From the right

came the proposal that if the Senate blocked supply and forced an election for the House of Representatives, the Senate too should be dissolved. Neither proposal has the slightest chance of being adopted. Though the danger remains, for the foreseeable future the Senate is most unlikely to risk exercising its disruptive power again. The scars of 1975 are too deep. Of course, if there were a fixed term for the House of Representatives, it is almost inconceivable that the Senate would ever block supply.

The role of the head of state

There have been some extreme views expressed that the head of state has no discretion, but must do what the prime minister requires. Australian Prime Minister Gough Whitlam claimed, while in office, that the Governor-General unquestionably must act on the advice of his prime minister, with no tolerance whatever.²⁷ Imagine a prime minister who was clearly beaten in an election refusing to resign until he had faced the House, as he is certainly entitled to do. On being defeated in an immediate vote of no confidence, he asks the head of state for a dissolution and another election which, according to the extremist view, the head of state would have to grant. It is only necessary to state the proposition to reveal its absurdity. The head of state must have some discretion.

The head of state must also have considerable discretion in deciding when a government has lost the confidence of the lower house. Whom should the head of state then invite to try to form an alternative government? To whom should the head of state grant the dissolution, if one becomes inevitable after the failure of attempts to form alternative governments, for holding office during an election campaign may be a considerable advantage?

These matters will be discussed later, but it should be noted how substantial is the necessary discretion given to the head of state, whether the term of parliament is fixed or flexible.

Conclusions

How well have the lower houses of the various parliaments performed the electoral-college role? Eighteen of the twenty electoral colleges here considered use single member constituencies as the method of choosing all their members. Although the single member constituency system exaggerates swings and usually produces a decisive result, it does not always result in the government desired by a majority of

²⁷ ABC, 'This Day Tonight', 17 June 1975.

voters. The preferential voting system used in Australia shows this most clearly. Of the 22 governments chosen by the federal House of Representatives between 1946 and 1998, five would not have been the preferred choice of a majority of voters. Although the figures are not so easy to interpret in the countries without preferential voting, it seems that in at least 10 per cent of the elections which resulted in an absolute majority of seats for one party, that party would not have been the preferred choice of a majority of voters.

Nor have the election results always been decisive. There were minority governments in the UK and Canada in the 1970s, and there were occasional minority governments in the Canadian provinces. In the five Australian states using single member constituencies, the pattern of clear majorities which applied in the 1970s and 1980s suffered an abrupt change towards the end of the latter decade, and in the 1990s there were minority governments in four of these five states, with the balance of power being held by Independents. There were no attempts to stitch together post-electoral coalitions, though some policy concessions were made to particular Independents to gain their support. The election of an Independent member as Speaker was also a popular option.

What can the Australian House of Representatives learn from the other nineteen parliaments we are considering in order to improve its performance as an electoral college? The first issue is the electoral system. Single-member constituencies seem to be the best option, though the system is far from perfect and gives a much less decisive result if a multi party contest develops. It is difficult to see a better option in the other nineteen parliaments.

The Australian federal system of drawing electorate boundaries is exemplary, and nothing useful can be learned from the other nineteen parliaments. The Australian system is fair, prompt and free from political delays or interference. On the other hand, it must be acknowledged that too frequent electoral redistributions are likely to undermine the stability of representation. MPs may expend much effort in establishing close ties with their voters, only to find their electorate boundaries substantially changed, or the electorate even abolished. This tends to make the party more important than the MP, thus vastly increasing the power of the party machines.

The seven Australian parliaments are the only ones to use preferential voting. The same is true of compulsory voting. There is no evidence that preferential voting gives a more decisive electoral result, or one that better reflects the overall wishes of voters, but it is probably desirable in that it produces MPs who are preferred—or perhaps least disliked—by a majority of their voters.

The life of the Australian House of Representatives, a maximum of three years, is far too short. Only New Zealand and Queensland have a similar term. The remaining five Australian state lower houses have four year terms, and the other twelve lower houses have five years. The Australian term should be increased to at least four years as soon as possible.

The term of the Australian Parliament should also be made fixed, as it is in New South Wales. There is no justification for leaving the Australian prime minister with the power to cut short the term of the House of Representatives to suit his political advantage. The term should be cut short only if no government possessing the confidence of the House of Representatives can be formed. The term should be capable of being lengthened—as can be done in Canada and New Zealand—by a two-thirds or three-quarters majority of the House of Representatives if a national emergency made an election highly undesirable.

There is nothing to be said in favour of the Senate usurping the electoral college role of the House of Representatives. If the House of Representatives had a fixed term, the Senate's power to block supply in order to force a premature election on the House of Representatives would become unusable, for what would be the point of trying to force an election if there *could* not be one? Nor is a double dissolution a sensible way of resolving a deadlock over legislation between the two houses. These problems are discussed when the roles of upper houses are considered in Chapter 8.

The executive government

The core of the executive government is the Cabinet, though in fact the Cabinet has no legal power and its existence is not mentioned in the constitutions of any of the four countries. It holds power because it is a committee, chaired by the prime minister or premier, of ministers who collectively control the party or parties which have the confidence of the lower house, and can usually be sure of the passage through that house of any legislation it wants. Constitutionally, Cabinet exercises its power through the Privy Council (called the Executive Council in Australia and New Zealand and the Canadian provinces) which does the bidding of the Cabinet. It exercises its policy and administrative power through ministers (not all of whom are necessarily in the Cabinet) who collectively control all the machinery of government administration and who must obey Cabinet decisions or lose office. Cabinets also have such specific power over legislation as Parliament grants to the Executive or Privy Council, typically covering such matters as when or whether to proclaim an act passed by the parliament, or granting power to make delegated legislation.

Cabinet has control over all government bills, which must be approved either by the full Cabinet or by a Cabinet committee delegated the necessary power. In the smaller parliaments, where party discipline and involvement tend to be tighter, the outline of a bill is usually considered by a government party committee and approved by the full parliamentary party before being introduced into the parliament. In these parliaments one might say that, as far as legislation is concerned, there is party government rather than Cabinet government.

Even when the government parliamentary party has no formal control over Cabinet actions, prudent prime ministers or premiers will always consider carefully the views of their supporters. Mrs Thatcher has said that she would have acted more decisively to cut government expenditure but for the fear of Conservative backbencher dissent.

There are other aspects of the executive government which must be considered. How many ministers should there be? How should they be selected and removed? What are their obligations? Is it desirable that they must be members of one of the houses of parliament? Can the

executive government bypass the parliament in matters of defence and foreign affairs? Finally, there is the matter of the appointment of judges. There is supposed to be a separation of powers, but in fact judges are appointed by politicians.

Executive councils

The Privy or Executive councils, the legal source of the Cabinet's power, are established in various ways. The Canadian Constitution Act of 1867 states that the executive government and authority of and in Canada are vested in the Queen, and delegated to the Governor-General. There is also a Privy Council for Canada, to aid and advise the Governor-General in the government of Canada. The Canadian Privy Council usually has more than a hundred members. It is not only composed of current ministers but, as Privy Councillors are appointed for life, it also includes all former Cabinet ministers. There are also some special appointments such as the provincial premiers appointed in 1967 as part of the centennial celebrations. Such a body would obviously be unworkable, so it almost never meets. The decisions of Cabinet are regarded as decisions of the Privy Council. If the Privy Council does meet—and it has met only three times since 1945—it is for ceremonial purposes. The first of the three meetings was to receive the King's approval in 1947 of the marriage of his daughter Elizabeth, and the other two, in 1957 and 1959, were chaired by the Queen.

The Australian Constitution similarly provides that the executive power is exercised by the Governor-General as the Queen's representative, and that there is to be a Federal Executive Council to advise the Governor-General. The Constitution further provides that the Governor-General, with the advice of the Executive Council, decides the number of government departments, appoints and removes the bureaucracy, and appoints judges to the Commonwealth courts.

New Zealand has had an Executive Council since 1841, fifteen years before responsible government. The Council was set up by the Governor using his prerogative powers. It was not mentioned in the New Zealand Constitution Act of 1852 nor, except in passing, in its modern replacement, the Constitution Act of 1986.

The Executive Councils of Australia and New Zealand are usually presided over by the Governor-General. An official deputy is appointed, always a minister. In Australia all ministers, assistant ministers and parliamentary secretaries are made members of the Executive Council, and once appointed remain members for life. In New Zealand membership is limited to those who are 'for the time being Our responsible advisers', that is ministers. Meetings of these

Executive Councils are a formality. They are organised by the prime minister's public servants and may, with the prior approval of the Governor-General, be held in his or her absence. The quorum is three.

The situation is even easier with the Privy Council in the United Kingdom. The Cabinet is regarded as a committee of the Privy Council, so separate meetings of that body are unnecessary. Since it is impotent as a body, membership of the Privy Council is generously bestowed. There are now more than 250 Privy Councillors, who serve during the life of the Sovereign who appoints them, and for six months after. All Cabinet ministers and all appeal judges are members. The judicial committee of the Privy Council consists of those councillors who are judges, and hears appeals from certain Courts, including Courts in the colonies. The judicial committee no longer hears appeals from Canada or Australia. The Privy Council includes some Commonwealth politicians, to whom the only benefit has been the use of the prefix 'Right Honourable'.

Power of the prime minister

Prime ministers, although technically only the chairmen of the Cabinets and first among equals, have enormous power if they choose to use it. They have to hold the various factions of their parties in balance, or at least neutralised, while at the same time trying to organise things so that the next election can be won, and possibly to move the affairs of the nation in a desirable direction. They decide who will be in the ministry, they dismiss ministers they do not want,²⁸ their policy decisions prevail while they maintain dominance of Cabinet, and they have enormous powers of patronage, such as honours, awards, political promotions and government appointments. Skilful selection of a particular person for a key job is a great source of prime ministerial influence on policy. The view is widely held that it was the failure of Edward Heath to use his patronage effectively that cost him the leadership of the Conservative Party.

A prime minister usually has his own department, with some expertise in all fields, and the Cabinet administrations report to him too. Whether a prime minister uses his power ruthlessly, or instead tries to be a conciliator and consensus-seeker, depends on his personality. Whatever their personal preference, no prime minister (or leader of the

²⁸ In Australia, since 1976 a Labor prime minister wishing to dismiss a minister has had to consult the parliamentary party, the Caucus. This was formalised in 1984 by the Labor Party Conference—a non-parliamentary body, it should be noted—which gave the power to decide the fate of any minister to a committee comprising the Party Leader and Deputy Leader in each House.

opposition) can escape from a presidential role during an election campaign. The media now focus on the party leaders to an extraordinary extent, and if attempts are made to bring forward other ministers or shadow ministers during election campaigns, they are usually virtually ignored, unless one of them makes a gaffe. As far as the public is concerned, the prime minister is almost the only figure in the government's election campaign.

But a prime minister's power is not unlimited. As Norman St John-Stevas wrote, 'when things go well the prime minister can use his personal powers although he does not need to, when they go badly he needs to use them but they can no longer be invoked.'²⁹ Harold Wilson expressed it differently. 'The prime minister's task is to get a consensus of Cabinet', he wrote, 'or he cannot reasonably ask for loyalty and collective responsibility.'³⁰ Moreover, ministers have their own departments, with a great deal of expertise in their own fields—usually more than is available to the prime minister—and they may be getting advice which suggests that the prime minister's wishes are unwise or unworkable. If a minister is resisting a prime minister's wishes, the prime minister's only weapon is to bring the matter before Cabinet or a Cabinet committee but, as St John-Stevas pointed out, it is by no means certain that the prime minister's wishes will prevail. If that happens, the only remaining option for the prime minister, if he still wants to have his way, is removal of the minister, which may be very damaging politically. Besides, the minister's replacement may accept the same departmental advice.

If a prime minister wishes to have a major reshuffle of the ministry, the usual method is to ask all ministers for their resignations. Reshuffles can be used to shift poor performers to less important portfolios, or to promote the better-performing ministers. In those parties where the selection of ministers is left to the prime minister, a reshuffle can be used to promote promising backbenchers, or to put unsatisfactory ministers (or ministers the prime minister finds incompatible) out to pasture on the backbench. Of course the prime minister again has to consider the likely reaction of his party. Even the strongest prime minister cannot always do exactly what he or she would wish.

Whether dictatorial or not, prime ministers have to keep the confidence of their Cabinets, because if they are disaffected the poison soon spreads to the party as a whole. The only antidote is electoral success, but if that seems to be in doubt a coup is almost certain. The manoeuvrings that removed John Gorton in Australia in 1971, David

²⁹ *The Collected Works of Walter Bagehot*, St John-Stevas (ed.), vol. 5, 1974, p. 138.

³⁰ *New Statesman*, 5 May 1972.

Lange in New Zealand in 1989 and Margaret Thatcher in the UK in 1990 all originated in the Cabinet. Perhaps the most dramatic error of judgement occurred in Queensland in 1987 when the National Party government was in disarray as a result of the revelations of a royal commission into corruption. Premier Bjelke-Petersen dismissed three ministers for disloyalty, but this provoked a party revolt in which Bjelke-Petersen lost the leadership. The National Party, still in disarray, lost the 1989 election.

Size of the ministry

The number of ministers is usually at the discretion of the prime minister or premier, but he operates under several constraints. The size of the ministry must be sufficient to appease the political ambitions of the government party members. There must be room, where necessary, for upper house ministers and ministers representing regions. There must be sufficient ministers to provide adequate political supervision of the bureaucracy in a world where the reach of government seems to be steadily increasing. On the other hand the ministry must not be embarrassingly large. This is a problem in tiny states or provinces such as Tasmania (population 459 659) and Prince Edward Island (population 137 800). In Tasmania, in 1990, the government party had thirteen members, of whom one was premier and eight others were ministers, and after providing a Speaker, a chairman of committees and a whip, there was only one backbencher to be whipped. A somewhat similar problem arose with the Army of Oz which, according to L. Frank Baum, had four generals, four colonels, four majors, four captains and only one private.³¹

A further constraint on a prime minister or premier is that the administrative structure of government is not easy to change. Setting up new departments is expensive, with many additional high-level bureaucrats to be provided, while reductions produce surplus bureaucrats who may have security of tenure. Reorganisation of the existing structure of departments tends to be slow and cumbersome, with a plethora of inter-departmental committees to resolve demarcation disputes. Finally, an incoming prime minister or premier may have to take into account election promises made about the structure of government. The result of the pressures is that the size of the ministry has been steadily increasing in all of the four countries we are considering. In sixteen of the twenty parliaments, all ministers are members of the Cabinet. In the four national parliaments the sheer

³¹ See *Tik-Tok of Oz*, 1913, p. 17.

number of ministers is felt to make this impractical, for a Cabinet of more than twenty or so members is clumsy and inefficient, though Canada put up with this until recently, and Australia did for three years when Whitlam was prime minister.

United Kingdom

In 1901 there were twenty ministers in the UK Cabinet, and 27 other ministers not in the Cabinet. Nearly half the ministers, including the prime minister, were peers. By 1946 the number of ministers was 67, though now less than a quarter were peers, and by 2000 the ministry had grown to 87, including only fourteen peers, all non-hereditary. Over the years, except in the special circumstances of the two World Wars, the size of the Cabinet has remained relatively stable, ranging between eighteen and 22.

In the Blair Government the 22 Cabinet ministers are mostly designated as secretaries of state, though there are exceptions—the Chancellor of the Exchequer, Lord Chancellor, President of the Council, Lord Privy Seal, Chancellor of the Duchy of Lancaster, Parliamentary Secretary to the Treasury (chief whip) and Chief Secretary to the Treasury, and there is also one minister. Two of the Cabinet ministers are peers, although neither is hereditary.

The great ministerial growth has been in the number of non-Cabinet ministers, usually described either as ministers of state or parliamentary under secretaries of state. The dilemma is that effective administration not only requires that the size of Cabinet be restrained but also that all major areas of government administration be represented there. In the UK, non-Cabinet ministers may attend Cabinet when business specifically concerning their departments is concerned, but that is not the same as having an influence on general policy. There were attempts to solve this problem by making a Cabinet minister responsible for several ministers outside the Cabinet, but there were difficulties over which minister was responsible to the Commons, and doubts about whether the Cabinet ministers concerned would have the necessary information to do their jobs effectively.

Such an 'overlord' system was introduced by Winston Churchill in 1951, but it was not liked by the Commons, particularly as all three overlords were peers. It lapsed in 1953. An informal system of co-ordination of non-Cabinet ministers by selected Cabinet ministers worked rather better, but the eventual answer was to create monster departments, each under a Cabinet minister, who may have the assistance of as many as four ministers of state, and one or more parliamentary under secretaries. With such large organisations there must be mini-Cabinet meetings of the ministers concerned, and the

usefulness of a minister of state depends on the extent to which the Commons and other outside interests are prepared to accept a junior minister rather than insisting on dealing only with the Cabinet minister.

In 1901 there were seventeen ministers in the Canadian Cabinet, with three other ministers not in the Cabinet. The number of ministers had not increased by 1946, but rose steadily after that, reaching 39 by the 1990s, all in the Cabinet. Prime Minister Mulroney made some attempt to stem the flood, reducing the number to 35 in 1993, and his successor, Kim Campbell, made even bigger changes later in the same year (with an election pending) reducing the number of ministers to 25. The Liberals overwhelmingly won the election in October 1993, and the new prime minister, Jean Chrétien, took the radical step of adopting the ministerial system widely used elsewhere, with 22 ministers in Cabinet and eight secretaries of state who were part of the ministry, but not members of Cabinet. But even Chrétien could not hold the numbers down, and two years later they had increased to 25 Cabinet ministers and nine secretaries of state. Canada also uses parliamentary secretaries extensively, there normally being about 30 of them, and the prime minister rotates these positions among the backbenchers in order to give them a chance to show their quality. parliamentary secretaries may respond during question time, and may sometimes attend meetings of Cabinet committees.

In the first Australian Federal Parliament in 1901 there were seven ministers (intended to be one from each state, plus a prime minister) as provided in the Constitution. The Parliament has to authorise any increase, but has never made any real difficulty, though sometimes the prime minister has been reluctant to ask. When Alfred Deakin was prime minister in 1909 he had seven colleagues in a coalition ministry, so he did not hold a ministry himself. As prime minister he survived on a backbencher's pay supplemented by voluntary contributions from other ministers (and on the salary he received as the anonymous Australian correspondent for the London *Morning Post*). Not all prime ministers have been so modest, and the number of ministers rose to nineteen in 1946 and 29 in 2000. There were also twelve parliamentary secretaries in the latter year. The number of ministers, as a proportion of the membership of the House of Representatives, has doubled since the First Parliament.

Since 1956 there has been a Cabinet of between eleven and eighteen members, except for the Whitlam years of 1972 to 1975, when all 27 ministers were in the Cabinet. A massive and rather clumsy reorganisation in 1987 reduced the number of government departments from 28 to eighteen, of which sixteen were major departments and the other two were minor ones, retained for political reasons. (One of the

minor ministries is Veterans' Affairs. Logically it should be part of Social Security, but the veterans would be deeply offended.) In the 2000 Howard ministry all the seventeen ministers responsible for major departments are in the Cabinet, and they are assisted by junior ministers, outside the Cabinet, who are responsible for designated areas of their responsibility. For instance, the Minister for Communications, Information Technology and the Arts (a Cabinet minister) is assisted by the Minister for the Arts. These junior ministers are accountable within their specific responsibilities, and answer questions on them. There are also twelve parliamentary secretaries, eleven of them assigned to Cabinet ministers. The other one is parliamentary secretary to the Cabinet.

Australia has had the smallest ministry of modern times. After Labor won the December 1972 election, there was a delay in announcing the final result while late votes were counted and preferences distributed, so there could be no immediate meeting of the Parliamentary Labor Party. In the meantime Gough Whitlam and his deputy Lance Barnard were sworn in as a two-man ministry, sharing 27 portfolios. This is not however the smallest recorded ministry. After King William IV dismissed Lord Melbourne in 1834, the Duke of Wellington formed a one-man ministry which lasted for three weeks until Peel, the prime minister-designate, returned from a Continental holiday.

New Zealand has followed the same pattern as the other national parliaments. Eight ministers in 1901, thirteen in 1946 and 25 in 1999. New Zealand has also adopted the idea of a Cabinet (twenty members after the 1999 election) with five additional ministers outside the Cabinet, as well as one parliamentary under secretary.

Selection of the ministry

The selection of the ministry is normally in the hands of the prime minister or premier, but here again he operates under constraints. If the government is a coalition—as all the non-Labor governments have been in federal Australia since the Second World War, for instance—there will have to be negotiations to decide how many ministers the junior coalition partner will provide, and what ministries are to be available to it. The leader of the junior coalition partner will usually insist on deciding which members of his or her party will be ministers.

Of course prime ministers and premiers will be looking to select as ministers those with the most ability or promise, but they must reward their close supporters, for otherwise these people are liable to become their bitterest enemies. They must also recognise that their party will

inevitably be divided into factions, whether formal or not, and it may not be wise to exclude a faction from the ministry, for it may create frustration and divisiveness. They must also consider whether their rivals are better kept in the Cabinet, where their disruptive activities may be constrained by the discipline of Cabinet solidarity, or given the freedom of the backbenches. The problem was well illustrated by an alleged remark of President Lyndon Johnson, who had a rather earthy turn of phrase. He was asked why he did not dismiss the head of the FBI, J. Edgar Hoover. 'I would much rather have that man inside my tent,' replied Johnson, 'pissing out, than outside pissing in.'

In the Canadian and Australian federations prime ministers must try to see that all states or provinces are represented, for otherwise there will be strong local reactions. They must also see that there are sufficient women in the ministry, or there will be criticism from women's groups. Fortunately the increasing number of highly talented women in the various parliaments makes it likely they will get there on merit rather than as mere tokenism. Finally, in nearly all of the bicameral parliaments a prime minister or premier must select sufficient ministers from the upper house, for most of the surviving upper houses have successfully maintained that there must be enough ministers in those houses to reward the political efforts of their members, to increase the pool of available ministerial talent, to answer questions and to handle government legislation. Whether these reasons are still valid will be discussed later.

A prime minister may of course consult anyone he chooses. The deputy prime minister would normally be consulted, though not perhaps when Mrs Thatcher was the prime minister and Sir Geoffrey Howe her deputy. In the United Kingdom, but not in the other countries, the chief whip has an influence, particularly on the selection of junior ministers. Then there may be important support-groups outside the Parliament who have favourites.

It is all very delicate and complex and, despite the enormous power and patronage it gives to prime ministers, some of them must look with envy at parliaments where the government party does the job itself. Although the leaders would have to live with the results, they might think that at least they would be spared the trouble, and the blame. There are eight parliaments in which one or both of the major parliamentary parties elects its ministry. These parliaments are the New Zealand House of Representatives and the seven parliaments in Australia—the federal Parliament and those of the six states. In most of them the Parliamentary Labour (or Labor) Party elects the ministry by exhaustive ballot, but in Canberra and in some of the states there are formal factions.

In Canberra, for instance, the 1990 Labor election victory resulted in the 110 Labor MPs and senators being split four ways—48 right-wing faction, 31 left-wing, 21 centre-left and ten unaligned. No faction had a majority, which created opportunities for some complex deals. The first task for the faction leaders after a winning election is to divide the ministerial spoils between the factions, and then put forward their nominations for the places. There may be some negotiation with the prime minister at this stage, if the balance of the ministry is wrong: too few senators, perhaps, or not enough women, or no one from a particular state. The faction leaders sometimes agree to let a non-aligned member in, but they certainly have more difficulty in gaining preferment. There may also be problems if there is an imbalance of talent between the factions. One right-wing backbencher said that as far as he could see the only way he could be made a minister was either to join the left-wing faction or to become a woman, and he was so keen to become a minister he was seriously considering the surgical operation. He later became a minister, still a right-winger.

The results of the negotiations between the faction leaders are rubber-stamped by the Parliamentary Labor Party, the Caucus. After the surprise Labor win in the 1993 election, the Caucus effectively gave Prime Minister Keating the power to choose his own ministry. Parliamentary secretaries are chosen by the prime minister.

When in opposition in the UK the Parliamentary Labour Party elects eighteen members of the Shadow Cabinet, and participates in the election of the Leader. At least four of the elected candidates must be women. The nineteen elected members of the Shadow Cabinet must, under the rules of the parliamentary party, form the basis of an incoming Labour Cabinet, provided they have retained their seats at the General Election, but otherwise ministers are chosen by the prime minister.

In Canada there is a long tradition of having ‘regional’ ministers, though what makes a region is not clearly defined. Sometimes it has meant a province, sometimes a group of provinces—the prairies or the Atlantic, for instance—and sometimes just part of a province such as Ontario or Quebec. The ministers have a portfolio responsibility, the regional responsibility being informal but sometimes very effective. In the past regional ministers have, at different times, been responsible in their regions for dispensing patronage, for the party organisations, and for influencing government expenditure and departmental programs. The Quebec regional minister (the Quebec lieutenant as he is usually called) is particularly important. In recent years in both the Liberal and Conservative governments the regional ministers have become the dominant members of the provincial caucuses, the party meetings of the

MPs from each province. In addition to fighting for the interests of his region, both within Cabinet and directly with departments, a regional minister is expected to explain federal decisions to his region and to try to soothe any complaints.

Of course sometimes prime ministers or premiers look beyond their own party or established coalition. If a major party is in a minority but is trying to form a government, the offer of a ministry to a minor party may be an effective bait. Sometimes it can be used to induce a defection. In Queensland the National and Liberal parties had long been in coalition in government, but the coalition broke up just before the 1983 election, at which the National Party won 38.9 per cent of the vote and half of the 82 seats. The National Party premier, Sir Joh Bjelke-Petersen, offered two Liberal ex-ministers a return to the ministry if they would join the National Party. They did, and Bjelke-Petersen had his majority. (Both the Liberal renegades later went to jail for misuse of their ministerial allowances.)

There was a somewhat similar event in Newfoundland in 1971. After the election a coalition of Conservatives and the New Labrador party commanded 22 votes in the 42-member Assembly. Fifteen coalition members were made ministers and one was made Speaker, but two of the six members excluded from office deserted the coalition and joined the opposition Liberals, giving them a majority and themselves ministries.

In the early days of a hung parliament, it is usually fairly easy for a minority government to reach some sort of accommodation with those holding the balance of power, for a very early election would focus attention on the major parties at the expense of the minor parties and Independents, who would tend to be blamed for the instability. As time passes, this fear declines.

In all the parliaments, no matter what the method of selection of the ministry, the prime ministers or premiers allocate the portfolios. They may of course consult, they may have inner circles, and they may be under various pressures, but ultimately the decisions are theirs. The only ministerial post traditionally requiring a professional qualification is that of Attorney-General, who usually has to be a qualified lawyer, though this rule has been sometimes broken in the states and provinces. When the first Labor government was formed in the Australian Parliament in 1904 there were no lawyers in the Parliamentary Labor Party, so one was borrowed from the Liberals to be Attorney-General. In New Zealand, Labour Prime Minister George Forbes, who had no legal qualifications, doubled as Attorney-General between 1933 and 1935. There is no shortage of lawyers in the major political parties these days.

Ministerial membership of parliament

A minister must be a member of one of the houses of parliament. In the UK there is no legal requirement that a minister should be in either the Lords or Commons, but current political reality makes it inconceivable that any minister could long remain outside Parliament. Besides, a British prime minister has had a life peerage in his gift.

In Canada, and in the provinces, there is no constitutional requirement for a minister to be or become a member of one of the houses, but it is felt to be a political necessity. There have been 75 instances in Ottawa when ministers were appointed who were not at the time members of either house. Four subsequently became members of the Senate and the remainder stood for the House of Commons. Not all were successful. General A.G.L. McNaughton was Minister of National Defence for nine months in 1954–55, and stood for election twice, losing both times. He then resigned as a minister. The Canadian prime minister has the useful weapon of usually being able to create a vacancy by offering a compliant government party MP in a safe seat the chance to become a senator, but supposedly safe seats are sometimes lost in by-elections.

In Australia the Constitution provides that no minister of state can hold office for more than three months without being or becoming a senator or member of the House of Representatives. In the states of South Australia, Tasmania and Victoria the constitutions provide that ministers must be members of one of the houses. There is no formal requirement in the other states, except in Western Australia, where there must be at least one minister in the upper house.

The New Zealand Constitution Act of 1986 provides that no one can be appointed a minister or member of the Executive Council unless that person is a member of Parliament, but there is provision for someone to be appointed as a minister if that person was a candidate at the general election, and the minister is then given 40 days to become an MP. The reason for these arrangements is that the writs may not be returned for two weeks after an election and until the writs are returned there are no MPs. The Act also provides that ministers must vacate office within 21 days of ceasing to be MPs.

It should be noted that the requirement that a minister must be a member of one of the houses of parliament does not apply in many of the other countries which have responsible government but not the Westminster system. In the Netherlands, for instance, usually between a third and a half of the ministers are appointed from the Parliament, the remainder being specialists in the work of the ministry to which they are appointed, often civil servants or university professors. The prime

minister is traditionally chosen from the parliamentarians, though there is no constitutional requirement for this to be so. The ministers answer questions and speak to their bills in both houses of Parliament, though they may not vote or move motions in either house. This widening of the ministerial pool is a very sensible arrangement which should be seriously considered by other countries with responsible government.

Looking at the European Union countries, the ministers who are chosen from the parliaments in the Netherlands, Sweden and Luxembourg must resign from the Parliament on appointment as a minister. This is workable in parliaments which use proportional representation, but in countries which use single member constituencies the by-elections could be very embarrassing for a newly-installed government, and might even cost its majority in the lower house.

Although there is no constitutional provision in the UK, Canada or Australia to prevent a prime minister being in the upper house, it is now inconceivable. Prime ministers in the House of Lords were common in the nineteenth century, and upper house prime ministers were not unknown in Canada and New Zealand. The last prime minister to be in the House of Lords was Lord Salisbury, who retired in 1902. There was some thought that Lord Curzon might become prime minister in 1923, but King George V chose Stanley Baldwin instead. As late as 1940 Lord Halifax was seen by some as an alternative to Winston Churchill. That era is now past, although since 1963 hereditary peers have been able to renounce their titles and status for life, and to stand for the House of Commons. Lord Home used this avenue to become prime minister in 1963.

Australia is a curious exception to the rule that a prime minister must be in the lower house, though only in a minor way. When Prime Minister Holt was drowned in December 1967, the Liberal Party chose Senator Gorton as its new leader, and therefore automatically Prime Minister. Gorton's selection was possible because the death of Holt created a vacancy in a safe Liberal seat in the House of Representatives. Gorton was prime minister as a senator for three weeks until he resigned to contest the by-election. Parliament did not meet during this period.

The only other upper house prime minister this century was in New Zealand in 1925, but he lasted for only sixteen days.

One would have thought that it was also well established that the principal economic and finance minister, variously called the Chancellor of the Exchequer, Finance Minister or Treasurer, must be in the lower house, because in all the parliaments it is in the lower house that financial legislation must be initiated. New South Wales has

broken this rule, and under the Carr Labor Government the Treasurer is in the upper house, an institution he affects to despise.

Cabinet committees

One method prime ministers may use to tighten their control of Cabinet is to set up formal Cabinet committees, and to chair such of them as they choose. Margaret Thatcher was not a great believer in formal committees, and often took key decisions after consultation with a small group of 'true believers', and their decision was imposed on the Cabinet or Cabinet committees. A Cabinet colleague, Francis Pym, records a typical event:

The 1981 budget was rigidly deflationary and thus highly controversial at a time of deep recession, yet the strategy behind it was never discussed in Cabinet and was only revealed to the full Cabinet on budget day itself. One can guess the reason: the Chancellor and the prime minister concluded that the Cabinet might well insist on some changes. But that is why the Cabinet exists—to make collective decisions on important issues that face individual Departments, and thus affect the government as a whole. Collective responsibility is based on collective decision-making. Margaret Thatcher is not the first prime minister to circumvent her colleagues, nor will she be the last, but this habit is not the sign of a happy or healthy government.³²

Such concealment of the details of the budget from most of the Cabinet until the last possible moment is practised in virtually all the parliaments, though ministers are usually involved in earlier steps—the review of proposed expenditure being the most important one—which contribute to the preparation of the budget. budget secrecy is far from new. It is claimed that it began when Gladstone was Chancellor of the Exchequer under Palmerston. The two were always quarrelling, and Gladstone held his budgets back until the last moment so as to prevent Palmerston from persuading the Cabinet to alter them.

Under Blair, in 2000, there were eighteen Cabinet committees and thirteen sub-committees. These committees are a useful way of involving non-Cabinet ministers in the government administration, but it is important for the prime minister to keep in touch with what they are doing in key areas. Prime Minister Blair chaired no less than six of these committees, those on health performance and expenditure, constitutional reform, defence and overseas policy, Northern Ireland, the intelligence services, and the liaison consultative committee with the Liberal Democratic Party.

³² Francis Pym, *The Politics of Consent*, London, Hamish Hamilton, 1984, p. 18.

Until the 1993 election, won by the Liberals, all the Canadian ministers were in the Cabinet, which had 39 members under the Mulroney Government, far too many for efficient decision-making. Cabinet meetings were no more than broad political discussions, and there had to be a smaller group to supervise the administration. This was the 24-member priorities and planning committee which was the equivalent of the Cabinets in the other national parliaments. There were also two small, powerful committees for 'operations' and 'expenditure review'.

With the smaller Cabinets now being used in Canada, it is appropriate for there to be a number of committees responsible to Cabinet rather than taking over its role. In the 1997 Liberal government there are four such committees, on Economic Union, Social Union, Special Committee of Council, and Treasury Board. None are chaired by the prime minister.

If a minister is unavailable, the head of his department may attend a Cabinet committee in his place. These public servants have the unusual but perhaps appropriate title of deputy minister.

In the 1998 Howard Coalition Government in Australia there were five Cabinet committees. In a press statement, Howard said that he had decided to make more use of the committee process for matters that did not need to come to the full Cabinet other than for final endorsement. He said he had also formed a General Administrative committee to free up Cabinet meetings for major policy decisions.³³

Three of the committees were to be chaired by the prime minister—the National Security committee, the Expenditure Review committee and the Employment and Infrastructure committee. The two committees which the prime minister permitted others to chair were the Parliamentary Business committee and the General Administrative committee.

In New Zealand under the 1999 Labour government there were nine Cabinet committees and four *ad hoc* ones. The prime minister chaired the policy committee, the committee on 'closing the gaps' and the appointments and honours committee, as well as the *ad hoc* committee on intelligence and security.

Ministerial administration

Although the Cabinet can make the broad policy decisions when necessary, the detailed supervision of administration has to be left to the responsible ministers. The actual administration is in the hands of

³³ Press release by the prime minister, 24 November 1998.

public servants (civil servants in the UK) who are generally politically neutral in all the countries we are considering, though of course they have their traditions and their prejudices. As Sir Kenneth Wheare put it: 'what is really meant, perhaps, by saying that the official is not a party man is that he is not a one party man ... he offers his best services to the party in power, to the government of any party.'³⁴ Nevertheless the top appointments are in the hands of the minister, in consultation with the prime minister for important or controversial ones. There is sometimes a tendency to appoint individuals, possibly outsiders, who are thought to be sympathetic to the government's objectives. This feeling is particularly strong if an incoming government has spent a long time in opposition.

An alternative approach, sometimes used in tandem, is for ministers to appoint policy-makers to their personal staffs. Unfortunately, after a party has spent a prolonged period in opposition, such individuals tend to be zealots often with no experience or understanding of public administration. The disastrous administrative experiences in Australia of the Whitlam Labor Government, which gained office in 1972 after the Labor Party had been 23 years in opposition, are a fascinating case study.

Although the loyalty of public servants to their (temporary) political masters is rarely in question, there is no doubt that their primary loyalty is to their own service. In the career of a public servant, the senior public servant in a department is much more important to his juniors than is the minister. Departments usually have their own traditions and their own agenda, and their assessment of a minister is largely based on how successful the minister is in implementing their agenda, and obtaining the necessary funds from Cabinet. Their agenda will always include increased power for the department, and almost never the reduction of staff or the shedding of responsibilities. If the minister has his own priorities, his ideas will be loyally investigated, but there is nothing so slow moving as a public servant who thinks the minister is making a mistake. One reforming minister in the UK claimed that 'the greatest danger for a radical minister is to get too much going in his department. Because, you see, departments are resistant, departments know they last and you don't.'³⁵

One way of circumventing public service delays, and at the same time reducing effective accountability to parliament, is to set up non-departmental agencies. These are used for many purposes: quasi-judicial functions, such as conciliation and arbitration of industrial

³⁴ K.C. Wheare, *Government by Committee*, London, Clarendon Press, 1955, p. 27.

³⁵ R.H.S. Crossman, *Inside View*, London, Jonathan Cape, 1972, p. 74.

disputes, adjudication of disputes arising out of departmental administration or disputes over human rights and so on; policy advice; scientific and cultural activities; and business enterprises, known by many names, such as nationalised industries and crown corporations. They are usually statutory bodies—set up by an act of parliament—whereas government departments are established by order of the Privy or Executive Council. From the point of view of ministerial responsibility to parliament it would be preferable to keep all the agencies within the departmental structure, but the desire to remove some activities from direct political control has led to the proliferation of non-departmental agencies. There is an extraordinary range of statutory authorities. They have even been found inside departments, and departmental public servants have been statutory authorities. The level of official ministerial control is laid down in the relevant act, and may range from the right to give general directions or to give directions only in certain specified matters, to no mention of the matter in the act, or a specific prohibition in the act against any ministerial intervention. Nevertheless the minister retains the power of appointment and replacement (subject to the act) and weak managements are sometimes unnecessarily compliant with ministerial wishes. Agencies know where their funding comes from, and may tend to pursue ministerial enemies while neglecting the transgressions of ministerial friends.

Parliamentary control is patchy. Some non-departmental agencies are not even required by their Act to report to parliament, and a substantial number of government bodies are neither departments nor statutory authorities. As Professor Sawyer put it:

legislatures are free to make whatever provision they choose in statutes establishing and regulating quangos, even to engaging in low comedy like that of the Queensland parliament, which created a 'Fish Board' of four members and declared it to be a 'Corporation Sole'.³⁶

Parliament does have the power to demand that any directions given by the minister should be tabled in the parliament, and to question the agency through the minister. If the agency receives public funds, questions may be asked during estimates debates and possibly by the Public Accounts Committee. Select or standing committees may investigate its activities, or the opposition may raise its problems during debates. But such supervision is sporadic, and unless there has been a widely publicised administrative fiasco the minister can usually head off any serious investigation, with the support of the government party.

³⁶ Geoffrey Sawyer, "Ministerial Responsibility and Quangos", *Australian Journal of Public Administration*, vol. 42, no. 1, March 1983.

In general, these non-departmental agencies are a great source of unsupervised executive power.

Governments sometimes acquire shares in public companies, usually all shares, sometimes just a controlling majority. In 1989 the Australian Senate Standing Committee on Finance and Public Administration identified 208 government controlled companies, 55 associated companies, and Commonwealth involvement in 58 companies limited by guarantee and 67 incorporated associations. Even then, the committee was not sure that it had identified all the companies in which the government had an interest.

Ministers have substantial power and patronage at their disposal in making appointments to the boards of such companies, but their power of direction is limited by the responsibility of the board under company law. A special case sometimes occurs when a government business is privatised. Although the government must keep out of the day-to-day running of the privatised company—otherwise the privatisation would be a farce—circumstances may well arise when its behaviour needs to be controlled in the interests of the community, such as when a strategic asset seems likely to fall under foreign ownership or control, or when a company is contemplating a change of direction which would have damaging social consequences. A technique which has been used is for the government to retain a ‘golden share’, whose terms of issue are set out either in special legislation or in the company’s articles of association. Typical examples, from United Kingdom and New Zealand experience, are the right to determine the policy of the corporation, and the right to veto changes to the articles of association. The power to use the golden share rests with the government. parliament is not consulted.

The executive government by-passing the parliament

Defence and Foreign Affairs are two important areas in which parliament has tamely acquiesced in the Cabinet continuing to exercise powers which traditionally were held by the sovereign and Privy Council, but which the development of responsible government should have rendered obsolete.

Defence

There can be little doubt that the decision to declare war, or to order military forces to start fighting, is the most serious a nation can take. Yet the decision is made by the Executive. Except in Canada, there is no statutory need for the approval of the legislature. Sometimes, but by no means always, the legislature is asked to approve the decision, but

this is often after substantial military risks have been taken, and funds committed far in excess of those voted by parliament.

The Gulf War is a good example. Iraq occupied Kuwait on 2 August 1990 and the UN Security Council promptly imposed sanctions on Iraq, and later authorised the use of force to implement the sanctions. Britain sent ground, air and naval forces in support of both objectives, and Mrs Thatcher refused to rule out the use of defensive force even if not authorised by the Security Council. The House of Commons was in summer recess, and it was more than a month before the House met to consider the matter. This meeting was not initiated by the government, but was held at the request of the leader of the opposition. The actions of the government were then overwhelmingly supported. In late November the Security Council authorised the use of 'all necessary means' to force Iraq to withdraw from Kuwait if it had not done so by 15 January, and this was debated by the House twelve days later. The government was again overwhelmingly supported, as it was in a further debate of 15 January, the day hostilities began. (All three votes were technically on motions to adjourn the House, but no one was in any doubt about the real issue.)

Australia made the decision in August 1990 to commit three ships to the Gulf blockading force, in advance of the UN Security Council decision. The decision to commit the naval force was not even made by the Cabinet, it was made by the prime minister and a few of his Cabinet colleagues. These ships were engaged in blockade duties almost immediately, and in active war operations from 15 January. On 21 and 22 January Parliament debated the issue, and each house passed a resolution in favour of the commitment—a week after the fighting started, though the commencement date had been known for more than six weeks. The Parliament would not have been recalled even then but for the fact that the procedures of the Senate allow for its recall at the request of a majority of senators, and this had been done. Prime Minister Hawke, not prepared to have the Senate get all the publicity, recalled the House of Representatives too.

Of course a parliament has other methods of disciplining a government which is fighting an unwanted war. The lower house could dismiss the government, or the parliament could refuse to pass the necessary appropriations or reject bills or regulations concerned with the war. Party discipline would prevent the former, and although the House of Lords and the Canadian and Australian Senates *could* obstruct any legislative actions of the government it is inconceivable that they would do so in such circumstances, for the victims would be the country's servicemen on active duty, obeying government orders.

It is certainly true that parliament can have no useful role in the control of military operations. This is best left to a small group, whether called a War Cabinet or not, and the prime minister must be its leader. The Falklands campaign was a superb example of such a system working well. But although parliament must not attempt to interfere in the detailed direction of military operations, it must insist that an executive government which is responsible to it must seek its approval before committing the nation to war or putting its armed services in a position where involvement in war is likely. Of course if a surprise attack is launched, a Pearl Harbor for example, the government would have to take the necessary action, but it must also seek parliamentary approval as soon as practicable. If this is not done, responsible government is meaningless.

Canada is the only one of the four countries to have taken the appropriate steps. The National Defence Act authorises the government to commit the armed forces to active service, and provides that parliament must meet within ten days of this power being exercised. The Emergencies Act provides that the declaration of an emergency (a crisis in public welfare or in law and order, or war) is effective the day it is issued, but a motion to confirm the declaration must be introduced into each house within seven sitting days, and there are provisions on the length of the emergency, and provisions that all orders and regulations made under the Act must be introduced into each house within two days of being issued.

In the case of the Gulf War, the government moved a motion in the House of Commons on 24 September 1990, condemning the Iraqi invasion of Kuwait and supporting the UN measures against it. On 27 November the House of Commons voted to support armed intervention by UN forces, to which Canada had made a contribution. On 15 January 1991, the day the ultimatum to Iraq expired, the House of Commons was recalled to debate a government motion reaffirming support for armed intervention by the UN force. The Parliament was thus involved, and gave its prompt approval to every step taken by the government.

Foreign Affairs

The executive government must be responsible for the day-to-day conduct of foreign affairs, but the parliament must be involved if the government enters into long-term international commitments; this involvement must include the negotiation of the treaty, with the states or provinces involved if their rights would be affected, as well as the final ratification of the treaty. There are an increasing number of these international commitments, on issues such as the International Labour Organisation and the United Nations conventions on human rights,

environmental standards, and trade. Certainly the government must negotiate and approve the signing of international treaties, but there is no reason, in administration or logic, why the parliament should not be involved in the negotiation of treaties and why the ratification of such treaties should not be made by the parliament rather than the government. This is not done in any of the four countries. Parliament will of course have to pass any legislation which is necessary to implement treaties, but treaties often give substantial power or responsibilities to the government without any necessity for legislation.

The Australian High Court has held that as long as there is a bona fide treaty the federal Parliament has the legislative power to implement that treaty, regardless of the effect on the powers of the states. Moreover, it used to be held that a treaty does not have any local effect until it is incorporated by statute, but treaties are having an increasing effect on the interpretation of local law. In Australia, for instance, the courts assume that the Parliament will intend to act in accordance with Australia's obligations under international law when it enacts legislation. In the famous *Teoh* case in 1995 the High Court held that ratification of a treaty gave rise to the 'legitimate expectation' that the government would act consistently with the terms of the treaty even if those terms had not been legislated into Australian domestic law.

To avoid this confusion, action should be taken as a matter of course to pass an Act to bring the wording of a ratified treaty on such matters as human rights into Australian domestic law. If Australia is not prepared to accept the obligations of such a treaty it should not be ratified in the first place, or if it has been ratified Australia should withdraw its ratification, or at the least declare some reservations.

By no means all international agreements are 'treaties' subject to ratification. It only applies when a formal requirement for it is written into the treaty. This is normally done when a treaty has significant political content or when national legislation would be needed to implement it.

In the UK new treaties subject to ratification 'lie upon the Table' in each house for 21 days before ratification, though the government has the discretion to waive this rule if it thinks this desirable. This 'Ponsonby' rule began in 1924, was then abandoned but restored in 1929, and since 1997 explanatory memoranda have accompanied all treaties that are laid before the Parliament. The explanatory memorandum describes the contents of the treaty, and then goes on to list the arguments for and against the UK becoming party to it.

Ponsonby's 1924 announcement included the undertaking that 'if there is a formal demand for discussion forwarded through the usual channels from the opposition or any other party, time will be found for

the discussion of the treaty in question.' If the opposition front bench does not make such a request, a backbencher may be able to secure a debate in private members' time. As a result of these provisions, some controversial treaties are debated, but many are not, and in any case the decision on ratification remains with the government, not the Parliament. Some treaties have an express requirement for parliamentary approval, and these of course cannot be ratified by the government without such approval, but such treaties are rare.

In Canada the provinces are actively involved with the federal government in treaty negotiation because, under the Canadian Constitution, the provinces have powers with which the federal government cannot interfere. If a proposed international treaty deals with such a matter, a provincial official or minister may head the negotiating delegation. The federal Parliament has no formal rights in treaty negotiation or ratification, but the practice has developed for the government to move resolutions in each house to seek approval for ratification of the most important treaties. Sometimes the resolution includes referral to a committee and a report from it before the vote on ratification is taken. The committees most likely to be involved are the Standing Committee on External Affairs and International Trade and the Standing Committee on Aboriginal Affairs and Northern Development. Committees may also be consulted by a minister during the negotiating phase. The decisions on ratification, and whether the Parliament should be consulted at any stage, still rest with the government.

It is also accepted in Canada that the provinces are able to enter into international agreements of less than treaty status, usually cultural agreements. Quebec has entered into several agreements with France, and the Canadian provinces which border the US may enter into cultural agreements with their neighbouring states.

In Australia, Prime Minister Menzies announced in 1961 that the government would present to both houses the texts of treaties which had been signed, or to which accession was contemplated, but this promise began to lapse by the late 1970s. Until that time the approval of the federal Parliament was normally sought for the ratification of treaties when federal legislation would be needed to implement them, but this too began to lapse. Treaties began to be tabled in bulk every six months, including many which had already been signed or ratified. The government began to view the negotiation and ratification of treaties to be purely an executive function, an attitude which was clearly expressed by the Labor Minister for Foreign Affairs and Trade, Senator Evans, who said in 1994 that 'tabling treaties is not intended to be an

exercise in ascertaining Parliament's views about whether or not Australia should become a party.'

In 1996 the new coalition government went some of the way to solving the problem, by setting up a Joint Standing Committee (one with members from each house) to consider the possible effects of all treaties on state, territory and federal laws, and the method of implementing the treaties. Treaties must be tabled in Parliament at least fifteen sitting days before the government takes action, except in cases of urgency. Fifteen sitting days means an elapsed time of between one and three months, and the government has agreed that the fifteen sitting days could probably be increased if really necessary. Each treaty must be accompanied by a 'National Interest Analysis', which is similar to an explanatory memorandum, and describes the impact on Australian citizens, the cost of implementing the treaty and any necessary changes to Commonwealth or state/territory law. When tabled in Parliament, the text of proposed treaties and the draft National Interest Analysis are automatically referred to the Treaties Committee for review. The committee invites comments from anyone with an interest in the subject matter of the proposed treaty, and conducts public hearings.

The federal government consults with state and territory governments during the negotiation of proposed treaties. There is a Treaties Council (comprising the prime minister, premiers and chief ministers) and a commonwealth-state-territory Standing Committee on Treaties. The Treaties Council has met only once, in 1997, and it is said that the meeting was very brief, being conducted in a lift while the prime minister, premiers and chief ministers were moving to their lunch room. The Standing Committee on Treaties, on the other hand, does some useful work, but too many of the premiers do not see why their parliaments should be involved, and seem to think that all the power that is needed is to be able to veto the ratification of a treaty, without having any involvement in its development. And they are most unlikely ever to be given such a power.

The Joint Standing Committee on Treaties writes to all state and territory governments seeking their views on treaties it is considering. The Standing Committee also seeks the views of the state parliaments, but this has little effect because only Victoria has a committee dealing with treaties, and without such a committee the request from the Joint Standing Committee on Treaties is lost among all the other paperwork.

Although this is a considerable improvement on what went on before, and the government has occasionally accepted recommendations of the committee, there are still problems. The National Interest Analyses need improvement, being made more analytical rather than simply describing the terms of the proposed

treaty. And the state parliaments need to set up proper arrangements for considering proposed treaties when they are forwarded to them by the Joint Standing Committee on treaties.

Except in the case of minority governments, the government will always have a majority on the Joint Standing Committee on Treaties, and party discipline being what it is, the majority is unlikely to make recommendations which would seriously upset the government. In any case, there is no federal parliamentary vote on the ratification of treaties, and the input of the states and territories is advisory only. The federal government still makes the decision on ratification, and may do so before the treaty has been considered by the Joint Standing Committee.

New Zealand partly followed the Australian example in the following year. New Zealand signs between 30 and 40 treaties a year, and about a third are referred to the Foreign Affairs, Defence and Trade Select Committee, accompanied by a National Interest Analysis, modelled on the similar documents presented to the Australian Parliament. The select committee may refer the treaty to another select committee if it thinks that is appropriate. The Minister for Foreign Affairs said in 1998 that 'the government will not ratify a treaty until the select committee has reported back to the House [with a copy of the treaty and the National Interest Analysis], or 35 days have elapsed since the treaty was tabled.' But the final decision on ratification still rests with the government.

It is true that it is well established, in both legal and constitutional practice based on the sovereignty of Parliament, that international agreements, even when ratified, have no *internal* legal effect unless Parliament has transformed their provisions into domestic law, but the effects of an international agreement may nevertheless be enormous. Australia has an additional problem because of the possible effects of international agreements on the Commonwealth Constitution. The Constitution divides political powers between the Commonwealth and the states, and amendments to the Constitution are supposed to be made only by national referendum. However, the High Court has ruled that if the federal government enters, in good faith, into an international treaty which obliges it to do certain things within Australia, then the federal Parliament is entitled to the necessary power to implement the treaty even though it is denied that power by the Constitution. There are limits to this power. Any laws passed by the parliament under such a power must do no more than give effect to the treaty or agreement, and must not breach express or implied limitations in the Constitution. Substantial changes can nevertheless be made, and such amendment of

the Constitution by the government without the formal approval of the Parliament or the people is a gross anomaly.

Executive federalism

Another method by which a government makes laws which effectively bypass the parliament occurs in the federations of Canada and Australia. The Canadians call the system 'executive federalism', by which the governments in Ottawa or Canberra reach an agreement with the governments of the provinces or states, and then present a bill to the various parliaments with the warning that the bill must be passed unaltered, otherwise the whole agreement will be wrecked. Though sometimes muttering darkly, the parliaments agree.

In Australia, the federal and state parliaments do not even have the chance to consider one important area of government finance, its borrowing. By a 1927 constitutional amendment, power over such borrowing was given to a Loan Council made up of the members of the federal and state governments.

It can be seen that the various parliaments have yielded, had taken away, or failed to claim, a large part of their legislative responsibilities. The Cabinet is the winner. The loser is responsible government.

Obligations of ministers

Membership of the ministry imposes certain obligations. The ministry must maintain a solid profile, expressed in rather cynical form by Lord Melbourne after Cabinet discussion of the corn laws in 1841:

Bye the bye, there is one thing we haven't agreed on, which is, what we are to say. Is it to make our corn dearer or cheaper, or to make the price steady? I don't care which, but we had better all be in the same story.

The advice the Executive or Privy Council gives to the head of state must be unanimous. Ministers should not criticise the actions of other ministers or express private views or speak about a ministerial colleague's portfolio without first consulting that colleague, must loyally support any Cabinet decisions, must not publicly disassociate themselves from any government decision, and must not announce a major new policy in their own area of responsibility without prior Cabinet approval. If a minister does so, Cabinet must either endorse the new policy or the minister must resign.

Of course ministers do sometimes break these rules. What action is taken depends on the prime minister, but something should be done, for a Cabinet cannot be publicly bickering and remain effective. How soon the prime minister takes action depends both on his personality and the political standing of the offending minister. Much more common are

unattributable 'leaks', information passed to the news media by the minister or his staff. Such leaks are always self-serving, either in terms of publicity for the minister, or damage to his rivals, or publicity for policies the minister is trying to sell to Cabinet. Such leaks are difficult to control, for proof of the culprit's identity is very difficult, though there may be deep suspicions.

In Britain there have been at least two occasions when the principle of Cabinet solidarity has been breached. The Wilson Labour Government permitted seven dissenting Cabinet ministers to campaign outside Parliament against the Labour Party line in the referendum on the terms of British membership of the EEC, though a junior minister, Eric Heffer, was forced to resign for speaking against the terms in the House of Commons. Cabinet ministers were again openly campaigning against each other in 1977 on the method of election to the European Parliament. These are the only modern examples, but there were earlier ones. Four ministers joined the National government in 1931 on condition that they could dissent on tariff policy. The revised Prayer Book in 1928, votes for women before the First World War and the secret ballot in the nineteenth century were all matters on which ministers could vote as they wished. Labour Cabinet ministers have also voted in the party National Executive Committee against policies decided by Cabinets of which they were members, and from which they did not resign. James Callaghan summed up the Labour attitude when he said that: 'I certainly think that the doctrine [of collective ministerial responsibility] should apply, except in cases where I announce it does not.'⁷

In Australia the Liberal and National³⁷ Party coalition governments sometimes have difficulty in presenting a united front. National Party leaders have several times openly criticised Cabinet policy. McEwen attacked the 1967 decision not to devalue the currency, and his successor Doug Anthony did the same in 1971. No action was taken by the prime minister against either. In the 1999 referendum on whether Australia should become a republic the coalition government did not take a stance, although Prime Minister Howard was openly opposed. Ministers could campaign on either side, and sometimes came into angry conflict with each other.

Labor ministers have always been permitted to speak at party conferences, and can if they wish challenge Cabinet decisions there. During the 1972–75 Whitlam Government, ministers were entitled to speak on any subject at meetings of the parliamentary party (the

³⁷ It was known as the Country Party until May 1975 when the name was changed to National Country Party. The party became the National Party in October 1982.

caucus). A minister defeated in Cabinet could take his case to the caucus and try to organise a reversal. Great confusion and acrimony resulted. The next Labor government, that of Hawke, elected in 1983, was much more tightly disciplined, and ministers did not take part in debates in caucus, except on matters which concerned their ministerial responsibilities. They did, however, retain their right to have frank discussions at meetings of their factions, including the right to criticise Cabinet decisions.

In New Zealand both National and Labour Party ministers may speak frankly at their caucus meetings, sometimes breaching Cabinet solidarity in the process, but in practice they do not often speak outside their ministerial responsibilities. In the National Party government elected in 1990 Winston Peters was the sole Maori in the Cabinet. He seemed to think that this gave him the right to criticise the policies of his colleagues, particularly the economic policy. Peters had substantial community support, not only among the Maoris, and Prime Minister Bolger took some time to discipline him. He was eventually dismissed in October 1991. He left the Nationals and formed his own party, called the New Zealand First Party. He held the balance of power after the 1996 election, and joined in a coalition with the Nationals, being given the post of Treasurer. He lasted rather longer this time, but was eventually dismissed again, this time for walking out of a Cabinet meeting.

Dismissals of ministers

Apart from being shifted by the prime minister, ministers may of course lose office by death, loss of their parliamentary seats, resignation or dismissal. Dismissals of ministers are rare. Ministers are usually given the option of resignation, which they prefer to take. Since 1970, although many ministers resigned under pressure or lost office in a reshuffle, the only two actual dismissals in the UK were those of Barbara Castle in 1976, when she refused to resign voluntarily in order to permit the incoming prime minister (Callaghan) to reorganise his Cabinet; and Keith Speed, the Parliamentary Under-Secretary of State for the Royal Navy, who was dismissed in 1981 for publicly criticising cuts in the Defence estimates. (In fact the cuts would have destroyed the aircraft-carrier and amphibious strength of the Royal Navy, but fortunately had not taken effect before the Falklands War broke out in the following year. The cuts were later reversed.)

There have been no dismissals in Ottawa, but they have been fairly common in Australia and New Zealand. Two Australian ministers were dismissed by Whitlam in 1975. Clyde Cameron refused to resign when

he was requested to do so, in order to shift him to a lesser portfolio, so he was dismissed. He then accepted the lesser portfolio. The deputy prime minister, Jim Cairns, was dismissed for misleading the Parliament, and also because one of his staff had a conflict of interest. Whitlam himself was dismissed by the Governor-General later in the year for refusing to ask for an election when he was unable to obtain supply from the Senate. In 1978 Malcolm Fraser dismissed Senator Withers as Minister for Administrative Services because he committed 'an impropriety'. Actually what he did was to suggest a name for an electorate to a royal commission inquiring into a recent electoral redistribution in Queensland. Withers was undoubtedly unlucky, but Fraser was anxious to preserve an image of ministerial integrity after the turmoil of the Whitlam years. There was another dismissal, though it was not strictly a ministerial dismissal. Senator Sheil had been named as Minister for Veterans' Affairs in 1977, but he made some favourable statements about apartheid in South Africa which were contrary to government policy, and he was dismissed before being sworn in.

There have been six ministerial dismissals in New Zealand since 1970. In 1988 the conflict over economic policy between Lange and his reformist finance minister, Roger Douglas, was coming to a head. In November Lange dismissed a Douglas supporter, Richard Prebble, the Minister for State-Owned Enterprises, for public disloyalty. Prebble had claimed that Lange was irrational and dictatorial, and that he was acting unconstitutionally. Douglas himself was dismissed a few weeks later. Two other dismissals involved Winston Peters. The final dismissal was of the Immigration Minister, Tuaraki John Delamere, a Maori who was found to have been authorising residency papers for Chinese migrants in exchange for their investment in Maori businesses or land. This was a considerable embarrassment for the ruling National Party government, for it occurred shortly before polling day in the 1999 election, but it actually made little difference, for the Nationals were heading for defeat anyway.

Resignations of ministers

Resignations are much more common than dismissals. Some resignations are genuinely voluntary, on grounds such as age or ill-health, or because the minister wishes to pursue business interests or accept an interesting non-parliamentary appointment. Such resignations are common in the UK, with no less than 59 between 1970 and 2000. Of course some resignations are forced by the prime minister, the alternative being dismissal. Very occasionally proffered resignations are refused. In deciding what to do about resignations prime ministers

have to consider a number of factors: the image they wish their government to project, and whether the behaviour of the minister will damage it; their own standards of acceptable ministerial behaviour; party support for the erring minister, and whether removal would be more damaging than retention; and the professional competence of the minister.

Different prime ministers view these factors differently. The only offence from which there seems no comeback is the deliberate misleading of the parliament. The problem was summed up in the removal of British War Minister Profumo, who had to go ostensibly because he misled the House of Commons, but actually because of the political damage caused by the revelation of his association with a prostitute called Christine Keeler, who was also being used by the Soviet Naval Attaché. A contemporary poem ran:

Now see what you've done, said Christine.
You've upset the whole party machine.
To lie in the nude is not at all rude,
But to lie in the House is obscene.

The problem of ministerial responsibility, and whether the minister has a duty to resign if there has been some mistake made by a subordinate, was dealt with in the 1976 report of the Royal Commission on Australian Government Administration: 'There is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates regardless of his own involvement, or to tender his resignation in every case where fault is found.' The best known ministerial resignation over departmental failings was as a result of the Crichton Downs affair in England, but it has been claimed that the resignation of the minister, Sir Thomas Dugdale, was actually because of disagreement with government policy. Ministers must answer to Parliament for what their departments have done, and if mistakes have been made they must reveal what action has been taken against the offenders and to prevent a repetition. But these days that is where ministerial responsibility ends, unless the minister wants to go.

The removal of a minister with its implied admission of a ministerial mistake may be more politically damaging for a government than the mistake itself. In fact since 1970 in the four countries we are considering only four ministers have resigned directly as the result of the shortcomings of their department. Three were in the UK, where the Foreign Secretary, Lord Carrington, the Lord Privy Seal and a minister of state, resigned because of the bad advice given by the Foreign Office on the events leading up to the Argentinian occupation of the Falklands. This seems extreme, for clear and timely intelligence assessments have

never been one of the strong points of the Foreign Office. Besides, the performance of the Defence Minister, John Nott (who offered to resign but was kept on), was very much worse. In Canada, the Minister for Fisheries and Oceans, John Fraser, in 1985 resigned from the Mulroney Conservative Government over a controversy surrounding the sale of tainted cans of tuna.

Of course, if a minister or his department are not performing well, there may be embarrassing pressure applied by questioning and criticism in the House, and that may result in the prime minister either moving the minister to another portfolio or sending him to the backbench. Ministers cannot deliberately distance themselves from decisions taken in their departments, though some try. If a minister is patently incompetent, or not taking the necessary action to see that administrative mistakes are corrected, then he may have to go. But whether he goes or not will depend of a weighing of the political costs and benefits. Such removals are very rare in New Zealand, where it is almost unknown for a minister to be sacked for mere incompetence. (In fact it has happened only once in the past 30 years, in 1978.)

Censure motions have not been effective in causing the removal of a minister. There have been no such censure motions carried in the lower houses of any of the four countries in modern times. It is true that the Australian Senate, which is not normally controlled by the government, has several times passed motions of censure of Senate ministers, but there has been no result. On one occasion the House of Representatives immediately passed a vote of confidence in the minister, on party lines. On the other occasions the censure motion was simply ignored. There can be no doubt that ministers depend for their survival on the lower house, and the censure of the Senate, though perhaps of interest, has no political effect.

Resignations over the collective responsibility of Cabinet

The collective responsibility of Cabinet requires that a minister must resign if he or she cannot accept the decisions or policy of the Cabinet or prime minister. The most dramatic resignations have occurred in the UK. They are the most numerous, too, for there have been no less than seventeen such resignations between 1970 and 2000 over issues such as entry into the EEC, Northern Ireland policy, single-parent policy, attitude to the European Union, agricultural policy and dissatisfaction with the prime minister. Four of these resignations were very dramatic. In 1985 the Secretary of State for Defence, Michael Heseltine, was in dispute with the prime minister over the method of providing additional capital for the Westland Helicopter Company, and he resigned in January 1986. Prime Minister Thatcher weathered the storm over her

handling of this affair, as she did in 1989 when the Chancellor of the Exchequer, Nigel Lawson, resigned because he found Cabinet policy (in reality, Mrs Thatcher's policy) unacceptable. In the following year the Minister for Trade, Nicholas Ridley, wrote an article in *The Spectator* saying that Germany was seeking to dominate a federal Europe, and that surrendering British sovereignty to the European Union was little better than handing it over to Hitler. This was completely contrary to Cabinet policy, and despite being a long-time supporter of Mrs Thatcher, he had to go. The fourth such resignation, that of her deputy, Sir Geoffrey Howe, later in the year, on her attitude to the European Union, was fatal for her and she was deposed. In 1995 her successor, John Major, was challenged for the leadership by the Secretary of State for Wales, John Redwood. Redwood resigned from the ministry in order to conduct his campaign against Major, but he was easily beaten.

In Canada the resignations have been much less dramatic than in Britain. There have been six such resignations over Cabinet policy since 1970, one during the 1968–72 and two during the 1974–79 Trudeau Liberal governments, two under Mulroney between 1984 and 1993, and one under Chrétien in 1996. Eric Kierans resigned in 1971 because of disagreements with the government's economic policy, Jean Marchand in 1976 over the handling of a strike by air-traffic controllers, James Richardson in the same year because he opposed the official language policy, Suzanne Blais-Grenier after publicly criticising the government for permitting the closure of a Montreal oil refinery, Lucien Bouchard because of a proposal to amend the Meech Lake Accord, and Sheila Copps, the deputy prime minister, in 1996 because of a broken campaign promise. She resigned her seat too, but was re-elected in a by-election.

Malcolm Fraser resigned as Australian Minister for Defence in 1971 because Prime Minister Gorton became involved in a dispute between Fraser and the Army. This resignation caused a challenge to Gorton's leadership, and Gorton was replaced as prime minister in a coup by William McMahon in March 1971. The Parliamentary Liberal Party very unwisely elected Gorton as Deputy Leader. As Gorton was deeply resentful of McMahon and some of his collaborators, the situation was very unstable. McMahon's opportunity came a few months later, when Gorton wrote a series of newspaper articles on his political contemporaries, including Cabinet colleagues. He also referred to the damage caused by Cabinet leaks, which was clearly aimed at the prime minister, who was not known as 'Billy the Leak' for nothing. McMahon had his grounds, and required Gorton to resign. In 1977 the Attorney-General, Robert Ellicott, resigned because he considered

Cabinet decisions were compromising his legal independence as the First Law Officer. In 1979 Eric Robinson, the Minister for Finance, resigned because he was unable to give Prime Minister Fraser his unqualified support, but reconsidered his position and rejoined the ministry four days later. Andrew Peacock resigned in 1981 because he found the level of interference by Fraser unacceptable. In 1989, during the Hawke Labor Government, the Minister for Telecommunications and Aviation Support resigned because he opposed a Cabinet decision to build a third runway at Sydney Airport.

In New Zealand in 1982 Derek Quigley publicly criticised the National Party Cabinet for excessive intervention in the economy. Prime Minister Muldoon offered Quigley the alternatives of a public apology to his Cabinet colleagues, or resignation. He resigned. In 1997 Christine Fletcher resigned because of concern over Prime Minister Bolger's leadership.

Resignations for personal errors

Since 1970 there have been a number of resignations of ministers for personal errors or misjudgements associated with their ministerial offices. In the UK in 1986 Leon Brittan directed the selective leaking of parts of a letter from the Solicitor-General in order to discredit and force the resignation of a colleague, Michael Heseltine, during the Westland helicopter affair, and Edwina Currie resigned in 1989 after making some remarks about the risk of salmonella infection in eggs which infuriated the egg producers and many of her parliamentary colleagues. She resigned, she said, because it was the best course in all the circumstances. She did not retract or apologise for her remarks about eggs.

In Canada under Mulroney there were three such ministerial resignations, two (in 1986 and 1987) because of conflicts of interest, and the other in 1985 for an alleged violation of the Canadian Elections Act. In 1996, under the Liberal government of Jean Chrétien, the Defence Minister, David Colonnade, resigned because of the impending release of a letter he had written to the Immigration and Refugee Board on behalf of a constituent, a letter which was in breach of the secret ethical guidelines for ministers. Although he accepted the resignation, Chrétien said that Colonnade would return to the Cabinet, though he did not say when. In 1998 the Solicitor-General, Andy Scott, resigned because of 'a personal error'.

In Australia there have been seven such ministerial resignations, one during the 1972–75 Whitlam Labor Government (for misleading the Parliament), one during the 1975–83 Fraser Coalition Government (for failing to take proper action against a minister who was caught trying to

smuggle a TV set through customs) and two during the Hawke Labor Government (one for breaching Cabinet confidentiality, and the other for misleading the Parliament). In the Keating government in 1993 Minister Ros Kelly took control in her office of a thirty million dollar program intended to provide recreational facilities, and used it for blatantly electioneering purposes. When asked by the Auditor-General for details of the program, she said they had not been kept. Proposals, she said, had been entered on a 'great big whiteboard' in her office, and were erased after a decision had been made. She eventually resigned, defiant to the end. In the first Howard Government the Assistant Treasurer James Short, and the Treasurer's Parliamentary Secretary resigned because of a conflict of interest when they made administrative decisions concerning companies in which they held shares. In 1998 the Minister for Administrative Services resigned as a result of his inadequate supervision of the abuse of travel allowances by his ministerial colleagues.

There has been only one such resignation since 1970 in New Zealand, though in 1956 a minister was criticised for carrying on a business as an importer while at the same time being the minister responsible for import licensing. He offered to resign, but instead was transferred to a different ministry. In 1996 Denis Marshall resigned as Minister for Conservation because of the tragic mishandling of an incident at Cave Creek.

Resignations because of unacceptable personal behaviour

Ministers may also be forced to resign because of revelations of unacceptable personal behaviour, not related to their ministerial responsibilities. Conservative ministers in the UK have a surprising propensity for being involved in sex scandals. Lords Jellicoe and Lambton in 1973 and Cecil Parkinson in 1983 all had to resign because the revelations in the media of their sexual transgressions had made them political liabilities. Of course there was not always a sexual element in such resignations. Reginald Maudling, the Home Secretary, resigned in 1972. He was involved with an architect who was under police surveillance, and resigned because he was responsible for the police force. Lord Brayley, a junior minister, resigned in 1974 after embarrassing inquiries were made into a company with which he had been involved. In 1993 Michael Mates, the Northern Ireland Security Minister, resigned because of improper links with Asil Nadir, a tycoon who broke bail and fled to Cyprus. The year 1994 was busier for the sexually active. One minister resigned because he had an affair and his wife committed suicide, and an assistant whip had a gay affair with a 20 year old; he was unlucky because the law to reduce the age of consent

to eighteen had passed the House but had not yet been promulgated. In the same year two junior ministers in the Major Government resigned over allegations that as backbenchers they had received money for asking parliamentary questions on behalf of Mr Mohammed Al-Fayed, the owner of Harrods.

The pattern was much the same in the Blair Government. In 1998 the Secretary of State for Wales (and nominee for the leadership of the new National Assembly of Wales) resigned after he was robbed at knife point and had his car stolen in what turned out to be a well-known gay cruising area. Later in the same year Peter Mandelson, the Minister for Trade and Industry and an influential figure in the Blair Government, resigned after it was revealed that he had taken a housing loan of £373 000 from another minister, who was himself under fire as an associate of the disgraced tycoon Robert Maxwell. Mandelson was too important a figure (at least in the prime minister's eyes) to remain out of office for long, and he took over the difficult task of Secretary of State for Northern Ireland in late 1999, only to be forced to resign again a year later.

There were an unusual number of ministerial resignations for unacceptable personal conduct in Canada—four under Trudeau and five under Mulroney—but things have quietened down under the Chrétien Liberal Government. The resignations under Trudeau involved a minister who was convicted of contempt of court, another who signed the husband's name on a document to obtain an abortion for a woman with whom he had had an affair, a third who attempted to influence a judge who was trying a constituent, and the fourth for tax offences. The five under Mulroney were also dramatic. In 1985 the Minister of National Defence, Robert Coates, resigned because he had placed himself in 'a compromising situation' during a visit to West Germany. The others resigned for diverse reasons: land speculation; trying to influence a judge; a conviction on a drinking and driving offence; and for being involved in a number of embarrassing incidents.

In Australia there have been eleven such resignations since 1970. In 1976, soon after the Fraser Government took office after the dismissal of Whitlam, the Minister for Posts and Telecommunications, Victor Garland, was charged with committing electoral bribery offences. The Chief Magistrate of the ACT dismissed the case, and Garland returned to the ministry. The next was more serious, for it involved Phillip Lynch, who was Treasurer and deputy leader of the Liberal Party. An inquiry in Victoria had linked him to improper land speculation, and although a legal opinion found that Lynch had done nothing illegal a further report expressed doubt about the propriety of some of Lynch's deals. Lynch was returned to the Cabinet, but with a lesser ministry. He

remained deputy leader of the Liberal Party. The third case also involved a deputy leader, this time of the National Party. Ian Sinclair was charged with forging his father's will for his own benefit, but was eventually acquitted and immediately reinstated in the Cabinet. Another resignation was for attempting to smuggle a television set through customs; the minister concerned was not reinstated.

One minister in the Hawke Labor Government, Mick Young, set what was probably a record by resigning and being reinstated no less than three times. He was very influential as Federal Secretary of the Labor Party, which probably explains his survival. He left Parliament in 1988 after being cleared of yet another charge, but soon afterwards resigned as Federal Secretary of the Labor Party when he accepted a part-time consultancy with Qantas airlines.

In 1992 Graham Richardson, the Minister for Transport and Communications in the Keating Labor Government, was forced to resign when it was revealed that he had put pressure on the President of the Marshall Islands to help a relative who was facing trial over alleged fraudulent business dealings. In 1994 a minister in the Keating Government, Alan Griffiths, resigned because of alleged criminal offences. An inquiry subsequently cleared him, though it did say that in one respect his conduct was improper.

In 1996 the incoming Liberal prime minister issued a *Guide on Key Elements of Ministerial Behaviour*, but it has not been very effective in controlling ministerial behaviour. In 1997 a minister, Geoff Prosser, had to resign because of improper business dealings. He continued to be a major retail landlord, and this clearly conflicted with his responsibilities as Minister for Small Business and Consumer Affairs. Things got worse later in the year when there were revelations of abuse of travel allowances, which involved both backbenchers and ministers, and two National Party ministers resigned, as well as the Minister for Administrative Services, who was responsible for the supervision of the use of the allowances. The resignations were becoming very embarrassing for the government, and after the 1998 election Howard issued a revised Guide. More importantly, he ceased to enforce the Guide so sternly, and several ministers who appeared to be in clear breach of the Guide were not forced to resign.

There has been only one such resignation in New Zealand, in 1999 when the Minister for Tourism resigned because of a scandal over 'golden handshakes'.

Extra-parliamentary political bodies

Some Cabinets have extra-parliamentary bodies to worry about. In the UK a Conservative prime minister appoints the party chairman, and, while in government, has little to fear from the party organisation. In opposition things may be more tumultuous, over such issues as the policy towards the European Union. The annual conference of the Labour Party tends to be unruly, and often politically damaging. The conference elects the National Executive Committee by a complicated system which results in the unions largely determining its membership. The NEC is powerful, with a network of a score of advisory committees which, although they have no direct power, may significantly influence the parliamentary leadership on legislation and electoral policy.

In Canada the party leaders of the Progressive Conservatives and Liberals combine the roles of party chairmen and parliamentary leaders, and party policies are what they declare them to be.

In Australia the extra-parliamentary organisations of the Liberal and National parties have very little influence on policy, which is the hands of the parliamentary leadership, though committees of the parliamentary party may have a considerable influence on the detail of election policies. The Labor Party platform is considered at biennial conferences and is binding on the parliamentary party, though like a religious tract it is sometimes open to varying interpretations. If the parliamentary leadership wishes to change policy on a matter covered by the platform, it has to go cap-in-hand to the conference. The Labor Party is now split into formal factions, and policy changes are usually achieved by deals between the factions rather than by the conference as a whole. In the Australian Democrats the full national membership decides by secret ballot such matters as the parliamentary leadership and party policies.

The National Party organisation in New Zealand, which does include some MPs, produces a political platform, but this is not binding on the parliamentary party, and a ruthless leader such as Muldoon simply ignores it. Since 1961 the parliamentary party has had control of Labour policy. A committee has been established so that party office-bearers can be consulted, if the parliamentary leader wants to. This is in accordance with the expressed wishes of the National Executive, which has pointed out that 'the functions of such a body, it must be emphasised, would be consultant and advisory only—as the MPs elected by the people cannot be subjected to any extra-parliamentary fetter.' It was because of this parliamentary power that the 1984–89 Lange Government was able to introduce revolutionary economic changes—a consumption tax, deregulation and privatisation—which

would have been unthinkable to an earlier generation of Labour stalwarts.

Appointment of judges

Much is made of the separation of the executive and judicial powers, but judges are in fact appointed by the government (in Australia technically by 'the Governor-General in Council') and may be dismissed on an address by both houses of Parliament. In Canada the federal government appoints the nine-member Supreme Court, though there is a requirement that three of the nine judges should be from the province of Quebec. The federal government also appoints not only the 31 member Federal Court, but also the judges of the major provincial courts—a total of about 800 appointments. The failed Charlottetown Accord would have required the federal government to name judges from lists submitted by the provinces. By no means all the present appointments are acclaimed. A 1985 report by a special committee of the Canadian Bar Association referred to cynicism, uproar and public dismay and outcry over many of the appointments. Some provinces, in order to avoid unwelcome appointments, temporarily reduced the sizes of their courts, awaiting a change of government in Ottawa. Though it is most blatant in Canada, in all the countries being discussed patronage sometimes results in sub-standard judges being appointed, or politically biased appointments being made to courts dealing with constitutional matters.

There is no obviously better method of appointment in current use. In the United States, judges in state courts are usually elected, mostly by popular vote but sometimes by the state legislature. Few would find this a desirable option, democratic though it is. Presidential choices for the Supreme Court have to be confirmed by the Senate, and candidates have to be prepared for prolonged questioning by the Judiciary Committee. These hearings are relatively new. For the first century and a half there were none, but since 1925 they have gradually become automatic, and increasingly intrusive. The process has become highly politicised, and again would not commend itself to many outside the United States. There are judges representing various community groups—a black judge, a female judge, a Jewish judge—and a president would be taking serious political risks if he did not propose a similar replacement. When President Nixon was seeking political support from the southern states, he nominated a southerner for the Supreme Court. His choice was criticised as being a below average lawyer, but one of Nixon's supporters, Senator Hruska (Rep., Nebraska) argued that below average lawyers had a right to representation on the US Supreme Court.

‘There are a lot of mediocre judges and people and lawyers,’ he said. ‘They are entitled to a little representation, aren’t they, and a little chance?’³⁸ Senator Hruska did not convince the Senate of this, but it does seem that the legal stature of proposed judges is less important to the Senate than their attitudes on controversial issues such as abortion.

Turning to this problem in the Westminster-style countries, it is difficult enough to persuade the top lawyers to leave their lucrative practices to become judges. It would be much more difficult if they had to face a public inquisition on their suitability by a parliamentary committee. But judges have to be chosen some way, and it would certainly not be acceptable for a court to be self-perpetuating. Under the Australian Constitution, the appointments to the High Court are made by the Governor-General in Council, that is, by the government, usually in fact by the prime minister and the Attorney-General. The principal role of the High Court is the legal interpretation of the Constitution, and its decisions may be very important to the states. In the past 80 years High Court decisions have been very centralist and have steadily increased the power of the federal government at the expense of the states, and it is understandable that the states should wish to have some influence on appointments to the Court. Under an act passed in 1979 the federal Attorney-General is required to consult with the attorneys-general of the six states before an appointment is made to the High Court, but the final decision rests with the federal government. This process gives no effective power to the states. The original concept of the High Court was that there should be five judges so that nearly every state could be represented, but in fact the High Court started with three judges, all three from New South Wales or Queensland, and two of the states (South Australia and Tasmania) have never had a High Court judge.

In 1983 Queensland proposed a solution to the problem which seems fair. According to the Queensland plan, when a vacancy occurs on the High Court bench, the federal Attorney-General should ask the six state attorneys-general for suggestions, and should also forward to them the names of any he has under consideration. For an appointment to be made, there would have to be support from at least three of the six states. Such a scheme would be in accord with the principles of federation. It would be desirable for such a change to be incorporated in the Constitution, for an act could always be altered by a strongly centralist government.

Having appointments to the High Court formally approved by four independent authorities would help to reduce the likelihood of

³⁸ 1970 *Congressional Quarterly Almanac*, p. 159.

inappropriate appointments being made on political or personal grounds. A British Lord Chancellor said that his

first and fundamental duty is to appoint solely on merit the best potential candidate ready and willing to accept the post. No considerations of party politics, sex, religion, or race must enter into my calculations, and they do not. Personality, integrity, experience, standing and capacity are the only criteria.³⁹

One could wish that all judicial appointments were made on this basis, but they certainly are not. One Australian prime minister had a strong preference for appointing judges from his state and of his religion, with some unfortunate results. In 1960 the NSW Labor Government appointed the retiring leader of the federal (Labor) opposition (a former High Court judge) as Chief Justice of New South Wales. According to a judge of the NSW Court of Appeal, when he was appointed he was suffering from advanced senility: 'He plainly could not manage the job. He was old and ill, uncomprehending and inarticulate, incontinent and barking mad.'⁴⁰ He lasted for two years.

Fortunately, even when appointments are blatantly political, the appointed judges often perform in a much more unbiased manner than they were expected to. As a rather cynical former Australian federal minister put it: 'once you put them there, they start thinking they got there on merit.'⁴¹

Conclusions

Although the Cabinet is not mentioned in any of the written constitutions, it remains the central feature of responsible government. In fact Bagehot preferred to use the expression cabinet government rather than responsible government, but there has been a dramatic change in the direction of its responsibility. Except when there is a minority government, the Cabinet ministers are collectively and individually responsible not to the lower house of parliament, but rather to the government party. We no longer have responsible government, in Bagehot's sense, but party government.

The responsibilities and the methods of selection and removal of ministers are broadly similar in all four countries, and there is little they can learn from each other. Australian ministers could learn from ministers in other parliaments, particularly Westminster, to show more

³⁹ Lord Hailsham, *Law Society Gazette*, 28 August 1985.

⁴⁰ Justice Meagher, Address to the St. James Ethics Centre, 27 August 1998.

⁴¹ Senator Reg Withers.

respect for their formal responsibility to the Parliament and to be more courteously answerable to it.

There are some problems which no parliament has yet tackled, and one—the use of the defence power—which only Canada has done anything about. It is an anachronism for the national parliaments to leave to the government the declaration of war or the giving of orders to the military forces to commence fighting. Canada has taken effective action, with its National Defence Act and its Emergencies Act, to control the government's behaviour in committing the military forces to action. All the national parliaments should follow the Canadian example. Similarly, although the formal negotiation of treaties must necessarily be left to the government, parliaments should insist on appropriate involvement in the negotiations and establish that ratification of a treaty requires parliamentary approval. None of the parliaments has yet taken effective action in this area, nor have they in improving the method of selection of judges.

In every parliament the number of ministers has multiplied enormously, there typically having been a threefold increase in the past century. Yet the pool from which ministers are chosen has not grown commensurately, in some cases not at all. This problem of the quality of the ministerial pool is studiously ignored by all the parliaments. Six of the twenty parliaments being studied use upper house members to increase the size of the ministerial pool, but this does little to solve the problem of ministerial quality, and creates other problems. As will be argued in Chapter 8, the presence of ministers in upper houses seriously damages the performance of those houses as legislatures.

It is now well established that a prime minister or premier cannot be in the upper house, except possibly for a brief transitional period. This has been a substantial change in the Westminster system of responsible government, as described by Bagehot. In Bagehot's day, and for half a century afterwards, British prime ministers were as likely as not to be in the House of Lords. The reason for the change was that a prime minister in the Lords could not be personally answerable to the House of Commons, and by the early years of the twentieth century this was no longer acceptable. Surely the same argument applies to the lack of answerability of other ministers in upper houses.

Removing ministers from upper houses of course does nothing to solve the problem of ministerial quality. If one does not want to be limited to choosing ministers from the ranks of government supporters in the lower house, why not follow the Dutch and Swedish examples and fill some ministerial vacancies with highly qualified individuals from the community? After all, it has never been a requirement in the UK that ministers be elected to the Parliament (the House of Lords is

not elected⁴²). Nor is it a requirement that new ministers should have served an apprenticeship in the Parliament, for there are numerous examples of new MPs moving directly into the ministry. What is important is that ministers should be personally answerable to the parliament, able to present their proposals and handle any questions on their ministerial performances. This personal answerability *to* the parliament is much more important than voting membership *of* it.

Bringing in some outsiders as ministers will meet strong opposition from MPs, for the possibility of ministerial office is regarded as one of the rewards of electoral victory. But it is possible to make the change, for several countries have done it, and the overall quality of their ministries has risen markedly as a consequence.

⁴² There is a minor exception to this rule, for 90 hereditary Lords were elected by their peers in 1999 in the transitional arrangements for House of Lords reform.

Curiously ill-defined—the role of the head of state

The role of the head of state under the Westminster system of responsible government is curiously ill-defined, whether the powers are those of the Queen or those of her representatives—governors-general, governors or lieutenant-governors—in the countries, states and provinces we are considering. The problem is not with the ceremonial functions, which Bagehot described as the discharge of the dignified role of the monarch. It is certainly useful to have someone other than the head of government to perform the occasionally interesting, sometimes spectacular, but usually politically trivial duties which fall to a head of state. Many find it curious to see the president of the United States, who combines the roles of head of government and head of state, performing routine ceremonial duties when there are urgent political problems awaiting his attention.

Canada, Australia and New Zealand have two heads of state, the Queen as the symbolic head of state and the Governor-General as the constitutional head of state. When the Queen visited Australia in 1954 Prime Minister Menzies wanted the Queen to take part in some of the formal processes of government, but the Constitution left no role for the Queen, all the relevant powers remaining with the Governor-General, despite the presence of the Queen. Menzies had to arrange for the passage of a special act to give the Queen the power, during her visit, to exercise some of the Governor-General's powers.

It is the political powers of the constitutional head of state which are in question. The 1926 Imperial Conference agreed that in all essential respects the relations between a Governor-General and his ministers were the same as between the King and his ministers in the UK. But what are these relations? Britain of course has no constitution set out in a single document, nor do nine of the ten Canadian provinces, but even where there is a single constitutional document the powers of the head of state are not clearly defined. It is generally agreed that the head of state has some discretionary 'reserve' powers, but what these powers are, and when they should be exercised, is a fertile field for academic debate. One authority has stated that 'amongst the text-writers on the

subject of constitutional conventions those interested will usually be able to find support for (or against) almost any proposition.⁷⁴³

In the written constitutions, there is generally some statement that the 'Executive Government and Authority' is vested in the Queen, to be exercised by the Governor-General (or Governor) on her behalf. This is a pre-Bagehot picture, a curious survivor, with no modern relevance. There are references to Privy (or Executive) Councils to 'aid and advise' the Governor-General or Governor or Lieutenant-Governor, but no mention of a Cabinet, or of a prime minister⁴⁴ or premier.

One might think that a possible way of determining which of the powers of the head of state are to be used at his discretion might be to look at the wording of the various constitutions. Where there is a reference such as 'the Governor-General in Council' having certain powers, it is clear that the Governor-General is acting on the advice, that is to say decisions, of the Privy (or Executive) Council, that is to say the Cabinet. In all the written constitutions, though, there are certain powers which appear to be given exclusively to the Governor-General or Governor. The authors of an authoritative work on the Australian Constitution have pointed out that the distinction between these two classes of powers and functions is historical and technical, rather than practical or substantial. The particular powers and functions vested in the Governor-General belong to that part of the executive authority which was originally vested in the Crown at common law, and is not at present controlled by statute. They are called the prerogatives of the Crown.

In the Canadian Constitution the Governor-General has exclusive power to choose and remove the members of the Privy Council, to summon and dissolve the House of Commons, to appoint senators and judges, to approve or reject bills passed by the Parliament, and to decide whether or not to approve expenditure proposals of the Parliament. No one suggests that the Governor-General should use, at his discretion, all of these powers, but there is general agreement that he may have to use some of them, his 'reserve' powers. The questions are what these reserve powers are, and when they should be used. The situation is no different in the United Kingdom and the Canadian provinces, which have no constitutions in a single document, for the reserve powers are governed by convention not by statute law.

⁴³ H.V. Evatt, *The King and His Dominion Governors*, 2nd edn, Melbourne, Cheshire, 1967, p. 268.

⁴⁴ Except in the Canadian Constitution, where the prime minister is briefly mentioned, but without any definition of his basic powers.

The areas where a head of state might have to make a personal decision cover approval of proposed laws and the use of the delegated law-making authority; the summoning and dissolution of parliament; and the appointment and dismissal of a prime minister. In what circumstances would the head of state, in order to maintain the working of responsible government, have to take action without or even against the advice of the prime minister or Cabinet?

Approval of legislation

The parliament, the law-making body, consists of the head of state and the houses of parliament. The head of state may approve or reject any law, but in practice the power to reject is never used. The head of state may indeed return a bill to the house in which it originated with a recommendation for amendment, but this is not done on his own initiative but on the advice of the Attorney-General to correct an error in a bill which became evident after it had passed both houses. This has been done in Australia fourteen times since federation, but it has not been done in recent times. It has not been done in New Zealand since 1949, and the power was abolished in 1986.

There is also a provision in Canada and Australia for the Governor-General to reserve a bill for the Queen's assent. This originated when the dominions were not fully independent, and a Governor-General was regarded as the representative of the British government, with the responsibility for ensuring that the 'colonies' did not pass any act which would damage British interests. It was not until 1926 that the Imperial Conference declared that the Governor-General 'is not the representative or agent of His Majesty's Government in Great Britain, or of any Department of that Government.' British High Commissioners (that is, ambassadors) were first appointed to Canada in 1928, Australia in 1936, and New Zealand in 1941. Reservations for royal assent has fallen into disuse, except for occasional ceremonial matters. The last Australian bill to be so reserved was the *Royal Style and Titles Act 1975*. In New Zealand a 1947 amendment made such reservations clearly anachronistic.

In the Canadian provinces the lieutenant-governors are officially appointed by the Governor-General, but the prime minister makes the decision. The lieutenant-governors are federal officers, and are expected to watch the interests of the federal government. They can reserve bills for consideration by the Governor-General, who would of course act on the advice of the federal government. By the Constitution Act of 1867 the federal government can veto such bills within a year of their passage. Seventy bills have been reserved by lieutenant-governors

since 1867, the last being in 1961. Lieutenant-governors have also used their power, on their own initiatives, to refuse assent to bills. This has been done to 27 bills since 1867. The last occasion was in Prince Edward Island in 1945, over prohibition.

In Australia the federal government has no power over state legislation, for the governors are in no way responsible to the federal government. The premier, not the government, chooses who is to be governor, and the Queen makes the appointment on the premier's advice. The governors do have the same power as the Canadian lieutenant-governors to refuse assent to bills, on their own initiative, but it has never been done in modern times.

It may seem strange that the head of state should give his assent to a bill or delegated instrument that he considers objectionable or possibly illegal, but in practice he has no option, though he may ask the Attorney-General for formal legal advice on a bill, and he should be satisfied that the correct procedures had been followed. Otherwise, in Bagehot's words, he may encourage or warn, but in the legislative field the head of state is a rubber stamp wielded by the government, though in the Canadian provinces the stamp may be seized by Ottawa. There is one exception to the control of the rubber stamp by the government. If a private member's bill is passed against the wishes of the government—this would be unusual, for such a bill would involve either a 'free' vote, or government party cross voting, or a minority government—the head of state should nevertheless give assent. Such a bill could of course not have been passed if it involved expenditure.

Dissolution of parliament

The second area where the head of state might have discretion is in the dissolution of parliament. Most dissolutions occur on the recommendation of a prime minister or premier, who has a secure majority in the House but who wishes to have an election at a politically advantageous time. Such dissolutions often make substantial cuts in the term of parliament, as has already been discussed, but the head of state invariably accepts the advice. He may feel that the reasons given by the prime minister for an early election are patently spurious, but he keeps his feelings to himself. If a parliament ever does move to a fixed term, the change will have to be initiated by the parliament itself. It will not be done by the head of state using his reserve powers.

Nevertheless a prime minister does not have unlimited power to demand elections. As former British Prime Minister Asquith said in 1923: 'the notion that a Ministry which cannot command a majority in the House of Commons ... is invested with the right to demand a

dissolution ... is subversive of constitutional usage.’ This view was supported by another former British prime minister, Clement Attlee, who wrote in 1952 that: ‘the monarch has the right to grant or refuse a prime minister’s request for a dissolution of parliament.’ The most authoritative version was given in a letter written to the *Times* on 2 May 1950 by the King’s private secretary, Sir Alan Lascelles, using the pseudonym ‘Serex’. Lascelles wrote that:

No wise sovereign ... will deny a dissolution to his prime minister unless he was satisfied that: (1) the existing parliament was still vital, viable and capable of doing its job; (2) a general election would be detrimental to the national economy; (3) he could rely on finding another prime minister who could carry out his government for a reasonable period, with a working majority in the House of Commons.

A former Governor-General of New Zealand made a useful distinction:

A prime minister without a majority in the House has lost the authority to insist that his advice should be accepted. A prime minister *with a majority* could threaten to resign if his advice is not accepted, knowing there is no alternative government for the Governor-General to call on. A prime minister without a majority cannot exercise that kind of pressure.⁴⁵

This rule would cover the case when a government loses the confidence of the lower house. The defeated prime minister has the right to ask for a dissolution, but no right to demand one. A head of state would consider rejecting a defeated prime minister’s request for a dissolution only if he thought that an alternative government could be formed by someone else. If that person—nearly always the leader of the opposition—fails to gain the confidence of the lower house, the head of state might try again, but if no one can form a government then there is no alternative to an election. It would be best to reappoint the original prime minister, permitting him to have whatever advantage that office gives during an election campaign. After all, he had been right about the need for a dissolution, and the head of state’s judgement had been wrong; and those other leaders who had tried and failed to form governments which had the confidence of the lower house had, by accepting the appointment, implicitly agreed that the House should *not* be dissolved.

There has never been such a case in the UK or New Zealand, but there is no real doubt about the power of the head of state to refuse a request for a dissolution on these grounds. In the 1924 Westminster Parliament there were three roughly equal parties. Ramsay MacDonald, the Labour leader, was appointed prime minister and survived for eight

⁴⁵ Sir David Beattie, in Hyam Gold, *New Zealand Politics in Perspective*, Auckland, NZ, Longman Paul, 1985. He was quoting an article by Sir John Marshall.

months before being defeated and asking for a dissolution. This was granted, but King George V had previously asked the leaders of the Conservative and Liberal parties whether, if MacDonald were defeated, either of them, or both in coalition, would be willing to form a government. Both had said no, so MacDonald was granted his dissolution.

In 1926 the Canadian Governor-General, Lord Byng, refused the request for a dissolution by Prime Minister Mackenzie King, who had lost the confidence of the House of Commons, and commissioned the leader of the opposition (Meighen, Conservative) to form a government. Meighen had great problems, because at that time newly appointed ministers had to resign their seats and contest by-elections, and such resignations would have cost him his majority. The requirement for a newly appointed minister to resign and face a by-election originated in the reign of Queen Anne. The requirement was abolished in Canada in 1931. In Britain an amendment was passed to eliminate the requirement for such resignations during the first nine months of a new administration, and in 1926 the requirement was completely abolished.

Meighen met the problem by appointing a large number of acting ministers, but had to face a by-election himself. Meighen's Government survived an initial motion of no confidence, but collapsed after facing the Commons for only three days, losing a division on a motion of censure by one vote, with Meighen watching helplessly from the gallery. Byng granted Meighen a dissolution, but Mackenzie King's Liberals won the election.

Byng cannot be criticised for verifying whether an alternative government could be formed, and as Meighen did in fact form a government which possessed the confidence of the House it was reasonable to grant him a dissolution when he was defeated, as it was then clear that no one could form an acceptable government in the existing House. Nevertheless the events left a great deal of bitterness among the Liberals, and since 1926 there have been no refusals of requests for dissolutions in Canada, either federally or in the provinces. Since confederation there had been three refusals of requests for dissolutions in the provinces, but there had been none since 1903.

In Australia there are three precedents for refusals of requested dissolutions in the Commonwealth (in 1904, 1905 and 1908) and no fewer than sixteen in the states. No one can reasonably doubt that the power is there.

Of course if there is no prospect of a new government being formed which could have the confidence of the lower house, the prime minister's request clearly should be granted. This occurred in the

United Kingdom with Callaghan in 1979 and in Canada with Clark in the same year.

The rule that a prime minister who has lost the confidence of the lower house has lost the authority to insist that his advice be accepted would also cover the problem of a prime minister losing an election and then asking for a dissolution and a new election without first facing the House. This has never actually happened, though there was talk of it in Tasmania after the 1989 election, when the Liberal government lost its majority, and the balance of power was held by five Green Independents. A bizarre series of events followed, later the subject of a royal commission. There was an offer of a bribe of one hundred thousand dollars, and possibly the Speakership, to a newly elected Labor MP to change sides; an advertising campaign, secretly funded by the Liberal Party, to demand a new election; and legal opinions given to Premier Gray that the Governor should order a new election if the premier asked for one after being defeated in the Assembly.⁴⁶ The Governor, fortified by an opinion by a former Chief Justice of the High Court, made it quite clear that he would not agree to a dissolution unless it was impossible to form a government which possessed the confidence of the lower house. He insisted that the Leader of the Labor opposition, who was seeking to be appointed premier, should produce clear evidence of his ability to form a government. This was done, in the form of a written agreement with the Greens, and the Labor Party was in power, though burdened by its formal coalition with the Greens.

A somewhat similar problem arises if a prime minister attempts to obtain a dissolution while a motion of censure is actually being debated, as Mackenzie King tried to do in Canada in 1926. Such a request should clearly be rejected, for to accept it would permit a government to escape the judgement of the lower house, to which it is responsible.

A more difficult problem would arise if parliament were not meeting, and the prime minister, having apparently lost the confidence of the government party but not yet having been deposed, asked for a dissolution. This nearly occurred in Queensland in 1987, when the premier, Sir Joh Bjelke-Petersen, faced with a party revolt, threatened to call a snap election and take the party down with him. In the event he did not use this ploy. The sensible thing for the Governor to have done, if faced with this situation, would have been to insist on the premier's leadership being confirmed by his party before agreeing to the

⁴⁶ There were claims that the *Australia Act 1986* deprived the Governor of any discretion. In fact the Act simply declares that the British government has no function in relation to the governance of the states, and that advice is tendered to state governors by state premiers. It does not say that state governors are bound to accept that advice.

dissolution, but there are no precedents for such action, and the Governor would have been in a very embarrassing position if the party had confirmed the premier's leadership.

The Australian Commonwealth has a peculiar problem with regard to double dissolutions—that is, simultaneous dissolutions of both houses. If a bill which has been passed by the Representatives is rejected by the Senate or passed with amendments to which the Representatives will not agree, or if the Senate fails to pass the bill, and after an interval of three months the House of Representatives passes the bill again, either in the same form or incorporating Senate amendments, and the Senate again rejects or fails to pass the bill or makes unacceptable amendments, both houses may be dissolved by the Governor-General if so requested by the prime minister. The Governor-General would have to satisfy himself that the constitutional conditions have been met, and there is plenty of scope for argument about the meaning of 'interval of three months' and 'fails to pass'. A former Chief Justice, Sir Samuel Griffith, also claimed that, for the Governor-General to grant a double dissolution, the deadlocked bill must be of such public importance that it should be immediately referred to the voters, or that there was a practical deadlock which could be ended only by a dissolution. The Governor-General thus has much to consider, though in fact the prime minister's advice has been accepted on all six occasions that a double dissolution has been requested.

As has been already discussed, the modern use of a double dissolution generally has nothing to do with legislative deadlocks, and everything to do with permitting the prime minister to hold a simultaneous election for the Senate and House of Representatives at a time of his choosing. A curious example of this occurred in 1975 when the Senate was refusing to pass the budget unless Prime Minister Whitlam agreed to an election, which Whitlam refused to do. With supply running out, Governor-General Sir John Kerr dismissed Whitlam and commissioned the leader of the opposition, Malcolm Fraser, as prime minister on condition that he would obtain supply and ask for a double dissolution on the grounds that a number of non-budget bills had met the deadlock requirements. The double dissolution was curious because, with the change of government, there was no longer a true deadlock. The new government certainly did not want to have the deadlocked bills passed, but it was important that the Senate should be dissolved with the Representatives, for the inevitable anger over the Whitlam dismissal would have been greatly magnified if the Senate had forced the Representatives to the polls while remaining itself immune.

The question of supply is sometimes crucial in a head of state's decision on a dissolution request. The head of state must be satisfied

that supply will be available for the period from the dissolution of parliament until the new parliament could vote further supply. This is never a problem when a prime minister in control of the lower house asks for an election, for he would certainly have made adequate supply arrangements. A difficulty might arise when a government loses the confidence of the lower house towards the end of the period for which supply has been granted and no alternative government can be formed. In practice, once it is obvious that a dissolution is inevitable, none of the parliaments has made any difficulty about granting the necessary supply. The 1975 double dissolution in Australia might have broken the pattern, for it is most unlikely that the Representatives would have voted supply for the minority Fraser Government, but as things were handled the Representatives had no chance to vote again on the appropriations they had granted the Whitlam Government.

The Canadian Parliament is the only one where supply is never a dissolution issue, because the Financial Administration Act permits the government to issue special supply warrants without the approval of the Parliament. This is the only valuable use of this iniquitous provision, which undermines one of the crucial features of responsible government.

Although it is clear that a head of state has the power to refuse a dissolution asked for by the prime minister, it is another matter for a head of state to dissolve a parliament without a formal request from a prime minister. It is a clear convention that he should not do so. In the words of Sir Samuel Griffith, 'he cannot act except on the advice of his ministers.' But is this immutable? To order a dissolution which is opposed by the prime minister is not on the same level as refusing a prime minister's request for a dissolution, for the ministry would not accept responsibility for the decision, and this is fundamental to responsible government. Even Sir John Kerr manoeuvred so that he had prime ministerial support—albeit of a new prime minister—for dissolution. Yet what Kerr wanted was for the Parliament to vote supply to the government so as to avoid administrative and social chaos, and he thought that a dissolution was the only way to achieve this. He could have used his power to dissolve the Parliament without dismissing the prime minister. This would have been traumatic, but no more so than what he actually did, and it would have ensured that during the election campaign the majority party in the Representatives would have been the government.

A similar problem might arise if a prime minister who had lost the confidence of the lower house refused to resign or recommend an election, and there was no possibility of an alternative government. The neatest solution might be not the dismissal of the prime minister but the

dissolution of parliament. Yet it is most unlikely that any head of state would take such dramatic action, for convention is clearly against it. It has been regarded as an essential component of constitutional practice that the head of state should always have a ministry which is prepared to take responsibility for such a decision. But a convention is, after all, only an accepted precedent which is obeyed because of the political difficulties which would arise if it were not. For a head of state, in certain rare circumstances, to order a dissolution on his own initiative might be the lesser of alternative difficulties, but it would be a very radical step.

Various authorities have suggested actions by the head of state which would certainly be no longer acceptable. 'A dissolution is allowable', wrote Dicey, 'or necessary, wherever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.'⁴⁷ Anson agreed that 'the prerogative might conceivably be a resource where a Ministry and House of Commons were alike out of harmony with the country and were unwilling to admit the fact'⁴⁸ and Forsey thought a forced dissolution was justifiable 'to protect the Constitution or to ensure that major changes in the economic structure of society shall take place only by the deliberate will of the people.'⁴⁹ But how is the head of state to assess the wishes of the nation? Does he use by-election results, or public opinion polls? Both are notoriously uncertain predictors of the results of general elections, and for the head of state to make a misjudgement on such a dramatic and crucial issue would be devastating for his position. It is an inappropriate power to give to a head of state, because it would in practice be impossible to exercise. The last time there was a forced dissolution was in the Canadian province of New Brunswick in 1865.

Appointment of a prime minister

The head of state still has the power of appointment and dismissal of the prime minister. Appointments usually do not cause much difficulty. Any political party which is a contender for government will have an elected leader, and if that party gained an absolute majority at an election, it is inevitable that he (or she) would become (or remain) prime minister. A formal coalition, such as the Liberal and National parties in Australia, would also have a clear leader. Problems may arise

⁴⁷ A.V. Dicey, *Modern Democracies*, London, Macmillan, 1921, vol. 2, p. 492.

⁴⁸ William Anson, *Law and Custom of the Constitution*, 5th edn, Oxford, Clarendon Press, 1922, p. 330.

⁴⁹ E.A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth*, Oxford University Press, 1943, p. 89.

when, after an election, no party or formal coalition has a majority in the lower house. There may also be problems when a prime minister's request for a dissolution is refused, or when a prime minister is deposed in a party coup, or when the prime minister of a minority government retires. There are precedents for dealing with all these situations, but they have not hardened into conventions, and the head of state has to exercise considerable judgement in assessing the political situation.

If a prime minister loses his majority at an election, he is entitled to remain in office and face the lower house, if he wishes. This should be done promptly. (What the head of state should do if the prime minister delays asking for the summoning of parliament is a separate issue.) It is usual, if another party or formal coalition is numerically stronger than his, for a prime minister to resign and for the head of state to commission the leader of the strongest party or formal coalition to form a government. If that leader does not have an absolute majority, there must be an early meeting of the lower house to allow it to make the final decision. There are no absolute rules, for the outcome may depend on the attitude of minor parties and Independents. Under certain circumstances the leader of a minor party might be appointed prime minister, with the support of one of the major parties. This was the situation in the state of Victoria in the decade after the Second World War, when there were several minority Country Party governments, supported at different times by different major parties.

If a prime minister is deposed in a party coup, his replacement will be nominated by the same body that deposed him. The only possible problem would occur with a coalition government, when the leader of the minor party might be more acceptable to the coalition as prime minister than the new leader of the major partner. The decision might require delicate soundings by the head of state. The only modern example is the resignation of the Australian Prime Minister Robert Menzies in 1941, when he had lost the support of his Cabinet. The Governor-General commissioned as his replacement the leader of the Country Party, the junior partner in the coalition. There was no real problem for the Governor-General, for the Country Party leader had been elected as leader of the coalition at a joint meeting of the two coalition parties.

If a prime minister retires when he is head of a minority or marginal government, the government party or parties will nominate his successor. The head of state, whatever his assessment of the prospects of survival of the new leader, has really no option but to appoint him as prime minister. The only recent example is the resignation of Harold Wilson in March 1976, at almost the precise moment when Labour became a minority government. It took three weeks for the cumbersome

Labour Party election machinery to produce his successor, but there was never any doubt that whoever it was—it was James Callaghan—would become prime minister.

Dismissal of a prime minister

The dismissal of a prime minister is rare. Normally a prime minister, faced with a situation where he clearly should go, will resign. Nevertheless there have been, and no doubt there will be in the future, occasions where a prime minister has refused to take the proper action. In these circumstances the head of state may have to intervene and dismiss the prime minister in order to preserve responsible government. The need for intervention could arise in several ways: by a prime minister who has clearly lost the confidence of the lower house, or of his party, refusing to resign or recommend a dissolution; a prime minister unable to obtain supply from the parliament; a prime minister who has probably lost his majority as a result of an election refusing either to resign or to ask for the summoning of parliament; or a prime minister acting illegally.

There have been no examples of a prime minister losing the confidence of the lower house or of his party and refusing to resign, though Queensland Premier Bjelke-Petersen was showing ominous signs just before his resignation in 1987. Australian Prime Minister Gough Whitlam was dismissed in 1975 when he could not obtain supply from the Parliament unless he agreed to call an election, which he refused to do. It could be said that Canadian Prime Minister Clark in 1979 unreasonably delayed the summoning of Parliament, and that the Governor-General should have told him to ask for the summoning of Parliament or else to resign in favour of someone who would make such a request. The only modern example of the dismissal of a prime minister or premier for acting illegally occurred in New South Wales in 1932, when the Governor dismissed the premier (Jack Lang) for refusing to withdraw a circular which the Governor claimed was directing public servants to break the law. An unanswered question is whether it was proper for the Governor, rather than the courts, to make a decision that a particular action was illegal.

The problem was studied by the 1988 Australian Constitutional Commission. An advisory committee recommended that the Governor-General should be able to:

dismiss the prime minister for persisting in grossly unlawful or illegal conduct, including a serious breach of the Constitution, where the High Court has declared the matter to be justiciable and the conduct to be unlawful, illegal or a breach of the Constitution, or when the High Court has declared the matter is not justiciable, and the Governor-General

believes that there is no other method available to prevent the prime minister or the government engaging in such conduct.⁵⁰

This view was not accepted by the members of the Constitutional Commission, of which one of the members was former Prime Minister Whitlam, who understandably had strong views about the dismissal of prime ministers. The Commission thought that the matter should be left to the House of Representatives—in effect, except during a minority government, to the government party caucus. But is this good enough? It is quite likely that the Labor Party caucus in New South Wales would have continued to support Jack Lang even if he had been convicted, particularly as Lang would undoubtedly have portrayed any conviction as being the result of his defence of the people of New South Wales against the tyrannical Commonwealth. The Constitutional Commission endeavoured to deal with the possibility of an inactive lower house by pointing out that a prime minister actually in jail would have problems. If his sentence of imprisonment was for more than a year he would, under the Australian Constitution, cease to be an MP. Even if his sentence was for less than a year, if he were in jail he would not be able to attend sittings of Parliament, and would eventually cease to be an MP unless given leave by the House of Representatives. Ceasing to be an MP would not legally prevent him from continuing as prime minister or premier in fifteen of the twenty parliaments, but it would in the Australian Federal Parliament.

The scenarios painted by the Constitutional Commission are so bizarre, and the solution they propose so unreliable in the crisis atmosphere that would inevitably surround such charges against a prime minister or premier, that they emphasise the importance of having the dismissal powers of the head of state clearly defined, on the lines of the proposal of the Constitutional Commission's advisory committee.

Summoning of parliament

The other area where it might appear that some heads of state might sometimes use their reserve powers is in the summoning of parliament after an election. Of course if the prime minister or premier refused to ask for the summoning of parliament within the statutory time he would be breaking the law, with consequences already discussed, but only in Australia federally and in two of the states and in New Zealand are

⁵⁰ *Final Report of the Constitutional Commission 1988*, vol. 1, p. 326. A minority of the committee was in favour of the dismissal of the prime minister by the Governor-General where there was 'no other method available to prevent the prime minister or his government engaging in substantially unlawful action.'

there constitutional requirements for the parliaments to meet within a given time after an election: within 30 days of the day appointed for the return of the writs in Australia, six weeks in New Zealand. Of the six states, only New South Wales and Tasmania have statutory requirements for the parliaments to meet within a specified time after the return of the writs. In the other states the premier has a free hand, though there is a requirement that there should not be more than twelve months between sessions of the Assembly and the Council, and of course the parliament must meet before supply runs out.

In the UK the Parliament traditionally meets promptly after an election, it being the custom for the date of meeting of the new Parliament to be fixed in the proclamation which dissolves the old one. The voting system is the simple one of first-past-the-post, so the writs are returned promptly after an election. Since 1945 the average interval between polling day and the first meeting of the new Parliament has been about three weeks.

The problem area is Canada, where there is no statutory requirement for the federal Parliament to meet within a given time after an election, and the government can give itself supply without the approval of Parliament. There is a constitutional requirement that there should not be more than twelve months between the end of one sitting of Parliament and the beginning of the next, but nevertheless there can be a substantial gap between an election and the meeting of the new Parliament, during which a government which no longer has a majority in the lower house can continue to govern.

The provinces are also covered by the provision in the Canadian Constitution which requires that 'there shall be a sitting of parliament in each Legislature at least once every twelve months', but some of the provinces have amplified this. Nova Scotia has passed an act requiring two sittings per calendar year, and in Nova Scotia the rules of the Legislative Assembly require that the Speaker must be elected within 44 days of polling day. There can be other pressures, too, for in Newfoundland and Labrador, for instance, newly elected members are not paid their indemnities and sessional allowances until they take their oaths or affirmations of office.

How long is a reasonable time between the election and the first meeting of the new federal Parliament is a matter which must concern the Canadian Governor-General. If the prime minister does not ask for the summoning of Parliament, the Governor-General has a real problem, for the prime minister is not breaking any law provided it is not yet twelve months since the end of the last sitting of the Parliament. Yet the prime minister is clearly flouting the principles of responsible government if he refuses to face the lower house after he has lost his

majority. There is no evidence that any Governor-General has threatened dismissal for such behaviour, even after the Canadian election of 1979, when a minority Progressive Conservative government under Joe Clark continued in office for almost four months without facing the House of Commons, sustaining itself with special warrants worth more than thirteen billion dollars. Rather than facing a Governor-General with an almost impossible decision, it would be better for the Canadian Constitution to be amended to require the Parliament to meet within a brief prescribed period after an election.

Codification of the head of state's powers

It must be clear that the head of state has to have substantial discretionary 'reserve' powers, and that the appropriate use of these powers, though always politically difficult, is essential for the proper working of responsible government. There have been many suggestions that the powers should be codified and either placed in the Constitution or, for the countries and provinces without formal constitutions, passed by an act of parliament. Dr Evatt, in his 1936 book *The King and his Dominion Governors*, argued cogently for the reserve powers to be codified and the interpretation of these rules to be carried out by some judicial or arbitral tribunal.

There are however problems with implementing this approach. In New Zealand the powers of the Governor-General could be defined by an act of parliament, as it could be for the powers of the Queen in the United Kingdom. In New Zealand a very incomplete list of the powers of the Governor-General was produced, and in 1983 was incorporated in the Royal Letters Patent, the Queen's instructions to the Governor-General. It was enacted by the Constitution Act in 1986. The instructions were incomplete in that they did not cover key issues such as the power of appointment or dismissal of a prime minister, or refusal of a prime minister's advice to dissolve Parliament. In Canada and Australia the constitutions would have to be amended, and such amendments are notoriously difficult to pass. In Canada the formula for amending the Constitution varies with the subject matter. On the question of the office of the Governor-General, any amendment would have to be approved by the federal Parliament and *all* the provincial assemblies. In Australia proposed constitutional amendments are put in a referendum, which to be carried must be passed by a majority of those voting in at least four of the six states *and* by an overall majority. In Australia, particularly, where constitutional amendments are made by referendum, it would be difficult to persuade voters to approve a list of powers for the Governor-General which would seem to many to be

undemocratic, particularly as politicians and academics would undoubtedly be haggling over the detailed wording and the desirability of particular powers.

There is a further problem in Australia, the legacy of the events of 1975. The bitterness over the dismissal of Whitlam by Governor-General Sir John Kerr still continues, and it seems inconceivable that the Liberal and Labor parties could reach agreement in the near future on the Governor-General's powers of dismissal of a prime minister, and if one of the major parties opposes a referendum it has no chance of passing. Since federation there have been 44 constitutional amendments put to the voters and only eight have succeeded.

This party divisiveness over a fundamental question concerning the powers of the head of state caused the republicans to take a very conservative approach in the 1999 referendum. The powers of the proposed president were left unchanged from those of the Governor-General, in the archaic form incorporated in the Constitution.

It seems that the only way to eliminate the inter party division in Australia over the dismissal power of the head of state would be to adopt fixed terms for the House of Representatives, which is of course highly desirable for other reasons, as has already been argued. There is no way the Senate would refuse to pass supply as a means of forcing an election if there *could* not be an election.

Appointment and dismissal of the head of state

There is one other aspect of the position of the head of state which would benefit from clarification. Except in the UK, the head of state is effectively appointed by the prime minister (or by the premier in the case of the Australian states),⁵¹ has no security of tenure, and can probably be removed by the prime minister or premier at any time. The reason for the final uncertainty is that, although the prime minister or premier recommends the head of state, the latter is formally appointed by the Queen as her representative. In modern times she has never failed to appoint the person nominated, but it cannot be certain that the Queen, faced with a request for an immediate change of Governor-General during a political crisis such as occurred in Australia in 1975, would not at the very least ask for further information and might even delay the change until the crisis was over.

⁵¹ Until 1986 advice relating to the appointment of a state Governor was tendered to the Queen through the UK Secretary of State for Foreign and Commonwealth Affairs. Since the passage of the Commonwealth *Australia Act 1986* the state premiers have advised the Queen directly.

Nevertheless the possibility of dismissal by the prime minister must weigh with the Governor-General, and was certainly a factor in the much-criticised behaviour of Sir John Kerr in not giving any hint to Prime Minister Whitlam that he was considering his dismissal before he actually dismissed him.

Yet it is surely absurd that a prime minister, appointed by and dismissible by a Governor-General, is able effectively to dismiss that Governor-General. It remains necessary because of the possibility that a Governor-General might start to use some of the enormous powers he is given under the Constitution, but which he is not expected to use on his own initiative. If a Governor-General were out of control like this, dismissal would be the only practical solution. That was the reason that, in the 1999 republican referendum, it was proposed that the prime minister should have power of immediate dismissal of the president. It is worth noting that in none of the other republics in the world does the head of government have the power to dismiss the head of state.

The problem would of course disappear if the powers of the head of state were codified, and it would then be possible for governors-general and governors to have fixed terms of office, say five years, which could be cut short only by death, resignation or an address to the Queen jointly by both houses of parliament. The present situation is very untidy and potentially disruptive.

The question of the method of appointment of governors-general and governors is also worth reviewing. They are the representatives of the Queen, accepted by her as a person the citizens of the country or state concerned would like to see as her representative. It is far from clear that the prime minister or premier of the day is the best person to select a Governor-General or Governor, or indeed why he or she should be involved at all.

This matter came to a head during the 1999 republican referendum in Australia. It was clearly unacceptable that the president should be appointed solely by the prime minister, and the convention came up with the idea that anyone could be nominated for the post. A committee would examine the nominations, and from their short-list the prime minister, after discussions with the leader of the opposition, would put forward a single name to a joint sitting of the two houses of parliament. The nomination would have to be seconded by the leader of the opposition and agreed by a two-thirds majority of the joint sitting.

This proposal was one of the reasons for the failure of the referendum, for it was clear that a majority of voters would prefer a nationwide election for the presidency. Because a president would have little direct *political* power, it was thought that political parties would not be inclined to put up their own candidates in such an election,

particularly if it were organised so that the election of the president had to be held on a date on which no other elections were held. It was claimed that the candidates would usually be distinguished citizens, and that voters would seek to reward distinction and service. It would be important to have the candidate's acceptance of the nomination. One would not want to have a repetition of General Sherman's statement that 'I will not run if nominated [for US president], and will not serve if elected.'

Of course the defeat of the republican referendum has deferred further consideration of this particular problem in Australia. But if it were thought that it was inappropriate for the prime minister to have sole personal responsibility for the selection of the president—as it clearly was, by an overwhelming majority—why do not the same arguments apply to the selection of governors-general and governors? After all, the president was intended to have identical powers to those of the Governor-General.

It would be very desirable for prime ministers and premiers to try out various methods of involving the community in the selection of the name of the person who would be proposed to the Queen to be her representative, but it is most unlikely to happen, for prime ministers and premiers like the power of patronage the present arrangements give them, and could always defend their position by pointing out how much money they were saving by not having elections.

Another advantage which would follow such a trial is that it would ease the transition to a republic in Canada, Australia and New Zealand. Though no doubt some distance off, such a transition is eventually inevitable, though it may be difficult to achieve in Canada, where a constitutional amendment to change the position of the Crown would require unanimous agreement between the federal government and the provinces, which would be very difficult to achieve. Moreover a trial of an electoral system for the position of Governor-General would require a prime minister who was a passionate supporter of a republic, and such prime ministers are hard to find.

None of this applies to the United Kingdom, where the head of state is hereditary and likely to remain so, or to the Canadian provinces, where the lieutenant-governors are appointed by the federal government, and are expected to represent its interests.

Conclusions

It is obvious that the head of state must have substantial discretionary 'reserve' powers in order to make responsible government work. He must be able to refuse a request for the dissolution of parliament under

certain circumstances, and in some of the parliaments have the power to order the summoning of parliament. He must also have discretion in the appointment and dismissal of a prime minister or premier. Unfortunately the extent of these powers has never been agreed, much less codified, and the result has been bitter disputes such as those involving Governor-General Byng in Canada in 1926, Governor Game in New South Wales in 1932, and Governor-General Kerr in Australia in 1975.

The codification of the powers of the head of state would not be difficult. The codification should cover the circumstances in which a head of state is entitled to make personal decisions, and when he is obliged to act on ministerial advice, and how any disputes over the use of powers would be adjudicated. But it is one thing to codify the powers of the head of state, another to have them incorporated in the Constitution. In Australia the scars of the 1975 dismissal of Prime Minister Whitlam are so deep that it would not be possible to reach agreement on the powers of the head of state unless there were preliminary steps taken to eliminate the possibility of the Senate again blocking supply in order to force an election. A fixed term for the House of Representatives is the obvious way of achieving this.

The method of appointment, the term of office, and the procedure for removal of a Governor-General or Governor are very unsatisfactory, and badly need clarification.

It is inevitable that Canada, Australia and New Zealand will eventually become republics, but the change seems some time away. It seems that the only option with any chance of general acceptance is the minimalist one, with an elected president taking over the role of the Governor-General.

There is no doubt that the transition to such a republic would be greatly eased if the powers of the head of state had been codified and an electoral system for that office given a public trial. Opponents of a republic could console themselves with the thought that clarification of these matters is highly desirable whether or not Australia becomes a republic.

Passing laws—lower houses as legislatures

Some people, particularly ministers, seem to think that possession of executive power necessitates the possession of the legislative power, or rather that the two are synonymous. In fact they can be quite separate, and if they are not kept separate the inevitable result is executive dominance. If the legislature is controlled by a tightly-disciplined party supporting the executive government, it will cease to be a legislature and become a mere legislative rubber-stamp.

There are many aspects which should be examined in assessing the performance of a lower house as a legislature. The basic legislature procedures with bills—first reading, second reading, committee stage and third reading are the same in all the parliaments, but there are differences in what may be considered at the various stages. Most bills are originated by the government, but by no means all are considered as thoroughly as they should be, often because the parliament does not sit for long enough, or the government uses various procedures (backed by its disciplined majority in the lower house) to limit debate. Individual MPs may also introduce public bills, but not many of them are passed.

In some countries, particularly the United States, there is a move to by-pass the parliament by allowing referendums to be held on some proposed laws, which if passed become law without any consideration by the parliament. Fortunately none of our twenty parliaments has adopted such a system. Nevertheless there are some bad trends developing, such as a government failing to proclaim a bill duly passed by the parliament, or important policy statements being made by ministers outside the parliament, usually to gain the benefit of a large television audience.

The first step is to try to describe an ideal legislature, bearing in mind practical political limits.

The ideal legislature

What characteristics should an ideal legislature possess? It cannot govern and must not try to. None of the parliaments we are considering

can pass any bills requiring public expenditure unless the expenditure has been recommended by the head of state. In practice this is of course the Cabinet. Almost all proposals for government action involve expenditure, so overwhelmingly only government initiatives, or those accepted by the executive government, have any chance of enactment. But although the legislature (unlike the American Congress) cannot be an effective initiator of laws, it has an important role in insisting that governments legislate openly, and in subjecting their proposed laws to scrutiny and, where appropriate, to amendment or rejection.

The legislature must represent the diverse views of the community. It should be seeking to see that new laws, or amendments to existing laws, have community support while at the same time respecting the reasonable rights of minorities. But although it should respect such rights, it must be able to resist pressure groups seeking to impose their idiosyncratic views on the whole community. Bureaucrats, faced with an administrative problem, often propose new laws when what is really needed is better use of the existing law. The ideal legislature would veto such unnecessary laws.

The ideal legislature would see that new laws were clearly expressed, so that they would be comprehensible to the citizens who have to obey them. The trouble is that laws have to be interpreted by the courts, and the drafting of bills and regulations is therefore done by legally qualified parliamentary counsel. It is very difficult for the parliament to modify such legislation to make it more comprehensible, so the important step would be to ensure that the parliamentary counsel who are appointed are skilled at brevity and clarity, skills for which lawyers are not noted. An example is a court judgment on a tax case. The judgment said of a provision in the Act that:

the wording appears involute and to have the aberration of tenses and in the use of the subjunctive mood. But if meanings of both the protasis and the apodosis sufficiently emerge we need not be concerned by inelegances appearing on a syntactical analysis.

One hopes that whoever wrote this will never become a parliamentary counsel.

An elected executive government must be able to govern, and it must have secure funds to do it. Its budget must therefore be respected by the legislature. A legislature tinkering with a budget, approving or rejecting some parts and amending others, is likely to lead to administrative and economic chaos. In exceptional circumstances, when the government seems to be acting most unwisely, the legislature might exercise its power to amend or reject expenditure or taxation measures in the budget, but this must be done with great care. The budget deficit or surplus is an important weapon of economic management, and the

government must have control in this area. This is important not only because the government will have much more comprehensive economic advice than will be available to the legislature, but more importantly because divided control would be very damaging. As was said about First World War generals, when negotiations were under way to provide a single Commander-in-Chief for the Western Front: 'it is not so much that one general is better than another; it is that one general is better than two.'⁵²

The legislature has the right, and the duty, to see that appropriation bills are clearly set out, with proper explanations for all proposed expenditures. It also has the duty to ensure that the government does not make any expenditure without the approval of the legislature. To ensure that the understanding about passing the budget package is not abused, the legislature should insist that any new programs, whether of expenditure or taxation, should be debated and agreed by the legislature before being incorporated in the budget.

Governments certainly will not like this. Governments enjoy the drama, the expectations and the publicity associated with the annual budget, but the benefits, if any, are for the government, not the nation or its economy. Governments like even more the fact that a budget can be presented as a package, so that the details of new programs often receive scant attention from the legislature. This should be unacceptable.

The legislature has three important functions with regard to government expenditure: voting the government adequate funds (supply) so that it can continue to function and implement approved policies; closely scrutinising government expenditure proposals; and checking that all expenditures have been properly authorised (the audit function). To perform these roles properly, the ideal legislature must insist that the government present adequate and clear financial information, that sufficient time is available for its proper consideration and, since financial control is a highly technical area, that the legislature has sufficient expert assistance to enable it to perform its roles effectively.

Governments will certainly obfuscate if they can. An example is the 'vote' system of appropriating funds. This lasted for three hundred years, and is only now being superseded in some parliaments by an accrual system of accounting, under which it is possible to see what a particular activity is costing, which was certainly not possible under the vote system. Parliament started making appropriations by votes, which could be spent only on the designated purposes, to prevent King

⁵² Nick Renton, 'Legislative Mumbo Jumbo', *IPA Review*, vol. 48, no. 1, 1995, p. 40.

Charles II spending the Navy estimates on his mistress, the appropriately named Duchess of Portsmouth. The system was slightly modified in the reign of William III, to prevent him spending public money on his friends, who were not even girls. That system continued into the modern era.

If the government has been elected on a particular program of policy changes, the legislature must accept that these programs are the wish of the electorate, and must facilitate their implementation. This will require some judgement by the legislature. Most political parties, having won an election, claim a 'mandate' for any policies that were mentioned, no matter how incidentally, during the election campaign. This claim is patently spurious. People vote for the *government* they want, though their decision may be influenced by major policy proposals, and there is usually a core of policies in a party's election campaign which can reasonably be said to have been the basis of that party's electoral success. Sometimes programs are not very precise. One British prime minister described his policy as 'to drift lazily downstream, occasionally putting out a boat-hook to avoid a collision.' Admittedly Lord Salisbury was talking about foreign policy, but the electoral policy statements of some parties in other areas have a similar ring.

Even when the legislature accepts the government's mandate in particular areas, that does not mean that bills to implement the policies should necessarily be passed in the form presented. Bills are normally extensively discussed before being presented to the parliament, in the bureaucracy, in the Cabinet, in the government party (and possibly in factions of that party) and sometimes with outside bodies, including minority parties in the parliament. Nevertheless the legislature as a whole has the duty to examine such bills closely, to see whether the method proposed is the most effective way of achieving the objective, and to satisfy itself that there are no unintended damaging consequences. If a white paper (a discussion draft of the bill) has been issued, the legislature should insist on seeing all the submissions. Evidence of experts in the community at large should be considered, for it is absurd to believe that all wisdom rests in the bureaucracy. Interest groups and minority groups in the community should also have their views taken into account, for this, besides being possibly useful, is an important means of reducing the alienation of the public from the political process. Hearings of all these views can be undertaken only by committees, who would report their conclusions to the legislature and propose any necessary amendments to the bills.

For bills which the legislature does not accept as being central to the program on which the government was elected, much more rigorous

criteria should be applied. The legislature would first have to be persuaded that the proposed law was necessary and desirable.

Our ideal legislature would also be extremely wary of ‘legislation by press release’, by which a minister makes a public announcement of a new policy, and some time later a bill is introduced to give retrospective effect to this policy, and parliament is expected to pass the bill. Although it is sometimes necessary in parliaments which meet infrequently to ‘legislate by press release’—to stop taxation loopholes, for instance—the legislature should be vigilant to ensure that the bill is introduced within a reasonable time after the announcement, that the retrospectivity is essential, and that the bill does not vary in any significant respect from the announcement. Moreover the legislature should not allow itself to be bulldozed by the tactics of the minister into passing a bill with which it disagrees.

In all the debates in the legislature over principles and policies, there is a danger that legal defects will slip through unnoticed. This is perhaps a particular danger with bills with whose purpose everyone agrees. An example is an apocryphal story about the British House of Commons:

More than 100 years ago, when divorce in the modern sense was possible only by Act of Parliament, an unhappily married Town Clerk was promoting a Waterworks Bill for his town; and in clause 64, mingled with something technical about filter beds and stop cocks, appeared the innocent little phrase ‘and the Town Clerk’s marriage is hereby dissolved.’ ... In due course the Royal Assent was given, and the Town Clerk lived happily ever after.⁵³

The important point about this story is that most MPs would not find it unbelievable. (There is also the question of whether the Town Clerk’s successors would have found themselves automatically divorced on assuming office.) These days, with divorce almost routine, the problems are more prosaic. Making some obligations or penalties retrospective, or giving bureaucrats unreviewable powers over ordinary citizens, are examples of abuses which are all too often produced by the government. The best solution which has been developed is to set up a small committee, with independent legal advice, to examine all bills as they are introduced and to draw the attention of the legislature to any such defects. The ideal legislature can then be expected to take the necessary corrective action.

The legislature would also be very careful about any law-making powers it delegates to the government, by empowering it to make regulations or similar instruments. The legislature must ensure that the

⁵³ R.E. Megarry *Miscellany-at-Law*, London, Stevens, 1955, p. 345.

terms of the delegation are no wider than necessary, that no power is given to make policy changes which should be given prior approval by the legislature, and that the delegated legislation is laid before the legislature and can be rejected by it if unacceptable.

Another area of potential abuse by the government is to delay the promulgation of bills passed by the parliament. Sometimes a delay is necessary, to permit the preparation of regulations, for instance, but the legislature must ensure that the arrangements for promulgation are precise, and if the government wishes to change the arrangements it must seek the approval of the legislature. This would prevent the present situation whereby some bills, duly passed by the parliament, have been wholly or partly suppressed by the government, sometimes for years. This has been a particular problem in Australia.

Lastly, our ideal legislature would be aware that the needs of effective administration demand that some bills should be passed by certain dates, and would arrange its program so that these dates were met.

Of course no such ideal legislature has ever existed, nor is it ever likely to. But it will be illuminating to see how far short of the ideal our existing legislatures fall, where they perform best, and where they perform worst.

Legislative procedures

All the parliaments follow the system which evolved in the UK for the parliamentary handling of proposed laws, though there are some local variations. A proposed law—a bill for an act—is given three ‘readings’. The ‘reading’ of a bill reflects the times when printed copies of bills were not available, and in any case many MPs were illiterate. These days all that is read is the short title of the bill. In most parliaments the first reading is a formality, merely placing the bill on the agenda of the house. The bill must be produced before the second reading, when the purpose of the bill is debated and a decision is made as to whether it should proceed. If a government has a majority it is almost unknown for one of its bills to be rejected. In earlier times, the rejection of a bill at the second reading stage sometimes caused excitement. In 1772 the Lords amended a clause of a money bill, and when it reached the Commons it was moved and seconded that the bill be rejected. The Speaker said ‘that he would do his part of the business and toss the bill over the table.’ The bill was rejected, and the Speaker, according to his

promise, threw it over the table, several members on both sides of the question kicking it as they went out.⁵⁴

If it passes the second reading, the bill is examined in detail to see that it achieves the agreed purpose in a clear and efficient manner, and any necessary amendments are made. This stage is usually done by a committee, often consisting of the whole house. The report of this committee is considered by the house, and during this stage further amendments may be made. Finally the bill is given a third reading, which is a chance to look at the bill as it has emerged from the committee and report stages. The debate is confined strictly to the contents of the bill, and is usually a formality.

Bills presented to the UK Parliament are divided into three categories: public bills, private bills, and hybrid bills. Public bills deal with subjects of general public interest. Nearly all public bills are government bills, but occasionally an unofficial bill (one initiated by a private member) becomes law. In 1998–99, 35 public bills were enacted, which is below the average, which would be about 60. Private bills, which should be distinguished from private members' bills, are for the benefit of individuals or groups, public companies or corporations, or local authorities. In 1998–99, four of these bills were passed, which again was below the average, which is about twenty. Hybrid bills are public bills which may affect private rights, and are dealt with by a special procedure. They are rare, with only ten passed between 1985 and 1999. All twenty parliaments use both types of public bills, but private bills are not universal and hybrid bills are not used outside the UK.

Handling of public bills originated by the government

United Kingdom

The first reading of a government bill originating in the House of Commons is a mere formality. A government bill originating in the House of Lords is deemed to have been given a first reading when it is received in the Commons and a member has told the clerks that he is taking charge of it.

The second reading is normally the key stage, when the purpose of the bill is debated and a decision made whether the bill should continue. A government normally has the numbers to pass its bills in the House of Commons, but it may have problems if it is a minority government, and difficulties may arise even when it has an apparently secure

⁵⁴ Quoted in Charles Gordon (ed.), *Erskine May*, 20th edn, London, Butterworths, 1983, p. 530.

majority. MPs at Westminster do not have to maintain a quorum in the chamber during debates, and ample notice is given of divisions. The responsibility for maintaining party attendance rests with the whips, who send round weekly notices to their MPs warning them when important divisions are expected and indicating the relative gravity of the occasion by the number of lines—one, two or three—drawn under the message. There is therefore not the same pressure as in the other parliaments for MPs to remain close to the chamber all the time the House is in session. Moreover, party discipline is now much looser at Westminster than it is elsewhere.

The committee stage is where a government bill is examined in detail. In Bagehot's day all bills were considered by the House as a whole, but the disruptive tactics of the Irish members led to two standing committees being set up in 1882 to deal with non-controversial bills. The number of committees was increased to four in 1907, and since 1947 the standing orders of the House have provided for bills to be automatically referred to a standing committee, unless the House of Commons orders otherwise. Bills of 'first class constitutional importance' are normally dealt with by the whole House, sitting as a committee. Other bills which may be dealt with by the committee of the whole House are ones which the government needs to pass quickly (when the courts have found a previous act defective, for example), or are of a very uncontroversial nature (for example a bill consolidating existing law), and the debate is expected to be so brief that it would not be worthwhile establishing a standing committee.

The remaining bills are sent to standing committees. The purpose of sending a bill to a committee is not to have it more carefully examined, but to enable a number of bills to be dealt with simultaneously, thus speeding up their handling. Each standing committee is known simply by a letter of the alphabet (Standing Committee A and so on) and members are appointed afresh for each bill. Each committee is chaired by a member appointed by the Speaker, who is supposed to be politically neutral. The relevant minister and shadow minister are members of the committee. The membership of the standing committees on bills is ad hoc and is apportioned according to party strength, so that the government party normally has control. The strength of the committees may vary between sixteen and 50, and the committee members are appointed afresh for each new bill. Even when the government has lost its absolute majority, as happened to Labour in 1976 and the Conservatives in 1994, no more than parity with the opposition parties is conceded. The chairman, who is appointed by the Speaker, then has the balance of power, and by tradition uses his vote to

support the original terms of the bill, and thus frustrates all evenly-contested amendments, opposition or government.

The number of standing committees is adjusted so as to meet the workload. There are usually not more than six or seven. The procedures in both the standing committees on bills and the committee of the whole House are the same as in the House of Commons, except that members may speak more than once to the same question. There is no direct input from the public, and no questioning of civil servants. When the standing committee has made any amendments it desires, the amended bill is reported to the House of Commons, and further amendments may be moved, though the Speaker will not normally permit amendments which have been fully debated in the committee to be moved again.

The House of Commons may fix a date by which a standing committee is to report, but this is used only when a bill is being 'guillotined' through the House on a fixed timetable. This was not used very often between 1970 and 1990, only 32 bills being guillotined during that twenty year period, but was much more used in the 1990s, particularly by the Blair Government, 51 bills being guillotined during that decade. This should be compared with the Australian House of Representatives, where as many as 132 bills have been ruthlessly guillotined in a single year. (This was in 1992, under the Keating administration.)

Since 1981 there has been an alternative procedure by which a bill can be referred to a special standing committee, which may take written and oral evidence from interested parties in up to three meetings. These hearings have to be completed within four sitting weeks, unless the House permits a longer period. This procedure has been rarely used, less than one in a hundred bills having been so referred since the procedure was introduced.

Money bills are handled somewhat differently. In the UK the financial year commences on 31 March. Until 1993 the practice was for spending plans to be announced by the Chancellor of the Exchequer in November. There was a full debate on this statement two or three weeks later. A further debate to consider the public expenditure plans was held in the New Year, the process being completed by the budget statement in March, which included any proposed tax plans, a new economic forecast and the latest estimates of the result of public expenditure for the year just ending. The November 1993 budget was the first of a new style of budgets by which spending, borrowing and taxation decisions were brought together in one statement to the House of Commons. The start point was the budget which was introduced in November, with an updated economic forecast. In addition to a broad overview of the economic situation, in his budget speech the Chancellor

of the Exchequer announced all the specific motions which would authorise the taxing charges to be incorporated in the Finance Bill. Some of these motions could be moved immediately to give provisional effect to tax changes, on tobacco or beer for instance. The debate on the budget usually lasted five days, at the end of which all the budget motions were voted on and passed without further debate.

This arrangement did not last. In the course of his speech on the 1997 budget the Chancellor (in the Blair Government) announced that from 1998 the budget would revert to March, with a pre-budget report published in November each year.

The Finance Bill incorporating the agreed resolutions is introduced after the budget motions have been passed, and often contains tax changes as well as the revenue necessary for the budget. The Finance Bill is handled like any other bill, except for the committee stage. At that stage some of the proposals, selected by the opposition, are debated in a committee of the whole House. Those matters chosen are the most politically controversial, and usually three days are made available. The remainder of the Finance Bill is considered by a standing committee, with the minister attending and answering questions. Although civil servants are present, they cannot be directly questioned. The committee may well meet a dozen times before it is satisfied. In 1983 the standing committee sat for 118 hours, but this was exceptional.

Many amendments are proposed, both in the standing committee and the committee of the whole House. These amendments are to stake out political positions or to earn the favour of pressure groups, and there is time to debate only a fraction of them.

The main estimates of expenditure are presented to the House at the same time as the budget, and these estimates are accompanied by an explanatory statement. As extra funds are needed during the course of the year, supplementary estimates are presented. Scrutiny of these estimates is cursory. As the Public Accounts Committee put it in 1987, 'Parliament's consideration of the annual estimates—the key constitutional control—remains largely a formality.' The last time the House reduced an estimate was in 1919, when the Lord Chancellor was refused an additional bathroom.

Since 1982 the House of Commons has set aside three days for debating the estimates, and for considering amendments to the Supply Bills, which authorise the estimated expenditure. The matters in the estimates and supplementary estimates to be debated are selected by the chairmen of the select committees, fourteen of which have watching briefs over the various government departments and as part of their terms of reference are required 'to examine the expenditure, administration and policy of the principal government departments and

their associated public bodies.’ In practice the committees do little about the estimates, and the debates tend to focus on subjects these committees have been considering, which may be useful publicity but has no effect on the estimates.

The problem is not that no one cares about the effectiveness of the parliament in these matters; it is rather getting something done about it. In the late 1990s there were two committees in the House of Commons looking at the problem—the Procedure Committee, made up of backbenchers, and the Modernization Committee, controlled by the government with the Leader of the House in the chair. The terms of reference of the Procedure Committee were to review ‘the practice and procedure of the House in the conduct of public business’, while the Modernisation Committee had an almost identical task, ‘to consider how the practices and procedures of the House should be modernised.’

In July 1999 the Procedure Committee proposed radical reforms to increase the control of the House as a whole, and its select committees, over government expenditure, with the appropriate increases in the resources available to the various committees. The aim was to shift the examination from the annual estimates to long term expenditure plans. It proposed that all the principal documents concerning each department’s spending plans should be referred to the relevant select committee for examination. The select committee would have to report within 60 days, and no money could be voted until the committee had reported. The government’s reply to the Procedure Committee’s recommendations was lukewarm, and nothing has yet happened.

Canada

The Canadian Parliament passes an average of about 40 government public bills a year, all of which these days originate in the House of Commons. From the late 1960s all bills were automatically referred to standing committees, but this was changed in 1986 so that specific bills were referred to legislative committees for review, an arrangement which was stopped in 1994. In that year, standing orders were amended to permit a bill to be referred to a committee *before* the second reading, and this is becoming increasingly common. Only a minister can move such a motion, and there is then a three hour debate in which MPs are limited to single ten minute speeches. The committee then effectively carries out the second reading and committee stages of a normal bill, and reports back to the House with any proposed amendments. Further amendments may be moved at this report stage, in the usual way. The proposal is not universally popular, particularly because of the elimination of the usual second reading debate, although some

discussion of this issue could take place during the three hour debate on the bill's referral to a committee.

The bills referred in this way are not central to the government's program and there is usually no consensus among government members. Typical bills related to bankruptcy, conflicts of interest of MPs, and gun control. Cross-voting is not uncommon on such bills, but is frowned on by party leaders. After fourteen Liberals cross voted in 1995, mainly on controversial legislation on gun control and hate crimes, Prime Minister Chrétien reacted angrily, stripping some of them of their committee responsibilities and even threatening not to sign their nomination papers in the future. In the 1994–97 Parliament, 25 bills—about 20 per cent of the bills passed—were referred in this way, but in the next Parliament this had dropped to four bills.

If there is general consent, a bill may be dealt with by the committee of the whole House of Commons, but this is very rare. It was used in December 1988 during the consideration of the free trade agreement with the US and Mexico.

The committees considering bills are adequately staffed, with technical assistance provided by the research staff of the parliamentary library, supplemented when necessary by experts from the community (chosen by the government). Some MPs still do criticise the level and quality of support available to committees, and certainly having the government select the expert advisers is objectionable. The committee hears evidence from the responsible minister and senior public servants and, if it wants to, from members of the public. Under a change adopted in 1991 the committee is restricted to hearing evidence only on 'technical' matters. The committee then considers the bill clause by clause. There is no official time limit on this consideration, though the parliamentary secretary to the minister sponsoring the bill is a member of the committee, and he may try to exert pressure on the chairman (always a government party MP) to hasten things along if he can. The only committees not traditionally chaired by a government member are the standing committees on Public Accounts and Scrutiny of Regulations.

The committee's report, which never recommends that a bill should be rejected, is considered by the House of Commons. New amendments may be moved, but the Speaker will not usually permit the moving of amendments which have been rejected by the committee, which has discouraged some MPs from moving their amendments there. Even though their amendments may fail in the House, they prefer to move them there in the brighter glare rather than in a dull committee room.

The procedure is rather slow moving, and all governments have difficulty completing their legislative programs. The solutions adopted

by both Liberal and Conservative governments have been to use omnibus bills covering several different subjects; to word the bills broadly so that fewer amending bills will be required in the future; and to make very extensive use of delegated legislation, which effectively by-passes the parliament.

Green and white papers are not now used as the basis for preliminary consideration of proposed bills, but a procedure has recently been introduced for a 'pre-study' bill to be tabled into the House of Commons, and public comment invited. This is all very well, but the public comment goes to the government, not the legislature.

Three new procedures have recently been adopted in Ottawa. The first is the possibility of the appointment of non-MPs to the committees. These appointed committee members are usually experts in the relevant field, and are able to question witnesses, take part in committee debates and the drafting of reports, but not to vote. The second development is the possibility of the nomination by the House of Commons of 'associate' members of committees, who may be co-opted by the committee to be members of any sub-committee that the committee may set up, and can also act as substitutes for members of the main committee.

The third new procedure is in some ways the most interesting. In 1993 the Liberal Party, then in opposition, proposed that some government bills should be prepared by the relevant parliamentary committees. This was designed to overcome the problems of the handling of controversial bills, which usually resulted in rigid party positions:

Once the Bill is prepared, since it is creature of a committee, rather than of the government, there would ... be no need for the Whips to be applied on any such vote. Debate on subsequent stages of a Bill drafted by a committee is not likely to lend itself to bitter partisanship ... Eventually, virtually all legislation could be initiated by committee.⁵⁵

In 1994 the new Liberal government amended standing orders to allow instructions to be given to a committee to prepare and bring in a bill. The committee is expected to provide the necessary instructions for the drafters, after hearing such evidence as it chooses on the purpose of the bill. The committee may, if it wishes, include recommendations regarding the actual wording. If the committee's report is concurred in by the House, the bill is then drafted and is handled in the normal way, except that there is no debate at the second reading stage.

This is a significant change in the balance of responsibility between the government and the legislature, moving towards the American

⁵⁵ Liberal Party of Canada, *Reviving Parliamentary Democracy*, January 1993.

model. In the Westminster system, the preparation of government bills has been seen as a responsibility of the executive, with the legislature examining the government's proposals and amending or rejecting them as necessary. In fact the system has been little used. The procedure was first tested in 1994, over a review of legislation concerning the adjustment of electoral boundaries. The bill was quickly passed by the House of Commons with a few technical changes, but died in the Senate.

The Canadian provinces

The parliamentary systems in the Canadian provinces are marked by short sessions so that part-time legislators face full-time governments, and the opposition is often very weak. In the past 50 years there have been 26 landslide election results, with one party winning 85 per cent or more of the seats. Eight of these have been in Alberta, but the most dramatic was in New Brunswick in 1987, when the Liberals won every seat. Such majorities do not make for effective legislatures.

Six of the provincial legislatures do not refer public bills to legislative committees, partly because of an historical reluctance on the part of the legislatures to reduce their power, and partly because in small provinces like Prince Edward Island there are not many bills and the Assembly itself is little bigger than the average committee (27 MPs, of whom ten are ministers).

Six provinces (Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Prince Edward Island) do regularly refer public bills to standing or select committees after they have been given a second reading. The proportion varies from all bills in Manitoba, Nova Scotia and Quebec, to 40 per cent in Ontario and about 10 per cent in Prince Edward Island and rarely in New Brunswick. Evidence from the public is solicited by the committees in Ontario, New Brunswick, Nova Scotia and Manitoba but very rarely in Quebec. Despite these committee hearings, it is very rare for opposition amendments to be accepted, except when there is a minority government. British Columbia refers about one public bill in a hundred to a standing committee, and Prince Edward Island about five a year. Newfoundland in 1989 started an experiment by which some government bills may be referred to one of three five-member parliamentary committees, but this idea was dropped and in recent years no bills have been referred to committees for examination.

Manitoba has a unique provision by which members of the public have the *right* to present their views to the committee, either orally or in writing. The number of such contributors has varied from none to over

200. The committees could set time limits for such witnesses, but almost never do.

In four of the provinces there is unlimited time available to the assembly for the consideration of estimates and even where there are limits they are generous by the standards of most other parliaments: twenty sitting days in Alberta, for instance. Only three provinces (Ontario, Quebec and Newfoundland) automatically refer the estimates to committees. In Ontario, the Standing Committee on Estimates selects between six and twelve ministries for detailed review of up to fifteen hours per ministry. The unselected ministries are deemed to be concurred in. The supplementary information provided with the estimates is generally quite inadequate, but in any case the estimates are almost never altered, except to correct typographical errors.

The Ottawa practice of Cabinets using ‘special warrants’ to grant themselves substantial sums of money without prior parliamentary approval is spreading to the provinces. The amounts so granted are retrospectively approved, usually in the supplementary estimates. The argument for such grants is that they are needed for urgent or emergency tasks, but the other countries do not seem to need them, and their use is a clear breach of a fundamental principle of responsible government.

Australia

Before some reforms were made in 1994, the Australian House of Representatives was almost totally ineffective as a legislature. It passed an average of 171 government bills a year, almost three times as many as were passed in the UK. Consideration of the detailed wording of bills was perfunctory. Except for a brief experiment, bills were never referred to standing or select committees. The details were considered in a committee of the whole House of Representatives, the only differences from the normal procedure being that the Chairman of Committees rather than the Speaker presided, and each member was permitted to speak on each motion for two periods not exceeding ten minutes. The minister in charge could speak for unlimited periods as often as he wanted.

To see how ineffective the House of Representatives was as a legislature at this time, it is worth looking at a typical year. In 1971 the House passed 138 bills, but only 34 of them were considered in detail in the committee, the remaining bills simply by-passing this crucial stage. There were two methods by which this was achieved. A procedure adopted in 1963 permitted the House to proceed straight from the second reading to the third reading of the bill, omitting the detailed examination of the bill in the committee. Of course the government

would not ask to omit the committee stage if the minister had amendments of his own to move, usually second thoughts from his department or suggestions made by government party backbenchers. A single voice could have insisted on a committee stage for any bill, but none did on 89 bills. Only one opposition amendment was successful during the whole of 1971. The amendment altered the heading of a schedule to Customs Bill (No. 2) so that it more accurately described the contents of the schedule!

Another way to stifle debate on bills was also ruthlessly used. The Australian Parliament sits for only half as many days as do the Canadian and UK parliaments, and it is always a rush to get all the legislation through. The guillotine helps. In the 1971 Parliament the government passed a guillotine motion requiring the passage of twelve bills in six and a half hours, including six bills which were allowed only two minutes each for all stages, which is surely an insult to the parliamentary process.

Other national parliaments also use the guillotine, but with nothing like the same ruthlessness. The standing orders of the Canadian House of Commons, for instance, provide for agreements between the parties for time allocations for the stages of a bill. If agreement cannot be reached, a minister may move the guillotine, but not less than one sitting day must be provided for each stage of the bill.

Things continued very much the same for the next two decades in the Australian Federal Parliament. The Parliament continued to pass an astonishing amount of legislation. The number of bills not considered in detail—that is, for which there were no committee stages—averaged 141 a year, which is an extraordinary dereliction of duty by a legislature. There was also no serious attempt to listen to suggestions from the opposition, even though some of them were genuine attempts to improve the legislation.

The increase in the use of the guillotine to restrict debate on bills was also disturbing. In the three years of the Whitlam Labor Government (1972–75) it was used an average of twenty times a year. Its use fell sharply in the Fraser years (1975–83) to an average of two, and in two of the years the guillotine was not used at all. The Hawke Labor Government, elected in 1983, reversed this trend and used the guillotine ruthlessly. In its first seven years it guillotined more bills than had been so treated in the entire period since federation. In 1988, 102 bills out of 210 were declared urgent, while in each of the years 1991, 1992 and 1993 over 100 bills were given restricted debating time (or guillotined). All government amendments were put together and passed when the allotted time expired. It was scarcely worthwhile for the opposition to divide on the bills or the amendments, for a division takes

eight minutes and this would eat into the scanty time available for the next bill.

There were attempts to do something about the problem. In 1978, during the Fraser Government, an experiment was made with legislation committees, more or less on the Westminster lines. A bill could be referred to a legislation committee after its second reading, but only if no MP objected. A committee had between thirteen and nineteen members, with what was intended to be a safe government party majority. The procedures were much the same as in the committee of the whole House, and the committees were not permitted to call witnesses. Thirteen bills were referred to the committees in the first three years. There were no amendments to six of them, and in a further four the only amendments came from the minister. The remaining three were interesting, because in all of them opposition amendments were either accepted without division, or passed with government party cross voting. The cross voting occurred on a bill dealing with listening devices for narcotics offences, and on another bill to ban whaling, which had a controversial clause making it an offence for an Australian citizen to take part in whaling anywhere in the world. The listening device amendments were accepted at the report stage, when the committee's report was considered by the House, but the whaling amendment was rejected, though five government party members cross voted.

This experiment with legislation committees was not really a success. Less than 5 per cent of bills were referred to the committees, and not more than two committees were ever operating at the same time. Their inability to take expert evidence limited their effectiveness. Their proceedings were constantly interrupted by quorum calls in the House, which committee members had to answer. Worse still, the committees were bitterly resented by some influential ministers, who did not like the scrutiny they gave to bills and particularly the cross voting. The committees lapsed in 1981, partly because the leading backbench advocate had lost his seat at the 1980 elections. Nevertheless it should be noted that the only bills amended in the House on opposition initiative between 1977 and 1987 were the two mentioned above.

An experiment with estimates committees was even less successful. In 1979 it was agreed, against the opposition of many ministers, that the main appropriation bill would be referred to an estimates committee after the leader of the opposition had made his response to the budget. The committee was to examine and report on the estimates, but it was not empowered to vary or reject them. Responsible ministers answered questions on their department's estimates, and they could, if they

wished, permit public servants to answer questions, though public servants were not supposed to be asked direct questions. Ministers did not like the arrangements at all. Much too intrusive, and a waste of time, they thought. In any case, the estimates committees were looking at less than half of the appropriations, for most government expenditure in Australia is authorised by permanent rather than annual appropriations, and the proportion is rising: from 42 per cent in 1965 to 68 per cent in 1985.

A second attempt at reform was made in 1994, under the Keating Labor Government. A new standing committee—called the Main Committee—was set up, to deal with the second readings and the ‘consideration in detail’ of bills referred to it. Any MP can attend the Main Committee. It meets at the same time as the House, usually for about six hours a week, speeding up proceedings by allowing two legislative streams to be operating simultaneously. The bills referred to the Main Committee are non-controversial, and votes are not taken there. If matters cannot be resolved unanimously, there are referred back to the House. A single dissenting voice is enough for this. Any decisions the Main Committee makes must be approved by the House.

At the same time changes were made to proceedings in the House of Representatives. The old Committee of the Whole was abolished, and bills are ‘considered in detail’ by the House using ordinary procedures, except that members may speak as many times as they wish on each motion, but for not more than five minutes each time. However, it is permissible for this stage to be by-passed, and less than a third of the bills are considered in detail at all.

The changes have solved some of the problems over the handling of legislation, but by no means all. The use of the guillotine has been markedly reduced since the Main Committee was introduced; in fact it was not used at all in 1999. On the other hand, consideration of the detail of the bills in the Main Committee has not been a success. MPs make policy speeches on these non-controversial bills, but spend very little effort on examining the detail of their contents. If you asked the average MP how many bills he or she had read carefully from start to finish, the answer would almost always be: none.

The Procedure Committee recommended a number of changes to the Main Committee, of which two are worth noting. Firstly, that it would be more appropriately named the Second Chamber; secondly, that there should be a freer style of debate, modelled on the UK House of Commons, by which members would be able to give way briefly during their speeches to allow other MPs to ask questions to clarify issues or raise objections. This should improve the standard of debate, as a

somewhat similar procedure has done in the Canadian House of Commons. It remains to be seen what the government response will be.

The introduction of three, rather than two, sitting periods a year seems to have reduced the rush of legislation at the end of a sitting period. The Senate has contributed, by refusing to consider bills not introduced in the Senate in the first two-thirds of a sitting period; bills which do not meet this requirement are automatically deferred until the next sitting period, although the government can seek an exemption from this rule. As the government does not control the Senate, its reasons, made in a formal statement justifying the need for the exemption, have to be persuasive to be successful.

A small step has been taken to improve the scrutiny of complex bills. Eight general purpose standing committees were set up in 1988, with watching briefs covering the full range of government activities. A committee may have a bill referred to it at any time after the bill has been given a first reading, and it may receive evidence and hold public hearings, though it cannot amend the bill but can only recommend amendments to the House. A committee can also recommend improvements to the program which the bill is implementing, and can suggest what should be included in regulations to be made under the authority of the bill. The trouble is that only a tiny proportion of bills receives this thorough examination. Only 26 bills have been referred to standing committees or select committees since the system started, and after a brief flurry of interest in the mid-1990s the number has fallen away again, with only one bill referred in 1998 and two in 1999.

The Australian states

One cannot say that the federal House of Representatives functions very usefully as a legislature, and the state legislative assemblies follow the same pattern. Perhaps, as most of them were established half a century before Federation, they may feel that Canberra follows them. No matter: it is a deplorable pattern. State parliaments sit briefly, opposition amendments to bills are very rarely taken seriously, and bills are almost never referred to parliamentary committees for public examination. The gag and the guillotine are used frequently in the New South Wales and Victorian assemblies, but rarely in the other states, though South Australia operates a weekly guillotine, agreed between government and opposition, which divides the time available between the various bills.

Victoria made an important advance in 1993, when it set up a Scrutiny of Acts and Regulations Committee, modelled on a similar committee in the Australian Senate, which is described in Chapter 8. The Victorian Committee has three sub-committees, one dealing with

bills, another dealing with regulations and the third with redundant legislation. Each sub-committee has a legal adviser. Queensland also has had such a committee since 1995, looking at the legal aspects of bills, but the legal adviser does not deal with each bill as it is introduced into the House, but only with such aspects of bills as are referred to him by the committee, which severely limits his effectiveness. The other states have taken no action in this area.

New Zealand

The New Zealand government occasionally makes use of a green bill, a draft bill which is circulated for public comment, and amendments may be made before the bill is introduced into the Parliament. The procedure for bills in the New Zealand Parliament is unusual in that the first reading of a bill is a significant stage. In most other parliaments the first reading is a formality, merely placing the bill on the notice paper—the agenda—of the House. In New Zealand the bill is produced at the first reading stage, and there is a limited debate during which the purpose of the bill is explained. With government bills, acceptance of the bill and approval of its first reading are automatic, though the debates are sometimes tedious and usurp the role of second reading debates, with much political point scoring. Since 1979 the standing orders of the House of Representatives have required that all government bills (with the exception of those of a budgetary nature or declared urgent by the government) be automatically referred to a select committee for further examination. The committee will usually advertise for submissions on the bill from interested individuals and organisations, usually allowing three weeks but frequently longer for the submissions. A program of public hearings will then be arranged. One bill attracted 1200 submissions. Of course others attracted none at all, but even with such bills the public scrutiny is valuable insurance, for an alert individual may be able to detect an unintended ill-consequence in an apparently innocuous bill.

Before the introduction of MMP a majority government had the power to declare to be urgent any bill it chose, and the bill could be rushed through the House without consideration by a select committee. Even when a bill was referred to a committee the government, if it wished, could use its majority on that committee to limit the public input. With MMP this is much more difficult. More consultation is required before a bill can be declared urgent, and the government cannot expect to have a regular majority on the select committees.

The significance of a bill being referred to a committee before its second reading is that it enables the committee to look not only at the details of the bill but also at its principles, and indeed whether it is

necessary at all. In New Zealand (unlike some other parliaments) the government does not normally attempt to force a committee to rush its consideration of a bill. Having heard all the witnesses it wants, as well as government officials, the committee then starts looking at the detail of the bill, clause by clause, using ordinary parliamentary procedures. A bill is sometimes sent to a committee in a very rough state, leaving it to the committee to tidy it up. An example was the Fisheries Bill of 1995, on which the committee received 112 submissions, 32 of which requested an appearance before the committee. The committee recommended extensive policy changes as well as re-arrangement of the bill, with the result that only ten of the 370 clauses remained unamended by the committee. The government accepted nearly all of the committee's recommendations. The downside of giving a bill to a committee in such an undeveloped state is that the amendments it proposes may be incomplete or inconsistent, and in a number of cases resulted in amending legislation being necessary when the act had barely had time to come into effect.

For all government bills, the committee has the assistance of a parliamentary counsel in drafting any amendments. The committees tend to act in a non-partisan way, for the party caucuses will not normally have taken a firm position on the wording of the bill. Generally the committee members try to reach agreement on amendments to overcome problems which have been pointed out, if necessary consulting the minister, the shadow minister and sometimes the party caucuses on important amendments. The bill is then returned to the House, with a recommendation as to whether or not it should be proceeded with—it is almost unheard of for a bill to be recommended against—and if the bill is to go on, listing any suggested amendments, which are automatically made to the bill before it is considered by the committee of the whole house. With the introduction of MMP, the government may not have majorities on each committee, nor hold the chair. In 1999 the Labour government (with Green support) had a majority on only eight of the fifteen committees.

A recent development has been the use by interest groups of mass petitions to Parliament supporting or opposing controversial bills. The number of petitions on the Radiocommunications Bill asking for the retention of the existing frequency for a Christian radio station was so great that the responsible minister announced a proposed amendment to the bill while it was still before a select committee.

After the select committee has reported, the subsequent proceedings with the bill are fairly standard. There is a second reading, with some inevitable political posturing. Then there is a committee stage, of the whole House, during which the opposition may put forward its

amendments, and the minister may move any amendments which implement departmental second thoughts or to correct anything the select committee has done which the minister does not like. And finally there is the usual third reading debate.

Money bills are handled differently. Money bills are defined in the New Zealand Parliament as those of a 'financial or budgetary nature'. To be so classified by the Speaker, a bill must be substantially (but not necessarily exclusively) concerned with those matters, and must deal with economic policy and not merely with administrative matters. A money bill is not, like other government bills, automatically referred to a select committee. It can be if the minister wishes, but this is rare.

The main appropriation bill, the expenditure side of the annual budget, is examined in more detail. The appropriation bill shows only the total of each vote, but the detailed estimates which make up each vote are examined, on behalf of the House, by the appropriate select committees. The activities of the select committees are co-ordinated by the Finance and Expenditure Committee, which has an overriding responsibility to determine 'what, if any, economies consistent with the policy implied in those estimates may be effected therein.'

Government officials are questioned by the committees in private session, and the reports of the committees are available to the committee of the whole house when it deals with the main appropriation bill, though debates at this stage are usually yet another broad ranging policy debate rather than consideration of the details of the estimates.

There are problems with the New Zealand select committees stemming almost entirely from inadequate resources. The public hearings are not recorded in Hansard, which makes it difficult for MPs who were not present to be sure of exactly what was suggested. More serious is the fact that advice for the committees usually comes from bureaucrats, frequently the ones who wrote the bill the committee is considering. They have an impossible conflict of interest. Further, the departmental advice is not heard in public, being taken by the committee behind closed doors. The lack of independent expert advisers to the committees is a serious weakness. There are also problems with the availability of sufficient MPs for the committees, although the 20 per cent increase in the size of the House has reduced this problem slightly.

The New Zealand Parliament has a curious habit of occasionally grouping a large number of bills, sometimes more than twenty, in a single bill, passing them through all the early stages as a single bill, and then breaking them up into their component bills when the Parliament has effectively finished its consideration. The procedure was originally

intended to speed up the handling of minor uncontroversial amendments to various acts, but has been used in recent years for quite substantial matters. From the government point of view it speeds up the passage of the bills, but it makes their consideration in committee very untidy and unsatisfactory.

Minority governments

A minority government has several possible approaches to the handling of legislation. If it has managed to organise promises of support from minor parties or Independents on motions of confidence and budget bills, it is almost inevitable that the price will be for them to have some influence on the government's legislative program, and the government will just have to accept this as the price of its survival. With regard to other bills, some will be non-controversial, and will benefit from detailed scrutiny and appropriate amendment, particularly if there is direct input from the public at the committee stage. Budget bills are normally passed as a package. The problems arise with bills which are disliked by the opposition. Depending on the attitude of the minor parties or Independents holding the balance of power, the government can either accept defeats stoically while waiting for a suitable issue on which to call an election, or attempt to negotiate with those holding the balance of power to gain support for particular bills, frequently with amendments wanted by the minorities. A great deal depends on the tactical situation, and the skill of the prime minister or premier.

In all minority governments, the negotiations with the minor parties and Independents over legislation are conducted by the executive government, usually by the minister concerned. The government party caucus is merely invited to support the agreement. Party discipline almost always holds, even when many government party members are against the deal. In such circumstances government party members have little influence on the detail of controversial bills.

Traditionally the parliamentary agenda is set by the government, with the order of government business being determined by the Leader of the House. This may be disputed when there is a minority government. It may happen too when there are many parties in the lower house, as in New Zealand as a result of MMP. The New Zealand House of Representatives has taken an important step by taking the matter out of the hands of the government and setting up a Business Committee to control the parliamentary program. The Business Committee may determine the order of business, the time to be spent on an item, how the available time is to be allocated among the parties, and the speaking time of individual members. The Business Committee is

chaired by the Speaker, and all parties are represented proportionally on the committee. Its aim is to reach unanimity or near unanimity on the business program of the House, and so far it is working well.

There is yet another version of minority government, when a government with a majority in the lower house does not control the upper house. The legislative problems, and the benefits, which flow from this are discussed in Chapter 8.

The effectiveness of parliamentary deliberations on bills

Whatever the procedures for the handling of bills, their effectiveness depends on the way they are manipulated. If MPs are going to support the party line regardless of the arguments and evidence advanced, the most elaborate procedures become mere charades.

United Kingdom

Until the early 1970s, party discipline in the House of Commons was fairly strong, so strong indeed that commentators came to regard a party line vote as automatic, and there was 'public suspicion that members have become mere ministerial voting machines that rarely even backfire in protest.'⁵⁶ There were occasional instances of deliberate abstention or voting against the known wishes of the party's leaders, but this did not unduly inconvenience any of the governments. The reasons for this discipline were many: loyalty to the party, fear of loss of political preferment, the possibility of action by the party in the constituency, and the belief (unfounded though it was) that if the government were defeated the prime minister would have to seek a vote of confidence or a dissolution, or resign.

The 1970s were a turbulent time in the House of Commons, with minority Labour governments for much of the decade, under Wilson between February and October 1974 and again under Callaghan from 1976 to 1979. By contrast the 1980s were stable with a secure Conservative majority from 1979 onwards. In the 1990s the Conservative majority evaporated, and in its last days the Major Government was in a minority. The Labour Party under Tony Blair won a decisive victory in 1997, and continued to govern until the end of the century.

Voting discipline became much less rigid. As far as the Conservative Party was concerned the catalyst for change was Prime Minister Heath (1970–74) whose manner and methods antagonised many of his own party. Two-thirds of the Conservative Party

⁵⁶ B. Crick, *The Reform of Parliament*, 2nd ed., London, Macmillan, 1970, p. 14.

backbenchers voted against the Heath Government on at least one occasion, and the Heath Government was defeated on five occasions by cross voting or abstentions by its own members. There were 204 divisions (out of 1100) in which there were Conservative dissenting votes (dissenting from the party line, that is) compared with 34 for the Labour Party.⁵⁷ Perhaps the most dramatic event concerned the joining of the European Common Market. When the House voted on the principle of entry in October 1971, the Conservatives were allowed a free vote, and 39 voted against entry. The Labour Party opposed the motion, but 69 defied the three-line whip and voted for entry. When the Common Market Bill came before the House in February 1972, Heath explicitly made the second reading vote a matter of confidence—that is, Parliament would be dissolved if he were defeated—yet fifteen Conservatives cross voted to oppose the bill and five abstained. The bill passed only because it had the support of five Liberals and five Labour MPs abstained.

Even with cross voting, almost all government bills were given a second reading. On a standing committee an opposition amendment will succeed only if there is cross voting by government party members, or if the minister accepts the amendment. The Heath Government suffered ten defeats caused by cross voting in committees and ultimately accepted all the amendments either outright or in modified form. Further bills, possibly as many as ten, were modified to head off threatened dissent.

In the minority Wilson Government of 1974 the pattern continued. In 23 per cent of the divisions in that brief Parliament someone broke ranks, though the embattled Labour Party held together rather better than the Conservatives, still led by Edward Heath. Few bills were introduced and the government was not defeated on any of them, chiefly because the opposition leaders did not want an early election, fearing that Labour would receive voter sympathy and gain an absolute majority. Nevertheless the government lost fourteen divisions on amendments to bills, and seven amendments made by the House of Lords were accepted by the Commons over government objections.

The October 1974 election gave Wilson a three seat majority, but this gradually disappeared through defections and by-election losses, and from April 1976 (when Callaghan replaced Wilson), Labour was again a minority government, frequently defeated on minor issues but surviving no-confidence motions until 1979 through the support of minor parties, particularly the Liberals. In the 1974–79 Parliament the

⁵⁷ The statistics and background information in this section are taken from publications by Phillip Norton (see bibliography).

Labour government suffered 42 defeats, 23 of which were caused by cross voting by Labour backbenchers. Out of some 1500 divisions either Labour or Conservative backbenchers cross voted on 423 of them (that is, 28 per cent). The frequency of Labour defections was rather higher than among the Conservatives. One significant alteration forced by the opposition reduced the basic rate of income tax and raised the level of income at which the higher rates would apply. Most governments in the past would have treated such defeats as grounds for resignation or a dissolution, but the Callaghan Government simply accepted them and plodded on.

In the Thatcher years, although the 'Iron Lady' always had a safe majority and from 1983 a substantial one, the new pattern of cross voting and abstentions continued. In the 1979–83 Parliament there were sixteen occasions when ten or more Conservatives abstained or cross voted. In April 1986 the Shops (Sunday Trading) Bill, which was introduced by the government in the Lords, was decisively beaten in the Commons because of substantial Conservative cross voting, despite a three-line whip. This was the first bill lost in the twentieth century by a government with a majority in the Commons.

Things became worse in the Major Government. John Major took over from Margaret Thatcher in December 1990 and, to everyone's surprise, won the election in April 1992 with a majority similar to Thatcher's in her first election. The trouble was that the Conservative party was splintering, chiefly over involvement in the European Union. The government was defeated nine times on the floor of the House, caused by cross voting by Conservative MPs.⁵⁸

Things became easier in the Blair Labour Government, not because of less cross voting but because of Labour's massive majority—419 of the 659 seats. In fact there was substantial cross voting, with 47 Labour cross voters on a bill dealing with lone parent benefit and 67 on one dealing with disability cuts.

How can one explain this behavioural change by the Parliament? In part it is because the idea that a government defeat automatically means an election is no longer credible, though it had been firmly believed by some MPs as late as the 1960s. Since then governments have been frequently defeated and yet survived, provided they keep the formal confidence of the House. No cross voter or abstainer was expelled from a parliamentary party, though some left voluntarily. Constituency retribution has not been evident, and as for loss of preferment it should

⁵⁸ Government defeats on the floor of the House, 1970–99: 1970–74, 6; 1974, 17; 1974–79, 42; 1979–83, 1; 1983–87, 2; 1987–92, 1; 1992–97, 9; 1997–99, 0. David Butler and Gareth Butler, *Twentieth-Century British Political Facts 1900–2000*, London, Macmillan Press, 2000, p. 201.

be noted that one of the Labour cross voters was Neil Kinnock, later leader of the Labour Party, and several of the Conservative cross voters during the Heath Government became ministers under Margaret Thatcher. The pattern having been broken, it seems that tight party discipline will be difficult to restore. The danger with cross voting is that it may distort decisions of the House, if all parties do not have similar disciplinary standards.

Of course great pressure can be put on an MP to toe the party line. The government chief whip has formidable weapons, apart from routine appeals to party loyalty and warnings of the danger of constituency retribution. For the government chief whip is the 'Secretary of Patronage'. He has great influence on the selection of junior ministers, and on the decisions as to which backbenchers will be rewarded with knighthoods. Despite these powers, the chief whips have had some failures, particularly with MPs who no longer have any ambition to be parliamentary secretaries and already have knighthoods.

It is easy to overstate the significance of the behavioural change in party line voting as far as legislation is concerned. At Westminster the government party has no direct input into bills before they are presented to the House, unlike the other parliaments where the outlines of bills (except for the budget) are extensively debated by the government party caucuses and their party committees before being introduced into the House. Substantial modifications are sometimes made to bills as a result, and if there is sufficient resistance a bill may even be withdrawn.

At Westminster these intra party arguments take place on the floor of the House, or in the standing committee if the chief whip has been careless enough to appoint malcontents to the committee. This procedure is undoubtedly more in keeping with the traditional concept of responsible government—the executive should present its bills to the House of Commons without having them first considered by a section of that House—but it does have disadvantages. The government may be more reluctant to accept sensible amendments in the public glare of parliament than it would be in a party committee or caucus. What is astonishing is not that there is now substantial cross voting in the House of Commons, but that until 1970 government party MPs were prepared to rubber stamp bills into which they had had no input.

This lack of prior access to the detail and structure of bills does not mean that government party members have no influence on what bills are put forward. All the major parties have committee structures for their parliamentary parties. Conservative backbench MPs have a weekly meeting, called the '1922 Committee', which ministers are entitled to attend only to discuss matters within their responsibility. There are also numerous ad hoc committees—perhaps as many as

twenty—set up to deal with particular matters, and they spawn many subcommittees. These committees may raise matters for discussion in the 1922 Committee. No votes are taken there, but the Whips attend and report the feeling of the meeting to party leaders.

The committee structure of the Labour Party is much more rigid. All ministers attend meetings of the parliamentary party and formal resolutions are considered and often voted on. These resolutions are then held to be the policy of the party. There are also twenty or so departmentally related committees which, when Labour is in opposition, are chaired by the relevant shadow minister. There may also be special working groups set up to consider major bills after they have been introduced, and to report on them to the party meeting.

All prudent prime ministers—including Margaret Thatcher—are sensitive to the likely reactions of government party backbenchers, and will disturb them only if the policy reward is worth it. The exception was Edward Heath who, despite having been chief whip, seemed insensitive to backbench views, and he ultimately paid the price. Many examples of backbench influence over legislation could be cited, and this pressure is obviously more effective if the government's majority is small. The Whips may well negotiate amendments with dissident government backbenchers, to avoid the embarrassment of cross voting and even possible defeat. During the 1951–55 Churchill Conservative administration, for instance, when the government had a majority of only seventeen, backbench pressure resulted in the introduction of commercial television, and the speeding up or amendment of policies such as MPs' pay, teachers' superannuation, judges' remuneration, and development councils.

Canada

Canadian MPs almost invariably follow the party line on legislation, both on the floor of the House and in committee. There are occasional defections, but these do not cause problems. When they occur, they are usually orchestrated by the whips to permit a member to make a symbolic protest—either because of conscience or strong local pressure—but not so as to cost the government a division.

Before bills are introduced into the House their outlines are considered in secret by the government caucus, and bills may be modified or even withdrawn as a result of caucus pressure. But in public the parties vote solidly. The party whips are the key to discipline. The whips used to have some peculiar problems. When there is a division in the Canadian House of Commons, the bells ring for either fifteen or twenty minutes, depending on the nature of the division. It used to be the custom that, when the bell-ringing time had elapsed (and

they sometimes rang for a little longer than scheduled to allow for tardy MPs) the government and opposition whips advanced side-by-side to the speaker and bowed, indicating that all was well, the bells could stop and the division begin. In 1983 there was a dispute over whether an omnibus bill should be split and the parts voted on separately. The government would not agree, and the opposition whip refused to make the ceremonial entry. The bells rang for fourteen days until the government agreed to split the bill. The standing orders were soon amended to eliminate the whips' ceremony.

The whips allocate office space, they usually decide who participates in debates and question time and who is on which committee, and they play a major role in deciding who goes on overseas trips with parliamentary delegations. Except in the UK, where the government chief whip commands even greater patronage, these powers are unmatched in the other parliaments.

Another important factor in ensuring party discipline, at least on the government side, is the short expectation of political life of the average Canadian MP which, coupled with a long tradition of political patronage, is a powerful tool for the whips. 'A very high proportion of government MPs will someday, when their parliamentary career ends, obtain a position of reward (patronage) as judge, member of board or commission, or ambassador.'⁵⁹

The great weaknesses of the committees considering bills were their changing membership and their partisan nature. If a committee member was unable or did not want to attend a meeting, a replacement was provided to keep up the party voting strength. The method of selection of the replacement was constantly changing—sometimes it was done by the MP, sometimes by the whip—but it resulted in an unstable membership, often largely unaware of what had gone on before. Worse still were the so-called 'goon squads' organised by the whip, who marched in as a vote was about to be taken, presented their credentials and asked a colleague 'which side are we on?' On controversial bills there is a high degree of partisanship, with cross voting almost unknown. In the decade of the 1980s, not more than five clauses in bills were amended against the wishes of the minister.

The recent decision to permit non-MPs to be appointed to the committees should improve the quality of the reports of the committees. These non-MPs are usually experts in the matter being considered, and although they cannot vote they should make a contribution to the committee reports. To overcome the problem of the replacement of committee members, the nomination of 'associate' members by the

⁵⁹ C.E.S. Franks, *op. cit.*, p. 45.

House of Commons should remove the need for goon squads; these associate members are also available for sub-committees. They will not of course alter the partisan nature of committee reports, for the associate members selected will always be of the same parties as the missing committee members.

Australia

Until 1987, it was extremely rare for opposition amendments to be accepted. Indeed, from 1977 to 1987—eleven years during which nearly 2000 acts of Parliament were passed by the Fraser Coalition Government (1977–83) and the Hawke Labor Government (1983–87)—except for the two bills amended by the legislation committees, not a single opposition amendment to any bill was accepted in the House.

From 1987 to 1994 there was a trickle of opposition amendments accepted, but this was largely because opposition members took to moving some of the amendments suggested by the all-party Senate Scrutiny of Bills Committee. This committee, of which more will be said later, has independent legal advice and examines the technical aspects of all bills. The government, knowing that the amendments would probably be made in the Senate anyway, sometimes found it convenient to accept them in the House.

The 1994 reforms did not make any significant difference to the number of opposition amendments to bills which were accepted by the government, which until 1999 still never reached double figures. In that year no less than *eight* bills were amended on opposition motions, and one had nineteen such amendments and another fourteen. The reason for the dramatic change was that the government was fighting to get major tax reforms through the Parliament, and obviously thought that if it showed a reasonable approach to the handling of legislation, the opposition or the Australian Democrats or the minor parties or Independents in the Senate might show more flexibility in their approach to the tax legislation. Indeed, the minister handling the Broadcasting Services Amendment Bill (No. 1), to which fourteen opposition amendments were accepted in the House of Representatives, thanked the opposition spokesman for his general support for the bill, and said that ‘I have no doubt at all that that bipartisanship should extend to the government’s tax legislation.’ Whether this approach will survive the passage of the tax legislation remains to be seen.

Party discipline is rigid in the House of Representatives. Cross-voting is very rare—almost unheard of—in the Labor and National parties. In the Labor Party, voting against or abstaining from voting in favour of a caucus decision normally results in expulsion from

the parliamentary party and political oblivion. There was only one occasion in the past three decades when a Labor MP broke ranks, and he survived! The Labor MP representing the gold-mining centre of Kalgoorlie voted against the Labor Government's 1988 gold tax. The caucus understood his problem, suspended him for a period which covered the summer parliamentary recess, and then forgave him. He was finally expelled from the Labor Party in 1995 for expressing many views which were contrary to Labor Party policy, particularly on immigration and racial policy, including attending meetings of extreme right groups such as Australians Against Further Immigration and the League of Rights. He held his vast electorate as an Independent in 1996, but was defeated by the Labor Party candidate in 1998. About ten Labor Party MPs and senators threatened to break ranks and vote against the Gulf War in 1991, but in the event the motion was carried without a division. There was one recorded 'no' vote, but it was by an Independent.

The National Party does not have the strict rules of the Labor Party, but it is a small, extremely cohesive group. The Liberal Party is the maverick. Its federal platform says (slightly tongue in cheek) that MPs should be 'responsible to their electors alone, and not subject to direction by people or organisations inside or outside Parliament.' Liberal MPs sometimes use this right, but not to much practical effect.

Cross-voting is most significant when a party is in power, for it may result in legislative amendments. In fact, during the 1975–83 Fraser Coalition Government one or more Liberals cross voted on eleven procedural motions (most of them moved by the government to limit debate) and on seventeen amendments to government bills, but the government did not lose any of the procedural motions and none of the amendments to the bills was carried. None of the cross voters was penalised by loss of selection as the Liberal candidate in the next election. Indeed, in some cases their position was strengthened, for they were representing the views of the party organisations in their states, which were opposed to what the federal government was proposing—on matters such as retrospective change to the income tax laws or the continuation of an anti-competitive internal airline system. Nor was any action taken by the parliamentary party. None of the cross voters was expelled or publicly criticised in the party room. Five of the cross voters later became ministers.

On bills on which the government party is deeply divided, a free vote is sometimes permitted, but only if an agreement can be reached with the opposition to grant similar freedom to their members. Free votes on government bills are rare, having been permitted only four times in the past 30 years. The bills concerned dealt with the abolition

of the death penalty (1973), family law (1974 and 1983), and sex discrimination (1984).

New Zealand

Party discipline is extremely strict in New Zealand, and a Labour or National Party member would never be away from the Parliament without a whip's approval. Labour members sign a pledge to vote as their caucus decides; they cannot even abstain. The National Party members are not pledged, but they have a very high degree of conformity, and all important matters on which they may be called upon to vote will have been previously discussed and agreed in the National Party caucus.

There was only one occasion between 1970 and 1999 on which cross voting cost the government a bill. This was in 1998 when two National Party MPs voted against a bill concerned with the Auckland Regional Council. The vote was tied, and in accordance with standing orders the bill was lost. This was the first defeat of a government bill in the twentieth century. Defeats on important clauses are also very rare. A National Party cross voter was publicly told by Prime Minister Muldoon that his re-nomination would be opposed, but the party president pointed out that the parliamentary leader had no standing in the matter. Those who cross vote repeatedly may suffer minor slights, such as lower priority in the competition for speaking opportunities, leave from the House or overseas trips. The most effective deterrent is undoubtedly the probability of the denial of ministerial office, though the minister of finance in the 1990 Bolger National Party government had cross voted in 1984 and cost the Muldoon Government an important clause. The overwhelming National Party victory in 1990, and the consequent arrival of a large contingent of new members, caused an upsurge in cross voting, but the government's majority was such that this did not cause any real problems.

In 1989 a Labour member was removed from the chairmanship of a select committee because he abstained from voting on a bill to sell the Bank of New Zealand. On the other hand, another Labour member suffered no adverse consequences in 1974 when he voted against the compulsory acquisition of wool, the caucus turning a blind eye because of the MP's electoral problems. But only two cases in the Labour Party in 30 years is an extraordinarily low rate of cross voting.

Public bills moved by private members

The amount of time the government is prepared to permit the parliament to spend on business not initiated by the government is a fair

indication of its respect for the institution. Private members' bills provide MPs with a device with which they can criticise government policy and put forward policy suggestions which they consider important. Professor Mallory has claimed that, in Canada, practically every significant measure of reform in modern times has been introduced by a private member, usually but not exclusively from the opposition. The ideas which receive public support are often eventually taken up by the government.

United Kingdom

The House of Commons makes a much more generous allocation of time for private members' bills than do any of the other parliaments we are considering. In a normal session, which lasts from the end of the summer recess in September or October until September or October of the following year, between ten and thirteen Fridays are reserved for such bills. Friday is chosen both because the House rises earlier and also because there is usually a free vote on private members' bills, which means that MPs not interested in the bills can leave the House and have a long weekend, or perhaps visit their constituencies.

Which backbenchers are permitted to move bills is decided by a ballot, with about 60 per cent of backbenchers—that is, over 400—entering it. The first six can be certain of having a bill debated, the next six probably will, and so on. Another method of introducing private members' bills is also available. Each Tuesday and Wednesday a backbencher may move for leave to bring in a bill. Only one such motion is accepted each day, and the mover may speak for ten minutes, explaining the purpose of the bill. This usually gives the publicity the MP is seeking, though very few bills introduced in this way eventually become law. MPs may also give notice of a bill; the bill is presented formally, and the MP does not make a speech at this stage. MPs cannot present such bills until the ballot bills have been presented, so there is very little likelihood of them being debated.

Each year a total of about fifteen private members' bills can be expected to be given a second reading, and having crossed this hurdle nearly all of them complete the remaining stages, which are the same as for other public bills. There are usually many amendments, either in the standing committee or at the report stage, in order to get the bill into acceptable shape if it looks like being passed. The House of Lords nearly always passes private members' bills which have succeeded in the Commons, though it occasionally proposes amendments.

Many members who are well placed in the ballot do not actually have a bill ready, and they are inundated with suggestions. Ministers with bills for which there has not been time in the government program

look for pliable backbenchers who have done well in the ballot, and they often find them. About a third of the private members' bills which are passed are in fact government bills moved by a backbencher. Of course backbenchers often do have passionate convictions, but they will get a bill through only if it is reasonably uncontroversial or there is substantial cross party support.

A good example of a bill passed against government wishes is the National Audit Act of 1983, which had its origins in a report by the Public Accounts Committee in 1981. The PAC report aimed to reform the powers, staffing and method of appointment of the Comptroller and Auditor-General. This was firmly rejected by the Thatcher Government, acting on the advice of the Treasury which was anxious not to see its own powers diminished. When the National Audit Bill was introduced by a backbencher, with co-sponsors from all parties, the government had to yield, though it managed to win some last-ditch struggles, of which the most important was the very regrettable decision to exclude the audit of nationalised industries from the scrutiny of the Comptroller and Auditor-General.

The flavour of private members' legislation is best given by examples. In 1984–85 and 1985–86, acts were passed relating to Agricultural Training Board; Betting, Gaming and Lotteries; Charities; Controlled Drugs (Penalties); Dangerous Vessels; Hospitals Complaint Procedure; Prohibition of Female Circumcision; Wildlife and Countryside (Service of Notices); Corneal tissues; Drainage Rates (Disabled Persons); Forestry; Incest and Related Offences; Marriage (Wales); Protection of Children (Tobacco); and Protection of Military Remains.⁶⁰

Controversial bills, on abortion for instance, have very little chance of passing. Delaying tactics by passionate opponents will usually succeed, for the chair will not normally accept 'gag' motions on private members' bills. A source of successful bills—about 20 per cent of the total—is the House of Lords, but a private member's bill passed by the Lords will meet a dead end unless it is taken up by an MP.

Many bills are introduced, particularly by the opposition, not with any expectation of them being passed, but in order to gain publicity for particular causes, and the tactic can be very successful.

Canada

Not more than one or two private members' bills become law each year, but at least some of the bills are brought to a vote. There is a

⁶⁰ J.A.G. Griffith and M. Ryle, *Parliament. Functions, Practice and Procedures*, London, Sweet & Maxwell, 1989, p. 400.

ballot of the many contending bills and motions which are put forward, and twenty are drawn by the Deputy Speaker at the beginning of each session. A committee considers the twenty, and selects six bills and motions which will be brought to a vote, after up to three hours' debate. Private members' bills cannot involve expenditure, and 'should be legally and constitutionally acceptable, differ from specific matters already declared by the government to be on its legislative agenda, avoid being couched in partisan terms and avoid dealing with any matter which the House could address in some other way.' A successful private member's bill banned smoking on Parliament Hill.

Australia

It is possible for individual MPs to introduce bills, but only seven such private members' bills have been enacted in the century since the first meeting of the new federal Parliament in May 1901. Ten private members' bills passed the House of Representatives, but three of them failed to pass the Senate. Of the seven successful bills, three have been passed since 1970. The first of these was to formalise the general agreement that the new Parliament House should be built on Capital Hill,⁶¹ and the third dealt with a curfew for Adelaide Airport. The second was much more controversial. The Northern Territory legislature passed an act which came into effect in 1996 to permit a doctor to end the life of a terminally ill patient at the patient's request. A government backbencher in the federal Parliament moved a private member's bill which would remove the powers of the legislatures of the three territories (Northern Territory, Australian Capital Territory and Norfolk Island) to make laws which would permit euthanasia.

Although the federal Parliament clearly had the power to override territory laws, there was considerable disquiet about the power being exercised. All three territories protested, and the Senate Scrutiny of Bills committee concluded that the bill 'may be considered to trespass unduly on personal rights and liberties' because it would override a decision of the democratically elected government of the Northern Territory. This was the attitude taken by Prime Minister Howard when the issue of mandatory sentencing of repeat offenders came up some years later, but on the voluntary euthanasia issue he supported overriding the Northern Territory legislature.

⁶¹ The temporary 'Old' Parliament House, opened in 1927, was built close to the site chosen for the Parliament House in the original design for the national capital. Construction of the new Parliament House on the original site would have involved the demolition of the temporary building, which was generally thought to be politically unacceptable.

The Senate Legal and Constitutional Legislation Committee also examined the bill and discussed the issues in its report, but made no recommendations because it was 'a private member's bill and is subject to a "conscience vote".' The committee received more than 12 000 submissions, an unprecedented level of community interest in a bill.

There was a 'free' vote (that is, a non-party vote) on the issue, but although this was supposed to be based on the consciences of the individual members, they could not ignore the powerful and well organised religious organisations passionately opposed to euthanasia. Although public opinion surveys indicated that 75 per cent of the public supported voluntary euthanasia for a dying person,⁶² the supporters were not nearly as well organised politically as were the opponents. In the event the bill passed both houses and became law in 1997. Three people had ended their lives under the Northern Territory act before it was overruled.

No opposition bill originating in the House has become law in modern times. Governments do not take kindly to bills moved by opposition MPs, feeling that they are usurping the role of government or at the least giving the opposition undesirable prestige. About one and a half hours are allocated each sitting week to private members' business, and bills must compete with motions for the available time. In practice, the opposition concentrates on motions critical of the government and on bills and motions which it is thought will cause the most political impact, without any expectation of being able to pass a bill.

The Australian states

Except in Tasmania, where the Greens managed to pass four private members' bills when they held the balance of power under minority Labor or Liberal governments, successful private members' bills are rare in the Australian states. In Queensland, although standing orders allowed for them, there were none even introduced from the 1920s until 1992. Then there was a dramatic change, with 39 bills being introduced in the next eight years. What was even more dramatic was that two of them actually passed.

New Zealand

Every second Wednesday while the House is sitting there is a Members' Day, when up to three non-government bills can be

⁶² The *Australian*, 9 July 1996. The figures were 53 per cent strongly in favour, 22 per cent partly in favour, 6 per cent partly against, 12 per cent strongly against and 7 per cent uncommitted.

introduced. They may be voted down at this stage, if the government does not like the bill and can muster the numbers.

Otherwise, they are sent to the relevant select committee for public input. If there is substantial support for the bill, the government may introduce its own bill on the issue, and the private member's bill then lapses. With minority governments, which have been common since MMP was introduced, it is not uncommon for bills to be reported back to the House with a recommendation that they proceed. The government cannot block such bills, for standing orders impose a deadline for the committee to report back, and the government cannot vary the order of their consideration by the House. Of course the bills cannot be passed if they involve expenditure which is not agreed by the government, and a minority government may be able to muster support to defeat other bills which it dislikes. From the end of the Second World War until 1990 only nine private members' bills became law, and all but one of the successful MPs was in the government party. Since then there has been a slight improvement, with four being passed during the 1996–99 minority government. Typical subjects for the bills have been fireworks, abolition of the death penalty, adult adoption and homosexual law reform.

Private bills

In the UK private bills deal with local matters, and are promoted by bodies such as a local authority, a nationalised industry, or a private company or charity. If the bills are not controversial they may be given a second reading without debate. Controversy may arise from local factions. The acquisition of land may be opposed, for example. Debate may also arise from political opportunism, if the promoting body is someone like British Rail, and MPs see an opportunity to air their views on its performance.

After the second reading, a private bill is referred to a small private bill committee, comprising four members if the bill is opposed, either by MPs or by a petition. If the bill is unopposed, the committee strength is seven. The committee on an opposed bill hears counsel representing the promoters of the bill and the petitioners against it, and both may call witnesses who may be cross-examined. The committee, like a court, hears only the evidence presented to it, and it has the power to recommend rejection of the bill or amendments to it. The subsequent progress of the bill is the same as for a public bill.

In Canada there are few private bills, and the necessary investigations are effectively left to the Senate, where most of them are introduced.

Private bills are almost unknown in the Australian Federal Parliament. Such a bill would have to be based on a petition, and would have to have special relationship to the interests of the petitioners. If such a bill were ever introduced, it would be handled in the same way as a public bill.

In New Zealand private bills fill in the gaps in the general law, or alter the effect of public acts, for the benefit of individuals. There are particular requirements for local consultation before these bills can be introduced into Parliament, but essentially they are handled in the same way as public bills, though they do not have the same certainty of passage as public bills introduced by the government.

Other types of bills

Hybrid bills in the UK are public bills which may affect particular private interests. The committee stage is usually handled by a select committee, which examines the bill in the same way as the private-bill committee, and then reports to the whole House. Typical hybrid bills were the Channel Tunnel Bill and the British Museum Bill. Such bills are not common, with the four introduced in the 1986–87 session being regarded as most unusual.

In New Zealand local bills are used to deal with the multiplicity of boards and similar bodies which run local government business in New Zealand. Such bills must affect a particular locality only. During the 1990s, 54 such bills were passed.

Government failure to proclaim bills passed by the parliament

In 1988, a demand from the Australian Senate that all government departments should give details of any legislation which had not yet come into operation received the answer that some sections of various acts had not been proclaimed because they ‘provoked considered and continued ministerial and bureaucratic opposition on enactment’ and were ‘therefore not proclaimed’. So much for the powers of the legislature to legislate! At the same time the Senate discovered that parts of acts had been left, unproclaimed, on the statute books for more than 50 years.

Decisive action was taken. The government, under Senate pressure, agreed that in future acts which were to commence on proclamation by the government should include a specific date, or a period after the royal assent, when the act would commence automatically—if not already proclaimed. If it were undesirable to specify a date because, for instance, there had to be similar legislation enacted by the state parliaments, the reasons were to be set out in the explanatory

memorandum. The Senate also passed an order requiring that all departments and authorities advise the Senate, twice yearly, of all unproclaimed legislation, the reasons for the failure to proclaim it, and a timetable for its future proclamation.

This is a very effective arrangement. It is worth noting, though, that it was enforced by the Senate not the House of Representatives. The House of Representatives, which is of course controlled by the government, would have been most unlikely to have initiated such action to control that government.

There is a similar problem in the UK where, as a typical example, the Easter Act of 1928 has still not been proclaimed. No effective action has been taken.

Legislation by press release

Legislation by press release is largely confined to Australia among the national parliaments, because of the relatively low number of sitting days there. An example of legislation by press release was the announcement by the Australian Treasurer, in February 1990, of an intention to increase the tax on luxury motor vehicles. The Treasurer added, in another press release, that ‘the government would expect motor vehicle dealers to make provision for the additional liability pending passage of legislation in the forthcoming session of parliament.’ The dealers complied, though in fact the Treasurer was telling them to break the law as it stood, comforting them by saying they would not be pursued by the Taxation Office. More blatant contempt for Parliament and interference with a theoretically independent Taxation Office would be difficult to imagine.

The Australian Senate has taken effective action to control abuses of legislation by press release, but has not been able to prevent its use. This is partly because the Australian Speaker does not have effective power to discipline ministers who make policy statements outside the Parliament, but largely because ministers can argue that, with the Parliament not sitting for three-quarters of the year, the announcement of the policy (usually concerned with taxation) could not wait for the Parliament to come back.

Adequate sitting days for consideration of bills

The Australian House of Representatives sits for an average of only about 61 days a year, whereas the UK House of Commons sits for about 170 days, the Canadian for 135 days, and the New Zealand House of Representatives for 95 days. The short sittings in Australia make it

almost impossible to give proper consideration to government bills or to provide reasonable time for consideration of private members' bills.

The pressure for the very short sittings in Australia seems to come from two complementary directions: from the backbenchers and from the ministers. Backbenchers want to be in their electorates so they can hold their seats, for their activities in Canberra do not seem to most of them to help much in this regard. Certainly any suggestion that they should spend twice as many days in Canberra each year would be greeted with dismay.

An English MP has recorded that, when he was first chosen as the Conservative candidate for a constituency he had never before visited in his life:

I asked whether I would be expected to live in the constituency. 'Here in Preston? Good God, no!' came the reply. 'It's a very marginal seat. You're a young man. [He was twenty-four.] You're bound to sow some wild oats, and it would never do to sow them in the constituency'. I then asked how often I would be expected to come to the constituency. [The Chairman] answered that regularity was the important thing. He wanted me to come once a month. If I came less there would be criticism. It was a very sensible approach.⁶³

Such behaviour would almost certainly be fatal for an Australian federal backbencher. The executioners would not be the voters, who probably would not notice, but the local party members who either choose the candidates or have a substantial influence on who is selected.

The ministry's approach is equally negative in Australia. At least while Parliament is not sitting it is more difficult for the opposition to gain publicity, which is very satisfactory for ministers. While Parliament is sitting all ministers must be available and briefed for the daily question time, though the question time rostering system introduced in 1994 reduced this pressure. However, it was only a trial, and it was not continued when the Coalition came to power in 1996. Even when there is nothing which concerns them happening in the House, ministers must be within four minutes travel of their seats in the chamber, to answer quorum calls or to vote in snap divisions. The 1989 change in the quorum of the House of Representatives from one-third to one-fifth enabled many ministers to be exempted by the whips from answering quorum calls, but they still have to be available for divisions, which may be called at any time without warning. It is understandable that a minister responsible for a complex department or involved in important Cabinet discussions would find his duties in the legislature a

⁶³ Julian Amery, *Approach March*, London, Hutchinson, 1973, pp. 442–3.

tiresome distraction, and would hold the view that the less the House sits the better, provided he can guillotine his legislation through. Of course if publicity for one of his bills through extensive debate would help the government (or the minister) politically, such a debate can usually be arranged, for the government controls the program of the House.

It will be a struggle to change such attitudes, and to make arrangements to eliminate unnecessary attendance by ministers in the House, but until they are changed the House of Representatives will continue to be a very defective legislature.

Limiting debate on legislation

Mention has already been made of the use of the 'guillotine' as a means of limiting debate on bills which the government considers to be unduly protracted. The government has other weapons. Under the standing orders of the Australian House of Representatives, if someone moves the gag—the motion that the question being debated be now put to a vote, which can be moved at any time, even in the middle of an MP's speech—the chair must put the question at once. This gag motion is used successfully about 30 times a year. In most other parliaments, the chair has the right not to put the gag motion if, in the opinion of the chair, useful debate is still going on. In Canada the gag cannot be moved while another member is speaking, and the motion may be debated. MPs who have spoken on the main question may speak again on the gag motion, so that it is not a very effective method of limiting debate. In the New Zealand Parliament the chair will not accept a gag motion if it would be 'an infringement of the rights of the minority', and another MP's speech cannot be interrupted by such a motion. In the Australian House of Representatives the gag is used about 50 times a year, averaging nearly once every sitting day.

An alternative to the gag is a motion that the MP speaking be no longer heard. It is used in the Australian House of Representatives about 30 times a year, which is once every second sitting day. This is a useful way for a ruthless government to cut short the speeches of opposition MPs without ending the debate, when that would frustrate government party members wishing to speak.

Improving the standard of second reading debates

In most of the parliaments debate tends to be a succession of prepared speeches, unrelated to one another, and not creating a serious intellectual argument. In the UK House of Commons there is a procedure by which an MP wishing to make an 'intervention' while

another MP is speaking in a debate may stand, and the MP speaking may, if he wishes, yield to the other for a brief statement or question. This is a useful way of enlivening debate and clarifying obscure arguments, though it is of course sometimes abused. Unlike the other national parliaments, the UK House of Commons does not have time limits on speeches. There was a brief experiment in 1979–80 with ten minute limits on speeches between 7 pm and 9 pm on the second readings of bills, but it was not popular and the idea lapsed. However, the Speaker can make it clear when he thinks a speech is going on too long, and it is wise for a backbencher to take heed, otherwise it may be very difficult for that MP to get the call in a future debate.

‘Interventions’ would not be workable in houses where an MP has a limited speaking time, for MPs almost invariably feel the allotted time is too brief, and would resolutely resist all interventions.

In the Canadian House of Commons an MP used to be allowed to speak for 30 minutes on most questions. In 1982 this was changed to twenty minutes, but a further period of ten minutes was provided for ‘question and comment’ on what had just been said, with the original speaker being given a right of response to each. When giving MPs the call, the Speaker gives preference to members of parties other than that of the original speaker, but not to the exclusion of members of his or her party. Since there is no precise time set down for the length of each question or comment, the Speaker will sometimes establish how many members are interested in participating and then apportion the time for each intervention accordingly. Occasionally the Speaker will interrupt a member who is not being relevant, but this has not been a major problem. The great feature has been that members have actually begun debating questions, rather than delivering a series of prepared speeches.

By-passing the legislature

There is a growing move in many places, particularly the United States, for the voters as a whole to be able to initiate or veto legislation, rather than leaving the task to their representatives. These citizens initiated referendums fall into three categories. The first involves submitting to a referendum, at the demand of a certain percentage of the electorate, a law already passed by the legislature, so that the electorate has an opportunity to veto that law. The second category involves putting a proposed law to a referendum, at the request of a prescribed percentage of the electorate. If the referendum is carried the law is enacted, without any requirement for the approval of the legislature or the government. The third type of citizens initiated referendum does not involve law-making. At the request of a prescribed percentage of the electorate, a

proposed law can be put to a referendum to obtain community views on its desirability. The law is not enacted by the referendum, but a heavy vote in favour would put great pressure on a government to move a similar law in the legislature.

There are real problems with giving law-making power to the voters. All the legislative checks and balances which have been built up over the years would be demolished. Drastic and deceptively simple solutions would be adopted to complex problems. Perhaps the most serious effect would be to remove any protection of the reasonable rights of minorities. Parliaments do try to perform this role. They are not always effective, but they do try. Pressure groups would also constantly be trying to bring their issues before the public. There would be frequent referendums on the death penalty, abortion law reform and on other issues which are socially destructive and divisive.

In California, where referendums are binding on the legislature, the courts have the power to negate their results if they attack fundamental rights or essential government powers. In 1989 a huge majority passed a referendum to halve the cost of car insurance premiums. Of course, the first court dismissed this patently stupid idea.

New Zealand introduced the citizen initiated non-binding referendum process in 1993. New Zealand has had plenty of experience with advisory referendums initiated by the government, principally to shed the responsibility for difficult decisions on socially divisive issues. Since 1894 there have been 42 such referendums, 31 of them on the subject of liquor licensing. With the citizen initiated referendums, a proposal for a referendum is submitted to the Clerk of the House of Representatives, together with a five hundred dollar fee. The Clerk determines the final wording of the referendum question, and the proposer must then collect the signatures of at least 10 per cent of registered electors and present their petition to the Clerk. The Governor-General determines a date for the referendum, which must be within twelve months of the presentation of the petition, unless 75 per cent of the members of the House of Representatives vote to defer it, which they may do for up to two years. The House of Representatives may also change the date of the referendum so that it coincides with a general election.

So far there have been three such referendums, and two have passed. In 1995 there was a referendum on whether the number of professional fire fighters should be reduced. This was heavily defeated. Two more were put at the time of the 1999 election. One of these asked whether 'there should be a reform of [the] justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences for all serious

violent offences.’ This was carried by more than 90 per cent of the votes. The second referendum proposed to reduce the number of MPs from 120 to 99. There was widespread support for this proposal too, more than 200 000 New Zealanders being prepared to sign the petition. The referendum was carried by over 80 per cent of the votes. There was no effective campaign against it. Unlike Australia, there is no public funding for the two sides in such referendums, and the case for the larger number of MPs—principally their availability for select committees—was simply not put effectively. In any case, no action has been taken by the government to implement the successful proposals, although after the 1999 election a select committee was set up to review the working of the MMP electoral system, and this committee might look at the number of MPs.

Policy statements made outside the parliament

As a retiring Speaker said recently in the UK House of Commons, ‘it is in parliament in the first instance that ministers must explain and justify their policies.’ But it is only in the UK that any serious action has been taken to control ministers in this regard. In the other parliaments, ministers all too often make their policy statements outside the parliament, usually on television or at public meetings, so as to gain maximum publicity without the opposition having the chance of an immediate response. One defence offered for such behaviour is that it was necessary to announce the policy immediately, and parliament was not sitting at the time. This excuse does not bear examination, for many of the policy statements are made during a parliamentary session. And if it is argued that parliament was not sitting, the answer is that most of the parliaments should sit for a great deal longer, which is necessary for other reasons.

Ministers in the UK House of Commons do make a considerable number of policy statements to the House, immediately after the one hour question period. These statements can be questioned by the shadow minister and by other MPs, which proceedings possibly lasting as much as an hour.

This is not to say that the UK system is perfect. The Speaker has no formal power to insist that ministers should make policy announcements to the House, but successive Speakers have spoken strongly in private to erring ministers, and have clearly indicated dissatisfaction if the matter was raised in the House on a point of order. A Speaker has said that she had made her views known, both publicly and behind the scenes, to both the governments which were in office during her time as Speaker. A Speaker can also embarrass an erring

minister by permitting a private notice question (especially from a shadow minister) on why the policy statement was not made to the House, which might force the minister to come to the House to answer the question, causing awkward publicity for him.

Despite these controls, the tendency of UK ministers to make policy statements outside the House of Commons has grown sharply in the 1990s. A former minister in the Thatcher Government, Sir Norman Fowler, has written that when he:

first joined the Commons in the 1970s it was ‘a shooting offence’ for ministers not to tell the House first. In the 1980s that tradition broadly continued as [he could] testify as a member of Margaret Thatcher’s cabinet. The rot set in during the 1990s and the result is today that parliament is a very different place. Announcements are regularly made outside the Commons—all too often as spoon-fed exclusives.⁶⁴

Of course not all the policy announcements are important enough to justify a statement at prime time in the House. Some deal with minor issues, which could be dealt with by a written answer to a (planted) written question.

Nevertheless the contempt of parliament shown by many ministers in the other legislatures justifies some action, and the UK model is worth looking at, though whether many of the Speakers would have the will to take action is doubtful. Perhaps formal restrictions should be placed on ministers making policy statements outside the parliament while the parliament is in session.

Conclusions

Let us consider the performances of the lower houses against the standards of an ideal legislature.

None of the lower houses has insisted that all new programs of expenditure or taxation should be debated and agreed by the lower house before being incorporated in the budget. None of the lower houses scrutinises proposed government expenditure effectively. The efficiency aspect is particularly neglected.

Few government bills are subjected to searching scrutiny. Except in the UK, the outlines of public bills produced by the government are usually considered by government party caucuses before being introduced into the parliament. Significant amendments may be made by the caucus, and bills even rejected, but once the caucus has passed a bill party discipline is used to resist any opposition amendments, with very rare exceptions when the minister finds one attractive. In the UK

⁶⁴ Norman Fowler, ‘Parliament and the Media’, *The Parliamentarian*, vol. LXXXI, no. 3, 2000, p. 16.

Parliament, where public bills are not considered by the party caucus before introduction into the House, the caucus discussions are effectively held in public in the House of Commons. Some amendments are then made because of pressure from government party MPs, and the results are much the same as in the other parliaments. Cross-voting is thus extremely rare, and many bills are passed which would have been rejected if MPs had been free to vote as they really believed, rather than being constrained to follow a decision of a majority of their party, or their party leaders. What is being lost is one of J.S. Mill's 'indispensable requirements ... a readiness to compromise; a willingness to concede something to opponents and to shape good measures so as to be as little offensive as possible to persons of opposite views.'

None of the lower houses has set up a specialist committee to examine all bills to check that there are no legally objectionable features, such as making some obligations or penalties retrospective, or giving unreviewable powers over ordinary citizens to bureaucrats, or inappropriately delegating the power to make laws. Such objectionable provisions are quite common in the laws proposed in all the parliaments.

'Legislation by press release' is largely confined to the Australian Federal Parliament as far as the national parliaments are concerned. This is because the Australian Parliament sits for such a small number of days each year, and as a consequence it may become necessary to announce and enforce action on a taxation matter while Parliament is not sitting. The Senate has taken effective action to prevent abuses of the use of this power. It is most unlikely that the House of Representatives would ever have taken action on this matter.

The parliaments should not put up with unreasonable delays by the government in proclaiming acts duly passed by the parliament. Here too the Australian Senate has taken effective action to prevent abuses by the government.

What can the Australian House of Representatives learn from the other national lower houses in order to improve its performance as a legislature?

The first and most important lesson is that it must be prepared to sit longer, probably at least twice as many days as it does now. It must also recognise that, if it sits longer, ministers will require release from excessive attendance in the House so that they can get on with their administrative tasks. Rostering of ministers at question time is an obvious step which should be re-examined, and the exemption of ministers from quorum calls and 'pairing' of ministers with opposition members for unimportant divisions should be extended.

Fortunately the Senate has taken the necessary steps to control abuses of ‘legislation by press release’ and the failure to proclaim legislation passed by the Parliament, but the House of Representatives must copy the UK House of Commons by giving the Speaker the power, and encouragement to use the power, to ensure that ministers do not make policy announcements outside the House while it is sitting.

The Senate has also taken the important step of setting up a Scrutiny of Bills committee with independent legal advice, to ensure that there are no legal defects in proposed legislation. The Scrutiny of Bills committee examines bills when they are first presented to the Parliament, so their report is nearly always available before the House considers a bill, and there is therefore no need for the House to duplicate the committee.

In the Canadian and New Zealand lower houses, virtually all government bills are referred to committees for public examination. In both of these houses the pressure of this work has meant that little committee time is available for other investigations. Neither Canada nor New Zealand has an elected upper house to assist with such inquiries. In Australia the Senate is available to perform this role, though there are some defects in its performance, as will be discussed in Chapter 8. There is little to be said for committees of both houses carrying out public inquiries into controversial bills, and it would seem best to leave such inquiries to the Senate, where no government is ever likely to have a majority, and the inquiries should be searching.

Only about 10 per cent of government bills are controversial, and the remaining bills usually slip through the House of Representatives with no proper examination of their details. There is much to be said for public input being invited on these bills, for experts in the community might well point out problems which had been overlooked. The Senate Scrutiny of Bills Committee also raises issues which require investigation on many bills. Non-controversial bills could well be handled by committees of the House of Representatives. As the bills would not have been opposed in the House, committee members would almost certainly approach any problems raised in a non-partisan way.

There is something to be said for the ‘pre-study’ of bills, as used in Canada and New Zealand, though it is important that any public comments should be available, not only to the government, but to the committee considering the bill. Australia should also consider carefully the arrangements for private members’ bills in the UK, a system which would become possible if the Australian House of Representatives greatly increased its number of sitting days.

The House of Representatives should copy the procedure of the Canadian House of Commons and permit expert non-MPs to serve on

the committees considering bills. These experts are able to question witnesses, take part in committee debates and the drafting of reports, but not to vote. It should also consider providing committees with associate members, to fill any temporary committee vacancies and serve on any sub-committees if they are needed. The Canadian procedure by which committees may be used to draft some government bills should be watched, but should not be adopted unless its success becomes more evident.

The debating procedure in the Canadian House of Commons, whereby the last ten minutes of a MP's 30 minute speech are available for 'question and comment' on what has just been said, has resulted in serious debate rather than a dreary succession of prepared speeches, unrelated to one another. The problem for the Australian House of Representatives is that such a procedure requires strict control by the Speaker, which might not be available in the Australian House.

A powerful and effective Speaker would also be needed to control two other abuses of power by the government—the use of the guillotine and the gag. The Canadian House of Commons has the best procedure for controlling abuse of the guillotine, for its standing orders provide that if agreement cannot be reached between the parties on the time allocations for the handling of each bill, the government may move the guillotine, but not less than one sitting day must be provided for each stage of the bill. This would make the use of the guillotine very unattractive to an Australian government!

Steps should also be taken to restrict the use of 'gag' motions—the motion that the question being debated be put to an immediate vote, which in the Australian House of Representatives can be moved in the middle of an MP's speech. This is not permitted in most other parliaments, and in those parliaments the Speaker also has the right not to put the motion if, in the opinion of the Speaker, useful debate is still going on.

Even if all these improvements were made it does not seem likely that they would make the Australian House of Representatives into a really effective legislature, though it would be a great deal better than it is now. The problem is the tightness of party discipline, which would too often prevent questions being considered on their merits. It does not seem possible that the Australian lower house will adopt the looser party discipline of the UK House of Commons. It seems that the smaller the parliament the tighter the party discipline. Besides, looser party discipline would be likely to damage the continuing electoral college role of the House of Representatives, by causing very undesirable instability in government.

The problem seems insoluble. Perhaps a single chamber simply cannot be a decisive electoral college and an effective legislature.

The other roles of lower houses

Bagehot thought that the House of Commons, in addition to its functions of choosing the executive government and passing legislation, had four other roles: an expressive function, expressing the mind of the people ‘in characteristic words the characteristic heart of the nation’; a training function, so that the people are ‘forced to hear two sides’; a function of informing the government; and a scrutiny and review function, ‘watching and checking’ government ministers.

Parliaments are not usually very effective these days in expressing ‘the characteristic heart of the nation’. The trouble is that the media, particularly television, tend to give undue prominence to dissenters, and only the most innocuous resolutions are likely to be unanimous. It is true that there are occasions when, in an almost mystical way, the parliament becomes the centre of pent-up national feeling on some crucial issue, and the MPs feel they are before the bar of history. But such occasions are rare.

Parliaments have had more success with the ‘training’ function. The adversarial system of parliamentary debate is admirably suited to presenting at least two sides of every controversial question, but how well this gets through to ‘the people’ depends on the news media, which have been revolutionised since Bagehot’s day. Moreover, the relevant ‘people’ who are to hear and presumably judge the two sides are far more numerous and more disparate. Television has become the main source of political information, and the moulder of political opinions. The two sides of complex political questions are sometimes presented on television, not always by political leaders, but the main effect of television has been to trivialise complex political problems.

Most of the parliaments we are examining have moved to permit the televising or radio broadcasting of parts of their meetings, but these have not always been successful in explaining complex issues to the voters, or indeed in improving the image of parliament. The serious press, unable to match the immediacy of television news, has moved increasingly to commentaries and background reporting rather than proceedings in parliament as the basis of articles. In any case

newspapers are much less influential with the mass of voters than is television.

The function of keeping the government informed of current political opinion in the community is on the whole done well. Governments are, if anything, deluged with too much information, from opinion polls, deputations and by-elections, so that they find it difficult to keep their resolution, and to be leaders not followers of public opinion. MPs certainly contribute their share of political information to the government, through meetings of their parliamentary parties and its committees, through representations to ministers, through questions and speeches in the House, and by organising petitions.

A modern MP would be surprised that Bagehot made no real mention of a member pursuing fair treatment or assistance for constituents. This is one of the most time-consuming tasks of an MP, and one which some MPs take very seriously, partly out of a sense of duty and partly to encourage voter support. In the UK, perhaps 10 per cent of the public at some time contacts a local MP for help, and ministers receive 10 000 letters a month from MPs. If the MP is dissatisfied with the minister's answer the matter can be pursued in the House. In 1990 the Public Information Office of the Canadian House of Commons received 50 000 requests for information assistance, and a majority of these were passed on to MPs' offices.

An even more significant role which has emerged since Bagehot's time arises from the fact that lower houses, unless there is a minority government or one with a very small majority, have largely lost their role of choosing the government, except immediately after an election, and even that is not put to a vote. The development of the party system has caused the real choosing-power to be taken away from the parliament and given to the voters. As a consequence many of the activities of MPs in the parliament are devoted to campaigning for the next election.

This post-Bagehot role, of using the parliament as an electoral campaign area, has come to dominate proceedings. The government is naturally anxious to put its decisions in the best light, so as to retain the confidence of the party and the voters. The opposition, as the alternative government, is constantly seeking to expose the deficiencies of the government, and to suggest that it would handle things rather better. When, and whether, the opposition reveals alternative programs to the parliament is a matter of tactical timing and the performance of the government.

The campaign for the next election usually starts as soon as the parliament meets after the previous election. Although they all have other purposes as well, question time, motions and private members'

bills are all directed towards the next election. The intermediaries are the media. From the point of view of the continuing election campaign, a brilliant speech or a devastating question is of little value unless it is reported in the media, for very few people read Hansard. Of course a good performance by a backbencher will improve his standing in his parliamentary party and he can usually arrange to have it reported in the local newspaper. But most elections are won by national swings, not by local efforts.

There is much criticism in America of the length of modern presidential election campaigns, which last five months. With responsible government, the election campaign lasts the entire life of the Parliament, usually several years. The formal campaign, lasting for a few weeks after the dissolution of the Parliament, usually has only a relatively minor effect on the election result, unless one of the party leaders makes a serious mistake.

Committees of inquiry

The performance by the various lower houses of Bagehot's fourth function—'watching and checking' ministers—exemplifies the impossible task these houses face, in circumstances of tight party discipline, in trying to combine the watching and checking role with that of being an electoral college. It is not that the houses lack the necessary powers. They can oblige ministers to give oral or written answers to questions concerning their administration; they can set up committees to investigate the performance of ministers and their departments; they can pass motions of censure on individual ministers; and they can reduce the appropriations for departments which are performing unsatisfactorily.

The difficulty is that these formidable powers are mostly theoretical. Committees of inquiry—which may be set up for the life of a parliament, or established to investigate a particular problem—are an excellent means of probing government administration, but they rarely probe very deeply. All four of the national parliaments have set up 'subject' or 'departmental' committees in their lower houses to monitor particular government departments and their ministers, but their performance varies. They work best at Westminster, where the opposition has a fair share of committee chairs and the committees can initiate their own investigations, and worst in New Zealand, where the committees are distracted from their investigative role by the demands of hearings on bills. But even where the committees work best, their effectiveness is severely limited by the pressures of party discipline. The committees do some valuable work in investigating problems

which do not involve rigid party positions or threaten ministerial reputations, but governments normally use their party strength to head off more intrusive investigations.

On the rare occasions when a committee does conduct an investigation which is opposed by the minister concerned—which are of course usually the matters which should be investigated—the minister has another line of defence: executive privilege can be invoked to avoid the answering of embarrassing questions. The privileges of the Australian Parliament were codified in 1987, but the codification does not really help in dealing with recalcitrant government witnesses before parliamentary committees. Certainly a witness who, without reasonable excuse, refuses to answer a relevant question may be sentenced by the House to up to six months imprisonment or a substantial fine, but the power is really unusable. Would not a direction by the minister to a public servant not to answer particular questions be ‘a reasonable excuse’ for the public servant? As far as a minister is concerned, under the current system there is no way a House committee would reject a claim of executive privilege for refusing to answer a question or for directing a public servant not to do so. Minor parties or Independents, with no hope of being in government, might advocate such action, but it would be resisted both by the members of the government party and by the opposition (the alternative government). The opposition would have no desire to set such a dangerous precedent for their future governments.

Even when a committee reports adversely on the performance of a minister, nothing may follow. Committee reports are not usually debated extensively in any of the lower houses. Except with a minority government, party discipline will prevent the passage of a censure motion on a minister, while the obvious solution of refusing or reducing expenditure on an unacceptable program would be resisted on party lines, being treated as a vote of confidence in the government.

‘Departmental’ or ‘subject’ committees

If the crucial role of monitoring the actions of government departments and non-departmental agencies is to be performed effectively, the only effective weapon for the parliament is to set up a system of supervising committees to do the task for it. All of the national parliaments have done so, the numbers ranging from fifteen in the UK to thirteen in New Zealand, 25 in Canada and eight in Australia. The New Zealand committees are the only ones which also regularly consider bills, though the Canadian and Australian committees occasionally do so.

United Kingdom

In 1979 the UK House of Commons set up fourteen departmentally-related select committees, though the move was opposed both by the Conservative government and the preceding Labour government. The vote was nevertheless 248 to twelve in favour of setting up the committees. These committees differed from the standing committees considering bills, for the membership was for the lifetime of a parliament. Most of the committees have eleven members, but two have as many as seventeen. Their role is to 'examine the expenditure, administration and policy in the principal government departments ... and associated public bodies.' They have been a reasonable success. They meet regularly, usually once a week. The committees are reasonably well staffed, and they are entitled to engage specialist advisers, such as distinguished economists. They call for evidence from the public, and hear oral evidence if they want to. They have the power to compel witnesses to attend, with the threat of a contempt of parliament charge to encourage the reluctant.

Probably the most successful has been the Treasury Committee, which has conducted budget reviews, investigations into the management of the economy and supply matters, and into the organisation and efficiency of the civil service. The committees achieve a high degree of unanimity, except for highly partisan inquiries, such as the one into the Falklands War, though some committees achieve consensus by avoiding controversial issues. The party composition of select committees reflects that in the House, so committees normally have a government majority. Committees choose their own chairs. The departmental committees have accepted the distribution of the chairs between parties as agreed by the whips, but have exercised their own judgement as regards individuals. By 1997 the number of departmental select committees had increased to seventeen.

Support for the committees is provided from the staff of the House of Commons. The smallest committees may have a clerk and two support staff, while the largest may have two clerks, two specialist assistants and two senior support staff. In addition to these staffs, the committees make liberal use of their power to appoint specialist advisers. By the standard of other parliaments the staff levels are generous, though outsiders are sometimes surprised that they are not bigger, in view of the complex tasks they may have to undertake. This view is not generally shared by MPs, who feel that if the staffs became larger the inquiries would become staff driven rather than member driven.

Ministers and civil servants are clearly influenced by the knowledge that their policy decisions may come under public scrutiny. There are

problems, though. Scrutiny of nationalised industries is much less systematic than it was before 1979, because the new structure involved the elimination of the old Select Committee on Nationalised Industries. Some of the committees, such as Energy, look seriously at the nationalised industries, but others show little interest. Committee reports are often not debated in the House, or if they are, they tend to be debated late at night or on a Friday, when the House is sparsely attended. The committees determine their own agenda, and as a result tend to focus on politically interesting happenings rather than on departmental objectives and methods, but this is probably inevitable, politicians being politicians. The reports are usually unanimous, but this is achieved by the committees steering clear of subjects which are divisive between the parties, which of course means the escape of many subjects which should be investigated.

The UK Parliament also considers actions by the European Union which would affect them, although the UK Parliament has no direct control over EU legislation. A Select Committee on European Legislation looks at every draft piece of legislation it receives and recommends which ones should be further considered. The select committee has two standing committees, dealing with different EU matters; one deals with environment, transport, agriculture and the Forestry Commission, while the other deals with everything else. These committees debate the references they receive from the select committee, rather than the debates taking place in the House, as was done before 1991.

Canada

Canada has a problem with its parliamentary committees, for they can never meet the expectations of the public. This is because of the proximity of the United States, where committees wield enormous power in the Congress. The average Canadian voter does not really grasp the different democratic systems in the two countries, and does not understand that the behaviour of committees of the US Congress would be quite incompatible with a system of responsible government.

Since 1867 the Canadian House of Commons has had a system of standing committees. On the second day of its first session, the House of Commons appointed ten 'select standing' committees, on privilege and elections, expiring laws, railways, canals and telegraph lines, miscellaneous private bills, standing orders, printing, contingencies, public accounts, banking and commerce, and immigration and colonisation, but few of them were effective. There was a radical reform of the system under the Trudeau administration in 1968, when the size of each committee was reduced to twenty members and they

were permitted to sit while the House was sitting and to appoint sub-committees.

It was also arranged that the estimates would be referred to the appropriate standing committee, as were most bills after being given a second reading. It was hoped that the committees would be informed and non-partisan, but these hopes were not realised, and the defects were exacerbated by the whips organising frequent membership substitutions in order to keep their parties' voting strength up, which was found to be necessary despite the reduction in size of the committees. There was a rapid turnover of committee chairmen (always provided by the government party) as a result of promotions to the ministry or to a parliamentary secretaryship. Committees sat for only a standard 90 minute period, and the chairmen generally did not provide leadership, preferring to allow each member in turn ten minutes for questions, which inevitably led to a great deal of muddle and repetition. Although some committees did good work, the general standard was not high. 'There is no continuous attendance', complained one witness, 'people come and go out of the room and members obviously aren't familiar with the subjects. We arrive with a presentation that has involved a great deal of preparation and nobody knows what we are talking about.'⁶⁵

Parliamentary inquiries were set up in 1982 and 1984 to try to solve these problems. Substantial changes were made. The number of standing committees was increased to 25 so as to match the number of government departments, the number of MPs on each committee was reduced, ideally to seven members, and the staffing and budgetary arrangements were improved. Separate *ad hoc* legislation committees were set up to deal with bills, though later changes returned some bills to the standing committees. The standing committees could initiate their own inquiries without seeking the approval of the House of Commons, and could review but not block non-judicial order-in-council appointments. Parliamentary secretaries, who had previously kept watching briefs on behalf of the government, were excluded from the committees. The government could be requested to make a comprehensive reply to a committee report.

More changes were made in the 1990s. The number of committees was reduced slightly, and the size of the committees increased so that the larger number of parties in the House could have representation; parliamentary secretaries were again permitted to sit on the committees. The concept of special legislative committees to deal with bills was abandoned, and bills were referred to the standing committees. But

⁶⁵ Quoted in Franks, *op. cit.*, p. 168.

there are still nineteen standing committees of the House of Commons and three joint standing committees of the Senate. Most of the committees have eleven to fourteen members, and the government party has difficulty filling all the places. The government party could normally expect something like 160 MPs in the 301-seat House of Commons, and about 60 of these would not be available to sit because of ministerial or other responsibilities. Government party MPs are often expected to serve on two, three or even four committees.

The results of the committee investigations have been inconclusive. Some of the committees have been prepared to criticise government policy, or at least the advice the government received from the bureaucracy, but most are still party dominated. The old problems have reappeared, with committee reports being curtly rejected by ministers, government party MPs preventing committees from meeting by refusing a quorum, and chairs and committee members who are embarrassing the government being swiftly removed.

Australia

The Australian House of Representatives in 1987 set up eight general purpose standing committees, all departmentally related, the first comprehensive system since federation. They are showing the same qualities and defects as the similar committees in the UK House of Commons, although the Australian committees cannot initiate their own inquiries, but must have a reference from the House or the minister (which in practice amounts to the same thing). They are always chaired by a government party member, and have a government party majority.

There are also a number of joint committees (that is, having members from both houses)—Foreign Affairs, Defence and Trade; Public Works; Public Accounts and Audit; National Crime Authority; Broadcasting of Parliamentary Proceedings; Corporations and Securities; Native Title and the Aboriginal and Torres Strait Islander Land Fund; Migration; National Capital and External Territories; Treaties; and Australian Security Intelligence Organisation—as well as several more dealing with domestic matters in Parliament House.

New Zealand

The New Zealand Parliament has long had a system of select committees and since 1979 virtually all bills have been referred to them. The committees were reduced from nineteen to thirteen and organised on a 'subject' basis in 1985. Because the New Zealand committees consider nearly all bills, most of them have little time or resources available for inquiries. In a 1989 assessment, six of the

thirteen select committees were found to be spending 85 to 90 per cent of their time on legislation. The problem of finding time for inquiries into government activities is exacerbated because the select committees also have to consider petitions and the estimates of their government departments. It is not surprising that in the four years from 1987 to 1990 the select committees produced only 26 reports between them, and eight of these came from the Regulations Review Committee, which is not one of the thirteen 'subject' committees. There were only three reports on state-owned enterprises. In a small parliament such as New Zealand's, and with limited support staff for the committees, it is difficult to see how the committees can combine the tasks of detailed examination of legislation and the scrutiny of the actions of government departments and instrumentalities. One or the other has to give.

Problems of committee investigations

All these committees do valuable work, but they share two weaknesses. First of all, their tasks are set either by the House (usually at the request of the committee) or by the committee itself. In both the government usually has the majority. Governments are unlikely to agree willingly to inquiries into matters they do not want inquired into, which are of course often the matters which *should* be looked into. Nevertheless, governments sometimes have to agree to such inquiries to avoid intra party dissension. The extent to which committee members bow to the wishes of their party leaders depends on their individual integrity and the strength of party discipline. In Britain the government has apparently made little attempt to direct committee activities; in Australia, on the other hand, proposed committee references are normally cleared with party caucuses. In Canada and New Zealand a committee may initiate its own inquiries within its area of responsibility, but as a committee nearly always has a government majority the usefulness of this power is limited, though there have been examples of committees pushing ahead with inquiries despite ministerial misgiving.

It is important that the committees concentrate on inquiries which cannot be effectively performed by anyone else, particularly the monitoring of government administration. Parliamentary inquiries into major policy problems may be more effective (and certainly cheaper) than royal commissions, but they must not be allowed to be done at the expense of the watchdog role over government administration and legislation. There is a limit to how many parliamentary committee inquiries can be undertaken, and the smaller the parliament the greater the problem. Canada, with twice as many members as the Australian Parliament and three times the New Zealand number, has problems in

providing enough government party MPs for its committees, and the situation is of course worse in the smaller parliaments.

Of course some ministers may be attracted by the idea of tying up a committee in some massive inquiry, so as to keep that committee off their back, but committees should fight against being manipulated in this way.

The second weakness is that the support made available to a committee is not always adequate for the task. MPs perform a key function on these committees, examining witnesses and discussing issues, but the effectiveness of a committee depends heavily on the size and quality of its support staff. There are no complaints about the level of committee assistance in the UK, for a typical committee staff would have five or six members, with additional outside expert assistance being provided as necessary. In Canada the staff of the House of Commons provides a clerk for each committee, some outside staff can be hired, and the parliamentary library assists with research staff. In Australia the standard full-time secretariat is five, comprising a committee secretary, two research officers and two administrative assistants, and a committee is normally permitted to employ one or more specialist advisers. New Zealand committees have to operate with a staff of two. For comparison, a standing committee of the US House of Representatives can expect a support staff of up to 30, though it must be acknowledged that these committees have an additional role as initiators of legislation.

The position in all the countries except the UK is that the government decides what resources are to be made available for parliamentary scrutiny of its activities, for there can be no expenditure without Cabinet approval, and Cabinets, to put it mildly, do not tend to be generous in this area. It seems that the UK Parliament is the only body at all likely to stand up to Cabinet on the issue. There is a House of Commons Commission, chaired by the Speaker; the Leader of the House is the only minister on the commission. The leader of the opposition nominates a member and there are three backbench members. The Commission's main duties are to prepare the estimates for running the House services, and to employ the permanent staff, who number nearly 1000. The estimates are not subject to Treasury limits, and if challenged by the government there would almost certainly be enough cross voters to ensure their passage.

The situation in the other parliaments could be compared, with some exaggeration, to that of a burglars' collective having the power to decide what resources are to be made available to the police. An Australian finance minister, Peter Walsh, put the position bluntly: 'I explicitly do not accept the proposition', he told the Senate in 1985,

‘that the parliament determines how much money the parliament will get. The executive government has the financial responsibility, and in the end the executive government will determine that question.’

It can be seen that these committees, though undoubtedly useful, are far from sufficient. The committees in the Australian House of Representatives have a unique weakness. They can be assigned investigative tasks directly by ministers, so they are in fact working for the executive. The concept of responsibility could scarcely have a more blatant reversal.

Public accounts committees

In nearly all the parliaments the most prestigious scrutiny body is the Public Accounts Committee, which has a different name in some parliaments. These committees are long-established. The oldest, established in 1861,⁶⁶ is at Westminster, and the youngest, established in 1988, very belatedly and after much resistance from the National Party government, is in Queensland. The PAC usually investigates questionable aspects of government expenditure raised by the Auditor-General. The committees are reasonably staffed, and their reports are taken seriously.

In Victoria in 1997 the autocratic Liberal premier, apparently offended by criticisms by the Auditor-General of the efficiency of some government programs, sharply restricted his powers by privatising his audit functions. This virtually destroyed efficiency audits of government programs, and caused considerable concern in the community. It was a significant factor in the surprise Liberal election loss in 1999. The powers of the Auditor-General were restored by the incoming Labor government.

What was also disturbing was that the necessary legislation to restrict the Auditor-General’s powers was passed by the two houses on party lines, and no government party member was prepared to stand up and vote against the elimination of an important source of information for the legislature in its scrutiny of government activities. This was despite the fact that the Auditor-General should be responsible to the parliament not to the government.

Question time

All the parliaments we are considering have a period each sitting day when ministers may be questioned on their performance. The UK

⁶⁶ New Zealand established an Audit Select Committee by statute in 1858, but it fell out with the government and was abolished in 1867. A Public Accounts Committee, without statutory powers, was established in 1871.

Parliament is the prototype, and its question time procedure is broadly followed in New Zealand. Canada and Australia, both federally and in the states and provinces, give much less notice of questions to ministers, their systems deriving from the procedures in use in the House of Commons at the time their political systems were developing.

United Kingdom

The first recorded parliamentary question occurred in the House of Commons in 1721, when the prime minister was asked to confirm that a key figure in the financial hoax called the South Sea Bubble had fled abroad and had been arrested in Brussels. There were undoubtedly other questions asked in the House of Commons in the eighteenth century, but regular questioning of ministers by other MPs did not emerge until after the First Reform Act in 1832. By 1844 questions were sufficiently established for the first edition of Erskine May's *Parliamentary Practice* to cite them as exceptions to the rule that an MP must always speak to a motion before the chamber. By the 1850s a regular time in the parliamentary day was set aside for questions, which were without formal notice, though it was customary for a minister to be orally informed of an intended question. The system broke down in the 1880s, when the Irish MPs became more than usually obstreperous, and written notice of all questions was thereafter required.

In the House of Commons ministers are now available on a roster basis for oral questioning from Monday to Thursday of each sitting week. The roster is decided by the government in consultation with the opposition. By the standards of other parliaments, ministers are not really very available. The minister of a major department is available for questioning only every three or four weeks, and the minor departments (Attorney-Generals, say) have a short time on Mondays. The prime minister is the real target, and until 1997 could be questioned every sitting Tuesday and Thursday for fifteen minutes. Tony Blair changed this, and the prime minister may now be questioned for one 30 minute period each sitting week.

Questions for oral answer must be in writing, must be about something for which the minister is responsible, and must ask for information or press for action. The order in which questions are asked is decided by lot. When the number of a question is read by the Speaker, the minister gives a prepared answer, and then stands by for the real questioning. The Speaker allows supplementary questions entirely at his or her discretion, though the questions must be relevant to the issue raised. There is always a supplementary question allowed to the originator, and if there is little interest in the matter, that may be all. If there is interest, the Speaker may allow half-a-dozen further

questions on the subject, taken alternately from the two sides of the House. An average of 70 questions (including supplementaries) is asked during the one hour question period.

The procedure is different for the prime minister. Because of the dominant role of the prime minister, questions may be asked on any aspect of government activity (or inactivity). Typically a bland question is asked (what engagements does the prime minister have next Friday?) and then the supplementary questions start, often with the leader of the opposition taking a prominent part, raising issues of current political importance. The questions from the opposition are almost always without notice, although often predictable. Questions from the government side are usually foreshadowed. The involvement of major political figures, and the impromptu nature of the session, make this usually the liveliest part of the parliamentary day.

New Zealand

The oral questions to be asked are determined by the party leadership, and ministers are given notice, varying from a few hours for the first six questions, which are supposed to be 'questions of the day', to 48 hours notice for the remainder. Any minister, including the prime minister, may be questioned on any sitting day. Forty-five minutes are allowed for questions each sitting day, and on average twenty are asked each day. The Speaker calls the questions, in the pre-arranged order, alternately from the two sides of the House. Contrary to the Westminster procedure, the MP reads out his question, sometimes wasting a lot of time. (The questions are read so that radio and TV audiences can understand what is going on; the MPs in the chamber have the questions in front of them.) As at Westminster, the minister reads his prepared reply, and the Speaker permits supplementary questions. The Speaker offers the questioner the first chance of a supplementary question, and then members from alternate sides of the House. Only occasionally does the Speaker permit more than three supplementary questions.

There is also a category called urgent questions, dealing with important events which, it is claimed, should be explained to the Parliament before a question handled in the ordinary way could be asked. If the Speaker accepts a proposed question as urgent, it is answered at the end of question time. The minister may have had only brief warning of the question.

Canada

In 1968 the Canadian Parliament made an attempt to follow one aspect of the Westminster pattern, when Prime Minister Trudeau introduced a roster system for ministers, to avoid the wasteful practice of a minister being briefed each day on a wide range of issues, and then not receiving a question. The change was not popular, and was quietly dropped in 1973 as being incompatible with responsible government. Now all ministers are available for questioning each sitting day. The questions are without notice, and the Speaker usually allows supplementary questions. The Speaker normally gives the first call to the leader of the opposition and then to the leaders of the other non-government parties. After that the call is given to members of the non-government parties, usually following lists prepared by the various whips. Government backbenchers are rarely called, and when they are the opposition is resentful, for question time is deliberately designed as an opportunity for the opposition. Ministerial answers are much more relevant and succinct than in the Australian Parliament, and an average of 40 questions (including supplementaries) is asked each sitting day, three times as many as in the Australian House of Representatives. If an MP is not satisfied with an answer, he may raise it again in the adjournment debate, and the minister or his parliamentary secretary will be there to deal with it.

The Canadian provinces

Question time in the provinces is generally similar to that in Ottawa, though New Brunswick has had some special problems, because from 1987 until 1991 there was no opposition. In order to inject some life into question period, the leaders of the registered political parties who were not represented in the Parliament were given the opportunity to ask questions of ministers after the ordinary question period was over. They asked their questions through the Speaker from behind the bar. Only the New Democratic Party used this opportunity on a regular basis. The Progressive Conservatives refused to use it, and the Confederation of Regions Party (an anti-bilingualism party) appeared only occasionally.

Australia

There has been a question time in the federal Parliament since its first session in 1901. The Speaker, who had been premier and treasurer in the South Australian Parliament, was asked whether there should be daily period of questioning ministers without notice. The Speaker replied that 'there is no direct provision in our standing orders for the

asking of questions without notice, but, as there is no prohibition of the practice, if a question is asked without notice and the Minister to whom it is addressed chooses to answer it, I do not think that I should object.⁶⁷

This attitude that ministers should not be obliged to answer questions has continued to the present day, and has done great damage to question time, particularly as the procedure has been copied by the states. This departure from the principles of the Westminster system cannot possibly be justified.

In the Australian House of Representatives all questions are described as being without notice, although in fact a government party backbencher who asked a minister a difficult question without warning would be very unpopular. The Speaker calls questions from alternate sides of the House, following lists provided by the whips. Occasionally there are 'free' days when the whips do not provide lists, and the Speaker gives preference to members who have not asked many questions. On these days backbenchers have a chance to air their local problems or ride their hobby-horses, but such days are few. There are no supplementary questions at all. Question time lasts 45 minutes each sitting day, and on average fewer than twelve questions are asked, but not necessarily answered. Some Labor Party ministers, notably Paul Keating, took to handling parliamentary questions in the same way as questions are handled in meetings of militant trade unions—if there is an unwelcome question the motives and the intelligence, and possibly the parentage, of the questioner are attacked, but the question is not answered. To show how unsatisfactory the Australian question time is, it should be noted that in the Canadian House of Commons 40 questions are usually asked in the 45 minute question time, while at Westminster the average is 70 questions in an hour—compared to an average of twelve in 45 minutes in Canberra.

The televising of question time (live most days, recorded and broadcast later on the others) has undoubtedly done considerable harm to the image of politicians in the community, for there is a reasonably large viewing audience and much of the behaviour is regarded as either juvenile or outrageous, or both. A serious improvement in behaviour would require a much more powerful and independent Speaker. The difficulty in achieving this is discussed later.

More modest improvements have been attempted. In 1994 the Labor government, over opposition objections, introduced a rostering system for ministers at question time. The prime minister would be available on only two days a sitting week, which meant about 40 times a year. A

⁶⁷ *Parliamentary Debates*, 3 July 1901, p. 1955.

proposal that supplementary questions should be allowed was rejected by Prime Minister Keating, who thought that the opposition had adequate opportunities by being allowed to ask every second question. He chose to ignore the fact that between an opposition question and its follow-up there might be a ten minute gap while a loquacious minister answered a 'Dorothy Dix' question from a government party backbencher.

The rostering system did not survive the 1996 election loss by the Labor government, but the new Speaker, Robert Halverson, did use his power under the standing orders to permit single supplementary questions, which could be asked only by the MP who asked the original question and had to be relevant to the minister's answer. These supplementary questions were not popular with ministers (despite the same system having been in use for many years in the Senate) and Halverson was induced to resign. His successor did not permit such supplementary questions. Halverson was compensated by being made Ambassador to South Africa.

The Australian states

The system in the Australian states is similar to the Canberra pattern. The length of question time varies between 30 minutes and one hour. An exception to the pattern of taking alternate questions from each side of the House occurs in Tasmania, because of the great scarcity of government party backbenchers. Tasmania also permits a single follow-up question. A problem in all the Australian lower houses is that the Speaker is a party appointment and, particularly in the Labor Party, he offends the ministry at his peril. To avoid constant party disputes over the Speaker's rulings, he is tied down by a web of standing orders, and has little discretion. The result is that question time is far too rigid and the length and relevance of ministers' answers are rarely controlled.

The use of question time

Question time in all the lower houses is used principally for election campaigning by both government and opposition, though the UK balloting system does permit backbenchers to raise issues of concern to their constituencies or their support groups, or ones to which the member has a personal commitment. Even in the other parliaments where the question list is controlled by the party leadership it has been found necessary, to avoid backbencher frustration, to permit occasional questions to be asked at the backbenchers' discretion.

Nevertheless question time is essentially an electioneering exercise, and it is not usually a source of factual information. Indeed, new

opposition members are warned never to ask a question without knowing the answer, for an unexpected answer might be very embarrassing. In any case, ministers are not obliged actually to answer questions. They may speak at length in reply to the question, provided that what they say is relevant to the question (and relevance is very generously interpreted by many Speakers) but they often do not give the information the questioner seeks. The exceptions are the initial answers in the UK House of Commons and the New Zealand House of Representatives, where the prepared replies are usually both relevant and helpful.

The campaigning nature of question time sometimes worries governments, particularly if it is televised live, as it is in the UK, Canada and Australia. The problem for the government is that it gives the opposition exposure that it would be difficult for it to obtain otherwise. Indeed, a prominent Australian Labor politician claimed that question time was not a right, it was a privilege extended by the executive government.⁶⁸ This shows a remarkable contempt for the answerability of the executive government to the lower house, but he had a point in that question time is not entrenched in any constitution. It is established by custom and enforced by the standing orders of the various lower houses, and a ruthless government, supported by a disciplined party, could theoretically amend standing orders to eliminate it. But question time is too well established for this to be feasible politics. There has been a regular question time in the British House of Commons since the 1850s, and all the other parliaments, except Queensland's, have had question times for a century, though it was not a daily event in New Zealand until 1962. Queensland, the lone maverick, has had a question time only since 1970. Question time seems secure, if not necessarily very informative.

The Speaker

Key elements of a successful question time are the strictness and impartiality of the Speaker, and these in turn depend greatly on the method of selection and security of tenure. There is no doubt that the system works best at Westminster. On being chosen, the UK Speaker cuts off all ties with his political party, and remains in office until he decides to retire. (Speakers were always male until 1992, when a woman was elected.) Although the principal requirements of a Speaker are now firmness and impartiality in enforcing all the rules for preserving order in the proceedings of the House, an earlier Speaker—

⁶⁸ Hon. P.J. Keating, Deputy Prime Minister and Treasurer, *Hansard*, 24 November 1988, p. 3206.

in 1597—described the requirements as ‘voice great, carriage majestic, nature haughty, and purse plentiful’. These days the major parties do not put up candidates against the Speaker at general elections, when the Speaker runs not as a party candidate but as ‘Mr. Speaker seeking re-election.’ In the past hundred years no Speaker wishing to continue in office has failed to be re-elected, both by his constituents and by the House of Commons.

The other parliaments have not been successful in detaching the Speaker from party politics. The Speaker is almost always a government party member, the office changing with a change of government. The Speaker therefore has great difficulty in exercising effective control over senior ministers, particularly the prime minister. At question time the length and lack of relevance of some of their answers are disgraceful, as is their childish abuse of opposition questioners. Sometimes the answer to a ‘Dorothy Dix’ question from a government party MP amounts to a policy statement, which cannot be debated and would certainly not be permitted in the UK House of Commons. But if the Speaker in the Australian House of Representatives, for instance, comes into conflict with senior ministers there is no doubt who will be the loser. A good example occurred in February 1975, during the Whitlam Labor Government. There was a slanging match between a Liberal frontbencher, Jim Forbes, and a Labor minister, Clyde Cameron. Forbes was ordered to withdraw an unparliamentary expression, which he did, and then Speaker Cope called Cameron to order. Cameron said to the Speaker, most improperly: ‘Look, I don’t give a damn what you say.’ The Speaker again called Cameron to order, and asked ‘Is the Minister going to apologise?’ ‘No’, called out Prime Minister Whitlam, who was sitting at the centre table. The Speaker then ‘named’ Cameron, at which point the Manager of Government Business should have moved for his suspension from the House, but when he stood up to do so he was waved down by Whitlam. The opposition then moved the motion, which was defeated on party lines, though three ministers and the Deputy Speaker abstained. The Speaker resigned.

In June 2000 the Australian Speaker suspended a minister (the first such suspension for 40 years) as well as a shadow minister and four backbenchers for disgraceful behaviour after questions on the new goods and services tax system. The six suspensions were the most ever made in the federal Parliament. The Speaker survived.

In 1996 there was an attempt to take the Speaker out of party politics. Prime Minister Howard said that ‘I think it is important that steps are made on both sides of the parliament to re-assert and re-establish a degree of respect and regard for the institution.’ The

Speaker, Robert Halverson, said that he was taking up the call of the prime minister for an independent Speaker, and that he would not be attending party meetings in future.

Perhaps the best solution is for the Speaker and the prime minister to be mutually antagonistic, but for the Speaker to have too much party support to be sacked by the prime minister. This occurred in the Australian House of Representatives between 1975 and 1983. Billy Snedden, a Liberal, had been leader of the opposition but had been ousted in a coup by Malcolm Fraser. When Fraser became prime minister, Snedden was elected speaker. He kept a tight rein on ministers, particularly Fraser, but continued to have substantial sympathetic support from the Liberal Party backbenchers. He was a very good and impartial Speaker, but the circumstances of his appointment are not likely to occur very often.

It will certainly be difficult to detach the position of the Speaker from party politics, partly because in the smaller parliaments a single seat may be crucial in determining which party has the numbers to form a government, but chiefly because the office is seen as a political prize for the government party. Nevertheless, within the limits imposed by party loyalty, most Speakers do attempt to be impartial, or at least to appear to be.

The prestige of the Speaker in the Australian Parliament was not improved when a Labor Party holder of the office was forced to resign in 1992 when it was revealed that he had received \$65 000 in compensation for injuries suffered when a bicycle he had hired from the parliamentary gymnasium collapsed under him. There was much criticism of the propriety of a Speaker suing his own department, and of the size and the promptness of the compensation payment.

Canada, whose House of Commons is half the size of that at Westminster, has made a useful advance in the selection of the Speaker. Until 1986 the Speaker of the Canadian House of Commons was appointed by the prime minister, as the Speaker of the Senate still is. Since 1986 the Speaker of the Commons has been elected by an exhaustive secret ballot, with all MPs candidates, unless they give specific notice of withdrawal. The inaugural ballot attracted twenty candidates, some of them accidental; one was a minister who was overseas. Although a government party candidate will usually win, the non-government parties may have significant influence on which of the government party candidates is chosen.

Despite the fact that it is rather cumbersome, the Canadian system is much to be preferred to that used in the Australian House of Representatives, which is typical of the smaller parliaments. A secret

ballot⁶⁹ is employed but there are usually only two candidates, one chosen by the government party and the other by the opposition party. Except with a minority government, the government candidate of course wins, and the opposition has no influence on the choice. The elected Speaker knows that he owes his appointment and survival to his party. The opposition does not matter, unless the uproar created by highly partisan rulings causes political embarrassment for the government. But governments have thick political skins.

Questions requiring written answers

If a member is seeking information, rather than trying to embarrass the government or seeking to obtain some personal publicity (or both), a question requiring a written answer is preferable, provided the answer is reasonably swift. Such handling is essential if the question is complex and the answer unavoidably lengthy. All the parliaments have arrangements for such questions, but there are marked differences in how long an MP may have to wait for a reply.

At Westminster written questions classified as 'priority' by the MP asking the question have to be answered on the day they are set down. If it is not possible to give a substantial answer so quickly, a holding answer must be given. Ministers endeavour to answer ordinary written questions within a week, and usually succeed.

Before 1986 written questions in the Canadian Parliament were usually answered within 65 days. A limit of 45 days, and a reduction in the number of written questions an MP could ask, were introduced in 1986. A question not answered within 45 days may be raised in the daily adjournment debate, when the minister will be present to respond.

In the Australian Federal Parliament delays of more than six months are not uncommon. The average is about three months, and it was thought quite extraordinary when a question was answered in two days. Most of the Australian state governments reply reasonably promptly to such questions. In Queensland they are usually answered the next day, but then there are very few questions. In Western Australia 60 per cent are answered within two days and the remainder within a week. Two states are unsatisfactory. In Victoria questions in the lower house are sometimes not answered for two or three years, for there is no requirement for ministers to answer within a certain time, but in the upper house since 1993 ministers have been required to answer questions on notice within 35 days. In New South Wales, where until recently ministers had no obligation to answer, questions sometimes

⁶⁹ Well, fairly secret. To avoid suspicions of disloyalty, Labor MPs have taken to showing their completed ballot papers to their neighbours.

remained unanswered for more than eight years. Amendments were made to the standing orders of the lower house in 1996 and the upper house in 1999 to require a minister to answer within 35 days, and if he failed to do so he would be forced to make an explanation to the House, and this procedure would continue every three sitting days until the minister did answer.

In New Zealand the standing orders require a minister to reply to a question requesting a written answer by the third sitting day after the question appears in the order paper.

In all the parliaments, questions requiring written answers may be used to assist in most of the roles of parliament: the campaigning role; the scrutinising of government activities and those of statutory corporations; advancing private campaigns by MPs; and assistance to constituents and pressure groups.

Debates initiated by the government

Debates are the other principal way of pressing these objectives. Such debates may range from the endorsement of complex policy statements to brief instructions such as that a statement may be noted, or the House adjourn. The length of time allowed for the debates and for the speeches of individual members, and the opportunities given to opposition parties and private members to raise their own subjects, vary from parliament to parliament.

Ministerial statements are a common way of presenting the government's case. Some ministerial statements in the UK Parliament—on involvement in the Gulf War, for instance—are supported by the leader of the opposition or an opposition shadow minister. Other ministerial statements are more controversial, explaining future policy or justifying past performance, and the opposition is likely to be critical. Ministers may make statements, usually after question time, on any events or policy decisions they choose. The statements are usually brief, less than ten minutes, and the opposition shadow minister is then given the chance to speak for the same time, and to ask a few questions. After the minister has answered the questions, the proceedings become a general question and answer period (confined of course to the subject of the statement), with the opposition shadow minister permitted a brief final comment or last question. These ministerial statements are frequent—sometimes over a hundred a year—and it is rare for discussion to last more than an hour. In the 1998–99 session, for instance, there were 176 ministerial statements, not including those dealing with arrangements of business in the House.

In Canada, ministers make an average of about 30 statements a year, and there are brief responses from the frontbench spokesmen of the non-government parties. In Australia, the usual procedure is for a minister to make a statement, by leave, having previously given a copy of the statement to the opposition. On conclusion of the statement the minister tables it, and moves 'that the House take note of the paper', and the statement may be debated immediately. There is an average of 25 ministerial statements a year, typically with an hour being spent on each. In New Zealand a minister may make a statement at any time, except that he must not interrupt a member already speaking, and may speak for up to five minutes unless the House gives leave for longer. The leader of the opposition, or his representative, may then reply for up to five minutes, after which the minister has a further two minutes to respond. That is all. It is a procedure heavily loaded in the government's favour, and it is surprising that only about ten ministerial statements are made each year.

The various parliaments have other procedures by which governments can initiate debates on subjects of their choosing. In the UK House of Commons the government may move substantive motions on matters as diverse as nuclear forces, the European Community, or the arts. Debates on important issues may also take place on the adjournment motion which has the advantage (for the government) that the opposition cannot move amendments. In all, about 150 hours a year are spent on such debates. In Canada and Australia, if a minister gives notice of a motion on a substantive issue it becomes government business and the government may then arrange the order of its motions as it thinks fit. Government motions are used very rarely in New Zealand.

All the government motions have the same purpose: to present government policies in the best light, and to win public support for them. The opposition's aim is to discredit the government's policies and performance, or at the very least, if the policy is popular, to suggest that the opposition, in government, would handle it rather better. The debates can be very important in clarifying the policies of both government and opposition, and also provide an opportunity for rising members to make their mark. If mere dissemination of the policies to those affected by them is all that is required, use of advertising or the news media is more effective than the parliament. Announcements of new government policies directly to the public, ignoring parliament, are becoming common. In the UK the Speaker takes some action to encourage such announcements to be made as statements in the House of Commons, but the other parliaments do nothing, tacitly accepting that the government is not politically responsible to the parliament.

Debates initiated by the opposition

The opportunity given to the opposition to initiate debates on matters it considers of concern are a useful measure of how fairly a lower house works. Even ruthless governments are likely to be held back a little in the suppression of the rights of the opposition by the thought that they will probably be in opposition themselves some day. Oppositions use the opportunity to move motions criticising government performance, exposing divisions in the government ranks, raising problems which need to be tackled, or putting forward opposition policies. Care has to be taken with the last one, for governments sometimes take over attractive opposition proposals, which is not in the least what the opposition wants. Stealing our clothing, trumpets the opposition, but there is little that can be done about it. Worse still, it is difficult to criticise the government's decision, though oppositions sometimes manage to.

It can be seen that all the opposition's motions are aimed at the next election. It might be argued that they are also performing Bagehot's 'informing function, of the government', but opposition motions very rarely tell governments anything they do not already know.

In the UK, since 1985 there have been seventeen days allocated for the official opposition and three days for the second largest opposition party to debate matters of their choice; the larger opposition parties occasionally yield one of their days to the small nationalist parties. The allotted days can be taken in the form of 'half days'—lasting about three hours—if so desired. In all, an average of a hundred hours a year is spent on motions initiated by the non-government parties. In Canada, there are twenty 'supply' days a year, when the non-government parties may move motions and debate any subject falling within the jurisdiction of Parliament.

In Australia there is a period of two hours each sitting Tuesday, Wednesday and Thursday for discussions of 'matters of public importance', two hours being allowed for such debates. Although any MP may submit a proposal, traditionally ministers do not do so for they have other means of initiating debates. Most of the subjects—about 90 per cent—are initiated by the opposition, and all of them are chosen by the opposition executive. The matter proposed for discussion must come within the bounds of ministerial responsibility, but the purpose is the same, whether the subject comes from the opposition executive or a government party backbencher: the continuing campaign for voter support.

In New Zealand there can be debate on a motion concerning 'a definite matter of public importance'. The Speaker tightly controls the

acceptance of such motions, which must deal with a matter which is within the responsibility of the government, has recently occurred and requires the immediate attention of the House of Representatives or the government. Many applications are rejected for not meeting these criteria. About seven a year are accepted, and the average time spent on these debates is fourteen hours a year.

Censure motions

Oppositions have a more potent weapon for forcing debates on subjects of their choice, but it must be used sparingly lest it become blunted. This weapon is a motion of censure of the government. By convention, the government promptly provides for such a motion to be debated, for if it is carried it means the downfall of the government. The traditional form is 'That this House has no confidence in Her Majesty's government', but there may be elaborations as to why the government should be condemned, particularly if the opposition knows the motion will not succeed.

In the UK, there were several no-confidence motions between 1970 and 1999. Three of them occurred during the minority Labor government of 1976–79, and the third one, in March 1979, was successful. The 1979 vote was actually on a motion to reduce by half the salary of the Chancellor of the Exchequer, but this was accepted by the government as a motion of no-confidence. During the Thatcher years, 1979–90, the Conservative majority was such that a no-confidence motion had no chance of success, so the motions moved, in 1980, 1981, 1985 and 1990, attacked aspects of the government's policy, its handling of social issues, or its management of the economy. Of course all these motions failed, but they provided publicity for the opposition. In the 1990s there were six no-confidence motions moved over the issues of economic management, the Maastricht treaty, poll tax, the European Communities Bill as well as two general motions. None succeeded.

Canada has a peculiarly rigid convention with regard to confidence motions. A government defeat on any vote is taken as a vote of no-confidence, though the vote can be reversed. In 1968 the minority Pearson Government was defeated on the third reading of a budget measure, but the situation was restored by the immediate passage of a vote of confidence. The rigid arrangements over no-confidence motions are much liked by the government whips, who use them to enforce party discipline. In 1985 a parliamentary reform committee recommended the obvious solution that for a vote to be taken as a matter of confidence it must be declared to be so either by the mover or

by the prime minister. Although this was accepted 'in principle' by the Mulroney Government, it seems that not until there is a minority government will reform be complete. There were no actual censure motions of the government moved between 1970 and 1999, but on opposition supply days the House of Commons several times debated motions which included censure of a minister. None of these motions succeeded.

In Australia the standing orders of the House of Representatives provide that any motion which expresses a censure of a government, or lack of confidence in it, and is accepted by a minister as such, has precedence over all other business. There were 251 such motions between 1970 and 1999. The tight party discipline ensured that all except one of these motions failed,⁷⁰ and even that one was decided on party lines. This was during the dramatic events of November 1975 when Labor Prime Minister Whitlam was dismissed by the Governor-General. He moved a motion of no confidence in Malcolm Fraser, the new prime minister, and it was carried on party lines. But it was too late; the Governor-General was already in the process of dissolving both houses.

In New Zealand a government has not been defeated on a vote of confidence since 1928. The opposition does not move a formal motion of no-confidence in the government, for private members' motions (including those from the leader of the opposition) have no precedence, and there is no convention in the New Zealand Parliament of giving immediate priority to a motion of no-confidence. The normal method in New Zealand is for the opposition to move an amendment to a major policy bill, the amendment expressing lack of confidence in the government. Such amendments have been moved 28 times between 1970 and 1999; all failed.

Governments can move motions of confidence in themselves, to re-establish their position after losing a vote, or as a weapon in a public-relations war. Whitlam did the latter successfully in Australia in 1975, when the Senate was refusing to pass the budget unless he agreed to an election. Governments can also declare any vote they wish a matter of confidence. This is done to rally disaffected backbenchers, who are not sufficiently disenchanted to wish to cause a government resignation or an election. Wilson employed this tactic in the UK in 1976 when he declared an adjournment motion a question of confidence. He did this in order to recover from a startling defeat the previous day, when his

⁷⁰ Some censure or want of confidence motions did actually pass, but this was after government amendments which totally reversed the thrust of the original motions.

white paper on expenditure was rejected, with 37 of his own party abstaining.

Many opposition motions contain criticism of the government or of individual ministers, but these are not confidence motions (unless the government accepts them as such) and are treated as ordinary motions, though a government may bring one on for early debate if it sees political advantage in doing so.

Private members' bills and motions

There remains the question of how individual MPs can press their concerns, or the interests of their constituents. All the parliaments give such opportunities to backbenchers on both sides of the house. Private members' bills have already been discussed in Chapter 6. Since 1995 private members' motions in the UK Parliament have been debated on Wednesday mornings, and backbenchers can expect a total of about 60 hours for debate on their motions each year, those to be debated being drawn by ballot. Many will thus be disappointed, but can achieve publicity, usually their principal objective, by tabling an 'Early Day' motion. These days, well over a thousand such motions are tabled each year, and as they may be supported by the signatures of other members, some of them have a wider significance than publicity for local problems or personal campaigns. Ministers have to consider very carefully any suggested changes in government policy which are supported by large numbers of government backbenchers, and also the levels of support for particular causes, or indications of divisions in the government ranks. With these motions backbenchers are performing Bagehot's 'informing' role, and they force a government to listen.

In Canada on four days of each sitting week one hour is set aside so that private members' bills and notices of motion can be debated, though this provision does not apply during the Address in Reply or budget debates, or on supply days. Notices of motion may either urge the government to consider a proposal for action on something within its jurisdiction, or attempt to make the government produce papers; success in the latter is very rare. MPs may introduce as many bills as they like but are limited to one motion each session. Hundreds of bills and motions are proposed each session, and it is not possible to debate more than a handful of them. As already explained when the handling of private members' bills was discussed, twenty of the bills and motions are drawn by the Deputy Speaker in a ballot, and a committee considers them and selects six which will be brought to a vote, after up to three hours debate. Each year the House spends more than twice as much time on private members' motions as it does on their bills. As an

alternative to giving notice of a motion, MPs other than ministers may make short statements on matters they consider important during a fifteen minute period provided each sitting day.

In the Australian House of Representatives there is an opportunity, for about 90 minutes each sitting Monday, for the consideration of private members' business, either bills or motions. A selection committee, on which the government party has a majority, decides which subjects should be discussed and for how long. This private members' business is followed by a 'grievance' debate lasting 80 minutes, during which members who are lucky enough to get the call have ten minutes in which to raise any matter they choose. Finally, at the end of each day's sitting, there is a half hour adjournment debate, during which members have five minutes to explain their chosen theme. Members thus have fairly frequent, though brief, opportunities to try to gain publicity for a problem or a cause. In all, they can expect a total of 70 hours in a typical year. In addition, they can try to gain publicity by giving notice of a private motion, knowing there is no chance of it being brought on for debate, but hopeful of possible publicity. As there cannot be multiple signatories to these motions, they are not as valuable to the government in the 'informing' role as are the British 'Early Day' motions.

In New Zealand the party system has taken control of the debates on private members' motions.

Petitions

As a method of gaining publicity for a cause, an alternative to giving notice of a motion is to present a petition. Petitions have a long history, but very little modern impact. Any citizen or group of citizens may prepare and sign a petition asking the house to take some action which is within its power. A petition has to be presented by a MP. In the UK the member may, if he wishes, state who the petitioners are, the number of signatories, and what they want. The member may also state his own position, but must not make a speech.

The Canadian House of Commons receives about four thousand petitions each year. Each petition must contain a clear, proper and respectful request for Parliament to take some action within its authority, and must be certified by the Clerk of the House of Commons. An MP may present a petition either by filing it with the Clerk of the House, or by giving a brief summary of it during a period allocated for the presenting petitions during the ordinary daily routine of business. The MP may also state from whom the petition comes and the number of signatories, but may not make a speech about it. Each MP has only

one chance each sitting to present all his petitions. The government has to reply within 45 days of receiving each petition, usually by tabling a written reply.

In the Australian federal Parliament the subjects of the petitions, the number of petitioners, and the electorates of the MPs presenting them, are read out by the Clerk in a steady monotone. Petitions are usually organised by politicians or their supporters, and are concerned with issues of public policy rather than the grievances of petitioners. The government is under no obligation to reply to petitions, and very rarely does so. The system is much the same in the states, where the petitions are either tabled or the Clerk reads out a summary. Western Australia is the exception, for there the MP reads out the petition. Despite their ineffectiveness, a surprising number of petitions are presented each year. In New South Wales, for instance, as many as 2000 petitions have been presented in a single year.

In New Zealand the MPs present their petitions in the same way as in the UK Parliament, and the petitions are then referred to the appropriate standing committee for investigation. The committee usually asks for a report from the department concerned and gives the petitioner an opportunity to address the committee. A report is then made to the Parliament, and the government is expected to respond. In practice, not all petitions are treated this way, either because a petition relates to a bill before the committee (the petition is then treated as a submission) or because the committee is overloaded. If the committee does not consider a petition, the government does not respond.

Research assistance for members

All members have small personal staffs to help with electoral work and to help with some research, and shadow ministers have additional staff, but they are quite inadequate to investigate the complex policy issues which face the parliaments, and to give MPs a reasonable base to confront the resources available to government ministers.

In the UK the allowance for MPs to reimburse them for expenses incurred on secretaries, general office expenses and on the employment of research assistants has been increased annually since 1974, and after starting at £500 in 1969 had reached £50 264 by 1999. The House of Commons library also provides research services and references services exclusively for MPs. MPs in the UK House of Commons have an interesting travel allowance. Like the members of nearly all the parliaments they have a car allowance for use on parliamentary duties, but they also have had, since 1998, a bicycle allowance for similar use. The allowance in 1999 was 6.2 pence per mile.

In Canada federally each recognised party (that is, with at least twelve MPs) is given funds to run a research office. The amount of the grant is roughly proportional to the number of MPs and, as a typical example, in 1999/2000 the government party (with 161 members) received \$1 370 940. Individual MPs are also given a grant to hire staff for their Ottawa and constituency offices. The basic amount of the grant is at present \$194 800, but there are supplements for ridings of above average size or number of constituents. The maximum salary an MP may pay a staff member is \$63 211.

In the Canadian provinces, the general pattern is that each MP is provided with sufficient funds to run an office and employ a constituency assistant. In addition, each parliamentary caucus is given funding based on the number of members in the caucus, to hire secretarial, research and computer staff who serve the whole caucus. The amounts available to individual members vary with the resources of the province. In Ontario, for instance, each member is allowed \$153 350 (in 2000/01) to hire staff to work either in Ottawa or in the constituency. There are no limits on how many staff can be hired, but there are limits on how much an individual may be paid—a clerk typist may be paid up to \$29 998, for instance, and a legislative assistant up to \$40 477. At the other extreme, in New Brunswick a member is given an allowance which is sufficient to pay for a part-time assistant in the constituency, and that is all the member gets, except of course for possible access to the caucus staff.

In Australia, there is no funding given to party caucuses. Federal MPs and senators each have a staff of three, a secretary and two research assistants, their salaries determined and paid by the government. In the states there are similar arrangements, except that the staff numbers are generally one or two, with the upper house members getting less support than those in the lower house. In New Zealand, MPs have a staff of two.

All the parliaments have libraries, and the staffs there do assist members, but they cannot meet all of the research requirements of the parliaments. Most of the parliaments have established additional research services, but there is much room for dispute about their role. Are they to meet the research requirements of individual members? Are they a support organisation for parliamentary committees? Or are they to use their own initiative to examine important policy issues for the benefit of all members?

In practice the support for parliamentary committees has usually been the dominant role, with some policy research being done, and individual requests generally being met only if they have broader importance, though in fact meeting these individual requests is very

important to the efficient working of parliament. A British MP wrote that members need 'access to information they want, with the necessary level of detail ... with the full confidence that it is neutral in its presentation and accurate.' In fact the House of Commons Library meets these requirements, providing a research service as well as reference sources exclusively for MPs.

In Canada only the federal Parliament and the Ontario and Quebec legislatures have separate research services for members. In Australia the Legislative Research Service was established in Canberra in 1966 with a staff of three to provide statistics to MPs and senators. In 1997 it was merged with the Parliamentary Library Information Service and by 2000 the new organisation had a staff of 115. Of the remaining parliaments, only New South Wales and South Australia have such services.

Broadcasting parliamentary proceedings

If the responsibility of the parliament to the voters is to be effective, the general public must be able to find out accurately what is going on there. All parliaments have recognised this, and all sittings of the parliaments have been in public, with the exception of a few secret sessions in wartime. The same applies to committee meetings when witnesses are giving evidence, which are open to the public unless a witness successfully asks for them to be held *in camera* on grounds such as national security, business confidence or personal safety. This is a dramatic change from the eighteenth century, when the House of Commons met in secret to conceal its proceedings from the King.

But it is one thing to have an open parliament, quite another to have information about its proceedings available to widely scattered voters. The number of people who attend parliament, other than as sightseers, is tiny. There is a verbatim record available of what is said and done in parliament, usually called Hansard, but its circulation is probably even smaller than the number of non-sightseeing visitors. The name Hansard comes from the firm which began printing the House of Commons debates in the nineteenth century, to replace the unofficial and frequently inaccurate accounts which until then had been all that was available. The circulation of the daily Hansard of the lower house is 2340 in the UK and the weekly Hansard 1300 in Australia. In Canada only a limited number is printed for in-house distribution, but it is also available on the internet.

Circulation of parliamentary information was traditionally by newspapers and magazines, but problems developed as the voting roll widened and the electronic media superseded print as the principal

means by which the general public received political information. All the parliaments were curiously timid and reluctant to adjust to the realities of the change, but most of them have now—to reverse the words of W.M. Hughes—been dragged kicking and screaming into the tart shop. They have realised that although parliamentary behaviour is sometimes unedifying and often boring, it is better to be noticed than ignored. Besides, they have a duty to inform the public of what they are doing.

There are three methods of using radio or television to report parliament to the people. The options are: a continuous live broadcast; live broadcasts of selected events, such as question time; or recordings taken to be used later in news bulletins or summaries of parliamentary happenings. Radio was the first of the electronic media to gain acceptance. The New Zealand Parliament has been broadcast live on radio since 1936, and that of Australia since 1946. There are special problems in Australia, where there are two active houses, and the solution has been for the broadcast days to be split between the houses, with the Representatives getting roughly twice as many days as the Senate. The daily question time of the house not being broadcast is recorded and can be heard during the dinner break.

MPs rather like radio broadcasts, but the audiences are derisory, usually only a few thousand nationwide. In 1983 the Australian Broadcasting Commission conducted a survey of listeners to the ABC in Sydney, Melbourne, Adelaide and Hobart, finding that just under one in two (49.3 per cent) had listened to the federal Parliament at some time in the past. Almost 58 per cent of these listeners confessed that they had done so only because 'it just comes on when I am tuned to the station.' Only one in five of those listening followed what went on in Parliament, and one in ten tuned in only to hear question time.⁷¹ In the UK there is no regular broadcasting of Parliament, but occasionally an important debate, such as that on the involvement of British forces in the Gulf War, is broadcast live. All parliaments now permit recordings of events in the parliament to be used in radio news bulletins and similar programs, though there are always requirements that the excerpts are not to be used for satire or ridicule, and that there must be a fair political balance.

Television has proved more difficult. Canada's House of Commons is the only national house which provides continuous live television coverage and has done so since 1978. All the provinces permit the televising of proceedings, though it is limited in Newfoundland and

⁷¹ G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament, 1901–1988*, Carlton, Vic., Melbourne University Press, 1989, p. 458.

Prince Edward Island. The Australian Parliament permits the live televising of question time, on a roster system between the two houses. A recording of the question time of the house not televised live is broadcast late at night. Some other selected events are televised live, such as the opening of Parliament, the budget speech and the reply by the leader of the opposition. Public committee hearings in either house may be televised if the committees agree. New Zealand permits the live telecasting of Parliament, but it is very rarely shown because of lack of viewer interest. The select committees could approve the live telecasting of their public proceedings but they never do, again because of lack of interest. In the UK, proceedings in both houses and their committees are available for broadcast, but usually only the prime minister's question time and the chancellor of the exchequer's annual budget statement are broadcast live on BBC2, with excerpts from other debates being used in news bulletins and other reports. Continuous unedited coverage of Parliament is also available on cable and digital satellite TV.

There are usually restrictions covering such matters as political balance and presentation. TV cameras must focus on the MP speaking, for instance, not the interjectors or the empty benches. To exploit the latter rule, some parliaments use a technique called 'doughnutting' when the house is sparsely attended, by gathering round the member speaking and giving the impression of a well-attended, attentive house.

The audiences vary. In Canada the parliamentary TV is watched by more than a million viewers per week, a major contribution to this figure being made by the evening replays of question time. The audiences for the Australian broadcasts of question time, normally at 2 pm, vary from 0.2 per cent of the viewing public to 9 per cent, though audiences for special events such as the treasurer's budget speech may be as much as 20 per cent of viewers. The average audience for the prime minister's question time in the UK is around one million.

What effects do the new methods of communication have on the behaviour of MPs? Radio does not seem to have very much effect, although it is true that in Australia MPs and senators definitely prefer to speak on a broadcast day and sometimes even address the few listeners rather than their parliamentary colleagues. Television is having a bigger impact. Viewers are sometimes startled by the behaviour of members. Since the introduction of the televising of question time in the Australian Parliament, the public assessment of politicians has fallen sharply. In a public opinion survey, the federal politicians were given a 'very high' or 'high' rating by 19 per cent of those canvassed in 1983 (before the televising of question time), falling steadily after question

time began to be televised, reaching 13 per cent in 1999.⁷² Television certainly improves the grooming of members, and some of them have learnt that they need different speech techniques for television audiences. Whether this matters or not depends on the role one believes the house is performing in its debates and question times.

Parliaments must accept the changing media techniques. After all, two hundred years ago their predecessors had to adjust to the opening of parliament to journalists and other writers. If the current changes are revealing unacceptable or childish behaviour by MPs, the remedy is in their hands.

Conclusions

What can the Australian House of Representatives learn from the other parliaments in the performance of these 'other roles'? All the parliaments can be said to be fairly effective in performing Bagehot's first three functions of expressing the views of the people, forcing people to hear two [or more] sides of political questions, and informing the government of opinion in the community.

As for the scrutiny and review function, investigations by parliamentary committees are potentially the most effective method of probing the administrative performance of the government. All of the national parliaments now have a system of committees to investigate the activities of government departments, but all suffer from the fact that they are usually controlled by the government party, and also from the nature of politics, which causes MPs to focus on dramatic mistakes and shortcomings rather than departmental objectives and methods. The committees function best in the UK, where party discipline is less rigid than in the other parliaments, and worst in New Zealand, where the committees also handle legislation and frequently become so bogged down with the handling of bills that they have little or no time to scrutinise what government departments are doing. This has not been a problem in the Australian House of Representatives, which rarely sends a bill to a committee, and indeed usually takes little interest in the details of the bills it passes. If the suggestion made in Chapter 6 that committees of the House should consider all non-controversial bills (leaving the controversial ones to Senate committees) is adopted, there would not be much impact on the available committee time. The

⁷² State parliaments, whose proceedings are not televised, suffered a similar fall, but it seems likely that the public does not distinguish between state and federal politicians. Of the occupations surveyed, only estate agents, union leaders, advertising people, newspaper journalists and car salesmen ranked lower than politicians.

committee inquiries into the non-controversial bills would be a sort of safety net, checking with experts in the community that nothing undesirable is slipping through by accident, and looking into matters raised by the Senate Scrutiny of Bills Committee. It would be rare for a committee to have to spend much time on such inquiries.

The committees in the Australian House of Representatives are reasonably effective in dealing with matters the government wants (or is prepared) to have investigated, but they almost never deal with questions the government does not want investigated, which are often the most important. Fortunately the Senate is available to fill this role. There is also one unique provision in the Australian House of Representatives. A committee may be given a task directly by a minister, so that the committee is effectively responsible to the minister rather than the other way round!

The performance of the committees depends heavily on the quality of their support staff, and the control of these crucial resources rests with the governments the committees are supposed to be scrutinising. Except in New Zealand, the staff resources for committees in the national parliaments are reasonable, but only in the UK is it at all likely that the lower house would revolt if the government began to starve the committees of resources.

In none of the parliaments is there effective supervision of non-departmental government bodies.

With regard to the roles Bagehot did not discuss, support by MPs for their constituents is on the whole diligently performed. In all the parliaments they now have some staff to assist them, and they can make representations, often effectively, either in the parliament or directly to the minister. There is a danger, though, from the nature of the requests for assistance coming to them, that they may find themselves acting as untrained social workers. How well the members of the lower houses perform their continuing electioneering role is a matter of opinion. Certainly they devote a great deal of time, effort and thought to it.

Turning to the mechanisms available to MPs for carrying out these roles, the least effective is question time in the Australian House of Representatives, which not only provides little information but also does great damage to the image of politics and politicians. It is mostly blatant and rather vulgar electioneering. Both questions and answers do not keep to the point, as evidenced by the fact that, for instance, the number of questions dealt with per hour in the House of Representatives is only a third of the number in the Canadian House of Commons.

What can be done to improve the deplorable standard of question time? Of the four national parliaments, Canberra is the only one where

supplementary questions are not allowed, a brief experiment initiated by a Speaker in the 1990s being intensely disliked by ministers and eventually aborted. In the UK and New Zealand, the questions are in writing and the minister gives a prepared reply and then stands by for the supplementary questions (the first from the MP who asked the written question, and then from alternate sides of the House) until, in the opinion of the Speaker, the question has been adequately dealt with. In the Canadian House of Commons nearly all questions come from the opposition, and questions from the government side are frowned upon.

What is desperately needed in Australia is for the two sides of politics to get together to improve the standard of question time, and to encourage the Speaker to enforce both relevance and brevity on the questioner and the minister, and to reject the attitude of a former deputy prime minister that question time was not a right, it was a privilege granted by the executive government, which epitomises the modern distortion of the responsibility of the government to the lower house of Parliament in Australia.

The UK and New Zealand system of written questions followed by a prepared answer, and then supplementary questions to clarify the matter, seems the best model. It is often claimed that this would give unacceptable power to the Speaker, who is a party figure in the Australian House of Representatives. But so he is in the Canadian and New Zealand parliaments, and they have managed to produce a satisfactory question time. What is wanted in Australia is a commonsense approach by the two sides of Parliament.

Such an approach might also improve the general standing of the Speaker, who is certainly not regarded with the respect given to the Speakers in the other national parliaments. Rulings by the Speaker (unlike those in the UK and Canada) can be, and often are, disputed. In the Australian House of Representatives, 159 motions of dissent from rulings of the chair have been moved since 1901, and seven have been successful. There have also been eleven motions of censure or want of confidence in the Speaker, Deputy Speaker or Acting Speaker. All have failed, but the damage done to the status of the office of Speaker has been considerable.

Whatever the merits of the motions concerning the chair, the voting in the Australian lower house is almost always on party lines, including motions to suspend MPs, no matter how outrageous their conduct. This makes it almost impossible for a Speaker to discipline a minister. For example, in 1975 the Speaker 'named' a Labor government minister for defying him during question time, but the Labor Party voted against his suspension. The Speaker resigned.

If it be information that an MP requires, questions requiring written answers are usually more effective than question time, provided the answers are prompt. In the Australian Parliament the delay in answering questions is excessive, being an average of about three months compared with a week at Westminster and three sitting days in New Zealand. The delays are symptomatic of the attitude of Australian ministers and bureaucrats to the Parliament.

The performance of the Australian House of Representatives is markedly worse than some or all of the other parliaments in two other areas: the frequency with which statements of government policy are made outside the Parliament, and in the handling of petitions. The Speaker of the UK House of Commons takes some steps to embarrass and thereby discipline a minister who makes an important policy statement outside the House of Commons. In the other parliaments it is becoming increasingly common for important policy statements to be made on nationwide television, with the parliament being informed later or perhaps not at all.

With regard to petitions, the Australian government almost never responds to those presented to the House of Representatives, whereas in Canada the government gives a reply to each petition within 45 days, and in New Zealand each petition is referred to the appropriate standing committee, which usually gives the petitioner a chance to address it. The Australian government should show more respect for voters who take the trouble to prepare petitions.

Although in all the parliaments there are reasonable opportunities for MPs to protect the individual interests of their constituents, by personal advice, by questions (oral and written), grievance speeches and direct representations to ministers, the growing reach and complexity of government administration has placed many problems beyond the capacity of MPs to remedy. The solutions have been the introduction of ombudsmen and various appeal tribunals, but, valuable as these are, they have weakened the responsibility of the government to the *parliament*.

Upper houses

The concept of a review structure to watch over political decisions is certainly not new. The Romans had a Senate from the sixth century BC. Less sophisticated societies had cruder structures with a similar purpose. ‘The ancient Goths of Germany had all of them a wise custom of debating everything of importance to their state, twice; this is, once drunk—that their councils might not want vigour; and once sober—that they might not want discretion.’⁷³

The executive government is not *responsible* to the upper house. The upper house has no role in the choosing of a government, and should have none in a dismissal. But the executive government should be *answerable* to the upper house for its proposed legislation and its administration. If the upper house is to be effective in these roles, it must have some control over the executive government, otherwise it will simply be ignored.

Of the twenty parliaments we are considering, only eight still have upper houses. All but two of these (the House of Lords and the Canadian Senate) are elected. Of the seven upper houses which have been abolished since 1867, only one was elective, that of tiny Prince Edward Island. The Canadian provinces of British Columbia, Alberta and Saskatchewan have never had upper houses. Ontario chose not to have one on partition from Quebec in 1867, and the Newfoundland upper house was not re-created when responsible government was restored in 1949. There is no doubt that the non-elective nature of the upper houses diminished their political prestige, and made possible their abolition by governments impatient with any check to their power.

For the perceived role of upper houses has changed since Bagehot’s day. In the eighteenth and nineteenth centuries an upper house was seen as a check on change and the onward march of democracy. ‘All second chambers have been instituted ... not from any disinterested love of mature deliberation, but because there is something their makers wished to defend against the rest of the community, especially inherited

⁷³ S.D. Bailey (ed.), *The Future of the House of Lords*, London, Hansard Society, 1954, p. 7.

possessions and status.⁷⁴ The Canadian Senate and most of the upper houses in the Canadian Provinces and the Australian colonies were quite openly structured so as to protect the interests of property owners. Madison campaigned for a strong American Senate as ‘check on the democracy ... it cannot therefore be made too strong.’ It was this anti-democratic role of the upper houses which led Abbé Sieyès to claim that ‘if the Upper house agrees with the Lower it is superfluous; if it disagrees it ought to be abolished.’

The march of democracy could not be halted, despite rearguard actions, and other justifications of upper houses came to the fore. The Bryce Report of 1918, for instance, held that a main function of second chambers was ‘the interposition of so much delay (and no more) in the passing of a bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.’ But who is to decide when the will of the people has been adequately expressed, and what it is? And how is the second chamber to be limited to imposing no more delay than is necessary? These were—and are—the unsolved questions.

This role, too, has been overtaken by events. In all Westminster-style parliaments, the past century has seen, through the strength of party discipline and the development of party machinery, the increasing dominance of the lower house by the Cabinet. This has been reflected in a dramatic growth in departmental bureaucracy and an extraordinary expansion of administrative law and delegated legislation. The power of the courts to constrain the executive has been reduced. The lower house has almost none. The restraining role, if it is to be performed at all, must fall on the upper house. ‘The House of Lords, which once stood guard over the actions of a too powerful House of Commons, now stands guard over a too powerful Cabinet.’⁷⁵ How effective a guard is another question.

Some upper houses are moving into the political space abandoned by the lower houses; others seem moribund. Many possible roles for upper houses have been suggested. They could provide an additional pool of ministerial talent. They could perform the legislative role with regard to bills and delegated legislation, to the extent that the lower house is unable or unwilling to perform it. They could protect the special interests of states or provinces, and minority groups. They could inquire publicly into government activities, particularly those the government does not want to be scrutinised. They could monitor the activities of government business enterprises and other statutory

⁷⁴ F.A. Kunz, *The Modern Senate of Canada*, University of Toronto Press, 1968, p. 6.

⁷⁵ Professor McKechnie, quoted in G. Ross, *The Senate of Canada*, Toronto, Canada, Copp, Clarke 1914, p. 84.

organisations. And they could force a government which is performing badly or irresponsibly to face an immediate election.

Before the desirability and practicality of these various activities can be discussed, it is necessary to describe the different methods by which individuals become members of upper houses, for they affect both the quality of membership and the effective political power of those bodies.

Composition of upper house memberships

United Kingdom

The House of Lords is of course the prototype for all the other upper houses, but its composition has never been copied, although there were a few stray attempts in Canada and Australia. As a result of the deal struck with Lord Cranborne in 1998, the number of hereditary peers in the House of Lords was reduced from 758 to 92, two of them ceremonial posts. There were also 26 bishops and archbishops (all Church of England, of course), 27 judges (created life peers under the Appellate Jurisdiction Act of 1976 and making up the country's highest court of appeal) and the 515 other life peers. Before the changes were made, the House of Lords had 1326 members, of whom 750 held their seats because they were born into the aristocracy. Eight more had been created. These figures do not include 63 Lords without Writs of Summons, and 52 (including four life peers) who were on leave of absence. Contrary to popular belief, most of the hereditary peerages are not ancient. Before the Stuarts, the number of English peers ranged between 23 and 55. These days only 30 per cent date from the eighteenth century or earlier. It should be noted that in the crucial vote, less than a quarter of the eligible peers actually voted.

The 90 hereditary peers who were to sit in the reformed House of Lords were elected by colleagues who were members of their party. Any of the existing hereditary peers could nominate, and each was given 75 words to state an election manifesto. These ranged from the eccentric to the pompous. One promised 'action against cruelty to animals, particularly fishing with rods. All cats to be muzzled outside to prevent the torture of mice and small birds.' At the other extreme, one merely said that he hoped his 'fellow peers will honour me with their vote, on account of their knowledge of my endeavours.' The elections were for 42 Conservative peers, 28 crossbench, three Liberal Democrats and two Labour. Fifteen Deputy Speakers and other office holders were elected separately, and there were two ceremonial posts.

The royal commission, set up by Tony Blair as the second stage in the reform of the House of Lords, reported in December 1999. It recommended that there should be some elected members of the new

second chamber but rejected the idea of a wholly democratic house. The Commission thought that the new House of Lords should have about 550 members with, according to the chairman of the Commission, John Wakeham, 'a significant minority chosen on a basis which reflects the views of the regional electorates', the number of regional members being somewhere between 65 and 195. A third of the regional members should be chosen at the time of each general election, and their term as regional members should be three terms of Parliament—that is, not more than fifteen years.

The Commission recommended that the remainder of the 550 members should be appointed by a genuinely independent Appointments Committee, aiming to achieve a political balance matching the political opinion in the country as a whole, with about 20 per cent of the total number of members being Independent 'cross benchers'. The appointments should include members with such qualities as 'a breadth of experience outside the world of politics', 'personal distinction' and 'a non-polemical and courteous style.'⁷⁶ The Commission also thought that one third of the members should be women and a broad range of religious and ethnic backgrounds should be represented.

Despite the promise by Tony Blair that a reformed upper house would be in place by the next general election there was in fact no further change before the 2001 election. Whether there will then be public support for further reform remains to be seen.

The House of Lords is the final court of appeal for most legal cases, and up to eleven 'Lords of Appeal in Ordinary' may be created. They retire as Lords of Appeal at the age of 75, but remain members of the House of Lords for life. The appellate function of the House of Lords is now quite separate, and only 'Law Lords' may hear appeals. Bagehot favoured removing judicial functions from the Lords, and in fact this was done in 1873. Unfortunately the Disraeli Government restored them in the following year, so there is the confusion of having two courts of appeal in England. The royal commission did not see any reason to tackle this problem, thinking rather that there was some advantage in having senior judges in the Parliament where they could be educated in social developments. The Commission did not discuss the desirability of the separation of the legal and legislative powers.

The bishops and archbishops are at present members of the Lords until retirement, which is now the age of 70 if not earlier. The Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester are there *ex officio*, and the remaining bishops

⁷⁶ Royal Commission on the Reform of the House of Lords, *Executive Summary*, p. 7.

are selected on the basis of seniority of appointment. The royal commission recommended a broadening and deepening of religious representation in the second chamber, to include Christian denominations other than the Church of England as well as representatives of other faiths.

Life peers have been regularly created since 1958, at a rate of about twenty a year. These peerages have been effectively in the prime minister's gift, but although most prime ministers have tended to favour their own party, all have appointed life peers from the other parliamentary parties and from Independents. Indeed, opposition leaders are regularly consulted before new life peers are created. The power of the prime minister to offer someone a life peerage has been a useful way of bringing a suitably qualified individual into the ministry.

The presence of life peers has done much to raise the intellectual level and prestige of the Lords. The hereditary peers did occasionally produce individuals of ability, and, because an hereditary peer was entitled to his seat at the age of 21 also occasionally represented youth or early middle age, but such peers are unlikely to be elected under the transitional scheme. The Law Lords added a certain judicial dignity and legal knowledge, while the bishops exuded rather unfocussed social compassion. There is no doubt, though, that the Lords have been hampered by their non-representative character, and have been reluctant to take proper action on some occasions for fear of being pilloried in the media as 'the Lords against the people'.

The House of Lords is unique in that its members are unpaid (except for daily attendance expenses),⁷⁷ and are under no constraint to attend the House. 'Whipping' is therefore a very imprecise science in the Lords, and party strengths can be deceptive. The royal commission recommended the introduction of a modest attendance payment.

Canada

Canadian senators, although they must reside in the provinces they represent and must have property worth four thousand dollars, do not really represent anyone except the prime ministers who appointed them. Since 1965 senators have been obliged to retire at 75. As prime ministers nearly always appoint senators from their own party, a prolonged period of rule by one party causes serious party distortions in the Senate. A prime minister with a secure majority in the Senate

⁷⁷ Peers who are not office-holders are reimbursed for travel, subsistence and secretarial costs concerned with a sitting of the House or a committee. In 2000 these allowances were £81.50 for overnight accommodation, £36.00 for day subsistence and £35.00 for secretarial assistance.

sometimes appoints a distinguished 'Independent', and party members sometimes desert the party after appointment. A prime minister also sometimes appoints an opposition MP to the Senate, in the expectation (not invariably achieved) that the government would win the ensuing by-election for the House of Commons.

Before 1984 senators did not take rigid party positions, but between 1984 and 1990 the Liberals in the Senate used their majority to frustrate the Conservatives on several occasions. In 1990 this culminated in the Senate attempting to block the Goods and Services Tax Bill. Prime Minister Mulroney used the deadlock procedure to appoint eight additional senators (all Conservatives of course), and by filling some vacancies which had been left unfilled, he managed to gain control of the Senate.

Another significant (but short-lived) development occurred in 1990. The Meech Lake Accord had provided that the provinces should propose lists of suitable persons to fill Senate vacancies as they occurred. Alberta held a province-wide election to choose a candidate and forwarded the winner's name to the prime minister. Brian Mulroney was in a dilemma. Was a single name a 'list'? Besides, the nominee was a member of the Reform Party, which was becoming a dangerous rival to his Conservatives in the prairies. Very reluctantly, and after a long delay, Mulroney appointed the new senator. The Meech Lake Accord has since died, so there will be no further elected senators, for the present at least.

According to a Canadian authority, the result of the system of appointing senators is that Canadian senators are old, biased in favour of a long-lived government, almost totally unrepresentative of minor parties, male-dominated (though less so than the Commons), and composed of many wealthy people who on average have more political experience than the MPs in the House of Commons. The average age of Australian senators in December 1999 was 49 years, and MPs 47. The average age of British MPs was 52 and peers 65. In Canada the figures were 51 for the House of Commons and 64 for the Senate. The Canadian Senate is becoming less male-dominated; in 2000 there were 34 women senators.

Australia

The Australian Senate was patterned on the model of the US Senate, though during the federation debates some doubted whether the concept of a powerful Senate representing the states was compatible with responsible government. Yet there was really no option: without such an upper house there was no way the four less populous colonies would have agreed to federation in the 1890s, and probably thereafter. The

Constitution therefore provides for equal representation in the Senate for each of the six original states. Because the Constitution also provides for a two-to-one ratio between the two houses, as the population grew and the number of MPs needed to be increased, the number of senators had to be increased accordingly.

Initially there were six senators from each state, elected on a state-wide basis, rising later to ten senators and in 1985 to twelve. The term of a senator is six years, with half the senators retiring every three years. The Northern Territory and the Australian Capital Territory, not being states, have two senators each. Election is by proportional representation, with preferential voting. The quota to elect a senator is 14.3 per cent of the votes in a normal half-Senate election, and 7.7 per cent when the whole Senate is dissolved after a legislative deadlock between the two houses. Robson rotation⁷⁸ is not used, so the party organisations have control over the order in which their candidates are elected. Indeed, if a voter wishes to follow a party ticket, all that is needed is to tick a box, and as the alternative may be to fill in 60 or more sequential numbers on the voting form, it is not surprising that over 90 per cent of voters do tick a party box.

The result of all this is that the senators are very similar in age and background to the members in the Representatives, the choice of house being largely dictated by political opportunity, with the proviso that those who see themselves as potential leaders of their parties will try to head for the House of Representatives. Because of proportional representation and the even number of senators to be elected in each state and territory, it is most unlikely that any government will have a majority in the Senate. The balance of power will be held by minor parties and Independents. The Senate is thus in some ways much more representative of the political views of the community than is the House of Representatives, though it is somewhat distorted by the requirement (copied from the US Constitution) of equal representation from each state, so that Tasmania (population 473 000) has the same number of senators as New South Wales (population 5.8 million). Fortunately the party voting patterns across Australia are remarkably consistent, very different from those in Canada and the UK, for instance.

The Australian states

Of the five legislative councils in the Australian states, three are elected by proportional representation. In New South Wales and South Australia the electorate is state-wide; the term of a councillor is two terms of the lower house, with half the councillors facing the electorate

⁷⁸ Robson rotation is described in Chapter 3.

at each general election. Western Australia continues its tradition of rural bias by having six regions, four returning five councillors each and two returning seven. The number of voters in the various regions is manipulated so as to give a two-to-one bias in favour of the rural and remote areas, with the result that the Council is significantly more conservative than the lower house, the Legislative Assembly, though after the 1996 election the balance of power was held by two minor parties. The life of the Council is a fixed four years, although the elections are held at the same time as the lower house.

Tasmania and Victoria do not use proportional representation for their upper houses. In Victoria there are two councillors for each electorate, standing at alternate elections. The Council electorates are created by lumping together four Assembly electorates.

The Tasmanian system is distinctly curious. For many years there were nineteen electorates for the upper house, with wild discrepancies developing in the number of voters—by the 1990s the electorates varied in size from 6000 to 21 000. In 1998 there was a reduction in the Council's size from nineteen to fifteen, to be achieved over three years. The number of voters in each electorate has been equalised, with a 10 per cent tolerance, which triggers a redistribution if it is exceeded. More unusual is the electoral system. Councillors are elected for fixed six year terms, with elections being held on the fourth Saturday in May each year. When the Council size has come down to fifteen, two councillors will be elected one year and three in the next year and so on, the electorates which are voting each year being selected so that they are as far as possible spread around the state.

The extraordinary result of the by-election atmosphere created by this system of voting has been that the Council is almost entirely filled with Independents. In 1990, for instance, the Council consisted of seventeen Independents (about a third of them leaning to the Liberals and another third to Labor), one Labor councillor and one Liberal. There were of course no party caucuses, though the two councillors who were party members attended the meetings of their colleagues in the Assembly.

The Tasmanian Legislative Council can be rather reactionary. When a bill to decriminalise homosexual acts was being debated, there were claims that homosexuals should not sully Tasmania with their behaviour, and that they should go to other states where such disgusting behaviour was legal. When a councillor suggested that the opponents of decriminalisation were using Old Testament arguments and 'in those

days a person was put to death for it', another councillor interjected 'not a bad idea either.'⁷⁹ The decriminalisation clauses were defeated.

Representation of community opinion

Although all the upper houses were set up to protect special interests, this role has diminished. Nevertheless the composition of upper houses gives various interests formal representation they would not have in the lower house. The House of Lords still gives power to some representatives of the hereditary peers, and to some judges and senior clergy of the Church of England. Appointments by the prime minister can place distinguished individuals in the House of Lords and the Canadian Senate, although the Canadian appointments seem more designed to reward party service than to enhance the quality of the Senate. Life peers have done much to enhance the quality of the House of Lords. They certainly come from diverse backgrounds.

The largest category is of politicians, whether ex-ministers, ex-MPs or others active elsewhere in party politics, especially in local government. But the many other occupations honoured include businessmen, trade unionists, civil servants and other public servants, diplomats, senior servicemen, industrialists, scientists, economists, journalists, newspaper proprietors, doctors, lawyers, farmers, technologists, actors and artists, clerics, accountants, nurses, social workers, and a composer.⁸⁰

If the recommendations of the royal commission are accepted, the representation would become even more diverse, with regional members as well as increased representation of women and of religions other than the Church of England.

The Australian Senate was originally designed as a states' house. 'Not only by its express powers,' said Barton, Australia's first prime minister, 'but by the equality of its representation of the states, the Senate was intended to be able to protect the states from aggression.' In fact, as some prescient members of the constitutional conventions had predicted, the Senate immediately split on party lines. The Senate has never been effective as a states' house. Of course senators raise state issues, but not more frequently—in fact rather less frequently—than their colleagues in the House of Representatives. There is however one state advantage: the existence of the Senate, and its election by proportional representation, ensure that there will be someone from each state in each major parliamentary party. Tasmania is the problem.

⁷⁹ Tasmanian Legislative Council *Hansard*, 3 July 1991, p. 1293.

⁸⁰ J.A.G. Griffith and M. Ryle, 1989, *op. cit.*, p. 461.

From 1972 to 1975 *all* five members of the House of Representatives from Tasmania were Labor, from 1975 to 1987 *all* were Liberal, and since 1998 *all* have been Labor.

The effect of proportional representation is to allow representation of minor parties and Independents, and to make it unlikely that a major party will have an absolute majority. The extent to which minor parties or Independents can gain seats depends on the size of the quota. In Australia federally, when there is a double dissolution and all twelve senators in each state are up for election, the quota is 7.7 per cent, but the drift of preferences from other parties will permit the election of someone with an even lower proportion of the primary vote. After the 1987 double dissolution, for instance, the state of the parties in the Senate was: Labor 32, Liberal-National Coalition 34, Australian Democrats seven, Nuclear Disarmament Party two, and one Independent. One of the Nuclear Disarmament Party (from New South Wales) received only 1.5 per cent of the primary vote. The person elected was later discovered not to be a citizen, and his election was declared void. His place was taken by the person who was second on the party ticket. The strength of the Nuclear Disarmament Party in New South Wales was estimated to be under 100 at the time, and it was divided into several factions.

Although the electoral systems in most of the Australian upper houses do result in the representation of minority groups and special interests, most suffer from the defect that they lag in following changes in public opinion. This applies whether their members are appointed for life or until aged 75, or whether a portion of the house (usually half, but in Tasmania one-sixth) retires at each general election. The continuing nature of elected upper houses was originally designed to maintain stability. As one delegate to the 1891 Constitutional Convention in Australia put it, it would be undesirable for ‘the people’s will in its burst and flush of impetuosity to reach the statute book. That is not what the sober-thinking, solid and—I will use the word—conservative Senate is for.’⁸¹ A modern upper house must be aware that its membership may not reflect changing public opinion, and must be particularly careful not to obstruct important measures which the government can reasonably claim were critical to its election program.

The possibility of abolition

The possibility of abolition concentrates the minds of upper houses, though the consequence of concentration is sometimes paralysis. Yet

⁸¹ *Official Report of the National Australasian Convention Debates, Sydney 2nd to 24th September 1891*, Sydney, Government Printer, 1891.

there is no serious move against any of the remaining upper houses. The House of Lords could be abolished by an act of Parliament, which the Lords could do no more than delay for a year. It is possible, but these days very unlikely, that the Queen could insist on the issue being put to the voters before she would approve such a bill. In 1977 the Labour Party conference voted overwhelmingly for the abolition of the House of Lords 'as quickly as possible', but this pledge was dropped from the 1987 manifesto. The Labour Party adopted a policy in favour of a 'second chamber', though it was not entirely clear about how it was to be constituted, except that it should have no hereditary component. The Labour manifesto for the 1992 election suggested the replacement of the House of Lords with an elected second chamber which would have a delaying power over bills which reduced individual or constitutional rights. The Conservative manifesto did not mention the House of Lords. With the reforms being implemented by the Blair Government, abolition is not now an issue.

Everyone seems to agree that the Canadian Senate should be reformed, but there agreement stops. 'It would be idle to deny that the Senate has not fulfilled the hopes of its founders; and it is well also to remember that the hopes of its founders were not excessively high.'⁸² There is no real move to abolish the Senate, though its behaviour over the Goods and Services Tax bill made it many enemies. Abolition would require an amendment to the Constitution which would have to be passed by the House of Commons and two-thirds of the parliaments of the provinces that have between them at least 50 per cent of the total population. It would be very difficult to obtain such a vote. The Senate would not be able itself to block such a bill, for it has only a 180-day suspensive veto over amendments to the Constitution.

In Australia the Senate is powerful, and is entrenched in the Constitution. There is no way the voters in a majority of the states⁸³ would vote for its abolition, for the four less populous states firmly believe that the Senate protects their interests. The Labor Party used to have the abolition of the Senate as part of its platform, but in 1979 recognised reality and deleted it.

Three of the five legislative councils in the Australian states are firmly entrenched in their state constitutions. The New South Wales, South Australian and Western Australian legislative councils could be abolished only by referendum, and past experience suggests that such a

⁸² C.E.S. Franks 1987, *op. cit.*, p. 94.

⁸³ Such a constitutional change might well require a majority of voters in *all* of the states, because of s.128 of the Constitution, whereby a state may not be deprived of its proportionate representation in either house without its consent.

referendum would surely fail. In Victoria the Council is only slightly entrenched, its abolition requiring an absolute majority in each house. However, no party is currently committed to its abolition. Tasmania, as usual, is the odd one out, for its Council could be abolished by an ordinary act of Parliament, but the prospect of the Independents who dominate the Council voting for their own destruction seems remote.

It can be seen that none of the surviving upper houses should fear abolition, anyway in the short term, or permit that fear to prevent them carrying out the jobs that should be done.

Ministers in upper houses

Although the House of Lords does provide a pool of ministerial talent, and a convenient method, through a life peerage, of bringing an eminent non-politician into the government, the expertise in the Lords is not often used in this way. It may occasionally be used as a quiet refuge for a busy minister. Prime Minister Macmillan sometimes moved a minister to the Lords to shield him from 'the time-wasting turmoil' of the Commons. Typically there are two or three Cabinet ministers in the Lords (out of 22) and five or six ministers of state (out of 30). As all ministers in the Commons are required to have someone in the Lords to answer for them, the balance of the Lords front bench team is made up of parliamentary under secretaries and whips. A typical government front bench team in the Lords would have 22 members, including seven whips.

Cabinet ministers in the House of Lords are more often than not life peers. In Conservative governments the other ministers and parliamentary under secretaries tend to be hereditary peers, because life peers have usually had successful careers outside politics, are not as young as they were, and are not very interested in full-time political drudgery without compensating power. In the 1990 Conservative government under John Major, for instance, both of the Cabinet ministers in the Lords were life peers, but only one of the six ministers of state and none of the remainder of the front bench. Suitable hereditary peers are much less available to a Labor government, and in the 1997 Blair Government there were none.

The elimination of hereditary peers will of course change this balance, but during the transitional period, where there are 90 hereditary peers elected by their colleagues, there may not be much change, for nearly all those hereditary peers who would have been considered for the front bench would be among the 90 chosen. The royal commission recommended that some ministers should continue to come from, and be answerable to, the new second chamber, and that

senior ministers from the House of Commons should make statements to an appropriate committee of the second chamber, and answer questions from it.

In Canada there is normally only one minister in the Senate, the leader of the government party, although in the past both Liberal and Conservative governments have used Senate ministers to cover gaps in their ranks in the Commons when there is no suitable MP from a particular province.

All the Australian upper houses, except Tasmania's, are substantially represented in the various ministries. In the 1990 Hawke Labor Government, for instance, the federal ministry contained 21 MPs (out of 76 members of the government party) and nine senators (out of 32). The figures for the second Howard Liberal-National Party Government in 1998 were 20 MPs out of 80, and nine senators out of 34. In the smaller parliaments (the Australian House of Representatives has 148 members compared to 659 in the British House of Commons and 301 in the Canadian) there is no doubt that the upper houses usefully increase the pool of potential ministers. Some of the most effective ministers in the various Australian parliaments have come from their upper houses, but there is no scope for the British technique of bringing a talented outsider into the ministry by appointing him to the upper house.

There are nevertheless substantial problems in having ministers in the upper house. A basic concept of responsible government is that the Cabinet is a committee chosen by the lower house, and is answerable to it. This has effectively prevented a non-parliamentarian remaining a minister, though this would be technically legal in the UK and Canada and some of the Australian states. The possibility of providing an MP in the lower house to represent such a minister is not thought to be a politically acceptable solution. Logically the same objection should surely apply to having ministers in the upper house.

At a practical level, if a minister is in the upper house he cannot be directly questioned by members of the lower house. Certainly he will be represented there, but the minister answering the questions may not be directly involved in the affairs of the department, or involved in only part of it. Though he will undoubtedly have a thick book of briefing notes, it is not at all the same as being able to confront the responsible minister directly. The same problem arises when the house debates the performance of departments or policies for which an upper house minister is responsible. In Australia, for instance, during the Gulf War the ministers for foreign affairs and defence were both in the Senate.

Senate ministers in Australia, like the ministers in the House of Representatives, wish to keep the sittings of the Parliament as brief as

possible, so that they can get on with their administrative work in their departments, and not give the non-government parties opportunities for easy publicity. The consequence has been that the Senate sits for an absurdly short time—only half the sitting days of the House of Lords, for instance—and much important Senate business is either rushed or neglected. It is surely wrong for the sitting days of the Senate, which is the only effective scrutineer of government legislation and administration, to be determined by the body being scrutinised.

Another problem is the effect that the presence of ministers has on the numbers available in the smaller upper houses for committee work. In the Australian Senate, for instance, where there are only 76 members, the unavailability of eight or nine ministers for committee work is a significant loss.

Most serious of all is the effect that the possibility of becoming a minister might have on the zeal with which upper house members approach their other activities, all of which have the potential to question, constrain or expose the government. The task of a minister in an upper house is to try to ensure that government legislation is passed promptly, without amendments, and with as little embarrassing debate as possible. Similarly, government activities must be presented in the best light, and any inquiries potentially harmful to the government firmly headed off.

All of this is of course totally incompatible with an effective role for the upper house, but the opposition will usually support this attitude, for they hope to be in government themselves one day, and they have no desire to see really effective controls established. Worse still, upper house members who are or aspire to be ministers—and that means virtually all upper house members—will try to use the upper house to support their party's continuing electioneering in the lower house, and such campaigns do great damage to an upper house as a serious legislature. In the Australian Senate, for instance, the policy of senators from the major parties on serious issues is determined at a joint meeting of their party, at which the lower house members outnumber the senators two to one. And if they have any ministerial ambitions, senators have to vote in accordance with these decisions.

It is difficult to see these attitudes changing while the aspiration of most upper house members is to be promoted to the ministry.

Upper houses as legislatures

United Kingdom

The royal commission did not recommend any significant changes to the legislative arrangements in the second chamber, so it may be

assumed that the present performance of the House of Lords in this area will continue. These days, of an average of about 85 bills passed by the UK Parliament each year, about twenty are introduced in the Lords. This figure includes a handful of 'consolidation' bills, which make no substantive changes to the law, but reorganise various acts to make them more accessible. These bills are always introduced in the Lords. A few important bills are usually introduced in the Lords so as to avoid a traffic jam in the Lords at the end of the session, but these cannot include supply and money bills, which must be introduced in the Commons. The Lords sit for some seven hours a day, four (or, towards the end of the session, five) days a week, and into the evenings each sitting day except Fridays. The total sitting days average about 150 a year, which puts other upper houses to shame.

About half of the available time is now spent on legislation, a remarkable increase occurring in the last two decades of the twentieth century. Only about a fifth of the time available for legislation is spent on second reading debates, a very low figure compared with other upper houses. The Lords do not normally divide on the second reading of a government bill. They follow a doctrine, first formulated by Lord Salisbury during the term of the Attlee Labour Government, that the Lords would not oppose bills which implement undertakings given in the government's election manifesto. Other bills—the deplorable retrospective War Crimes Bill, for instance—may be opposed, though the Lords have only a delaying role, not a veto. The impressive legal talent in the Lords effectively demolished the War Crimes Bill during the second reading debate, but the Thatcher Government was driven by political rather than legal standards, and after the necessary interval the Commons passed the bill again. When the Lords rejected it for a second time, the full provisions of the Parliament Act of 1949 were invoked for the first time, and the bill became law.

The committee stages of bills are much more thorough, and taken on the floor of the House. It is very rare for a bill to be referred to a committee; only ten have been referred in the past three decades. There is no opportunity to hear public evidence or receive submissions. In July 1992 a Select Committee on Committees recommended a special standing committee to take evidence on technical bills and then consider them clause by clause. These committees were later renamed special public bill committees, but only three bills have been considered by them, none since the 1994–95 session. None were referred to any other committee in the 1990s.

There are numerous amendments made to the bills considered on the floor of the House. Nearly all of them are initiated by the government, dealing with problems with poorly drafted bills which have

nevertheless passed the House of Commons, second thoughts on technical detail or even policy by the sponsoring department, or mistakes noticed or promises given to make certain amendments. The House of Lords is a convenient place to make such amendments, though if it did not exist other ways to make them could be found, as has to be done in unicameral parliaments.

There are, though, some amendments which would probably not be made but for the House of Lords. The first type occurs when problems which have been raised in the Commons but dismissed there are raised again in the Lords, and the government introduces amendments to resolve them, either wholly or in part. The second type occurs when a peer points out a defect which no one had noticed until then. The range of specialist expertise in the House of Lords make this not uncommon. The third type is different, for it is an amendment resisted by the government but passed anyway by the Lords. Before the 1998 transitional reform of the Lords about ten bills a year were amended in this way. For the House of Lords to press the issue, it had to be concerned with one of the Lords' special interests, which were 'in summary: the treatment of pensioners and the disabled, rural/countryside issues, matters of constitutional etiquette, respect for existing minority rights and, to a lesser extent—because it rarely leads to defeats—consumer rights.'⁸⁴ It remains to be seen how the new House of Lords will use its power.

Some, but by no means all, of the third type of amendments were accepted wholly or in part by the Thatcher and Major governments, which was a significant change from the attitude of the Labour governments of the 1970s, when most such amendments from the Lords were rejected. The Lords did not insist on them, though they did manage to negotiate some changes to bills such as those on the dock-work scheme, devolution proposals, and aerospace and shipbuilding nationalisation, from which the Lords were able to exclude ship-repairing.

The Blair Labour Government also accepted some amendments from the House of Lords, one of which significantly changed the Crime and Disorder Bill (1998), which contained wide ranging provisions on law and order. At the report stage in the House of Commons a motion was moved to reduce the homosexual age of consent from eighteen to sixteen, to bring it into line with that for heterosexuals. The amendment was passed on a free vote by 336 votes to 129, but was rejected in the

⁸⁴ Andrew Adonis, 'The House of Lords since 1945', *Contemporary Record*, vol. 2, no. 3, Autumn 1988, p. 384.

Lords. The government accepted the Lords rejection so as to get the other 25 measures in the bill into operation.

Although the House of Lords rarely refers government bills to committees, it has set up a European Communities Committee to consider draft EU legislation. The committee has six sub-committees, and they consider selected draft legislation in detail, taking evidence from witnesses including UK ministers and European Commission officials and members of the European Parliament. Although the UK Parliament has no formal role in the EU legislative process, the House of Lords reports are regarded as authoritative and often superior to anything produced by the European Parliament.

Private bills are concerned with benefits to any person or body of persons. About half of the private bills to come before Parliament are introduced in the Lords, and if they are disputed they are referred to select committees which act in a quasi-judicial manner, hearing evidence and arguments from both sides. The Parliament Acts of 1911 and 1949 do not apply to these bills, and the Lords occasionally reject them, notably a 1976 bill to nationalise Felixstowe Dock, despite the bill being supported by the Labour government. There has been a considerable increase in private legislation in recent years, because railway, light rail and other works projects require such legislation, and although the Lords could cope with the workload the Commons was under pressure. In a typical reaction of a modern 'responsible' government, the system was changed so that Parliament no longer has to approve these works bills.

Several private *members'* bills are passed each session but such bills frequently die in the Commons, for a private member's bill from the Lords not only requires a sponsor in the Commons but must follow the same tortuous procedures as private members' bills introduced in the Commons. Nevertheless private members' bills from the Lords have raised important issues, such as abortion, homosexuality and sex discrimination, which have ultimately been dealt with one way or another.

As the Lords have no power over money bills, the estimates are not considered at all by them.

Canada

Until 1984 it was a much calmer picture in Canada. The Senate had not rejected a government bill since 1940, or insisted on an amendment since 1961. The Senate did do some useful work in tidying up defects in the bills which were overlooked in the Commons, or making last minute changes to bills—possibly to meet promises made in the Commons, though in fact only 69 government bills have been amended

in the past 30 years. During the 1970s and early 1980s the Senate used a system of sending the subject matter of government bills (not the bills themselves) off to legislation committees for public input while the bills were still before the Commons, and tabling the reports in the Senate where they would be available to the responsible minister. This pre-study was helpful, as worthwhile amendments could be made to a bill before it arrived in the Senate, but its almost clandestine nature did nothing for the public image of the Senate. Many senators felt that it was more appropriate for the normal procedures to be followed, and pre-studies are now very rarely used.

Things changed dramatically in 1984, when the incoming Conservative government was faced with a Liberal majority in the Senate. On past experience this would not necessarily have been a problem, but the Liberal senators had been reinforced by new senators chosen from ex-members of the House of Commons, and they introduced partisan tactics to the Senate.

In the 1984–85 session the Senate delayed a 19.3 billion dollar borrowing bill until the government tabled its spending proposals. Although the Senate was technically in the right, its action provoked anger and the Senate responded with threats to delay legislation. Helpful procedures such as committees privately suggesting amendments to ministers were dropped. Bills were still referred to legislation committees, and there was substantial input to these committees, but the committees were controlled by the Liberal opposition, and they became very partisan, with almost no cross voting. Although the Senate never finally insisted on its amendments, they did cause considerable delays and frustration.

In 1988 there was a dramatic development. The Conservative government had negotiated a free trade agreement with the United States. The enabling bill was duly passed by the Commons, but the Liberal parliamentary leader announced that the Senate would not pass the bill until an election was held on the issue. Whether the Liberal majority in the Senate would have obeyed these orders (it almost certainly would have) was not put to the test, for Prime Minister Mulroney called an immediate election, which he won. The bill was then passed by the Senate.

This was nothing compared to what happened two years later. The Mulroney Government had passed a bill through the Commons to introduce a new indirect tax, a 'goods and services' tax. When the bill reached the Senate it was referred to a legislation committee. The committee, controlled of course by the Liberals, toured the country for two months stirring up opposition to the bill, which the committee then recommended should be rejected. Extraordinary scenes followed: the

Senate sitting 24 hours a day for weeks on end while the Liberal opposition filibustered, with whistles being blown and old speeches and complete books being read; the use of the deadlock power to bring in eight new Conservative senators; sustained uproar for hours to prevent the Leader of the Government being heard so that he could move a motion to bring the matter to a vote; members of the Commons being invited, most improperly, on to the floor of the Senate to harangue senators; press photographers on the floor of the Senate; and fist fights almost breaking out between senators. The bill was eventually passed, but the whole process was scandalous and a dramatic change from the dignified and rather somnolent Senate of the past. What will happen in the future, if another government is faced by a Senate controlled by an aggressive opposition, is a critical question. The problem has been deferred, for the Liberal government elected in 1993 managed to regain control of the Senate two years later by filling four vacancies with party members.

Before we leave the question of the Senate's handling of bills, two unusual procedures should be mentioned. Although the Senate can establish legislation committees, it has never yet done so. If a bill is to be considered by a committee—and this is rare—the bill is referred to one of the standing committees. Only one standing committee (the National Finance Committee) deals with estimates. Because of the absence of ministers in the Senate, the responsible minister from the Commons may give evidence to the committee handling the bill, and may even be invited to come into the Senate to handle a bill at the committee stage. Other upper houses could well consider such arrangements.

They might also consider the Canadian Senate's arrangements for the pre-study of bills, which have already been described. The purpose of the procedure was to allow some Senate input into bills, which are frequently sent up to the Senate at the end of a session, and expected to be adopted quickly and without change. It falls far short of making the Senate an effective legislature, but it was better than nothing, until it fell into disuse.

The Canadian Senate does not really consider supply bills at all, though it certainly has the power to do so if it chooses. Private bills are usually introduced in the Senate in order to balance the workload between the two houses. Private bills are considered carefully by a committee, which hears both petitioners and those opposed to the bill. There are many fewer such bills than there used to be, for most were divorce petitions from Quebec and Newfoundland, and these were stopped in 1963. There are few private *members'* bills introduced in the Senate, because such bills have little chance of becoming law and there

is no publicity value, for the Senate is little reported and there are no constituents.

Australia

The government has had a party majority in the Australian Senate for only five of the last 30 years (1976–81). With the House of Representatives having abandoned any pretence to being a legislature, it might have been thought that the Senate would move rapidly to fill the gap. Nevertheless the Senate was surprisingly slow to move into the field of careful committee examination of government bills.

In 1970 seven (later increased to eight) 'legislative and general purpose' standing committees were set up, and one might have thought that they would play a major role in reviewing government bills, whether originated in the Senate or received from the Representatives. In fact very few bills were referred to these committees—usually only one or two a year, none in some years—although it was generally agreed that the bills which had been considered by the committees had been considerably improved as a result.

Of course the government could be expected to resist such referrals, claiming delay, though the urgency was rarely apparent. The real reason seemed to be that the government felt that any detailed examination of its bills, with public evidence being taken, by an all party committee was an unreasonable intrusion by the legislature into the business of the government! Yet the government did not normally control the Senate, so how did it prevent a bill being sent to a committee? The secret was to do a deal with the Democrats or the Independent senators holding the balance of power, agreeing to allow them to make amendments which would be attractive to their supporters, on the implied condition that opposition amendments and attempts to refer the bill to a standing committee would be resisted. It was a pernicious system. A deal could not always be made, and bills were frequently amended by the combined votes of the opposition and the Democrats, or very occasionally referred to a standing committee for thorough examination.

Even attempts to refer bills to the standing committees for consideration in the lengthy winter recess never succeeded. The chairs of the legislative and general purpose standing committees were always government party senators, and they *always* maintained that their committees were already overloaded with inquiries and they could not possibly deal with any legislation.

After prolonged campaigning by those who wished to reform the Senate as a legislature, in 1989 a select committee was set to examine, among other things, the question of the referral of bills to standing

committees. The committee recommended the setting up of a Selection of Bills Committee, to consider all bills except money and appropriation bills, which at this time were dealt with by the estimates committees. The Selection of Bills Committee was required to report on each of the other bills as to whether it should be referred to a standing committee, and if so which committee and by when it should report to the Senate. The select committee's recommendations were unanimously adopted by the Senate, and the immediate result was a sharp increase in the number of bills considered by the standing committees. More bills were referred to committees in the first twelve months of this procedure than had been in the previous twenty years. Now about 30 per cent of bills presented to the Senate are examined by one or other of the committees.

Another problem that had to be tackled was how to provide adequate time for the Senate to consider a bill thoroughly. Governments of both persuasions tended to pass a mass of bills to the Senate at the end of a session (until 1994 there were two sessions a year) with the demand that they should be rushed through. The Senate, which was not controlled by the government, imposed increasingly stringent guidelines for the handling of government legislation, and the government eventually agreed that it would make 'a concerted effort to ensure that in future most legislation is introduced in one sitting for debate in the next', and that from 1994 the number of parliamentary sessions would be increased from two to three. The Senate strengthened this by passing a standing order which required that a bill passed in one period of sittings may be considered in that period of sittings only if it is introduced in the first two-thirds of that period, and any bills introduced after that are automatically adjourned until the next period of sittings. The government has to make a special plea for a bill to be exempted from this rule.

There was a further change in 1994. There is always a danger when a committee is examining legislation and also conducting inquiries into the activities of a government department that the committee will become overloaded and one or the other will have to give. The solution adopted was to set up two committees—one dealing with legislation, the other with references—in place of each of the eight legislative and general purpose committees. The chairs of all the legislation committees were government party senators, giving the government an effective majority on each of the committees.

The big increase in the number of bills referred to committees is all very well, but the quality of the examinations of controversial bills has fallen very sharply. While only a few bills were being considered by Senate committees, the party leaderships did not attempt to force

committee members to toe the party lines. The bills that were referred were thoroughly examined, and the reports were usually unanimous, even on highly controversial bills such as the one on freedom of information.

With the greatly increased number of bills being considered since 1990, it is no longer acceptable to the party leaderships to have them examined in such an independent way. Effective pressure has been brought to bear on the senators concerned. Committee members now follow the party lines, and committee hearings on controversial bills tend to become electioneering stunts rather than serious examinations of the contents of bills.

There has also been a disturbing development in the behaviour of the chairs of legislation committees. All such chairs are held by the government party, and the senators concerned seem to be moving towards a belief that government bills should not be touched. Even the referral of the very important GST bills to legislation committees was resisted by the government, apparently on the grounds that the very complex bills had been carefully considered by the government, so why was the legislature trying to get involved in the detail of such legislation?

The attitude of the legislation committee chairs is that, if possible, bills should not be referred to a committee at all, the chairs using often dubious claims of work overload. If they are referred, the hearings should be brief and if possible no amendments should be made. The reason for this developing attitude is that a committee chair is seen as a stepping stone to the ministry, and the prestige of a senator is thought to be greatly increased by ruthless and successful protection of government bills. The reaction of the non-government parties was to use their majority to refer some controversial bills, not to the legislation committees but to the references committees, where the non-government parties had a majority.

These problems do not arise if a bill is not a matter of dispute between the parties. About 90 per cent of bills fall into this category. There is no doubt that the legislation committees do valuable work with these bills, and many of the non-controversial bills they consider are improved as a result of their investigations. In the committee hearings expertise in the community is brought in, and perhaps even more importantly the opportunity for members of the community to have some chance to make an input into laws which may have a significant effect on them is very important for the working of the democratic system.

The question, though, is whether the Senate committees can afford to spend time on these non-controversial bills. There are only 76

senators, and there are unlikely to be more than about 33 or 34 government party senators. By the time ministers and the president have been provided from the government party, there are usually not more than 23 or so government party senators available for committees. With the number of joint committees with the House of Representatives and other important Senate committees stretching the time of the available senators, it is important that the Senate committees should focus on investigations the House of Representatives cannot or will not undertake.

For this reason it was earlier recommended, when the performance of the House of Representatives as a legislature was considered, that consideration of non-controversial bills should be left to the committees of the House of Representatives, thus leaving Senate committees with time for more controversial investigations. At the moment the committees of the House of Representatives do nothing about such bills; some effective pressure will have to be applied to them.

Private members' bills in the Senate used to be infrequent, but the development of the minor parties has made a sharp change, the number being introduced rising from about two a year in the 1970s and 1980s to twelve in the 1990s. This is because there is some prospect of the bills being passed, as a result of the lack of government control of the Senate, and senators have begun to make use of the publicity opportunities. Since 1970, 162 private members' bills have been introduced in the Senate, and twenty have been passed by that chamber. In order to be taken up by the House of Representatives, a senator's bill must be sponsored by an MP, and seven of the twenty bills passed by the Senate were ultimately accepted by the Representatives. It is worth noting that two of the seven successful Senate bills were moved by opposition senators, and two others by Australian Democrats.

The estimates are reasonably thoroughly dealt with. They are considered by the eight legislation committees, who are allocated departments to consider by a Senate resolution. They consider the main estimates (after the introduction of the budget in the House of Representatives in May) and the additional estimates (usually in November). The evidence is taken in public session, but ministers from the House of Representatives do not appear before these committees, with the result that most of the departments being examined are represented by a Senate minister who has little detailed knowledge of what is going on in the department. Public servants from the department being examined do attend, and may answer the questions of committee members if the minister approves, which he usually does, particularly if he is not the responsible minister.

These committees have been effective in forcing the government to produce estimates in a standard format with proper explanatory notes. They have also uncovered some waste and mismanagement, and certainly public servants view the hearings with trepidation. On the other hand, the committees have serious shortcomings. They are not permanent watchdogs, for they meet for only a few days a year. Worst of all, the non-government senators are anxious to embarrass the government by uncovering dramatic mistakes by public servants, rather than examining the policy and methodology to which the expenditure is related. Still, that is the nature of politicians.

The increased influence of the minor parties and Independents in the 1990s has resulted in a great deal of the negotiations on the budget being conducted directly between them and the government, and they have been able to negotiate specific changes to the budget in return for their support for the budget as a whole. This is a great change from the days when the budget was regarded as non-negotiable and its progress through both houses was regarded as automatic.

The consideration of annual reports by government agencies has also been greatly improved. Responsibility for considering these is assigned among the legislation committees, and the committee has to report to the Senate whether the report is apparently satisfactory. If it is not the committee has to conduct a detailed examination. There is no doubt that, although the system is far from perfect, the Senate has made a dramatic improvement in the supervision given to the very numerous government agencies, which a decade ago were scarcely scrutinised at all.

The Australian Senate has taken also three dramatic actions which have substantially improved its performance as a legislature. In 1981 it set up a Scrutiny of Bills Committee, with independent legal advice, with instructions to examine each bill when it is introduced and to report if any bills trespass unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; inappropriately delegate legislative powers; or insufficiently subject the exercise of legislative power to parliamentary scrutiny. The all party committee raises queries about an average of 85 bills a year, nearly 40 per cent of those introduced into the Parliament. In something like half of the cases the responsible minister provides a satisfactory explanation, but that leaves nearly 50 bills a year where there are concerns which the minister, in the opinion of the committee, cannot meet.

The committee does not yet have the political clout of the comparable Senate committee watching over delegated legislation, but its views are available to both MPs and senators, and about 30 per cent

of its criticisms result in amendments to bills. Without this committee a good deal more defective legislation would be passed. It will come as no surprise that the establishment of the committee was strongly opposed by the government of the day, the Fraser Coalition Government. The government's attitude was that the bills had been carefully drafted by the government and its advisers, so why should the Parliament want to get involved? A waste of time, the government said. The committee was established only after several Liberal senators cross voted.

The Senate has also taken action to limit two other abuses of power by governments. A custom had grown up by which the treasurer would announce a change of tax policy in a press release, and this change would come into immediate effect, even though the bill to enact the changes retrospectively might not be introduced for many months, sometimes more than a year. Worse still, the bill might differ significantly from the press release which until then taxpayers were being expected to obey. In 1988 the Senate passed a resolution which sharply restricted the amount of retrospectivity it would tolerate, and since then government behaviour has noticeably improved in this regard.

The other abuse of government power which has now been controlled concerns the failure to proclaim acts or parts of acts which have been duly passed by the parliament. Certainly delay is sometimes justified, to allow for such matters as the preparation of regulations, but the situation was often absurd, with acts which had been rushed through the Parliament as 'urgent' remaining unproclaimed for months or even years. Following Senate protests, all acts which are to commence on proclamation now have a provision that they come into effect after six months if the proclamation is not made. The Scrutiny of Bills Committee is very assiduous in drawing attention to any bills which have open-ended proclamations. The government provides the Senate with an annual list⁸⁵ which shows the details of legislation which is to come into effect on proclamation and has not yet been proclaimed. The reasons for the failure to proclaim the act are set out. As an example, in the 1999 report there were 24 such acts. The oldest was passed in 1974, and dealt with financial corporations. The government said that Part IV of the Act was inconsistent with new arrangements for the financial sector, and the need for it was being reviewed.

⁸⁵ Initially a list was tabled twice a year, but the system worked so smoothly that in 1999 the Senate agreed to the list being made annual.

If the government, for some good reason, does not wish to proclaim an act, or part of it, it now has to come back to the Parliament, explain its reasons, and ask it to amend or repeal the act. That is as it should be.

State upper houses are generally less effective than the Senate as legislatures. None of the state upper houses regularly sends bills to committees for public examination. Western Australia has the only upper house with a standing legislation committee, intended to deal with contentious bills as well as revisions of acts. The committee is empowered to take evidence from the community, but only about 5 per cent of bills are referred to it. Tasmania, as usual, has an unusual arrangement. Although the Legislative Council does not formally take evidence from the public, there is an arrangement whereby the whole Council meets with pressure groups, hears their cases and asks questions. Although evidence from the public is desirable, this procedure is far too loose. There is no public call for submissions on a bill, the evidence is not given on oath, and the proceedings are not recorded.

When upper houses are not controlled by the government, bills are fairly frequently amended. The Tasmanian Legislative Council, which is never controlled by *any* government, amends 40 to 50 per cent of bills, many of them heavily, and meetings of managers from the two houses are often used to try to resolve differences.

Ministers from the lower houses are entitled to attend the upper houses in Victoria and New South Wales, to explain their bills and to answer questions, but not of course to vote or to move motions. The right has occasionally been exercised in New South Wales, but is not used in Victoria.

To show the contempt state governments sometimes show towards upper houses, it is worth looking at the recent behaviour of the New South Wales government towards its upper house. The Legislative Council is elected by state-wide proportional representation, and is rarely controlled by any government. The Legislative Council, against the wishes of the government, added clauses to a government bill. Rather than go through the complicated procedure for the resolution of a deadlock between the two houses, the government accepted the amendments in the lower house, and then proclaimed the Act excluding the amendments made by the Legislative Council. And there was nothing the Council could do about it.

Deadlocks between the two houses over legislation

If upper houses are to be effective legislatures, there will inevitably be deadlocks over legislation between the two houses, or, lower houses

being what they are, more accurately between the government and the upper house. A method of resolving such deadlocks is desirable, but not easily devised. In the UK the problem has been solved by removing any power over money bills from the Lords and limiting them to a mere delaying power over most other bills. In Canada the government can nominate four or eight additional senators (one or two from each region) to resolve a deadlock. This has been used only once, in 1990.

In Australia federally there is the so-called double dissolution procedure, by which, if there is a deadlock over a bill, both the Representatives and the *whole* of the Senate may face an election if the government so desires. If the deadlock persists after the election, it can be resolved at a joint sitting of the two houses. A legislative deadlock is held to exist if the Senate rejects or unacceptably amends a bill passed by the House of Representatives, and after an interval of not less than three months the same thing happens again. The double dissolution method of resolving such deadlocks was adopted by the 1897 Constitutional Convention after other suggestions had been rejected. The idea of a referendum was decisively defeated, and almost in desperation the Convention accepted the concept of a double dissolution.

It was not very well thought out. Although the delegates to the 1897 Convention were quite clear that the Senate had to have the power to reject (but not amend) the budget, they did not consider what happened next. Perhaps they thought that a compromise budget would be produced by negotiations between the two houses. Whatever their thoughts, the deadlock procedure does not cope with the blocking of supply, because a government cannot afford the waiting period of three months, at any rate with the traditional budgetary timetable.

Nor has the procedure worked at all well for other deadlocks, for in an election campaign the dissolution issue is soon forgotten. It would be a bold person who held that, after such a campaign, the voters' decision on who should form the government was also a decision on the particular piece of legislation which caused the election. Moreover, in some double dissolution elections, several deadlocked bills have been put to the community. What does a voter do if he or she agrees with some of the deadlocked bills and disagrees with others? The threat of a double dissolution is not even an effective way of bringing a recalcitrant Senate to heel, for governments hold elections when it is politically advantageous to do so, and would very rarely be prepared to risk loss of government over a particular piece of legislation. Besides, with proportional representation in the Senate, a double dissolution is an advantage to minor parties, and therefore unattractive to the major parties.

Victoria and South Australia are the only states with similar deadlock procedures. In each of these states the first three years of the four year term are 'fixed', and an election cannot be held unless a no-confidence motion has been passed in the lower house, or there is a legislative deadlock between the two houses. If the Victorian premier wants to resolve a deadlock issue (or use it as an excuse for an early election), an election can be held for the whole Assembly and half the Council. In South Australia an election must have been held between the first and second rejections by the Council, and the premier has the option of sending the whole Council to the polls, as well as the Assembly. But it is almost inconceivable that any re-elected government would want to have another election so soon, so it is not surprising that the procedure has never been tried. South Australia has an alternative method of resolving deadlocks, the election of two additional Council members, but this too is not very attractive and has never been tried.

The American model is not helpful either. In Washington the president can veto legislation passed by the Congress, though this veto can be overridden by a two-thirds majority of each house. This system is designed to allow the executive to prevent the legislature passing laws not desired by the executive. In modern responsible governments the problem is the opposite. There the problem is how to prevent an active Legislature not controlled by the executive from unreasonably frustrating its legislative program.

A system of resolving legislative deadlocks is clearly desirable, and general elections have not been a satisfactory solution. More use could undoubtedly be made of conferences between delegates from each to try to resolve differences over amendments. There have been only three such conferences in the Australian Parliament since 1901 and all produced solutions. It is certainly a better system than the government attempting to do secret deals with minor parties and Independents in the Senate. In Canada eight such conferences were held between 1925 and 1999. Five resulted in settlements, one in a stalemate, and two bills were abandoned when the government refused to accept the recommendations of the conferences.

But although conferences might be helpful, they certainly will not resolve all the legislative deadlocks, particularly with the tightening of party discipline which has occurred in most parliaments. There are two other possible ways of resolving deadlocks—by a joint sitting of the two houses, or by a referendum of voters. The problem with a joint sitting is that different methods of election are usually employed for the two houses. The most common is single member constituencies for the lower house and proportional representation for the upper. The narrow

margins which normally result from proportional representation, and the decisive majorities which are the usual outcome of single member constituencies, would mean that the government would nearly always have a secure majority at a joint sitting, which would then become merely another party controlled rubber stamp for the government's legislation.

A referendum of voters would be a better way to resolve a deadlock, for in a referendum on a particular piece of legislation the interest of voters would be focussed on the bill rather than electing a government. The only Parliament to have adopted the referendum as a means of resolving a legislative deadlock is New South Wales, but the procedure is so cumbersome that it is almost unusable. It takes at least nine months for the pre-conditions for holding such a referendum to be met. If a bill passed by the Legislative Assembly has not been dealt with by the Legislative Council after two months, or has been rejected or unacceptably amended, the Assembly may, after waiting three more months, pass the bill again, and the process is repeated. But that is not the end. There has to be a conference between managers (usually ten of them) from each house, but no votes are taken. If the managers fail to reach agreement on the bill there may be a joint sitting of the two houses, though again no votes are taken. If there is still no resolution, the Assembly may direct that a referendum be held, but such a referendum may not be held for at least two more months.

It is not surprising that such a complex procedure has been used only once since its adoption in 1933. That was in 1960, on a bill to abolish the Legislative Council. At the subsequent referendum the bill was soundly rejected. There are too many delays and safeguards in the New South Wales procedure. Governments will not hold referendums recklessly, for defeats are usually politically very embarrassing. A government will consider a referendum only if the bill in question is important, there appears to be strong community support for it, and there is no prospect of the upper house passing the bill in an acceptable form. Certainly the upper house should be given time to consider the bill properly, but surely a period of four months from the time a bill is first left the lower house should be ample. Governments deserve to have the power to implement key elements of their program in a timely fashion. The safeguard is that if what they want is out of tune with the community, the referendum will fail. New South Wales has the right solution, but the wrong method of applying it.

Monitoring of government administration

In monitoring the activities of the government, its departments of state, its business enterprises and other statutory and non-statutory government bodies, upper houses have the same weapons as lower houses: questioning ministers, either orally or in writing; setting up committees of inquiry; and forcing debates on particular topics by moving motions. One might have thought that, as lower houses have become more disciplined to the will of the government, the upper houses would have moved to fill the void, but this has by no means always happened.

The House of Lords uses select committees to meet particular needs, but with no coherent pattern. There are two committees, one (with six sub-committees) dealing with the scrutiny of European Union legislation and the other (with two sub-committees) with science and technology. They have a high reputation for objective, in-depth analysis among their somewhat specialist interest groups. There are occasional *ad hoc* select committees—about one or two every three years—dealing with general policy matters such as murder, life imprisonment, overseas trade, unemployment and also some domestic committees dealing with such matters as the broadcasting of the proceedings of the House of Lords. There is no systematic scrutiny of the activities of government departments and quasi-government organisations.

The Royal Commission on Reforming the House of Lords, which reported in January 2000, appeared to accept the present arrangements, but recommended the establishment of three new committees. Two of these were a Constitutional Committee to scrutinise the constitutional implications of all legislation, and a Human Rights Committee to examine all bills and delegated legislation for human rights flaws. There is no doubt that these committees would be valuable, after the experience of the Scrutiny of Bills Committee in the Australian Senate. The third proposed committee was potentially the most important, for it was to scrutinise treaties laid before Parliament and to draw attention to matters which should be considered by the Parliament before the treaties were ratified by the government. The royal commission also recommended the strengthening of the power and the support provided for two existing committees, one scrutinising delegated legislation and the other scrutinising ministers' handling of European Union business. Finally, the Commission thought that there should be more consideration of the drafts of bills before they were introduced into the chamber.

The Canadian Senate uses standing committees fairly freely to investigate particular problems, and some useful reports are made. The

committee reports are usually fully debated in the Senate, but government responses to the recommendations are infrequent. Critical examination by Senate committees of the activities of government departments and business enterprises (Crown corporations) is negligible. Perhaps the most useful recent Senate committee inquiry concerned a proposal to establish a security intelligence service. The bill was very controversial and heavily criticised. It was not debated by the House of Commons, but instead was referred to a special Senate committee, which proposed substantial amendments. These were accepted by the government, and a satisfactory new bill was drafted.

The Australian Senate has eight 'references' committees, covering the full range of government departments.⁸⁶ These committees have conducted some valuable inquiries, by no means always on subjects welcomed by the government—which are of course often the ones that should be investigated. The committees can inquire only into subjects assigned to them by the Senate, but in practice the Senate rarely gives a committee a task it *does not* want or refuses a committee a reference it *does* want. The committee reports are debated in the Senate and generally receive good media coverage. The government is expected to reply to a committee report within three months, and it usually does, giving its observations and intentions with regard to the committee's recommendations. As part of the deal when the functions of the old legislative and general purpose committees were divided, all the references committees have a non-government chair. This gives the non-government parties control of the committees, and there has been some blatant electioneering by some of the committees, which has reduced their prestige and the value of their reports. The Senate also occasionally sets up a select committee to investigate a particular problem.

Senate supervision of government business enterprises and other statutory commercial and marketing bodies is negligible. Some questions are asked by estimates committees, though these are often inappropriate because there is no proposed appropriation for the enterprise concerned. In any case, the party political nature of estimates committee hearings makes any serious examination of their operations very difficult. The old Senate Finance and Government Operations Committee did some useful work in establishing how many such bodies there actually are. It uncovered a surprising number no one seemed

⁸⁶ The eight committees cover the following areas: Community Affairs; Economics; Employment, Workplace Relations and Education; Environment, Communications, Information Technology and the Arts; Finance and Public Administration; Foreign Affairs, Defence and Trade; Legal and Constitutional; Rural and Regional Affairs and Transport.

aware of. The committee also did some excellent work in ensuring that annual reports were made and were presented to Parliament. There is an opportunity for senators to speak briefly when an annual report is tabled,⁸⁷ but the real responsibility rests with the Senate references committees, for each annual report is referred to the appropriate committee for it to make any investigations it thinks appropriate, and since 1989 the relevant committee has been required to examine each annual report referred to it. A committee could, if it wished, summon members of the management before it, and cross-examine them on their operations and the quality and timeliness of their reporting to Parliament. In fact, no committee has yet systematically exercised its power, partly because of the pressure of other work and particularly because of the tradition of very short parliamentary sittings. Meanwhile the organisations concerned go on, virtually unsupervised by the Parliament which represents their owners.

The Australian state upper houses generally do not have a very developed system of standing committees, though they do participate in joint committees with the lower houses on matters such as public accounts and delegated legislation. Western Australia's system is the most extensive with five standing committees. The Western Australian committees cover legislation; estimates and financial operations; ecologically sustainable development; constitutional affairs; and public administration. Bearing in mind that there would typically be more than 600 state government agencies, it can be seen that the supervision is very limited, even in the one state which has a standing committee on the subject.

New South Wales has also made some useful advances in recent years. In 1988 two standing committees were created, on Social Issues and State Development, with a third standing committee, on Law and Justice, established in 1995. There are also three estimates committees to scrutinise the annual budget.

Question times

Seven of the eight upper houses have daily question times while the house is sitting, though in all of them its effectiveness is limited because most of the ministers are not available for questioning. Certainly a frontbencher represents each lower house minister, but this is not at all the same thing as directly questioning the responsible minister. In the House of Lords questions are not directed at a particular

⁸⁷ Thirty minutes a day are allocated in the Senate for debate on 'government papers'—reports and so on—and among these papers are the annual reports from statutory bodies, but the debate is often barely relevant to the annual report.

minister but at the government, and a frontbencher replies on behalf of the government. None of the upper houses has attempted to arrange for lower house ministers to visit the upper house, on a roster basis, to answer questions. This would no doubt be difficult to arrange, but in its absence question time in the upper houses remains of limited effectiveness.

In the House of Lords, as in the Commons, all the questions are printed on the order paper,⁸⁸ and the Lords deal with four questions each sitting day. Supplementary questions are freely allowed, and the period is fairly lively. The average time taken by the question period has risen from ten minutes in 1970 to 30 minutes in 1999.

The Canadian Senate has traditionally had a club-like atmosphere, with senators deciding among themselves who is to ask a question or a supplementary question. The Speaker has had little control unless appealed to, though he has been given a little more authority after the traumatic events of 1990. Question time is certainly not very satisfactory. Usually the only minister in the Senate is the Leader of the Government, and he has no departmental responsibilities. Committee chairs are sometimes asked questions. It is all a sort of ritual game, with opposition senators trying to induce the minister to depart from his brief and to make an admission which will embarrass the government, while the minister tries to stick to his brief while at the same time not looking ignorant or foolish. Question time used to be open ended, but it has been reduced to 30 minutes.

In the Australian Senate, as in the Representatives, all questions are in theory without notice but, unlike the Representatives, one supplementary question (never more) is allowed to the senator who asked the question (never to anyone else). An hour is allowed for question time each sitting day, and in that time an average of sixteen questions and four supplementaries is asked. To avoid lengthy policy statements by ministers in response to a 'Dorothy Dix' question, (named after an American 'agony aunt' who ran a column in an American newspaper answering questions most of which she had written herself) and lengthy speeches masquerading as questions from other senators, the Senate in 1992 imposed a one minute limit on questions and a four minute limit on ministerial answers, and on supplementary questions a one minute limit on both question and answer.

⁸⁸ A procedure survives by which a 'private notice' question may be asked on a matter of urgency, without appearing on the order paper but with the approval of the Leader of the House. Such questions are now discouraged, and half a dozen a year would be a high figure.

The questions alternate between the two sides of the chamber, and a minister in trouble with an opposition question will hope for a friendly one from his own side. Question time is heavily biased in favour of the ministers, but the opposition has an opportunity for 30 minutes after question time to debate the answers given by ministers. A senator may move to take note of an answer given that day by a minister, and may speak for up to five minutes on it, the call alternating between the two sides of the chamber.

In the state legislative councils question time is substantially the same as in the Senate, though except in New South Wales the period is shorter. Supplementary questions are not permitted in the Victorian Legislative Council, whereas as many as three have been permitted in Western Australia. The Tasmanian Legislative Council has no question time because it has no ministers.

Questions asking for written answers

In all the upper houses, there are arrangements for ministers to provide written answers to questions from upper house members. In the House of Lords, the number of such questions has risen from about 300 a year in 1971 to 4322 in 1998–99. Some of these questions are ‘planted’, so that a minister may make a written statement without going through the formality of making it orally in Parliament. All the questions are normally answered within a fortnight.

In Canada written questions are little used by senators, only about 40 a year being asked. The government certainly does not hurry in answering them, but there is usually a reply within three months. In the Australian Senate an average of about 1000 questions a year are placed ‘on notice’ to be answered in writing, and most are answered within 30 days, although some remain unanswered for many months. If a question is not answered within 30 days, and the minister has not given an acceptable reason for the delay, the matter may be raised at the end of question time, usually by moving a motion for the answer to be tabled by a specific date. Ministers usually comply with such orders, though nothing effective can be done to them if they do not.

All the legislative councils in the Australian states use such questions lavishly, with New South Wales councillors asking more than 900 a year. In Tasmania 150 are asked each year, for this is the only way a councillor can question a minister. In all the states, the delays in responding to upper house questions are the same as for lower house members.

Orders for ministers to produce government documents

If the executive government is to be accountable to the parliament, it must be prepared to produce relevant documents on matters of public concern. Some government documents of course should be exempt, such as Cabinet minutes or ones affecting national security, but most should be made available to the parliament. Governments of all persuasions resist such disclosure when the documents would be politically embarrassing, and mere requests for the documents are not likely to be effective.

An extreme example occurred in the New South Wales upper house in 1996. When an opposition councillor asked the treasurer, Michael Egan, for some documents about allegedly improper government handling of the Fox Film Studios agreement, Egan refused to produce them. When the Council passed a motion requiring Egan to produce the documents, Egan refused again, and the Council suspended him from the remainder of the day's sitting. Egan disputed the validity of the order for his expulsion and refused to leave. He had to be escorted out by the Usher of the Black Rod, acting on the orders of the President. Egan took the Council to court (at considerable expense to the taxpayers) seeking a declaration that an unlawful trespass on his person had taken place when he was expelled, but the real issue was an attempt to prove that the Council did not have the legal power to require the production of documents, and that the government, having being elected to govern, had the right to determine which documents should be made public. Egan failed, both the New South Wales Court of Appeal and the High Court finding that the Legislative Council had the power to act as it did, and the Court of Appeal finding that claims of public interest immunity and legal professional privilege do not protect the government from the use of the Legislative Council's power. The documents were eventually tabled on 26 November 1998, more than two years after they had been asked for.

Over the years the Australian Senate's power to order the production—and even the creation—of documents has been used increasingly, and in recent years has averaged about fourteen a year. The reaction of the government has been predictable; in 1999 the government started freely to use 'public interest' as a reason for not producing the documents, although the grounds were nearly always very dubious. There were five refusals of requests for the production of documents during the year. Two were of particular interest. The first of these was when the Leader of the Government in the Senate, Senator Hill, was formally censured by the Senate for not producing documents which had been requested. The documents concerned the Jabiluka

uranium mine. He did table some of the documents, but withheld others, and later said that only 'key documents' had been produced.

The Minister for Family and Community Services, Senator Newman, was involved in the second of these dramatic refusals to produce documents. She refused to release a draft document on changes to the welfare system, despite having earlier said she would release the draft at a Press Club speech. Among the many grounds she gave for refusing to release the draft to the Senate were that its disclosure would 'confuse the public debate' and 'prejudice policy consideration', whatever that may mean. The minister was censured by the Senate, and the government was put under pressure by the Senate majority who increased the length of question time and ordered a committee hearing on the minister's behaviour. The draft document was eventually produced, but it certainly would not have been if the government had had a majority in the Senate.

The power to order the production of government documents is much less used in the Canadian Senate. One of the few significant examples occurred in 1995, when a special select committee recommended 'that an humble address should be presented to His Excellency the Governor General praying that he will cause to be laid before the Senate a copy of the submissions to the Treasury Board in August 1993 relating to the Pearson Airport Agreement.' The recommendation died on the order paper without being brought to a vote.

Select committees in the House of Lords can request the publication of government documents. The government usually produces the documents requested, but in fact requests are very rare.

Debates

In all the upper houses there are procedures by which debates can be initiated, to give information, to gain publicity, to draw attention to problems, or to attempt to force government responses. In the House of Lords ministerial statements are infrequent, because so few ministers in the Lords are responsible for policy. However, important statements made in the Commons are repeated in the Lords by junior ministers, and questions on them are allowed for up to 30 minutes. Wednesdays are set aside for debates rather than legislation. These debates may be initiated by the opposition parties, or by the cross-benchers, or by government backbenchers, but once a month there are two two hour debates on backbenchers' motions chosen by ballot. There are other debates on government motions, such as to 'take note' of a green or white paper, and there are debates on select committee reports, usually

moved by the chairman. These various debates occupy about a quarter of the sitting time. Peers can also initiate debates as the last business of the day (similar to adjournment debates in other parliaments) by giving notice of a so-called 'unstarred' question, and the debate on the question has no time limit, which makes it unpopular with the management. About 50 such debates occur each year, typically taking a total of 60 hours.

Important ministerial statements made in the Commons are sometimes debated in the Canadian Senate, but no ministerial statements are made there. Very little use is made, either by the opposition or by individual senators, of opportunities to initiate debates on other subjects, because the purpose of such debates is publicity, and such debates in the Senate would not attract it. The fact that senators have no constituents to appeal to is another reason for the lack of interest in such debates.

In the Australian Senate, as one might expect in a house not normally controlled by the government, there is generous time allowed for the opposition to debate matters of its choice, at least while the Senate is sitting, which is an average of only 73 days a year, as compared with the House of Lords average (1994–95 to 1998–99) of 148 days a year and the Canadian Senate average of 82 days. The Australian state upper houses meet even less frequently than the Senate, and for shorter hours when they do meet. Each sitting day in the Senate there is a period, usually two hours, when 'matters of public importance' or 'urgency motions' may be moved, and there is a further period on Thursday when motions or private members' bills may be moved. Both these periods are used almost exclusively by the non-government parties, in proportion to their party strengths, but the subjects are chosen by the party leaderships. There are two other periods when backbenchers can air their personal interests and campaigns—the lunch hour on Thursday and the adjournment debate each day. The latter lasts as long as senators desire to speak, which is sometimes quite a long time. In all, the party controlled debates last roughly 200 hours a year, and the backbenchers' debates 40 hours. Considering the relatively small number of sitting days a year, the non-government parties have very fair opportunities to put their point of view.

New South Wales, Victoria and Tasmania set aside one day each sitting week as a private members' day though, except in the Tasmanian Legislative Council where there are no parties, it is usually pre-empted by the party leadership. New South Wales also permits 'matters of public importance' to be raised, but this is not much used, despite unlimited time being available for the debates. In the Western

Australian Legislative Council there is no government business as such, and ministerial motions have to take their turn with the motions of other councillors. Backbenchers may be able to raise their own issues on private members' day (if they can persuade their party leadership), and there is another opportunity on the adjournment debate each day.

In some upper houses the members use the device of giving notices of motions, knowing that there is no chance of them being debated, but hoping to gain favourable publicity for themselves, or their party, or their cause. The number of such motions ranges from 475 a year in the Australian Senate to an average of eight in the two legislative councils which use them. Such motions are little used in the House of Lords or the Canadian Senate, because the Lords and the Canadian senators have no constituents. The subjects of the motions may vary from serious matters such as international relations or abortion, to trivial publicity such as the victory of a football team, though some upper houses do not permit such motions. The aim is always publicity.

An upper house forcing an election

The last, and most controversial, of the possible activities of an upper house is to force a government which retains the confidence of the lower house to a premature and unwanted election. Justification for such action might be found if the government were acting illegally, or governing so incompetently that it had lost the confidence of the voters, or was proposing a major change of policy which had not been foreshadowed to the voters.

In the nineteenth century the head of state might have taken action on such matters, and as late as 1914 it was thought that King George V might order an election over the government's proposals for Irish Home Rule, but it seems highly improbable that any head of state would now intervene in such matters, though questions might be asked and warnings given. The only exception might be if the government were acting illegally and refused to refrain. In all other cases, if any action is to be taken it will have to be taken by an upper house, if it has the power.

An upper house, disenchanted with the government and seeking to destroy it by forcing it to a premature election, has two weapons at its disposal: refusal of supply, or the rejection of so many government bills as to frustrate the government totally. The House of Lords has lost both these powers. The Canadian Senate has the power to reject appropriation bills, but it would be pointless for it to use this power, for the government would survive without difficulty by using special appropriations, which do not need parliamentary approval.

The only upper houses with effective control over supply are the Australian Senate and the legislative councils of Victoria, Tasmania, South Australia and Western Australia. The New South Wales Legislative Council has not had power over a bill for 'the ordinary annual services of the government' since 1933. Since federation in 1901 the supply-blocking power has been used six times: twice federally (1974 and 1975), twice in Victoria (1947 and 1952), once in South Australia (1912) and once in Tasmania (1948). On each occasion the outcome was an election, and in all but two of the elections the government which was refused supply (or threatened with refusal) lost the election. The exceptions were the 1974 federal election in Australia, in which the incumbent Whitlam Labor Government scrambled home in the House of Representatives but did not gain control of the Senate, a failure which would be fatal for it eighteen months later; and the 1948 election in Tasmania, where the Labor government was returned. There were dark mutterings in the Labor ranks, but no action was taken against the Legislative Council.

What is to be said for the upper house taking over the electoral college role of the lower house? Certainly governments sometimes govern badly, and lose the support of the voters, though oppositions are not always the best judge of this, as evidenced by the 1974 fiasco in Australia. Certainly governments sometimes make abrupt changes of policy, towards objectives not considered in the preceding election campaign. The Canadian Senate forced such an election in 1988, by threatening not to pass the bill on free trade with the United States unless an election on the issue were first held. But if an election is forced on such a change of policy, it cannot be guaranteed that the new policy will be a major issue in the campaign. Experience suggests that it will often be submerged in other issues. Besides, it is important for a government to be prepared to change its policy, radically if necessary, to meet changed circumstances. There was a story of Australian Prime Minister Gough Whitlam keeping a chart in his office of Labor's election promises, and gleefully crossing them off as they were met, despite the fact that radically changed economic circumstances (the first oil crisis) had made many of them very inappropriate. If the threat of a snap election dissuaded the government from taking sensible administrative action, the nation would be the loser.

This is the nub of the problem. If a government, despite possessing the confidence of the lower house, is under constant threat of being forced to an election, it will behave very much like a public company faced with a hostile takeover. That is, it is likely to drop any long term investment plans and concentrate on immediate benefits to the

shareholders. In a government, such behaviour would be very damaging.

The likely behaviour of a government deprived of supply must also be considered. After the events in Australia in 1975, it seems certain that no government would meekly accept being forced to the polls by the upper house, unless the government was satisfied that the opposition had made a misjudgement and that the government would win the election, as happened in 1974. A government is more likely to attempt to outface the opposition, refusing to recommend a dissolution to the Governor-General or Governor. Despite the fact that historically the failure of a government to secure supply from the parliament justifies the dismissal of the prime minister or premier, it is most unlikely that any Australian head of state would act as Sir John Kerr did in 1975. The memories are too bitter. Besides, a government might not accept dismissal in such circumstances, and what would the head of state do then? Call in the army, or the police? What would almost certainly happen if both sides remained intransigent is that supply would run out and essential government services would fall into chaos. Of course this could not continue indefinitely; there would have to be an election eventually, but the government would try to make sure that the opposition was blamed for the chaos—and would probably succeed, which is why any future blocking of supply would be an act of political insanity.

If its use would be so damaging, what should be done about the power of upper houses to block supply? Neither the British nor the Canadian model is desirable. Both the British and Canadian upper houses have lost power as legislatures because of their lack of control over supply, though their non-elective nature restricts their legislative role in any case. Victoria and South Australia have made attempts to deal with the problem. The legislative assemblies in those states have four year terms, with the first three years being 'fixed' and the final year having the usual arrangement whereby an election can be held at the whim of the premier. If the full four year term were made fixed, as it is in New South Wales, it would eliminate the possibility of the Legislative Council blocking supply in order to force an early election, for there could not be one.

Before it adopted the fixed four year term, New South Wales had in place for many years an alternative arrangement for preventing its upper house from forcing a premature election by blocking supply. The state Constitution has a unique provision, by which the Legislative Council has the power to reject or amend any bill, except money bills dealing with the 'ordinary annual services of the government'. This is a sensible provision for those who think an upper house should not have

the power to usurp the electoral college role of the lower house by making it impossible for the government to continue, but who also think an upper house should have the power to amend or reject other supply bills.

Unfortunately the New South Wales scheme is not well worked out. The Legislative Council is confronted with a single bill covering not only the 'ordinary annual services of the government' but all other annual government expenditure. How does the Legislative Council amend such a bill to remove something it finds objectionable—a new capital-works project, for instance—without risking blocking supply? Unless the government was prepared to accept the Council's amendment, or to split the bill, the very crisis which the provision is meant to overcome would strike. Besides, the expression 'ordinary annual services' is not defined. A definition was worked out between the federal government and the Senate in 1965, when it was agreed that certain government expenditures were not for 'ordinary annual services'. Such exclusions covered the construction of public works and buildings; items of plant and equipment which are clearly definable as capital expenditure; certain grants to the states; and new policies not authorised by special legislation. To the list was later added the expenditure for Parliament, which is certainly not ordinary annual expenditure of the *government*.

There is nevertheless no guarantee that the New South Wales courts would use this definition. It seems desirable that the New South Wales Constitution should be amended to include a definition of the ordinary annual services of the government (preferably based on the federal model, which works), and also to require that the expenditure for the government's ordinary annual services be submitted to Parliament in a separate appropriation bill. If New South Wales made these changes, it would have a model which other bicameral parliaments could well copy.

The frustration of a government by the upper house rejecting or unacceptably amending key government bills is a much less certain method of forcing an election, and in doing so an upper house destroys its credentials as a responsible legislature, and damages the community it represents in the process. In any case, the election initiative is in the hands of the government, and it certainly will not call an early election which it is likely to lose.

Conclusions

There are constant proposals for the reform of upper houses, particularly the non-elected House of Lords and the Canadian Senate,

but all the reform proposals have started from the faulty premise that the role of an upper house has not changed since Bagehot's day, a 'revising and leisured legislature' which is 'extremely useful, if not quite necessary'. In fact, as most lower houses have effectively abandoned their legislative and critical public inquiry roles, and responsible government has become party government, the upper houses must take over the abandoned roles, for otherwise there will be an elective dictatorship.

The Australian Senate is the most effective of the eight upper houses being considered. It sends about a third of the bills it receives to legislation committees for input from the bureaucracy and the public. It has established a Scrutiny of Bills Committee, with independent legal advice, to examine the legal details of bills, and this committee has uncovered an astonishing number of flaws. It has established an efficient system for control of delegated legislation, a subject in which the House of Representatives takes no interest. The Senate has taken action to restrict the government's use of 'legislation by press release' and also to force the government to proclaim within a reasonable time the bills duly passed by the Parliament—or to come back to the Parliament for permission not to. Estimates committees examine all the appropriation bills, and force public servants to answer questions about their details. In the investigative field, the Senate committees have conducted many useful inquiries, and have shown themselves willing to venture into fields the government would have preferred to keep out of sight.

This is all very well, but there are many deficiencies. First, the Senate is the only upper house in the past 50 years which has forced a premature election by blocking, or threatening to block, supply. Nothing has been done to restrain this power.

Second, committee consideration of some controversial bills has often developed into electioneering slanging matches, a far cry from the days when the committees considering controversial bills nearly always produced unanimous reports. The Senate also often tamely acquiesced in absurdly short time limits imposed by the government, though the situation was greatly improved in 1993 when a motion was moved by a minor party to require bills to be automatically adjourned if insufficient time was available for scrutiny, unless the government could provide good reason for urgency. The motion was adopted by the Senate, although Prime Minister Keating described it as a 'constitutional impertinence'. The responsible ministers, if they are in the House of Representatives, do not appear before the committees considering the bills. If the bills are controversial on matters on which government and opposition have taken opposing stances, the attitude of committee

members is dictated by the decisions made at party meetings, at which senators are outnumbered two-to-one by representatives.

Third, the chairs of all the legislation committees are government party senators, and as the proportion of bills being reviewed by committees increases they are coming to see their role (and their prospects of promotion to the ministry) as getting government bills through with no delay and no amendments.

Fourth, the estimates committees are only temporary, and are poorly staffed. The Senate has not been prepared to stand up to the government to insist on adequate resources being made available.

Fifth, the Senate has taken no action to persuade the government that ratification of treaties and some aspects of the use of the defence power should be subject to approval by Parliament.

Sixth, the scrutiny of non-departmental government activities—business enterprises and so on—is derisory.

Finally, and this is the most serious of all, the Senate meets far too briefly, typically for only half as many days as the House of Lords, and much necessary work is rushed or neglected as a consequence. It is absurd that the Senate's sitting pattern is largely determined by the government it is supposed to be watching. Ministers tend to regard parliamentary sittings as irritating distractions from their other work. Provided they can get their legislation passed, they feel that the less the Senate sits the better, and the Senate tends to oblige.

What can the Australian Senate learn from the other upper houses, and what will it have to solve for itself?

There is nothing to be said for the Senate usurping the electoral college role of the House of Representatives by blocking supply in order to force an election. If the House of Representatives had a fixed term this danger would be largely removed, though it is just possible that the Senate might try to force an election by demanding that the government party pass a vote of no confidence in itself. If that is thought to be a real risk, or a fixed term is not implemented, then the provision in the New South Wales Constitution denying the upper house any power to reject appropriations for the ordinary annual services of the government should be adopted.

In order to make the best use of the relatively small number of senators available for committee work, the Senate should concentrate on controversial issues. Committee examination of bills should concentrate on controversial bills—about 10 per cent of the whole—leaving the House of Representatives to handle the careful consideration of non-controversial bills.

It would also be important that the responsible minister should give evidence to legislative committees. If ministers from the House of

Representatives showed reluctance to give such evidence, and be subject to cross-examination, the answer of the Senate would be simple. The bill will not be proceeded with until the responsible minister has given evidence. It would also be worth considering the Canadian Senate arrangement by which the responsible minister from the lower house is allowed to handle a bill in the Senate at the committee stage.

The budget should be accepted as a package, but to ensure that this understanding is not abused, the Senate should insist that any new programs of expenditure or taxation should be debated and agreed by the Senate before being incorporated in the budget.

The Senate general references committees should be encouraged to tighten their examination of non-departmental government agencies. A greatly increased annual number of sitting days—up to 150, say, to make the Senate comparable in this respect with the House of Lords—would facilitate this.

The Senate should look to the Canadian legislation which gives the Parliament control over the government's use of its defence power, without preventing an immediate response by the government in an emergency. The Senate should press for a similar act in Australia. None of the four national parliaments has control over the ratification of treaties negotiated by the government, so the Senate will have to mount its own campaign there.

If the Senate functions as an effective legislature, deadlocks between the two houses over legislation would be inevitable. Many could be resolved by conferences between delegates from each house, but some will be intractable. Special general elections have proved a hopeless method of resolving such deadlocks, and joint sittings of the two houses would be little better. The only Parliament with a potentially satisfactory solution is that of the New South Wales, where a deadlock may be resolved by a referendum of voters. Unfortunately the New South Wales referendum procedure is so cumbersome as to be virtually unusable, but it would not be difficult to produce a workable scheme. A referendum would certainly be better than any of the alternative ways of resolving an intractable legislative deadlock.

The acceptance of the Australian Senate as effectively the sole legislature would require the modification of its method of election. Proportional representation results in a Senate which certainly represents the balance of political views in the community, but there are two defects in the electoral system. The first is caused by the equal representation of the six states, regardless of population. Fortunately voting patterns are remarkably consistent across the country, if one treats the Liberals and Nationals as a single party. This consistency of voting is quite unlike that in Canada and the UK, where major parties

may have no representation in significant areas, and local parties proliferate. It would be almost impossible to alter the provision in the Australian Constitution for equal representation of the states, for the less populous states strongly (though wrongly) believe that the Senate protects their interests.

The second problem with Senate representation is caused by the election of half the senators every three years. This continuing nature of the Senate may be appropriate for a conservative house of review, but is not suitable for a legislature, which should be as reflective of current community opinion as is the government whose proposed laws it is reviewing. The answer is to make the terms of both houses the same (as has been done by some of the state parliaments), hopefully a fixed four year term for both.

The status and financial rewards of the chairs of major Senate committees should be raised so that they approximate those of ministers. To avoid abuse of these rewards, the number of such major committees should be limited to half the number of ministers there are in the House of Representatives. If the chairs were fairly divided among the parties in the Senate one might expect more unbiased chairs, for they would owe their positions not to who was in government, but to their personal standing in the Senate. These rewards to prominent senators would compensate them for the loss of the possibility of ministerial office, which is an essential change.

For the presence of ministers in the Senate is the greatest obstacle to reform. Upper houses have been regarded in most parliaments as providing a useful pool of ministerial talent, but there are other and better ways of providing such a pool if it is needed, which indeed it often is because of the shortage of talent in the lower house. While the aspiration of most senators remains to become ministers, there will be little pressure for reforms which will make the government more accountable to the Parliament, and the Senate more effective as a legislature. Those in power will resist such moves, while those out of power will not wish to see any new constraints on *their* power when *their* turn comes.

Parliamentary control of delegated legislation

It would be idle to pretend that parliamentary control of delegated legislation is a burning issue in the community or that most voters would even know what delegated legislation is. For these reasons it is difficult to find members of any of the parliaments prepared to take much interest in the matter. Nevertheless it is of great importance, for uncontrolled delegated legislation offers a fertile field for government despotism and bossy interference by bureaucrats. Delegated laws sometimes have much more impact on the lives of ordinary citizens than do most acts of parliament.

Delegated laws are made by a person or body to whom parliament has expressly delegated part of its law-making power by an act of parliament. The laws go by many names—regulations, ordinances, statutory instruments, secondary legislation, by-laws and proclamations, to name just a few. There have been 75 different varieties counted in Australia. There has been delegated legislation in England since the fourteenth century. In modern times, in all the countries we are considering, there has been a steady increase in the use of delegated legislation. In Australia, for instance, in a typical year four times more regulations are issued than acts are passed. In Britain the proportion is higher, with 2000 delegated instruments being used compared with only 70 or so acts.

There is no doubt that delegated legislation is necessary. Passing an act through parliament, unless there are exceptional circumstances, is a lengthy and usually tedious business. Complex details, but not principles, are best left to experts to draft and amend, particularly if the legislation is in a field where there may be a need for urgent amendment at a time when parliament is not sitting. Delegated legislation can be extremely complex. It was pointed out in the House of Lords that:

the Lord's Prayer contains 56 words ... the Ten Commandments comprise 197 words; the American Declaration of Independence has 304 words; but

the European Community Directive on the import of caramel and caramel products comprises 26 911 words.⁸⁹

Such verbosity is not confined to the northern hemisphere. In Australia a set of regulations made on the automotive industry ran to more than 3000 pages. Legislation of such length and detail simply cannot be handled by the ordinary procedures of legislatures.

An increasing problem is what is coming to be called quasi-legislation, the use of guidelines, codes and policy directives with semi-legal status, using the authority given by an act which delegates the power to direct, determine, notify, order, instruct, declare, issue or publish. Many actions taken under these powers will be purely administrative, but others will involve decisions on matters of policy, which certainly should be subject to scrutiny by the legislature. The problems are threefold: to distinguish between matters of administration and those of policy; to ensure that significant policy matters are brought to the attention of the legislature, for their acceptance or disapproval; and to ensure that any such quasi-laws which affect individuals are reasonably available to them.

There are two common ways by which parliament can control delegated legislation. It can require the delegated legislation to be laid before parliament and that it not come into effect until parliament approves it—either by an affirmative resolution, or by the lapse of a specific period without the legislation having been disallowed. Alternatively, the delegated legislation may come into immediate effect, but may be disallowed by the parliament within a specified time. (These two are the most common methods, but there are many variants.)

It is true that the courts have some control over improperly made delegated legislation, but their power is limited to matters such as whether the instrument is within the power delegated, whether there are inconsistencies with other acts, and whether prescribed procedures have been followed. The courts have no control over many of the potentially objectionable features of such legislation. In any case, legal remedies tend to be expensive and long delayed, and it would surely be better to ensure that the legislation is properly made in the first place.

The ideal legislature

How should an ideal legislature control delegated legislation? First of all, it must pass an act to ensure that all delegated legislation made

⁸⁹ Lord Hayter, quoted in the *Third Commonwealth Conference on Delegated Legislation*, 1989, p. 79.

under the authority of an act of parliament is laid before the legislature either before or within a brief period of being enacted, and that any delegated legislation not so handled will be of no effect. The legislature must have control of such legislation, so the act must provide that all delegated legislation must be either approved by an affirmative resolution of the legislature or otherwise be subject to disallowance within a prescribed number of sitting days (say fifteen) after being laid before the legislature. The government must not be able to prevent an adverse decision by not bringing on the debate. In bicameral parliaments each house separately must have the power of disallowance, to prevent the possible difficulty of a lower house controlled by the government being reluctant to disallow the government's delegated legislation.

Finally, if disallowed, the delegated law must not be remade in the same form for a prescribed period (say six months) without a permissive resolution being passed by the legislature. This is to avoid the sort of absurd conflict which occurred in Australia in 1930–32. The Labor government and the Senate, which was controlled by the opposition, were in conflict over a waterfront regulation. The Senate disallowed the regulation whenever it met, and the government remade substantially the same regulation whenever the Senate rose, whether for a recess or at the end of a sitting week. The regulation was actually remade twelve times, the farce ending only with a change of government in early 1932 and an amendment to the Acts Interpretation Act to prevent a recurrence.

The next step is for the legislature to scrutinise carefully any bills which delegate power to the government to pass laws. An early example was the Statute of Proclamations passed in 1539 during the reign of Henry VIII:

The King for the time being, with the Advice of his Council, or the more part of them, may set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by acts of Parliament.

Our ideal legislature would insist that any exercise of delegated power to amend acts of parliament—which for obvious reasons are generally known as Henry VIII clauses—be extremely rare, be essential, and come into effect only after an affirmative resolution has been passed by each house of parliament.

In a work called *The New Despotism* written in 1929, Lord Chief Justice Hewart was critical of the fact that between 1888 and 1929 there had been nine Henry VIII clauses. They are now being produced at Westminster at a rate of about fifteen a year, but in answer to a recent

question in the House of Lords about the number of such clauses Baroness Jay said that

no information is held centrally on the number of “Henry VIII” clauses in legislation. Collecting the information for the past decade would require a major exercise which could only be undertaken at disproportionate cost.⁹⁰

A typical example of a Henry VIII clause is in the *Local Government and Housing Act 1989* where it is provided that the Secretary of State may make an order amending, repealing or revoking any provision of any act which was in force at the time or was enacted in the same session.

A new version of a Henry VIII clause was introduced in the UK in 1994 by the Deregulation and Contracting Out Act, by which the government is able to issue an order to amend or repeal any acts which impose a burden on business as long as their amendment or repeal does not reduce necessary protection. Our ideal legislature would ensure that these orders are subject to the same scrutiny as those made under other Henry VIII clauses.

All bills which delegate law-making power should be examined to see that the delegation is both necessary and no wider than essential, and that they contain no provisions which would exclude the delegated legislation from parliamentary control, unless they are purely administrative. It is also important that the power to be delegated is clearly defined. The [Australian] *Migration Legislation Amendment Bill 1989* originally provided that ‘The regulations may provide for prescribed decisions of the Secretary to be reviewed by prescribed review officers on application, as prescribed, by prescribed persons.’ Such mumbo-jumbo must not be accepted.

The ideal legislature would also be very wary of any power of sub-delegation given in the bill, for the use of these powers is very difficult for a legislature to scrutinise. An extreme instance was given to the 1989 Commonwealth Conference on Delegated Legislation:

An Act was passed. Regulations were made under the Act. Orders were made under the regulations. These orders delegated certain powers to the Secretary of the Department. The Secretary was empowered to delegate to a senior executive service officer who could delegate the power to delegate to a delegate, and that delegate could delegate the power to make a decision.

What does our ideal legislature do about the delegated legislation once it is produced? It would examine the delegated legislation to see that it was within the power granted by the act, that it was not retrospective, that it did not unnecessarily diminish personal rights and liberties and

⁹⁰ House of Lords, 14 April 2000.

that it did not give bureaucrats unreviewable power over the public. If the delegated legislation contained policy matters, these should be closely looked at, to see that they were not of such importance that they should be debated and decided by the legislature as an amendment to the act, rather than being slipped through by regulation. The ideal legislature would also ensure that the delegated legislation was clearly worded, a matter which should definitely not be left exclusively to the lawyers. An example of absurd drafting (whether done by lawyers is not known) read:

In the Nuts (unground)(other than Ground Nuts) Order the expression 'nuts' shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (unground)(other than ground nuts) by reason of their being nuts (unground).

Such detailed matters cannot possibly be dealt with by the legislature as a whole. The rationale for delegated legislation is that the legislature as a whole could not possibly find time (or have the inclination) to deal with the hundreds, perhaps thousands, of delegated laws produced each year. The only feasible answer is a parliamentary committee examining all the delegated laws as they are produced and reporting to the legislature on any which are defective. This committee must have the power to move disallowance motions, which would have to be dealt with by the legislature. The committee must act in a non-partisan way, which is not as difficult as it sounds, particularly if the committee has independent legal advice. The contentious issues are usually technical, and the offenders are bureaucrats.

However, disallowance of a proposed law some time after it has come into force is not a very satisfactory method of administration. An alternative to disallowance is to provide that the delegated law does not come into effect until the time for possible disallowance has passed. This should be used whenever practicable, but it will not always be appropriate, for in some cases the delay might be very undesirable. To avoid the confusion caused by disallowance, it is important for the committee to negotiate with the minister to see if the delegated law can be amended to remove the defects, always with the threat of disallowance in the background. Most ministers are co-operative, often seeming rather surprised at what their bureaucrats are trying to get away with. Nevertheless, bureaucrats being as they are, negotiations will not always be successful, and the legislature must be prepared to disallow if necessary. Indeed, a legislature which very rarely, or never, disallows delegated legislation is probably ineffective in its control.

Although ignorance of the law is said to be no excuse for breaking it, this presupposes that the law in question is reasonably available to those affected by it. In many jurisdictions the availability of delegated

legislation, particularly quasi-laws, is grossly inadequate. The ideal legislature would ensure that all such laws were readily available to those affected by them. It would also ensure that each piece of delegated legislation was accompanied by an explanatory memorandum, setting out the purpose of the delegated law and its mode of operation. Some parliaments are beginning to insist that some delegated laws be accompanied by formal impact statements, setting out the effect of the new law on the target group—business for instance. Such impact statements may be useful in making bureaucrats think more carefully about what they are actually doing, and may help the parliamentary committee to decide whether a delegated law is of such significance that it should be referred back to the legislature for consideration as an amendment to the act. The danger is that the policy issues raised by the impact statement might cause the committee itself to start debating policy, which would destroy its non-partisan approach and end its usefulness. This danger must be watched.

Delegated laws have a habit of surviving interminably, long after their usefulness has passed. The ideal legislature must ensure that the delegated laws it has accepted are regularly reviewed, and repealed where appropriate. A convenient way of achieving this is to attach a ‘sunset clause’ to the delegated legislation, so that if it is not re-enacted after a designated period (say ten years) it is automatically repealed. Otherwise there will have to be regular checks of all delegated legislation to weed out those that are no longer needed, but this would leave the initiative with the government rather than the legislature.

Should the legislature be empowered to amend delegated legislation? In view of the complexity and specialist nature of much delegated legislation, and the time the legislature is likely to be able to spare, the answer is that probably it should not. Certainly none of the twenty legislatures we are considering has such power. It is enough for the legislature to disallow the offensive piece of delegated legislation, to encourage the government to draft an acceptable alternative.

As was the case with statute law, an ideal legislature for the control of delegated legislation has never existed. In practice, performance in this field has ranged from reasonable to deplorable.

United Kingdom

In the UK, much delegated legislation takes the form of ‘statutory instruments’. There is a drafting manual, and annual volumes of statutory instruments are published. The parent act may give either house the power to disallow a statutory instrument, but there is a reluctance in the Lords to press matters to a division. This is probably

because, when the Lords defeated the Southern Rhodesia (United Nations Sanctions) Order 1968, there was a proposal to remove the Lords' power of veto. Their Lordships have not since then attempted to defeat a statutory instrument.

There is no formal procedure in the House of Commons for scrutiny of bills to see that any delegated power is necessary and appropriately defined and controlled, but the House of Lords set up a committee to deal with these matters in 1994. Quasi-legislation and sub-delegation are virtually uncontrolled, and control of Henry VIII clauses is patchy. There are something like fifteen acts a year which delegate power to the government to amend acts of parliament, and it is not uncommon for the government to be permitted to exercise the power without an affirmative resolution of the parliament.

A new style of a Henry VIII clause was introduced in 1994. The Deregulation and Contracting Out Act gave ministers the power to make orders to repeal or amend any act passed up to the end of the 1993–94 session. The aim is to remove a statutory burden on a trade, business, profession or individual provided that the minister was satisfied that this would not remove any necessary protection.

The arrangements for the control of these orders are much more thorough than those for statutory instruments. The minister must consult interested parties about a draft order, and then lay before Parliament a proposal for the order, accompanied by a detailed explanatory memorandum. Each house has set up a committee to consider proposed deregulation orders, and the committees have to support the draft order, propose amendments, or recommend rejection. (The House of Commons committee recommended the rejection of three proposed orders between 1994 and 1999.) The minister, if he wishes to proceed with the order, is required to take into account the reports by the deregulation committees, and the draft order is voted upon by both houses. It is a very tight procedure, with time limits for the various stages.

This is all very well for acts passed before the end of the 1993–94 session, but it did not deal with acts passed after then. This was because the government did not consider it proper to pass an act giving the power to repeal future, as yet unmade, legislation. To cover this loophole, the government required that, after April 1993, bills introduced, and secondary legislation laid before Parliament, must be accompanied by a compliance cost assessment where there was an impact on business. The aim was to ensure that a proper balance was achieved between protecting people at work, consumers and the environment without imposing unnecessary burdens on business or stifling growth, but the procedure did not work very well. In 2001 the

Blair Government passed an act extending the deregulation procedure to all acts, providing the act is at least two years old when the order is made.

The UK also occasionally uses an unusual type of affirmative resolution, under which a delegated instrument comes into immediate effect but must be approved by an affirmative resolution of each house within 40 days. It might be thought that the ordinary disallowance procedure would be sufficient in such cases, but in the UK Parliament that procedure does not guarantee the opportunity to vote, and some delegated instruments are felt to be of such significance that Parliament should vote on them.

The procedure of the House of Commons for handling such affirmative resolutions is hardly satisfactory. The debate is brief, not more than one and a half hours. It often takes place before the statutory instruments committee has made its report, and the committee chair sometimes does not even have the opportunity to speak. The system in the Lords is better, for at least they have the committee report before the debate is held.

There are two parliamentary committees dealing with statutory instruments, a joint committee of seven Lords and seven MPs, and a separate Commons select committee (made up of the seven MPs on the joint committee) to deal with instruments involving taxation or money, over which the Lords have no power. The chair of the joint committee is traditionally a member of the opposition. The legal advice to the committees is provided by parliamentary officers, who are responsible to the Speaker, not the government.

The number of statutory instruments produced each year is soaring. In 1998–99 there were 1444 statutory instruments laid before the House, and instruments of 60 or 70 pages are no longer a rarity. There are in addition about 700 delegated instruments issued by local governments each year, but they are not subject to any parliamentary scrutiny at all. The joint committee does some useful negotiating with ministers and government departments to get statutory instruments into more appropriate shape, but its power is very limited. Its terms of reference cover matters such as whether the instrument is within the power granted by the act, whether its drafting is defective or whether it imposes a charge on the public revenue. Any MP may attend and speak at a committee meeting.

There are two significant omissions in the standing committee's power. The committee is not empowered to report instruments which trespass unduly on rights and liberties, a provision which is common in other parliaments. The second omission is that the committee is not empowered to report on the merits of the instrument or on the policy

behind it, even to the extent of suggesting that the subject matter is too important to be done by delegated legislation, and should be debated by the Parliament as an amendment to the act. There is a minor escape clause, which could sometimes be useful, for the committee can draw the attention of both houses to an instrument which 'appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made.'

The procedure for disallowance is very unsatisfactory. The committee has no right to demand a debate, even when it has pointed out grave defects in the delegated instrument. All that it can do is to table a 'prayer', which is a motion to disallow the instrument. If the prayer is not supported by the opposition spokesman, nothing happens. There have been only four successful prayers since 1946, and only about 15 per cent of the statutory instruments to which either the joint or the Commons committee has drawn attention are debated at all, either in the chamber or in one of the standing committees. The government can simply prevent debate by not providing any time for it.

Explanatory statements automatically accompany statutory instruments, but impact statements are almost unknown. Promulgation of statutory instruments is satisfactory, but promulgation of quasi-legislation is haphazard, and citizens may have to search through circulars, statements in the Commons, manuals, annual reports or shite papers if they want to find the rules which bind them.

Finally, there is no parliamentary system of regular review of existing delegated instruments to see if they are still required, and sunset clauses are very rare.

A report by the House of Commons Procedure Committee in early 2000 described some of the procedures used for scrutinising delegated legislation as 'absurd, and tending to bring the House into disrepute.'⁹¹

Canada

In Ottawa the disallowance procedure is weak, being based on parliamentary standing orders rather than a statute, and can be used only by the House of Commons. The Senate is powerless. The use of delegated legislation is widespread. At the end of 1988 only 400 acts were in force but there were over 3000 current instruments of delegated legislation,⁹² and new ones are being produced at a rate of over 1000 a year. There is no act requiring all delegated legislation to be tabled in

⁹¹ Nicholas Winterton, 'Procedural Reform', *The Parliamentarian*, vol. LXXXI, no. 3, 2000, p. 14.

⁹² The figure of 3000 instruments is only a rough estimate because of the numerous exceptions to registration and publication requirements.

the Parliament, but a particular act may provide that delegated laws made under that act be tabled.

There is mandatory public participation in the preparation of most regulations, though the authority is a government administrative order, not an act of Parliament. The draft regulations must be published in the *Canada Gazette*, and there is a set period for comment. There must also be an impact analysis statement accompanying each such regulation. Interestingly, the name attached to the impact statement is that of the bureaucrat who proposed the idea, not that of the responsible minister who, as a Canadian bureaucrat has pointed out, often has no idea what his bureaucrats are doing.

There are Cabinet directions to departments and agencies on how to prepare regulations, and Cabinet approval is required for unusual powers.⁹³ All of this is no doubt admirable, but it has nothing to do with legislative control. It is the government supervising itself, or negotiating with the public, by-passing the legislature.

Canada has a unique problem, in that all federal delegated legislation is constitutionally required to be enacted in both official languages, English and French. This not only nearly doubles the workload of any parliamentary committee studying the legislation, but also offers a fertile field for disputation over shades of meaning between the two versions. The courts are required to treat both versions as equally authentic.

There is a standing joint committee for the scrutiny of statutory instruments, consisting of seventeen MPs and eight senators. There are two joint chairs, one from the government party and one from the opposition. The Statutory Instruments Act empowers the committee to examine all instruments for which the government is directly responsible, though some instruments may be excepted: those dealing with international affairs and federal-provincial relations, the prevention and suppression of subversive or hostile activities, and those whose disclosure would result in an injustice or undue hardship to an individual.

If the committee objects to a statutory instrument, it reports to the House of Commons that the instrument, or a part of it, should be revoked. Six such reports were tabled in the 1990s. If the report is not brought on for debate and decision within fifteen sitting days, the recommendation of the committee is treated as an order of the House of Commons that the government revoke the instrument. The order has no legal effect, though one would expect the minister to obey if such an

⁹³ *The Preparation of Legislation*, Ottawa Privy Council Office, 1981, p. 9.

order were passed, for government members would have been involved in the decision.

The committee does not often make adverse reports on statutory instruments, perhaps because the government procedure for their preparation is much better than in most of the other countries, more probably because voting in the committee is liable to be on party lines. Voting is supposed to be 'free', but things did not go well on the only occasion, in 1987, when the committee made a report recommending revocation of a regulation. The regulation was clearly beyond the power delegated in the act, but the minister, while agreeing it was illegal, wanted to keep it in place because it would be helpful in some current trade negotiations. He threatened the committee with a party vote in the House of Commons to reject the report. The committee surrendered, and accepted their report back 'for further consideration'.

This case illustrates the difficulty of using a house controlled by the government as a means of controlling improper actions by that government, though the value of the committee's negotiations with departments and ministers should not be underestimated. About a quarter of the instruments seen by the joint committee are criticised by it, often because of problems of drafting and clarity, or consistency between the French and English versions, but occasionally because of more fundamental defects.

In the great majority of cases (perhaps 80 per cent) the committee is successful in having remedial action taken. The committee also has a useful weapon if it is meeting departmental obstruction and obfuscation. Like other standing committees, it may at any time make a report to both houses on any matter within its jurisdiction. The committee may describe the problems it is having and request the government to table a comprehensive response in the House of Commons within 150 days. It has been found that the necessity to make a public report to the House of Commons concentrates the minds of bureaucrats wonderfully.

Cabinet approval is required before a Henry VIII clause can be inserted in a bill. Such clauses have not been used in recent years, but if they were there is no affirmative resolution procedure in place. There is no formal procedure for the examination and repeal of redundant regulations, and sunset clauses are never used.

The Canadian provinces

The situation in the provinces is less satisfactory. Seven of the ten provinces do not even have parliamentary committees to consider delegated legislation. Most of these seven provinces do publish

regulations, but they are not formally laid before the parliaments, and there are no arrangements for disallowance. Things are only slightly better in the three provinces (Manitoba, Saskatchewan and Ontario) which have set up parliamentary committees to scrutinise delegated legislation. The criteria for review are generally based on the recommendations of the 1932 Donoughmore Committee in Britain, and are adequate, but in none of the assemblies is there a formal procedure for disallowance of a regulation criticised by the committee. Only two of the provincial committees (Ontario and Saskatchewan) have independent legal advice, and the committees meet only two or three times a year. That is however a considerable improvement on Saskatchewan's performance in the 1970s and 1980s when it met only once in twenty years. In Manitoba there is a Standing Committee on Statutory Regulations and Orders, which is supposed to examine the regulations, but the committee has not done so since 1972.

It is a sorry picture. The control of a large area of legislation has been surrendered by the legislatures.

Australia

In the Australian Parliament, *either* the Senate or the House of Representatives may disallow regulations. The power was given in the early days of federation, when the concept was that the lower house represented the people and the Senate represented the states, and it was logical to give the two houses separate powers. It is inconceivable that any modern government would initiate such a restraint on its power. The House of Representatives, controlled as it is by the government, has never taken any perceptible interest in delegated legislation.

By the Acts Interpretation Act, all regulations have to be published in the *Commonwealth Gazette* and be laid before each house within fifteen sitting days of making the regulation, and any regulations not so handled cease to have effect. These provisions are of no effect for delegated laws or quasi-laws which are not regulations, unless the principal act specifically provides that they are to be handled in the same way as regulations.

The Senate Scrutiny of Bills Committee, set up in 1981, potentially has a crucial role here. Among the terms of reference of this committee are instructions to report whether any bills inappropriately delegate legislative power, or do not subject the use of such power to parliamentary scrutiny. The trouble is that the committee examines over 200 bills a year, and makes comments on about 40 per cent of them, with the assistance of an independent legal adviser. Not all the comments refer to delegated legislation, and criticisms may be lost in

the rush. The committee chairman does not move amendments on behalf of the committee when the bills are considered in the Senate, but at least the comments of the committee are available to senators when they debate the bill. Unfortunately, in that forum amendments tend to be dealt with on party lines, and some inappropriate powers escape. The committee does do some useful work negotiating with ministers to improve the delegation arrangements in the bills. Most ministers are reasonably cooperative, but the committee does not yet have much political clout.

Affirmative resolutions are almost unheard of, but then so are Henry VIII clauses. This is almost certainly because of the effectiveness of the Scrutiny of Bills Committee and more particularly the Senate committee on delegated legislation (called the Standing Committee on Regulations and Ordinances), which would undoubtedly detect and successfully move to disallow any such actions. The Senate has had this committee since 1932, when it was established as a result of the dispute between the opposition-controlled Senate and the Scullin Labor Government. Since then its existence has never been seriously challenged, even when the government controlled the Senate.

The standing committee's terms of reference are to scrutinise each regulation and ordinance⁹⁴ to ensure that it is in accordance with the principal act; that it does not trespass unduly on personal rights and liberties; that it does not make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal; and it does not contain matter more appropriate for parliamentary enactment.

The committee has an independent legal adviser, who examines each of the 1200 regulations issued each year by the federal government, and draws the attention of the committee to any which seem to infringe its principles, typically about 170 a year. The Senate has no power to amend or to disallow parts of delegated instruments, though it would like the latter power. If the committee agrees with its legal adviser—and it usually does—an attempt is made to negotiate with the responsible minister on the necessary changes, and typically about three-quarters of the queries are satisfactorily dealt with, either by the minister giving an acceptable explanation or an undertaking to make the necessary amendments.

If the negotiations look like failing or becoming unduly protracted, which happens about 50 times a year, notice of a motion of

⁹⁴ Ordinances are used for the territories of Cocos Island and Norfolk Island. They have not been used for the Northern Territory and the Australian Capital Territory since they were given self-government.

disallowance is given in the Senate. Once such a notice has been given the matter must be dealt with within fifteen sitting days, otherwise the instrument is automatically disallowed, and an instrument once disallowed cannot be remade in the same form for six months, unless special permission is granted by the Senate. The prospect of having an instrument disallowed is an excellent spur for a minister. The committee's reports are almost always unanimous—caused largely by the non-partisan legal advice it receives—and motions of disallowance are always backed by the Senate. It is a very effective committee, and one has only to look at the undesirable regulations it has successfully resisted to see what would happen in its absence. Typical examples of regulations amended as a result of objections by the committee are ones reversing the onus of proof, and ones giving bureaucrats important powers over individuals, with no arrangements for review.

Of course not all resistance to regulations emanates from the committee. Individual senators can move to disallow regulations, and very occasionally they do, usually for reasons of political publicity. The most dramatic use of this power occurred in 1987 when the Hawke Labor Government introduced a bill to create an identity card, to be called the Australia Card. The Senate was opposed to the idea, and a deadlock ensued. The government invoked the deadlock procedure, both houses were dissolved, and an election was held. It was a convenient moment for the Labor government to hold an election (the opposition was in some disarray) and the Labor Party duly won the election. The Senate still refused to pass the bill, and the government then proposed, still using the deadlock procedure, to hold a joint sitting of the two houses to pass the bill. It was then pointed out in the Senate that regulations would be required to bring the act into effect, and notice was given of an intention to disallow such regulations. The government dropped the bill, not very reluctantly, for the Australia Card was expected to be very unpopular. The fact that the Labor Party won the election, despite the unpopularity of the Australia Card, shows the absurdity of using a general election as a means of resolving a deadlock over a particular piece of legislation.

Most delegated legislation is accompanied by explanatory statements, though these are often of poor standard. Impact statements are rarely used. There is no formal consultation with interest groups, as there is in Canada, before a final version of the delegated instrument is produced, and there is no publication of delegated legislation in draft. Perhaps the greatest weakness in the Senate's handling of delegated legislation is the lack of any attempt to weed out obsolete or redundant delegated instruments.

The Australian states

The situation in the six states is generally less satisfactory than in Canberra. More than 2000 pieces of delegated legislation are passed each year under the authority of the various state parliaments. Delegated legislation which is to be laid before parliament can be disallowed within a prescribed number of sitting days, usually fourteen. In Victoria, for instance, motions for disallowance are treated as general business, which is called at the discretion of the government, and disallowance motions the government does not like may be allowed to lapse. In some states the concurrence of both houses is required for disallowance which means that a government can block a disallowance motion in the lower house, but in Victoria the upper house is ensuring that, in new acts, it has independent power to disallow regulations. In some of the parliaments not all delegated legislation is available for disallowance. Local government by-laws are not dealt with at all in Victoria, and only a small proportion of them in Queensland.

All of the six states have parliamentary committees to scrutinise delegated legislation. The committees claim that their main work is not in moving to disallow legislation, but rather in negotiations with government departments to correct defective laws. There is doubtless some truth in this, but an effective committee must have a bite as well as a bark, and the paucity of successful disallowance motions in three of the state parliaments gives little confidence that there is effective parliamentary control there.

All of the parliamentary committees, except those of Queensland and South Australia, have independent legal advice. Experience has shown that such independent advice is important, for if a committee suspects, rightly or wrongly, that it is receiving politically-biased or self-serving advice it will be almost impossible to reach unanimity, and subsequent support in the parliament will probably not be forthcoming, for governments are not usually very cooperative in disallowing their own legislation. Some of them seem to regard the disallowance of a regulation as almost a vote of no confidence. Queensland in particular has had a rather idiosyncratic view of the responsibility of the government to Parliament.

Interesting features in the handling of delegated legislation in the various states should be mentioned. In Tasmania the committee works in an extremely leisurely fashion, usually not attempting to make a report until the disallowance period has expired, relying on the goodwill of the government to make any necessary changes, though individual members of the upper house (which has power of disallowance) sometimes take pre-emptive action. On the other hand, if

the committee reports adversely on a delegated instrument while Parliament is not in session, the operation of the instrument is suspended until Parliament meets.

Since 1985, Victorian government departments have been formally required to consider various matters (including possible alternative methods of achieving the objective) before introducing a regulation. There is also a requirement that the proposal for a new regulation be announced in advance, and interested parties be consulted. In South Australia the committee seeks the views of interested parties (through the local MPs) on regulations which may have a local impact.

Victoria and New South Wales have also introduced a requirement for an 'impact statement' to accompany any proposed delegated legislation which will impose a significant cost, disadvantage or burden on any part of the community. This has the danger that it may cause the joint committee to consider policy matters, and consequently to divide on party lines. As the government has a majority on the joint committee, and MPs are denied the right to move for the disallowance of delegated legislation unless it has been adversely reported on by the joint committee, this may make the joint committee ineffective.

In none of the states except Tasmania is there anything to stop the government immediately re-enacting a delegated instrument which has been disallowed, and in none of them except the Western Australian upper house is there any power to force a government to bring on a disallowance motion before the period for disallowance has expired.

Where the states have been effective is in eliminating outdated delegated legislation. Victoria was the first state to take action, and from 1992 all Victorian regulations have had a 'sunset clause' which automatically revokes them after ten years unless they have been remade. South Australia, Queensland and Tasmania have adopted a similar procedure. In New South Wales the life of a regulation is five years, though its life may be extended for a further five years if the extension is compatible with the premier's stringent guidelines and has the approval of the regulations committee. Of the countries and provinces we are considering, only New Zealand can match them in this respect.

New Zealand

Until the 1980s the control of delegated legislation by the New Zealand Parliament was derisory. Until 1962 there was not even a requirement for all regulations to be laid before Parliament. There was no general provision for disallowing regulations until 1989. Such results are always a danger when there is only one house, controlled by the

government, but New Zealand was an extreme case. The cause was lack of interest, it seems, rather than government heavy-handedness.

The situation is now much better. Regulations are required to be laid before Parliament, and notices of disallowance may be given by any MP at any time. If the notice of motion is given by a member of the Regulations Review Committee and is not dealt with within 21 days, the regulation is automatically disallowed. This, however, applies only to 'regulations'. There is much other delegated legislation which is not yet caught, principally the laws made (under the authority of Parliament) by the multiplicity of local authorities.

The Regulations Review Committee is chaired by an opposition member, though as there is only one house it is inevitable that this committee often has a government majority. Most bills in the New Zealand Parliament are referred to a parliamentary select committee, which usually advertises nationwide for submissions and if necessary seeks specialist advice. The Regulations Review Committee has the duty to report to these committees if it thinks that bills they are considering inappropriately delegate legislative power. Henry VIII clauses are not uncommon, and these cause problems as there are no procedures in the House of Representatives for affirmative resolutions. The only answer is for the Regulations Review Committee to negotiate with the minister to try to eliminate such a provision, and if this fails, to draw the attention of the relevant select committee to it. The select committees sometimes, but not always, take action to eliminate these obnoxious powers.

The New Zealand House of Representatives has the unique power to disallow regulations at any time, even years after they have been enacted. The rationale for this power is that the Parliament has such power over acts, so surely it should have it over regulations. In a unicameral parliament, regulations will be repealed only if the government wants them to be repealed, and if the government wants to repeal a regulation it can simply do so without involving the parliament. Nevertheless the extended disallowance power is probably a useful safety valve, for public complaints against the working of an existing regulation are heard by the Regulations Review Committee, and it could move disallowance and bring on a debate if it found a complaint convincing.

The New Zealand House of Representatives has another power which would be envied by those in other parliaments with an interest in delegated legislation, the power to disallow a part of a regulation.

In 1987 the Regulations Review Committee surveyed the number of regulations in force and found they numbered nearly 4000. After further investigation the committee recommended that about 10 per cent should

be repealed as unnecessary, but the government decided on further research, and nothing much has happened, though there is now a system by which redundant regulations can be revoked by Regulations Revocation Orders. This epitomises the New Zealand dilemma. There is now a certain movement towards proper control of delegated legislation after total neglect in the past, but with a single house and tight party discipline, effective control depends on government goodwill. Whether this will continue when the control begins to bite remains to be seen.

Conclusions

It can be seen that there is much to be done in all the four countries if there is to be effective control by the legislature over all forms of delegated legislation. Progress will not be easy, because the problem stems from the dual role of the lower houses as electoral colleges and legislatures. As one UK delegate to the third Commonwealth Conference on Delegated Legislation put it:

The Opposition do not want to rock the boat too much, because they are waiting to get into power. They do not want too nosy a Joint Committee on Statutory Instruments with too many powers, and therefore do nothing about it. When the parties change round, the Opposition again do nothing about it because they are waiting to get back into government.

The control of delegated legislation by the Australian Senate is probably the best in the twenty parliaments we are considering. The Scrutiny of Bills Committee keeps a watchful eye on bills as they come in to see that there are no unnecessary or improper delegations of law-making power, though the Senate does not always take action to meet the committee's concerns. By contrast, the prestige of the Regulations and Ordinances Committee is so high that the Senate would almost certainly disallow a regulation or ordinance if the committee so recommended. Ministers know this, bureaucrats know it too, so that when the committee calls, ministers and bureaucrats jump.

The weakness in the Senate system is the absence of any procedure for the repeal of outdated delegated legislation. The Senate should seek government cooperation to adopt some of the procedures being evolved in the Australian states. The Senate should also negotiate with the government to give it power to disallow part rather than the whole of a regulation, as can be done in New Zealand.

The Senate should press the government to improve the community involvement in the drafting of its regulations—Canada provides a good model—and to prepare impact analysis statements to accompany approved regulations.

The House of Representatives has never taken any interest in the systematic control of delegated legislation. Although most of the other lower houses are involved in this area, the Australian national system works so well without the lower house that nothing would be gained, and much might be lost, if the House of Representatives became involved.

What parliaments cannot do

The enormous expansion of government activities in the past hundred years has made a nineteenth century parliamentary structure inadequate for monitoring wide areas of government performance. Parliaments have simply been unable to extract sufficient timely information from governments.

Inquiries by parliamentary committees into government administration, although often useful, are sometimes inappropriate, whether because of their party political nature or because of lack of expertise or support. MPs have also proved inadequate defenders of the rights of their constituents against increasingly pervasive bureaucracies, and have also often failed to control government actions (or inaction), whether legislative or administrative, which infringe the basic rights and liberties of individuals or minority groups.

These problems are being tackled in all four countries, but most of the solutions inevitably reduce the responsibility of the governments to the parliaments, by setting up outside bodies to perform functions which have proved to be beyond the effective powers of the parliaments.

Freedom of information legislation

A key problem for all parliaments is access to timely and adequate information about government activities. Virtually all senior bureaucrats would like to keep much of this information hidden behind a self-serving screen of secrecy, which must be removed if the government is to be truly responsible to the parliament and the people. The problem was well expressed by the Australian Liberal Prime Minister Malcolm Fraser when he said:

The principle of responsibility—to the electorate and the parliament—is a vital one which must be maintained and strengthened because it is the basis of popular control over the direction of government and the destiny of the nation ... people and parliament must have the knowledge to pass

judgement on the government ... Too much secrecy inhibits people's capacity to judge the government's performance.⁹⁵

On an earlier occasion he had said: 'How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?'⁹⁶

This is not at all the way most bureaucrats, and most ministers for that matter, view the issue. Their view seems to be that such information as is released should be at a time and in a form which is acceptable to the government department concerned. The bureaucracy's handling of Malcolm Fraser's desire for a Freedom of Information Act is illuminating. A bill was produced, which was riddled with total exemptions and unreviewable ministerial discretions not to release documents. It is indisputable that some information held by the government must be protected, such as material affecting national security or involving the privacy of individuals, but the bill as presented was ridiculous. Nevertheless it would certainly have been passed by the House of Representatives, but fortunately it was introduced in the Senate because the Attorney-General was a senator. Sufficient Liberal senators cross voted to have the bill referred to a Senate committee, and after prolonged hearings the committee recommended substantial improvements to the bill, nearly all of which were adopted.

Although most of the resistance of the bureaucrats to an effective Freedom of Information Act was specious and self-serving, there was one claim which had to be taken seriously by the Senate committee. It was suggested that the concept of freedom of information was incompatible with responsible government. It was argued that four characteristic features of responsible government could be damaged by freedom of information: collective ministerial responsibility; individual ministerial responsibility; a politically-neutral bureaucracy; and the anonymity of individual bureaucrats.

The worry about collective ministerial responsibility can be easily disposed of. Certainly the secrecy of Cabinet discussions must not be breached, for if frank debate in Cabinet became impossible the stability of Cabinet government would be weakened. However, there is no suggestion in any of the freedom of information legislation that records of Cabinet discussions or policy documents prepared for Cabinet consideration should be released. This does not mean that self-serving attempts to protect information which has nothing to do with collective ministerial responsibility should be countenanced. Statistical summaries

⁹⁵ J.M. Fraser, 'Responsibility in Government', *Australian Journal of Public Administration*, vol. 37, no. 1, March 1978, pp. 1-2.

⁹⁶ *Canberra Times*, 23 September 1976, p. 2.

prepared for Cabinet consideration are an example of information which should *not* be hidden from the public. Why should the public, on whose behalf the information was collected, and who paid for its collection, not have access to such factual data?

The theory of individual ministerial responsibility differs greatly from the practice, and it is difficult to see how the present practice would be damaged by freedom of information. Certainly the public revelation of actions by a department might result in fierce questioning of the minister in the parliament, but this is surely proper under responsible government.

It is also difficult to see how freedom of information would damage the political neutrality of the bureaucracy. On the contrary, the possibility of the release of a document would surely make a bureaucrat very wary of taking an excessively- partisan political position.

The one area where freedom of information does have a marked impact on the traditional concept of responsible government is the removal of the anonymity of individual bureaucrats. But are bureaucrats still anonymous, and does it matter if they are not? An Australian Attorney-General has said:

the views or supposed views of individual public servants tend more and more to be canvassed in the Press. Individual public servants have more and more direct dealings with the public in the development as well as in the administration of government policies and programs. This process of change needs to be allowed to evolve.⁹⁷

A prominent British civil servant, Sir William Armstrong, wrote that 'there would be every advantage in the names of the civil servants responsible for such [policy option] studies being known, and their being allowed to join in public debate on their own findings.'⁹⁸ Canada has adopted this approach, with the name of the bureaucrat who initiated the policy being attached to such documents as impact analysis statements accompanying new regulations.

Of course many contrary views have been passionately proclaimed. Records would be less formal; more advice would be given orally; written advice would be more cautious and less innovative; civil servants could no longer point out that a policy proposed by a minister had flaws, if the document containing such criticisms were liable to be released to the press or the opposition; and so on. All that can be said about these fears is that, although they were obviously sincere, they

⁹⁷ Senator P.D. Durack, QC. Press release by the Attorney-General, Canberra, 21 August 1978.

⁹⁸ William Armstrong, *The Role and Character of the Public Service*, Oxford University Press, 1970, p. 15.

have not been borne out by experience. An Australian Senate committee, examining three years of experience of freedom of information, found that the overwhelming opinion among public servants was that the possibility of public release had if anything improved the quality of departmental documents.

Proper access to information held by the government is critical to the responsibility of that government to the parliament and the people. Yet progress has been slow, and bureaucracies and some ministers are fighting to delay new acts and make existing acts more restrictive. Of the parliaments we are considering, the first to introduce freedom of information legislation was Nova Scotia in 1977 followed by Canada federally in 1982. Both Australia and New Zealand passed such acts in the same year, and by 1999 eighteen of the twenty parliaments had passed freedom of information legislation. The only major holdout was the UK, where the bureaucracy successfully exploited an obsolete concept of ministerial responsibility to frustrate liberalising moves, but the Blair Government finally introduced a Freedom of Information Bill in 1999. The other holdout was the Canadian province of Prince Edward Island.

Royal commissions and commissions of inquiry

It is one thing to have information, quite another to do something effective with it. Parliaments are often ineffective in investigating serious allegations of government mismanagement or corruption. Governments would usually resist such inquiries, and their resistance would almost always be effective in the lower houses. In any case the usual partisan nature of a parliamentary committee of inquiry on such a matter would tend to discredit the report, though if the government members voted for the criticisms the effect would be dramatic, but not at all what the government wanted. Faced with serious allegations which cannot be shrugged off, a government may set up a commission of inquiry. If the government so wishes the commission of inquiry may be called a royal commission, but this is usually reserved for commissions whose subject matter is of outstanding public importance. A judge or former judge usually presides over a royal commission, but this is not mandatory. The name 'royal commission' is sometimes improperly used. In Canada, for instance, 'a royal commission is a commission issued under the Great Seal of Canada.' But the description 'royal' is much abused, with some commissions technically entitled to its use not employing it, and others appropriating it when they have no business doing so.

Setting up a commission of inquiry can be a dangerous solution for the government. It is often said that such an inquiry should never be set up unless the answer is known, but in fact a commission of inquiry is very difficult for a government to control. The subject is usually dramatic and the evidence widely reported, so if the commission asks for an extension of time, or a widening of the terms of reference, it is politically very difficult for the government to refuse. A dramatic example of the potential problems in such an inquiry is one held in Queensland between 1987 and 1989. The government set up the inquiry with the intention of it having brief hearings and laying to rest allegations of police corruption. In fact the inquiry, called the Fitzgerald Inquiry after its chairman, lasted for more than two years and revealed widespread corruption in both the police force and the government. The premier was forced to resign, three ministers were sentenced to imprisonment, as was the Commissioner of Police, and the long-serving National Party government was defeated. This was certainly not what that government had in mind.

As a result of the inquiry, Queensland set up what were in effect two continuing commissions of inquiry, called the Criminal Justice Commission and the Electoral and Administrative Law Commission. These two commissions were to report to all party parliamentary committees, but the commissions had great political power, at least while the corruption revelations remained vivid. Indeed, the parliamentary committee concluded that the Parliament had politically, if not legally, delegated its law-making powers over the electoral system to the Electoral and Administrative Law Commission, and that therefore the parliamentary committee was 'honour bound' to accept its recommendations. Of course this could not last, and the commission was abolished in 1993.

The Criminal Justice Commission has survived, although its power to investigate organised crime was removed in 1997. Its purpose now is to ensure that corruption in the public sector does not return. In its dual roles of 'watchdog' and 'educator/reformer', it aims to detect and reduce corruption and misconduct in official places.

Such bodies can cause other problems for politicians. New South Wales has had a long history of corruption in government, in the police force and in parts of the judiciary. In 1988 the incoming Liberal-National coalition government established an Independent Commission Against Corruption, but four years later the premier who set it up became a victim of it. He was by then leading a minority government and had offered a senior public service post to an Independent MP, confident that the government would win the resultant by-election. It did, but the premier was forced to resign following an adverse report by

the Commission. Two months later the New South Wales Supreme Court overturned the decision, but it was too late for the premier, who had by then resigned from the Parliament.

Between 1970 and 1999 there were ten royal commissions in Britain, on subjects such as gambling, the National Health Service, reform of the House of Lords and standards of conduct in government. None were initiated between 1979 and 1990, because Mrs Thatcher resolutely refused to countenance them: few prime ministers have had her resolution. In Canada there have been 44 federal royal commissions in the past 30 years, covering a wide range of matters such as pollution, the allowances of MPs, parliamentary accommodation, steel profits, Canadian unity and the deployment of Canadian forces to Somalia. In Australia there have been 22 federal royal commissions, on subjects as diverse as the after-effects of the atomic tests at Maralinga, transport charges to Tasmania, and Aboriginal deaths in police custody. In New Zealand there were seventeen royal commissions, but the rate has declined markedly in recent years, for there have been only three such inquiries since 1983.

A problem with commissions of inquiry, apart from the potential for government embarrassment and their very great cost, is the effect on the judiciary. Many ministers like to have a judge presiding over a commission, feeling that this will give prestige and at least some prospect of restraint. Besides, judges are inexpensive. A judge would be expected to conduct a royal commission as part of his duties, whereas if a QC were employed the fee is likely to be at the daily court-appearance level, and for a prolonged inquiry may run into millions. Some judges seem to like the drama and publicity, or perhaps the release from more boring cases, though by accepting they place an increased load on their colleagues and inevitably increase the delays before cases are heard in court. The downside is that a royal commission is often involved in highly controversial political affairs, and there is a real danger that the public perception of the independence of the judiciary will be damaged. A Chief Justice of Canada has pointed out that ‘judges may not have the necessary qualifications to determine socio-economic questions ... As one commentator has put it—our courts are held in high regard because judges usually stay within their area of competence.’⁹⁹

The involvement of judges in royal commissions has been criticised in many jurisdictions, but the only ones to take formal action are the Australian High Court and the Victorian Supreme Court which will not permit their judges to sit on any non-judicial government body.

⁹⁹ Justice [later Chief Justice] Brian Dickson.

Nevertheless commissions of inquiry could still be effective without a judge presiding, and these commissions do perform a role in investigating government actions and their consequences, which the parliament to which the government is responsible might in theory deal with, but in practice rarely can.

Ombudsmen

The vastly increased scope and complexity of government administration and its impact on the public have meant that MPs cannot possibly resolve all the conflicts between their constituents and the bureaucracy. MPs have traditionally been seen as the protectors of the rights of their constituents, to see that they receive their entitlements and are not unfairly treated. MPs in all the four national parliaments are now provided with staff to assist with political research and the problems of constituents, but the task has grown far beyond the capacity of the old system. In Britain an MP is given an allowance to provide for a secretary and a part-time research assistant, though whether the allowance is spent in this way is up to the MP. In Canada and Australia an MP has a staff of three and in New Zealand two. For comparison, a typical member of the United States House of Representatives has a staff of fifteen.

One answer to the problem is to appoint an ombudsman, who investigates complaints from individuals about administrative actions of the bureaucracies, but not (except in the UK) ministerial decisions. The office of Ombudsman was first created in Sweden in 1809, to be copied by Finland in 1919, Denmark in 1953 and Norway in 1962. New Zealand was the first of our four countries to make such an appointment, to be followed by the province of Alberta in 1967. The office has many titles: Ombudsman; Parliamentary Commissioner (Ombudsman); Parliamentary Commissioner for Administration; and (in Quebec) Public Protector. An ombudsman's investigations are informal and in private, and their aim is conciliation. He can make recommendations to government departments and ministers, and can report the problem to parliament if he considers the response inadequate.

Eighteen of the twenty parliaments we are considering now have ombudsmen to whom citizens or groups may make complaints. The two exceptions are the UK and Canada. In the former there is a parliamentary ombudsman, but he has no power to initiate his own investigations, as all complaints must come through an MP. This is perhaps consistent with the theory of responsible government, but it does not work very well. MPs do not generally avail themselves of the

services of the ombudsman and the number of complaints dealt with, in relation to population, is about one-tenth that of the ombudsmen in the other countries. There is also a Northern Ireland Ombudsman, and separate local government ombudsmen for Scotland, England and Wales. In Canada the idea of a federal ombudsman has never been really popular. Prime Minister Trudeau said in 1968, when the idea was first being discussed, that in his opinion the Minister of Justice functioned as an ombudsman. Various government agencies do have ombudsmen or public complaint commissions, but the federal government has held out.

Although the Australian Ombudsman does make annual reports to Parliament, they are rarely debated in the House of Representatives, despite containing many instances of official administrative shortcomings and sometimes raising important questions. One would have thought that the opposition would welcome the opportunity to initiate debates on such matters, but so far nothing has happened. The Ombudsman also has the power to make a report to Parliament on a specific matter if he is not satisfied with the handling of his report by the government, but neither house showed any interest, and the power has not been used since 1986.

The Senate, as usual in such matters, does rather better than the House of Representatives. The Standing Committee on Legal and Constitutional Affairs is showing increasing interest in the Ombudsman's activities, but the investigations are not nearly as systematic and thorough as they should be.

In addition to an ombudsman, Australia has another elaborate system for dealing with complaints from persons affected by government decisions. An Administrative Appeals Tribunal was set up in 1975 to hear such complaints. It can review administrative decisions made by federal ministers, authorities and officials, other tribunals, and some non-government bodies. It can affirm the decision, substitute its own decision, or send one back for further consideration with any recommendations it may care to make. The Tribunal derives its power from specific provisions in various acts, but its jurisdiction is rapidly extending. It now has jurisdiction in more than 300 separate areas, covering such matters as deportation, employees' compensation, and customs. In 1998 it was announced that the Administrative Appeals Tribunal over the next few years would take over appeals in the areas of social security, immigration and refugees and would be renamed the Administrative Review Tribunal, but the arrangements may have difficulty getting through the Senate, which is not controlled by the government.

The Tribunal is not always the first body to review an administrative decision. In some cases it may not review decisions until after an internal review by the body which made the initial decision, and in other cases there has first to be a review by a specialist tribunal. The president is a judge of the Federal Court, and all the senior members are lawyers. The Tribunal does useful work but it has been criticised as being more formal than the High Court, and the concept is totally outside the theory of responsible government. The minister is made responsible for his administrative decisions and those of his subordinates, not to Parliament but to a non-elected extra-parliamentary body.

Of the states, only New South Wales and Victoria have similar tribunals.

The audit function

If the government is to be truly responsible to the parliament, it is essential that there should be an effective audit of the government's accounts to ensure that the money provided by the parliament is spent on the agreed purposes and that the agreed programs are executed efficiently.

There is no way these audit functions could be carried out by parliamentary committees. The audit function requires unrestricted access to government accounts and records (including, where necessary, Cabinet records), and no government would allow a parliamentary committee such access, for the committee would inevitably contain members of the opposition. Parliamentary committees sometimes examine the efficiency of government programs, but this is not normally systematic. Even when the government cannot prevent such an inquiry being set up, it still has another possible line of defence. It can claim executive privilege, and its witnesses may refuse to answer questions or sometimes even to appear at all. There is nothing effective a parliamentary committee can do about it, though the committee members will undoubtedly make a lot of noise. All the government has to worry about is how its uncooperative attitude will be reported in the media and viewed by the voters.

The solution to these problems has been the appointment of an independent auditor, usually called the Auditor-General, to report to the parliament (not the government)¹⁰⁰ in most of the countries. But

¹⁰⁰ In New Zealand the Controller and Auditor-General reports to the government rather than the Parliament, but in 2000 there was a move to give the Controller and Auditor-General the status of an Officer of Parliament, responsible directly to that body.

although reports by an auditor-general, particularly ones critical of government administration, can gain media publicity and force the government to take action, only parliament, if it has the will, can force the government to be financially accountable.

Auditors-general are increasingly looking at the efficiency of government administration and programs, known in Canada as value-for-money auditing. To avoid an auditor-general becoming embroiled in party politics, it is important that the purpose of the government program be accepted, and the assessment limited to the efficiency with which the objective is being achieved. Nevertheless the Auditor-General must make choices. Some programs, such as foreign policy, are too broad and too nebulous for efficiency auditing to be useful, though some auditors-general have fallen into the trap of trying to audit the unauditible. Even when the programs are suitable for efficiency audits, the choice the Auditor-General makes as to which programs should be subject to efficiency audits may involve him in political controversy.

Even with the proper structure in place, there are many other aspects which must be watched. The key figures are of course the auditors-general. If they are to be effective, they must be independent of the governments they are auditing. (There have been dark suspicions that in at least two Australian states recently the Auditors-General have been selected in the expectation that they would not inquire too deeply into some dubious government activities.) It is therefore important that auditors-general be appointed and if necessary removed by their parliaments, and that the government has no role in this; that they report regularly to their parliaments, and their reports cannot be suppressed by the governments; that they cover the full range of government activities, including non-departmental activities such as business enterprises; and that the parliaments ensure that they have sufficient resources to perform their tasks efficiently.

If Parliament is to follow up the criticisms of the Auditor-General, the Public Accounts Committee (PAC) too must be adequately staffed. As the role of the PAC involves critical scrutiny of the government, the chair should be a member of the opposition. A chair from the government party would have a strong temptation—and some have succumbed—to divert the committee's attention from matters which might be embarrassing for the government.

Looking at how these matters are dealt with in the twenty parliaments, the audit function is in fact reasonably well handled. Every one of the twenty parliaments has an auditor-general, sometimes with a more high-flown title: Comptroller and Auditor-General in the UK, Controller and Auditor-General in New Zealand. Each of the parliaments has a Public Accounts Committee, though it is sometimes

known by a different name—Public Accounts and Audit Committee (PAAC) in Australia for instance.

There are nevertheless some unsatisfactory aspects. In four of the six Australian states the auditor-general is appointed by the government without any involvement by the legislature or formal consultation with the opposition. The exceptions among the states are Queensland, where the PAC is consulted about the process of selection and appointment, and New South Wales, where the PAC has the right of veto over proposed appointments. But giving these powers to a PAC may not be effective if the committee divides on party lines, and it is very regrettable that in Australia and the six states the chair of the PAC is held by a government rather than an opposition member.

The situation is better in the other parliaments. In the UK the Comptroller and Auditor-General is nominated in an address to the Crown, moved by the prime minister with the agreement of the PAC, and passed by the House of Commons. In Canada and the Canadian provinces the appointment of an auditor-general is made by the legislature upon the unanimous recommendation of a committee of the legislature. In Australia federally the Auditor-General is appointed after consultation with the PAAC, and the Auditor-General and the committee exchange lists of the priorities for audit functions. In New Zealand the Controller and Auditor-General is appointed after consultation between the prime minister and the leader of the opposition.

Not all the auditors report to the parliament. In the UK there is a second audit system called the Audit Commission, dealing with local government and health matters, and making reports on their efficiency, but the Audit Commission does not report to Parliament. A further problem is that in the UK, Canada and the Canadian provinces the auditors-general do not audit non-departmental government activities, such as business enterprises, nor do the Canadian PACs have the power to initiate their own inquiries on matters not raised by the Auditor-General.

This may seem a formidable list of problems, but in fact the audit function has on the whole been performed well. The PACs are highly regarded and membership often leads to higher office, though the tendency to give the PACs other expenditure control functions is weakening their attention to audit, particularly as some of the committee, notably those in the states and provinces, are already inadequately supported by specialist staffs.

The parliamentary handling of efficiency reports is generally much less satisfactory. All the auditors-general, except those in the UK and Queensland, make recommendations on how to improve the efficiency

or value-for-money of government programs, but the parliamentary follow-up is weak. Logically such reports should be dealt with when the departmental estimates for the next year are being considered, with bureaucrats being closely questioned to ensure that corrective action has been taken where necessary, with the threat that otherwise the estimates would be reduced. Logical this may be in administrative terms, but in political terms it never happens. A reduction in the estimates by the lower house would be regarded as a vote of no confidence in the government, and would be decided on party lines.

The only systematic study of the efficiency reports is by the Public Accounts Committees, but the PACs have neither the time nor the support staff to do the necessary job over the full range of government activities, and in any case their traditional desire for unanimous reports effectively precludes them from investigating highly controversial problems, which are of course the very ones which should be investigated.

The reports could be considered by the 'departmental' committees, where such committees have been established, but these committees have their own agendas, and generally do not like to be distracted by efficiency audits. If there is to be any useful outcome from these committee hearings it is important that an auditor-general's efficiency report contains recommendations rather than merely listing problems. Parliamentary committees are not at all well designed to construct policies and to impose them on governments, and merely to give a committee the facts and to expect it to work out the best solution is a forlorn hope.

This is not to say that efficiency audits serve no useful purpose. They often gain considerable publicity, and it is usually not easy for a government to ignore the findings. As a former president of the Canadian Treasury Board put it: 'the AG is godlike and, in political terms, it's almost impossible to take him on.'¹⁰¹ Besides, despite popular views to the contrary, ministers and their departments *are* interested in efficiency and value-for-money, if sometimes only to still public criticism, and provided that the solution does not require the minister to venture into a political 'no-go' area.

Summing up, governments can usually be expected to react to critical efficiency audits, but parliaments do not really have an effective role in the matter.

¹⁰¹ Sonja Sinclair, *Cordial but not Cosy*, Toronto, McClelland and Stewart, 1979, p. 125.

A bill of rights

Modern parliaments are by no means always effective defenders of individual rights and liberties; indeed they often actively encroach on them. People may look to the courts for protection, but they may look in vain. Courts certainly do have a role in controlling a government acting without legislative backing. In New Zealand, for instance, the Muldoon National Party Government came to power committed to abolishing Labour's superannuation scheme. After the election, employers were told by the government that they need no longer make payments to the Superannuation Board (a decision welcomed by the employers), and that the act would be amended when Parliament met in a few months. The government's action was challenged in the courts, and in 1976 the Chief Justice held that it was contrary to the 1689 Bill of Rights, which prevents the Crown from suspending laws without the consent of Parliament.

In Australia 'legislation by press release' is common. But even if the courts could deal with such a breach of the law, they can do nothing if an obnoxious law is valid. The supremacy of statute law ensures that a court can do no more than try to work out its meaning and then apply it as justly as possible. If there is no entrenched constitutional limitation on the power of parliament to enact laws which infringe basic human rights, the only controls are the consciences of the members of parliament and the prospect of a future election at which they may be held to account. These are frail defences for the reasonable rights of minority groups who are unpopular with most voters. The tyranny of the majority, and the ability of a populist government to mount a scare campaign, are ever-present risks. Justice Michael Kirby, of the High Court of Australia, has said that 'the ballot box can sometimes be an instrument to legitimise oppression by law ... for most of my life, as a homosexual Australian, I have been oppressed by unjust laws.'

What limits are there to a government's power to propose laws which infringe basic human rights? There will of course be pressure against such laws, from individuals, from government organisations such as a human rights commission, and from voluntary organisations such as Amnesty International. But if the government sees political advantage in a particular bill, there is little doubt that it will pass the lower house. An upper house, if one survives, can present a barrier, but it is sometimes a weak one. The House of Lords can do no more than delay legislation if the government is determined. An example is the passage of the deplorable War Crimes Act, which was twice rejected by the Lords but still became law.

There have been many attempts to put limits on the power of governments. The Bill of Rights of 1689 was an early attempt, but it is not entrenched, and the UK Parliament is not limited by it. Unentrenched bills of rights have also been enacted in Canada and New Zealand but, being unentrenched, they can always be by-passed by the Parliament. Lord Hailsham said in 1976:

I do not accept that a party government of either colour would hesitate for a moment, with its main programme bills, to insert when it wished to do so, the necessary exempting words: 'Notwithstanding anything in the Bill of Rights or any other rule of law or statute to the contrary.' I could almost compose the ministerial speech, of course of the most soothing and conciliatory kind, which would accompany such a section.

Canada enacted a bill of rights in 1960. The act stated that 'fundamental rights' were to be protected without discrimination on the grounds of 'race, national origin, colour, religion, or sex'. The 'fundamental rights' included property rights, equality before the law, and freedom of speech, the press, assembly and association, and religion. The act also protected rights such as freedom from cruel punishment or arbitrary arrest, to a fair trial, to be presumed innocent until proved guilty, to legal counsel, to an interpreter, and the right not to testify against oneself. However, the act was not entrenched, and could be amended by the Parliament in the same way as any other act. Parliament was also specifically permitted to pass bills which conflicted with the bill of rights, provided that the bill stated that it was to operate notwithstanding any conflicts with the bill of rights. The bill of rights did not apply to provincial legislation, and could be suspended in a national emergency, a loophole Prime Minister Trudeau used in 1970 during the Quebec troubles. All in all, this bill of rights was a weak document, and it was replaced in 1982 by a more effective charter of rights and freedoms, which was entrenched in the Constitution.

In New Zealand, the incoming 1984 Labour government was committed to a bill of rights, though it was not clear whether it was to be entrenched, and if so, how. After prolonged argument, both in Parliament and in a select committee, the idea of entrenchment was dropped, at least for the time being. The 1989 bill of rights aimed to protect basic rights: the right of life and security of the person; democratic and civil rights; non-discrimination and minority rights; and protection from unreasonable search, arrest and detention. But it is weak in effect. Ordinary parliamentary enactments override the bill of rights whenever there is a conflict. The Attorney-General has a statutory duty to inform the House of Representatives if a bill being considered appears to be inconsistent with the bill of rights, but if the Parliament goes ahead anyway that is the end of the matter. The courts

cannot strike down an offending act, though they are required, whenever possible, to give such an act an interpretation that is consistent with the bill of rights. There have been some bizarre cases. There was a claim that an increase in rent for public housing breached the 'right to life', and another that freedom of expression gave the right to walk down a street naked.

The ineffectiveness of an unentrenched bill of rights has led various countries to entrench such rights and freedoms, to protect them from a predatory legislature. The First Amendment to the US Constitution, passed in 1791, set out in nine articles the rights and freedoms which were derived from the English Bill of Rights of 1689. It is of course easier for a country with an entrenched constitution to entrench a bill of rights, though the amending of constitutions is by no means easy.

When the Canadian Constitution was 'patriated' in 1982, a Charter of Rights and Freedoms was included. The Charter is substantially the same as the 1960 Canadian Bill of Rights, with two crucial differences: it is entrenched (and therefore cannot be simply changed by an act of Parliament) and it applies to both federal and provincial legislation. It makes its rights and freedoms 'subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.' But there is a loophole, for the federal or a provincial parliament may pass legislation which operates despite infringing the legal and equality sections of the charter, provided the act concerned declares that it is to operate notwithstanding those sections. Such a declaration may last for five years, and may be re-enacted. This power was immediately used by the province of Quebec.

Cases invoking the Charter are arising at a rate of about 500 a year, but the judges are putting definite limits on attempts to use the Charter to block government programs. On the other hand, they have 'required the government to assume the burden of demonstrating the reasonableness of legislative limits on rights.'¹⁰² The Supreme Court has struck down provisions in several acts, concerning such matters as unreasonable search of premises, a 'constructive murder' provision, and a statutory minimum sentence of seven years for the importation of drugs regardless of the quantity. Procedural steps have been taken by the government to try to adjust draft bills before introduction to the Parliament to ensure that they conform to the Charter, and most court decisions under the Charter have dealt with administrative failures rather than the defects of acts of Parliament.

¹⁰² P.H. Russell, 'The First Three Years in Charterland', *Canadian Public Administration*, vol. 28, no. 3, 1985, p. 374.

The idea of a bill of rights evokes more opposition in Australia, which like Canada has an entrenched Constitution. Perhaps Australians are not so influenced by, or informed about, the performance of the US Supreme Court in enforcing the US Bill of Rights. The Australian Constitution, drafted in the 1890s, does include a few rights: trial by jury for indictable offences under Commonwealth law; freedom of religion; and a requirement for the Commonwealth, when it acquires property, to do so on just terms.

The 1959 Joint [parliamentary] Committee on Constitutional Review recommended that there should not be an entrenched bill of rights, on the grounds that the absence of constitutional protection 'had not prevented the rule of law from characterising the Australian way of life.' All parties agreed with this conclusion, but during the 1960s the Labor Party changed its attitude, and during the 1970s and 1980s the Whitlam and Hawke Governments made three attempts to pass a statutory (that is, not entrenched in the constitution) bill of rights, but were frustrated by the Senate and by inept ministerial handling.

A government bill was introduced into the Senate in 1973, but it met a storm of criticism, was amended by the minister and then quietly dropped. The Hawke Government tried again in 1983 with a bill based on the International Covenant on Civil and Political Rights. It has few provisions for judicial enforcement and was basically a publicity document, but it nevertheless faced political problems. It covered state as well as federal laws, and the premier of Queensland, for one, objected that it omitted all the usual controls on claims of human rights, which he thought should be limited by the needs of public safety, public order and the protection of public health and morals. (The premier in question was vehement on such matters, but at the same time presided over a remarkably corrupt administration.) The bill was dropped. A weaker bill of rights, not covering the states, was introduced in 1985, but was frustrated by a filibuster in the Senate.

An entrenched bill of rights was being pursued at the same time. In 1985 the Labor government set up a non-partisan Constitutional Commission to conduct a review of the Constitution with a view to its revision in 1988, the bicentenary year. Among other things, the Commission was asked to ensure that 'democratic rights' were guaranteed. There were extensive public hearings, and in an interim report early in 1988 the Commission submitted recommendations that included 'one vote, one value' and the extension to the states of the federal constitutional guarantees on freedom of religion, the right to trial by jury and to just compensation for the acquisition of property. These constitutional amendments, among others, were put to a referendum in September 1988, and suffered the worst defeat in

Australian constitutional history. After such a devastating defeat, there was no interest in the final report of the Constitutional Commission, which included extensive and persuasive arguments in favour of a bill of rights.

The question of a bill of rights has aroused passion, and sometimes absurd exaggeration, on both sides of the argument. A former Australian Chief Justice, Sir Anthony Mason, has dispassionately summed up the arguments for and against such a bill. He suggested that the advantages are that it:

deters Parliament from abrogating the rule of law, thereby presenting a constitutional obstacle to the use of parliamentary power as a means of a totalitarian system; it ensures that the power of the majority in parliament cannot be used to override the rights of minorities and individuals; it offers principled and reasoned decision-making on fundamental issues; it reinforces the legal foundation of society, thereby enhancing the role of law in society; it has a major educative role in promoting greater awareness of, and respect for, human rights.

Chief Justice Mason also outlined the objections to a bill of rights. Is the greater protection of human rights worth the price that has to be paid for it? Some claim that the price would be high: the judiciary, given the power to strike down parliamentary legislation that is inconsistent with the bill of rights, would be behaving undemocratically; judges would be turned into law-makers; many controversial matters, which are now expected to be decided by the elected Parliament, would be decided by an unelected judiciary; too much power would be given to judges who, by their background and training, might not be qualified to exercise it; and judges would become politicised.

Other objections have been raised. In Australia a bill of rights is seen by some as an attempt by the federal government to intrude into areas reserved for the states. The populist premier of Queensland, Sir Joh Bjelke-Petersen, claimed a bill of rights would place 'the citizens of Queensland, the government of Queensland and the Parliament of Queensland, in the hands of Commonwealth-appointed courts and judges'.

These conflicting arguments and passionate disputes seem to have been overtaken by events, and the protagonists are debating the wrong question. No less than 68 international agreements relating to human rights have been accepted. Canada, Australia and New Zealand have ratified the United Nations Covenant on Civil and Political Rights and although the UK has not, it has acceded to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which obliges all the countries which have ratified the

Convention to ensure that their domestic law is compatible with it. The rights in the European Convention, which are guaranteed to every individual of whatever nationality, are clearly defined, but are much more limited than those in the UN Covenant. They were in fact based on an earlier draft of the Covenant and, in the words of the preamble to the European Convention, they are only 'the first steps' in the enforcement of human rights. Many of the rights are also subject to limitation on grounds such as national security, public safety and order, the prevention of crime and the protection of the rights of others, and most may be ignored in time of war or other public emergency threatening the life of the nation.

The European Convention came into force in 1953, though the UK did not give its citizens the right of individual petition—the crucial component of the system—until 1966. Petitions are received by the European Commission of Human Rights, which rejects most of them, either because national remedies have not been exhausted or on the merits of the case. Those which cannot be settled amicably may be considered by the European Court of Human Rights at Strasbourg, and UK practices which were lawful under British common or statute law have on several occasions been found not to protect human rights adequately, at least by the standards of the European Convention.

To avoid problems in the courts, the European Convention has been incorporated into UK domestic law, though because of the need for training and other preparations it was not implemented until October 2000. However, several provisions were immediately implemented when the Act received the Royal Assent in November 1998, such as the appointment of a UK judge to the European Court of Human Rights and the abolition of the death penalty for military offences. Until the Act came into force the minister in charge of a bill in the House of Commons was required to make a statement about the bill's compatibility with the Convention rights, and the devolved parliaments in Scotland and Wales did not have the right to do anything which was incompatible with the Convention rights.

Two human rights covenants were unanimously adopted by the UN General Assembly in 1966, in amplification of the Universal Declaration of Human Rights of 1948. The covenants were split between civil and political rights and economic, social and cultural rights at the insistence of the western powers, who felt that civil and political rights were enforceable and justiciable, whereas the economic, social and cultural rights—the right to work, for instance—were essentially political. The Human Rights Committee supervises the Covenant on Civil and Political Rights and the Committee on Economic, Social and Cultural Rights supervises the other covenant.

The covenants were ratified by the UK and Canada in 1976, New Zealand in 1978 and Australia in 1980. The covenants have spawned four other specific conventions, covering the elimination of all forms of racial discrimination, the elimination of all forms of discrimination against women, against torture and other cruel, inhuman or degrading treatment or punishment, and the rights of the child, and each of these conventions has a UN committee watching over the behaviour of member nations.

The UN has spawned some rather unusual agreements. The *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* was adopted by the UN General Assembly in 1979. Australia has acceded to this agreement—one of the nine countries to do so—but none of the major countries has acceded.

The provisions in the Civil and Political Rights Covenant are similar to those in the Canadian Charter, which is in fact based on them, though the Canadians express the rights rather more clearly and forcefully. There is nothing in the covenants to oblige countries to pass a bill of rights, provided that adequate remedies are available to a person whose rights or freedoms are violated. The first optional protocol to the International Covenant on Civil and Political Rights permits *individuals* who claim their rights have been violated, and who have exhausted all available domestic remedies, to appeal to the UN Human Rights Committee. Canada ratified this optional protocol in 1976 and New Zealand acceded to it in 1988 and Australia in 1991.¹⁰³ The UK has not ratified this optional protocol, evidently feeling that the European Convention was enough.

The Human Rights Committee has a two-stage process. It first considers whether a particular complaint (known as a ‘communication’) is technically admissible, on issues such as whether the particular complaint involves a right covered by the Covenant, and whether all domestic remedies have been exhausted. If a communication is deemed admissible, the committee will then examine the merits of the claim. The committee is not a judicial body and does not make judicial determinations. It brings relevant material to the attention of the government concerned, which has six months to reply. The committee then considers the matter and sends its conclusions to the complainant (the ‘author’) and the government concerned. The Human Rights Committee has been very wary of dealing with Article 1(1) which says ‘all peoples have the right of self-determination.’ The inclusion of this provision was opposed by the western powers as being vague and undefined, but it was included anyway.

¹⁰³ Accession combines signing and ratification in one action.

Some of the committees are distinctly odd. The committee set up under the Convention for the Elimination of all Forms of Discrimination against Women has directed Slovenia that children under three should be looked after by day-care establishments rather than their families; it has criticised Belarus for reinstating a national Mothers' Day; it has said that the Koran should be interpreted in ways that the committee accepts, and has directed the Irish government to eradicate the influence of Catholicism from its culture and its people.

The International Covenant on Civil and Political Rights requires countries 'to adopt such legislative or other measures as may be required to give effect to the rights in the ... Covenant', so an adverse ruling from the Human Rights Committee would be almost impossible for a government to ignore, except possibly in the case of Canada, if the Canadian Supreme Court had made a different ruling on the same matter.

The Optional Protocol on Civil and Political Rights had been ratified by 96 countries by 1999. Jamaica withdrew in January 1998, but cases under consideration at that time are still to be considered by the Human Rights Committee. Trinidad and Tobago gave notice of withdrawal, to take effect from June 2000. Canada, with 96 individual appeals to the Human Rights Committee, was second only to Jamaica (177 appeals) and ahead of Australia (34 appeals) and New Zealand (21 appeals) in the number of individual appeals made. Many of the appeals were ruled inadmissible, but some—nine in Canada, two in Australia, but none in New Zealand—were held to have revealed a violation.

So what Australia and New Zealand have to consider is not whether they want to have a bill of rights which would limit the sovereignty of parliament—they already effectively have one—but whether they want their civil and political rights and freedoms interpreted by international organisations, whose members may well have quite different legal traditions.

If the two countries wish to keep such matters under their own control, they will have to pass acts bringing the International Covenant on Civil and Political Rights and any related covenants and conventions into their domestic law, effectively allowing their direct interpretation by their own courts. If they were not prepared to do this, they should not have signed the treaty in the first place. It would not be necessary to entrench these acts, for it is highly unlikely that any government would propose legislation which was in conflict with a UN covenant to which they were a party.

Part 3

The future of the
Westminster system

What is wrong with an elective dictatorship?

The executive government has always been seen as the primary source of tyranny, and in Britain the Parliament was developed to control its power. After centuries of struggle, this control was finally achieved in the nineteenth century by making the executive government responsible to the Parliament. The growth of disciplined political parties in the twentieth century has reversed this responsibility, and the executive government can now often control the parliament, resulting in a form of elective dictatorship.

There is nothing new about the concept of an elective dictatorship. After all, nearly 2500 years ago the Roman Commonwealth instituted the office of dictator, the incumbent to be chosen by the Senate to deal with crises such as war, sedition and crime, which were too difficult for the two annually-elected and often mutually antagonistic consuls to deal with. The dictator initially held office for six months.

The Nazi government of Adolf Hitler is an extreme example of a modern elective dictatorship, but Hitler *was* elected and his dictatorship *was* legal under the Weimar Constitution. The Weimar Republic had responsible government, with a Chancellor as head of government. The president—the aged Field Marshal Hindenburg at the time of Hitler's accession—had considerable authority, including dictatorial power if public order and security were threatened.

The Weimar Parliament was elected by proportional representation, with consequent difficulty in forming stable governments. In January 1933 Hitler, as leader of the largest party, became chancellor in a coalition government, and in the following month a mentally-retarded Dutch anarchist set fire to the Parliament building. Although it now appears that the Nazis were not involved in this crime, Hitler certainly made full use of it. He persuaded the president to use his power to suspend the Constitution by emergency decree, to restrict the right of assembly and of the press, to give power to put individuals in protective custody, and to provide for the death penalty for serious disturbances of the peace.

Even after making ruthless use of these powers, the Nazis were unable to gain more than 44 per cent of the votes in the March 1933 election, yet Hitler was still able to persuade the new Parliament to pass an Enabling Act giving him dictatorial powers for four years. Passage of such an act required a two-thirds majority, and even though a hundred left-wing deputies were either under arrest or in hiding, their presence would not have prevented Hitler obtaining the prescribed majority. He now had the power, not only to pass new laws but to amend the Constitution without consulting the Parliament, and without having to persuade the president to issue emergency decrees. A year later President Hindenburg died, and Hitler, using his dictatorial powers, simply combined the job of president with that of chancellor. His elective dictatorship was now uncontrolled.

There were in fact two more national elections during Hitler's rule, in 1935 and 1938, but on each occasion the elections were blatantly rigged, with the Nazi ticket gaining more than 98 per cent of the votes. Finally in 1942 the Parliament passed a law which released Hitler from all existing legal restrictions, and made him leader of the nation, supreme commander of the armed forces, head of the government and supreme executive chief, supreme justice and leader of the party.

Although the 1935 and 1938 elections were undoubtedly rigged, it seems clear that Hitler's rule had the overwhelming support of the German people, certainly from 1936 onwards. By 1936 Germany had made a faster recovery from the Great Depression than any other country in Europe, national morale had been restored, the hated Versailles Treaty had been torn up, and rearmament had commenced. Business leaders generally supported the Nazi regime. They had little regard for Hitler personally, despite the fact that he preached a very conservative social philosophy ('children, church and kitchen' was his slogan for women, for instance), but they were grateful for the suppression of communists and trade unions which had made possible the dramatic economic recovery.

Of course, even with the Nazi control of the media, the public could not be unaware of the Nazi thuggery and the concentration camps filled with communists, trade-union leaders, Jews, homosexuals and gypsies, for by the end of 1933, after less than a year of Nazi rule, there were 50 such camps. They seem to have been regarded by some as aberrations of which Hitler was unaware, and by others as regrettable necessities. Of course they were not. They led inexorably to murders, mass genocide and world war.

No one would suggest that the Nazi pattern could arise in any of the four countries being considered. The constitutional tradition and the rule of law are much more firmly established there than they were in

the Weimar Republic. Nevertheless there are disturbing common patterns in all elective dictatorships.

In modern times, attention was first called to the new elective dictatorships by Lord Hailsham, in a famous address on the BBC in 1976. He later wrote:

Disregard the fundamental human values of justice and morality and you will soon turn majority rule into unprincipled tyranny. But in practice, human nature being what it is, every human being and every human institution will tend to abuse its legitimate powers unless these are controlled by checks and balances, in which the holders of office are not merely encouraged but compelled to take account of interests and views which differ from their own.

In pointing to the dangers of an elective dictatorship, Lord Hailsham was in fact echoing the views of a long tradition of political theorists, dating back to the times of ancient Greece. Even the expression 'elective dictatorship' was similar to Thomas Jefferson's description of a type of government as elective despotism. He wrote

The concentrating [of all the powers of government] in the same hands is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one ... An elective despotism was not the government we fought for.

The founders of the United States of America, particularly Jefferson and Madison, brought remarkable intellectual rigour and imagination to the problems of creating a new democracy. They may have been somewhat misled by the French philosopher Montesquieu, who thought that the separation of the executive, legislative and judicial powers was the secret of the success of the English system after 1688, and the American system was modelled on that principle. 'The Americans of 1787', wrote Bagehot, 'thought they were copying the English Constitution, but they were contriving a contrast to it.' In fact what Montesquieu was emphasising was the importance of the independence of the judicial system from political forces (unlike the situation in France), and this separation of powers is common to both the British and American systems.

There was great concern among the authors of the American Constitution that there should be checks on the use and abuse of political power, and that the various parts of government should be in balance. James Madison, the principal author of the Constitution, wrote that:

in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control

the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

As Lord Acton put it: 'Power tends to corrupt and absolute power corrupts absolutely.' Edmund Burke was also aware of the dangers of untrammelled power. Two hundred years ago he wrote that 'in a democracy the majority of citizens is capable of exercising the most cruel oppression upon the minority.' His views were echoed nearly a century later by J.S. Mill when he wrote of:

the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consider ... A majority in a single assembly easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views.

He went on to say that, to control a government, it was essential to:

throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable.

This attitude was totally different to that of Dicey three decades later. Dicey believed that the true source of the life and growth of the British Constitution was 'the absolute omnipotence, the sovereignty of parliament'. It must be admitted, though, that when this sovereign Parliament was prepared to take action with which Dicey disagreed—as in Home Rule for Ireland—his respect for the Constitution seemed to vaporise. He recommended a referendum (so much for the sovereignty of Parliament) and, if a majority voted for Home Rule, he was prepared to see armed insurrection (so much for respect for the British Constitution).

The authors of the American Constitution were almost obsessive in their desire to have checks on executive power, and they created a system of division between executive, legislative and judicial power which is still unique. Several flaws in the model they created have emerged over the years, but the dangers of elective despotism which they sought to prevent are real. Responsible government as it has developed in the four countries we are considering does little to control these dangers.

None of the four countries has anything approaching responsible government in Bagehot's sense, though all pretend they have. What they have is party government, where the party which wins the majority

of seats in the lower house forms the government, and its leader become prime minister. The government is responsible, not to the parliament, but to the caucus of the government party MPs. The lower house merely registers the laws proposed by the government, after discussions with the government party caucus. The caucus relies for its electoral success on the party organisation, which in some of the parliaments may give orders to the parliamentary party.

The power of such a party government is not invariably absolute. The procedure in the British House of Commons, where the party discussions take place in public in a standing committee rather than in the relative privacy of a caucus meeting, has much the same result, though it must be said that the resultant cross voting has beneficial results on the independence of MPs in other areas. Another problem occurs if the government does not have an absolute majority in the lower house. If this happens, there will be a coalition with other parties or Independents, or a minority government. The government will negotiate with its possible allies with the aim of retaining government and keeping control of the lower house so that it can get a rubber stamp on its key legislation.

There are also other constraints. The doctrine of the sovereignty of parliament, under which its enactments cannot be struck down by any court, now applies only in New Zealand. Canada and Australia are federations, with entrenched constitutions. The powers are divided between the federal and state governments, and any disputes are decided by the courts. The UK is a *de facto* provincial member of the European Federation, with laws enacted by its Parliament liable to be overridden by European Union laws on certain designated subjects, and disputes resolved by a Union court.

These restraints still leave formidable and effectively unreviewable powers in the hands of a government which controls the lower house. The only remaining barriers to party despotism are upper houses, but these barriers are of very uncertain strength. If the government party has the numbers in the upper house it is really no barrier at all for, except in the UK, where party members of both houses meet in a common caucus where the upper house members are usually heavily outnumbered by those from the lower house. The decisions of this caucus are usually binding on upper house members, even in cases where most of them actually oppose the decision. cross voting is rare; it is effectively non-existent among Labor members in Australia. The House of Lords was a special case, for most of the peers did not accept party discipline. The answer was inevitable. Exploiting the non-elective character of the House of Lords, governments managed to reduce its power to a mere delaying role.

However, if the government party does not have the majority in the upper house—and this is becoming increasingly common, with four of the six elected upper houses using proportional representation—the upper house can be a formidable obstacle to an elective despotism, reviewing legislation thoroughly, and amending and sometimes rejecting it. Government activities may be closely and critically scrutinised, and inquiries held into matters the government does not want investigated. If elected by proportional representation, upper houses can reasonably claim to be more reflective of actual community opinion than a lower house elected by single member constituencies. This claim should be slightly qualified, if only part of an upper house—usually half—retires at each election. This is deliberately done to make the upper house a continuing body, without violent fluctuations in balance caused by temporary changes in public opinion.

Despotic governments do not like this sort of behaviour at all, and have conducted substantial campaigns to destroy or emasculate their upper houses. ‘Why should a democratically-elected government be frustrated by people who have not been elected to government?’ they cry, and their call has some effect, for many in the community, particularly those who voted for the government, would support them. Let the government govern seems to be the feeling. As the poet put it: ‘For forms of government let fools contest; What’er is best administered is best.’ So let the government pass such laws as it wishes, in the form it wishes. Let the government set up such inquiries as it wishes, and prevent any inquiries and suppress any information as it wishes. After all, it is answerable to the voters at the next election, and that is enough.

But is it enough? What are the dangers of such an elective dictatorship? Five such dangers stand out.

Responsibility to the electorate

First of all, the responsibility to the electorate is crude and unsatisfactory. Three, four or five years is a long time to allow any group untrammelled power, and its ultimate accountability depends on the issues which can be brought to the fore at election time. The government can often manipulate the current issues as well as being able to choose the date for an election. Public opinion polls have a crucial influence on the choice of the date for an election, despite prime ministers frequently saying that the only poll that matters is held on election day. Parliaments usually last their full term only if the polls are adverse. The power of a prime minister to call an early election when

public opinion is, perhaps temporarily, in his favour is a very great political advantage, and a quite unjustifiable one.

Answerability to parliament

The second objection is that an elective dictatorship is also most defective in its answerability to parliament. A government which controls the parliament can suppress information or inquiries which are to its disadvantage, sometimes by refusing to supply information, sometimes by using party numbers to head off or interminably delay threatening inquiries, and sometimes by throttling the parliamentary budget so that resources are simply not available for a proper inquiry.

Many people are appalled at the scandalous revelations which are periodically turned up by American congressional inquiries. What they overlook is that equally scandalous events may be happening in their own societies but are not being uncovered by their supine parliaments. Some outrageous financial deals have been done by governments in some of our twenty parliaments, and kept secret for years. There have been numerous cases of governments being able to suppress unfavourable stories until elections have been called and won, elections which would almost certainly have been lost if all the proper information had been available to the voters.

The evasive devices are many: irrelevant answers at question time; excessive delays—sometimes years—in answering questions from MPs requiring written replies; orders to public servants not to provide information to parliamentary committees by claiming Crown privilege, or by asserting that a policy issue is involved; and the failure of ministers to give proper information to parliamentary committees investigating aspects of their responsibilities, and sometimes even failing to appear before the committees at all.

Two examples will suffice. During the UK parliamentary inquiry into the Westland helicopter affair, the responsibility (or lack of it) of civil servants to *Parliament* was laid down by the *government*. Civil servants, the government claimed, are accountable to ministers and ministers are accountable to Parliament, so civil servants are bound by any instructions given by ministers and must observe confidentiality. The Parliament did not like the rules, but could do nothing about them. Nor could the accountability of a minister to Parliament be enforced. In the same select committee investigation, the committee:

asked Mr Brittan [the minister who had directed the leaking of selected passages from a letter of the Solicitor-General which were damaging to a colleague, Mr Heseltine] whether he authorised that the whole document be published. He refused to tell us. We asked Mr Brittan who selected the passages to be quoted. He refused to tell us. We asked Mr Brittan whether

he knew the facts that would enable him to answer the previous questions. Again, he refused to tell us. We put the following question to Mr Brittan: 'Why was the Solicitor-General not told that his letter was going to be leaked?' Mr Brittan would not tell us.¹⁰⁴

The second example occurred in Australia in 1975, when the Senate wished to call several public servants to the bar of the Senate to answer questions and produce documents about some dubious overseas loan negotiations undertaken by the government. The government claimed Crown privilege, and directed the public servants, if the Senate did not accept the claim, to refuse to answer questions or to produce documents. The public servants obeyed, and the Senate yielded.

This conflict between Crown privilege (or 'public interest immunity', as it is sometimes euphemistically called) and parliamentary privilege is difficult to resolve. The responsibility of the government to the parliament would suggest that it should be parliament, not the government, which should decide whether questions should be answered or documents produced, *in camera* if necessary. On the other hand, parliament is a party political body, and many committees are notoriously leaky. In practice, the government simply refuses to produce documents or permit the giving of evidence which it claims would be prejudicial to the public interest, and parliament has yielded.

The courts have taken a firmer line. It now seems to be well established that a minister's certificate claiming Crown privilege will not be accepted as conclusive in all cases, and the courts will decide the competing claims of public interest. In the UK the courts do accept that there is a class of documents such as Cabinet minutes which remains privileged, but the Australian courts have held that no class of document is entitled to absolute immunity.

The relations between the government and the parliament are so highly politicised that an appeal to the courts to resolve a question of Crown privilege would not be appropriate. Yet it is difficult to justify the present situation, where the government decides what is in the public interest, and not infrequently seems to confuse its own political interest with that of the public. Of the options available, the best would seem to have the head of state decide, in the event of a dispute between the government and the parliament, where the balance of public interest lay. But governments would not like such a solution at all.

¹⁰⁴ J.A.G. Griffith and M. Ryle, *op. cit.*, 1989, p. 38.

Appointments

The third danger in an elective dictatorship is the power of the government to make appointments to the courts, to the senior ranks of the bureaucracy and to management positions in government business enterprises and other government-controlled organisations. The vast expansion of government activities in modern times permits government patronage on a scale which would have shocked even such a celebrated user of patronage as King Charles II. Some appointments are made to reward loyal party service, others so as to have a political supporter in a key policy post. Many appointments, of course, are made on merit, but the possibility of the abuse of this patronage power is disturbing.

The only parliament to take any action to supervise such appointments is that of Canada, though not yet very effectively. The potential for corruption is considerable, and one very troubling aspect of government corruption is the way it often has implicit business support, particularly in the early stages. Queensland under the National Party in the 1980s is a good case study. Many businessmen rather liked having to bribe only one person—a corrupt minister or senior bureaucrat—and thereby avoid complicated, expensive and time-consuming tendering processes.

Further, judicious bribes can override planning and environmental objections, which can indeed be tedious and frustrating if carried to extremes. Some businessmen prefer a corrupt government to an incompetent one. A bribe may not necessarily be for the personal benefit of a corrupt minister. It may take the form of a donation to party funds. In Queensland in the 1980s it was generally accepted that one or the other was necessary before a major contract could be made with the government. Ingenious methods of transferring funds were developed, such as deliberately defaming a minister and then making a large out of court settlement (which was tax free), or purchasing the mineral rights on a minister's private property, doing nothing about them, and, after a judicious pause, forfeiting the rights. What businessmen giving such bribes do not realise, or do not care about, is that an incompetent government can be changed, but once there is corrupt public administration it is extraordinarily difficult to cleanse it.

A vigilant, inquiring and effective parliament is essential if such corruption is to be nipped in the bud, but such a parliament cannot co-exist with an elective dictatorship. In the case of Queensland, the lower house was ruthlessly controlled by the government, and there was no upper house.

No parliament has established any watching brief over judicial appointments, which are entirely in the hands of the government, despite the fact that the independence of the judiciary is a crucial constitutional concept. In Canada and Australia, where the courts interpret the constitution, there is an ever present danger that the courts will become another prize for the political parties to seize.

Foreign policy and defence

The fourth objection to an elective dictatorship is the inability of the parliament to assert proper control over the government's defence and foreign policy activities. A government can move the armed forces into dangerous positions and can declare war without consulting parliament. It can sign and ratify treaties which make fundamental changes to the legal, economic and social systems of the country, again without any consultation with parliament. Examples of the use of such powers are the granting to citizens of the right of appeal to international human rights organisations, which makes major changes to the effective power of parliament and the courts. Similarly the conclusion of trade agreements may radically affect the economy. In Australia the government can effectively change the Constitution by concluding an appropriate international treaty. Except for some controls in Canada on the use of the defence power, the four national parliaments have done nothing to control the enormous powers thus left with the government.

Control over the legislative process

The final objection to an elective dictatorship is that it gives the government control over the legislative process. Modern governments are far too prone to see new laws as the solution to administrative problems, when they would often be better advised to see that existing laws were administered fairly and efficiently. If the government controls the legislature, the bills wanted by the government party and the bureaucracy will be bulldozed through the parliament, any significant amendments being fiercely and effectively resisted by the government party. The government can also avoid public scrutiny in the parliament by leaving not only administrative details but substantial policy matters to be completed by the government under powers delegated by the principal act.

If the government controls the legislature it becomes a cipher. The possibility of substantial input into a bill by expert witnesses is normally frustrated by a government if it has power to do so. Governments do not like committee hearings on their bills, for the members of a committee, studying a particular problem and hearing

informed evidence on it in public, tend to develop a common bond which undermines rigid party discipline. Yet public examination of a bill frequently results in a better solution and reveals defects and unintended consequences.

Most bills emanate from the bureaucracy, and all bureaucracies have a tendency to totalitarianism. They are looking for laws which solve administrative problems with precision and certainty. Questions of justice and ethics are not necessarily considered.

Bills may emerge from the bureaucracy, and be accepted by the Cabinet and the government party, which reverse the onus of proof; make criminal or taxation laws retrospective; discriminate on the basis of sex or religion and fail to provide for constructive objection; give unreasonable powers of search and entry; invade personal or medical privacy; inappropriately delegate ministerial power to unspecified officials, and so on. The only defence against such abuses of power is a parliament which is willing and able to force their removal. In an elective dictatorship there is no such defence. The effective by-passing of parliament as far as legislation is concerned is the most serious consequence of elective despotism.

The five defects of an elective dictatorship, each serious in itself, are devastating in sum. What must be considered, urgently, is how the defects can be overcome.

Where do we go from here?

Many societies seem to live in a state of illusion about their political systems. Mention has already been made of the way dictatorial Roman emperors pretended that the actual governing body was ‘the Senate and People of Rome’, and how in modern times communist dictatorships describe themselves as democratic republics, when they are neither democratic nor republics. Similarly, in 1867 people still talked as if the British Constitution were based on the separation of the executive, legislative and judicial functions whereas, as Walter Bagehot pointed out, that division no longer existed. The system which had developed was something quite different, depending not on the separation but on the merging of the legislative and executive functions in the Cabinet. A single chamber, the House of Commons, both chose the executive government—acting as the electoral college, in the American usage—and also acted as the key part of the legislature. Bagehot thought this arrangement distinctly superior to the American model of the separation of the executive and legislative powers.

Although Bagehot may have lost most of his clothes, he still has a very large empire. At the end of the twentieth century people were still talking as if the system of responsible government described by Bagehot still survived, despite the fact that the growth of party discipline since Bagehot’s day has destroyed that system. Except in conditions of minority government—uncommon in the four countries we are dealing with—a Cabinet is responsible to the government party, not to the parliament. Under a coalition the result is still party government, but with the program being distorted by the policies of a minor group, policies which would probably not be supported by a majority of voters or by a majority of MPs. A minority government survives by doing deals with minor parties and Independents so that they pass important legislation and key confidence votes, and in return they are given some influence on particular pieces of legislation which are in their areas of interest.

All lower houses have lost their role as legislatures, for with modern party discipline it is impossible for one house to be both the decisive chooser of the government and an effective controller of its proposed

legislation and its actions. The result is an elective dictatorship, with all the dangers that entails. An upper house, where one survives, may act as a check on a party government, but only if the upper house is not controlled by the government party and its powers are not emasculated. It is a constant aim of a party government to gain control of the upper house so as to make it a compliant legislative rubber-stamp, or if party control is not possible to use every available threat—abolition, removal of powers, ridicule—to prevent it resisting or even seriously questioning the will of the ‘democratically elected government’.

Granted that we no longer have effective responsible government, what do we do about it? Let us look at the Australian Federal Parliament—one of the most advanced (or degenerate, depending on the point of view) forms of party government—to see if there are any ideas from the other nineteen parliaments which might usefully be adopted, and what further changes would be necessary to restore truly responsible government.

In considering possible reforms, it is necessary to keep in mind the constraints. The first is that there is no likelihood of acceptance of a radical change in the political structure. There may be dissatisfaction, even disgust, with some aspects of politics and politicians, but there is little general interest in political theory, and proposals for massive change would be met with apathy or resistance. Any changes will have to be incremental, keeping the same outward structures while subtly changing their nature, as has in fact happened to the structures of responsible government since Bagehot’s day. It is also vital that the members of the parliament should accept the framework within which they are to operate.

Parliamentary democracy is a fragile instrument, and can easily be disrupted or destroyed if any substantial body of its members does not accept its rules. The disruptive activities of the Irish members in the British House of Commons in the late nineteenth and early twentieth centuries, the destruction of the Weimar Parliament by the Communists and Nazis before the rise of Hitler, and the corrupt impotence of many of the parliaments in newly independent countries are vivid reminders of the dangers.

The second constraint is that although the excesses of party discipline have destroyed responsible government, it would not be possible to eliminate political parties. There is no way that politicians could be prevented from joining together in groups, agreeing to take common positions on certain issues. Besides, without some cohesion between members any parliamentary system would soon become unworkable. What must be done is to control abuses of party power and

to devise a system of government which would make excesses by party zealots less likely.

Any attempt to restore responsible government will inevitably meet with resistance from those who rather like an elective dictatorship. There is a certain attraction about an elected government being able to govern without having other bodies quibbling and sometimes frustrating its actions, but the dangers of an elective dictatorship are great, as have already been described in Chapter 11.

With these constraints in mind, let us look at possible reforms to the Australian federal political system.

The House of Representatives

Electoral college

None of the twenty parliaments has been able to solve the problem of having a single body both choose the government (the electoral college role) and also act as the critical scrutineer of its administration and its proposed laws. Some of the other lower houses perform the electoral college role well; none performs both roles well; some perform neither well.

The Australian House of Representatives has performed reasonably well as an electoral college. It has made a decisive choice of government after each election since the Second World War. That is not to say that its performance has been perfect. Although its system of drawing electorate boundaries is on the whole excellent, the use of single member electorates has sometimes resulted in the election of governments which would not, by a narrow margin, have been the preferred choice of a majority of voters. This has happened in five of the 22 elections since 1945. The voting system—preferential and compulsory—has not been copied outside Australia. Preferential voting is probably desirable as it tends to produce MPs who are preferred—or perhaps least disliked—by a majority of their voters, while compulsory voting may make a decisive election result more likely by making it more difficult for minor party candidates or Independents to be elected. Both are therefore just worth retaining.

Life of parliament

The life of the Australian Parliament is three years, and can be cut even shorter at the whim of the prime minister, for his political advantage. Short parliaments inevitably lead to short-sighted governments. Of the other nineteen parliaments, only New Zealand and Queensland have three year lives. In the other five Australian states it is four years, and in

the remaining twelve parliaments, five years. The life of the Australian Parliament should be increased to at least four years.

Only one parliament—that of New South Wales—has taken action to remove the traditional but now totally unjustifiable power given to prime ministers and premiers to cut short the terms of their parliaments to suit their political advantage. The term of the House of Representatives should be cut short only if no government possessing the confidence of the House can be formed.

Australia is the maverick among the national parliaments in that there is no arrangement for the life of the Parliament to be increased if social conditions—war or other turmoil—made an election highly undesirable. The UK Parliament can extend its life indefinitely by a simple majority of each house, and has done so in each World War. The life of the Canadian House of Commons can, by a two-thirds majority, be extended indefinitely ‘in time of real or apprehended war, invasion or insurrection’, and the New Zealand House of Representatives can extend its life by a three-quarters majority.

The Australian Parliament would require a constitutional amendment if it wished to extend its life, and a referendum campaign during a national crisis would probably be as disruptive as an election campaign. Australia should follow the lead of the other national parliaments, and make the necessary amendment to the Constitution before the turmoil strikes. What is needed is for the circumstances under which the Parliament may extend its life to be defined in the constitutional amendment. The constitutional amendment should also ensure that the parliamentary majority approving such action should be sufficient to ensure that both the government and the alternative government agree with it, and the permissible length of the extension should be laid down (though the extension could be renewed). The Canadian model seems suitable, though the three-quarters majority needed in New Zealand is preferable, for it is not unknown in Canberra for the government party to have more than a two-thirds majority.

Legislative role

The House of Representatives has almost totally abandoned the legislative role. Bills are now very rarely referred to committees for public hearings to take evidence from the minister concerned, bureaucrats and informed members of the public. The number in the 1990s was less than three a year. Nearly three-quarters of the bills are not considered in detail at all, and bills are frequently forced through the House with only a few minutes for all stages. Successful opposition amendments are rare in the House of Representatives—over an eleven year period between 1976 and 1987, under two different governments,

when nearly 2000 bills were passed, not a single opposition amendment was accepted to any of them.¹⁰⁵

No other national parliament treats the legislative role with such contempt as does the Australian House of Representatives. Canada, New Zealand and some of the Canadian provinces regularly refer bills to committees which question bureaucrats and receive input from the public, but cross voting is rare. The bills emerge from the committees in the form the government wants, though ministers sometimes accept suggestions made in submissions from the public.

In the UK it is very rare for a bill to be sent to a committee to hold public hearings, but cross voting is not uncommon in the House at the committee stage of a bill. This cross voting is partly because government party MPs will not have had a chance, as the MPs in other parliaments have, to criticise the bill before it is introduced into the Parliament, and partly because party discipline is looser at Westminster than elsewhere. This is possibly because of the sheer number of MPs, for the UK House of Commons is twice the size of the Canadian House of Commons and four times the size of the Australian House of Representatives. The cross voting at Westminster is rather erratic. Sometimes one major party has cross voters, sometimes the other, rarely both together, and the result is that bills are not really examined and amended on their merits. It must be concluded that, while current party discipline continues, there are no procedures in use in the other national parliaments which would, if adopted, make the Australian House of Representatives into an efficient legislature.

Australia is fortunate to have a strong upper house available to take over the legislative role abandoned by the House of Representatives, but care must be taken that the Senate (with only 76 senators) is not overloaded with investigations into non-controversial bills with the result that committee effort is simply not available for important, controversial investigations. Something like 90 per cent of government bills are unopposed, but it is important that they should be carefully examined to make certain that accidental flaws do not slip through. These bills could usefully be examined by committees of the House of Representatives, investigating matters raised by the Senate Scrutiny of Bills Committee and seeking input from the public. Because the bills are non-controversial, the committees should be able to act without divisions on party lines.

The Australian House of Representatives has been ruthless in its use of the 'guillotine', by which the government limits the time for debate

¹⁰⁵ Except for two bills which were handled by an experimental procedure. The experiment was quickly stopped by the government.

on the various stages of its bills, sometimes allowing ridiculously short periods. The best solution is that of the Canadian House of Commons where, if agreement cannot be reached by the various parties as to the time to be allowed for each bill, the government may move the guillotine—but not less than one sitting day must be allowed for each stage of the bill. It is most unlikely that such a procedure would ever be adopted in Canberra.

There is a better prospect of better control of ‘gag’ motions—the motion that the question being debated be put to an immediate vote. The Australian Parliament is the only one of the national parliaments which permits such a motion to be moved in the middle of an MP’s speech. This clearly should be stopped. In the UK and New Zealand the Speaker has the discretion not to put the gag motion if useful debate is still going on, while in Canada the gag motion may be debated, with MPs who have already spoken in the main debate permitted to speak again, so it is not a very attractive way for a government to limit debate. The UK and New Zealand solution would seem to be suitable for Australia.

Standard of debates

Something should certainly be done about the standard of debate in the House of Representatives. All too often debates are a series of prepared statements rather than a genuine discussion, the only departures from the prepared statements being personal abuse. Two parliaments have taken some action to improve the situation. In the UK House of Commons an MP who is speaking may yield to an ‘intervention’ from another MP, who, if the original MP yields, may make a brief statement or ask a question on what the MP has said. This creates genuine debate, but it would never be accepted in the parliaments which have fixed times for speeches, which all the parliaments except Westminster have. In the Canadian House of Commons a ten minute ‘question and comment’ period is usually allowed at the end of each twenty minute speech, with the original MP being given a right of response to each question or comment. Occasionally the Speaker has to interrupt an MP who is speaking for too long or is not being relevant, but this has not been a major problem. It is an excellent way of creating a genuine debate, and the Australian Parliament should certainly copy it.

Governments by-passing the parliament

Action has been taken by one national parliament to assert its control over an important policy area where the government in the past simply by-passed the parliament. Canada has passed legislation which requires

the government to seek the approval of parliament for the deployment of the armed forces for warlike operations, and this should certainly be copied by the Australian Parliament. None of the national parliaments has yet taken action to require that the ratification of treaties should be approved by the parliament, and perhaps Australia could set an example in this.

All four countries have had problems with political bodies—the European Union in the case of the UK, the United Nations in the case of the other three—setting up human rights organisations which supervise the legislative behaviour of their member nations in relation to human rights. The European Convention came into force in 1953, and the UK is a member. Possible human rights violations are considered by the European Commission of Human Rights, and those which cannot be settled amicably may be considered by the European Court of Human Rights. Several times judgments of UK courts based on their common and statute law have been overruled by the European Court using the European Convention, and to avoid this problem the European Convention has been incorporated into UK domestic law.

The UN has a somewhat less legalistic system. Two human rights covenants were unanimously adopted by the UN General Assembly, and four more conventions have been spun off. The Human Rights Committee considers complaints about human rights, and after discussions with the government concerned it sends its conclusions to the government and the complainant. If its conclusions are adverse, the government is required to adopt such legislative or other measures as may be required to correct the problem.

Not all the countries concerned are happy to have their laws interpreted by a foreign body. Canada has effectively incorporated the International Covenant on Civil and Political Rights into its Constitution, so those human rights issues are interpreted by its courts, and adverse UN Human Rights Committee findings would be much less powerful if the problem had already been considered by the Canadian Supreme Court and it had come to a different conclusion.

It would be difficult for Australia to adopt the Canadian model, because of the great difficulty in making amendments to the Australian Constitution. The UK solution would however be perfectly adequate. If the federal Parliament passed acts incorporating verbatim all the human rights covenants and conventions which Australia has ratified, the courts would be given the same power as those in Canada. If the Parliament is not prepared to have these covenants and conventions part of Australian law, they should not have been ratified in the first place. The fact that these acts would not be entrenched would not be a problem, for it is very unlikely that the federal Parliament would pass

any act which specifically evaded the acts incorporating UN covenants and conventions to which Australia was a party.

Delegated legislation

The important field of delegated legislation is totally ignored by the House of Representatives. In all the other bicameral parliaments there is a joint committee from the two houses to oversee delegated legislation. In Australia, however, the performance of the Senate Regulations and Ordinances Committee has been so satisfactory that there would be nothing gained, and perhaps much lost, by involving the House of Representatives.

Questioning the government

An Australian government's attitude to its accountability to the lower house was epitomised by the claim by Deputy Prime Minister Keating that question time was not a right, it was a privilege granted by the government. With such an attitude, it is not surprising that question time is the near farce it is. Opposition questions are rarely answered, and personal abuse is common. Part of the problem is the absence of a strong, impartial Speaker in charge of proceedings. The UK House of Commons provides an admirable example of an independent Speaker, who presides over the House with firmness and impartiality, particularly at question time. Decisions of the Speaker are not disputed, and he has much more discretionary power than the Australian Speaker.

New Zealand has developed a much better question time than the Australian House of Representatives. It is based on the UK model, where written notice is given of a question, the minister gives a prepared answer, and then the Speaker permits supplementary questions—alternately from each side of the House—until in the Speaker's opinion the subject is exhausted. In New Zealand the Speaker is as much a party figure as he is in Australia, so if New Zealand can make such a question time work Australia should be able to do so also.

Written questions on notice are a much greater source of information than is question time, and Australia lags badly behind the other countries in the promptness with which such questions are answered. This should be rectified. Petitions from voters are also treated with contempt. They are read out by the Clerk in the House of Representatives, but the government does not reply at all. The Canadian model, by which the government has to reply within 45 days, usually by tabling an answer, should be adopted.

Monitoring government administration

The Australian House of Representatives now has a system of ‘subject’ committees to watch over the activities of government departments. All the committees are chaired by government party MPs and all have a government majority. They certainly very rarely investigate matters which the government does not want investigated. Worse still, the committees may be given tasks by ministers, so that the committees are effectively responsible to the ministers who are supposed to be responsible to them.

The system of ‘subject’ committees is similar in all the four national parliaments and all suffer from the same limitations. They are useful at investigating matters the government wants or is prepared to have investigated, but the government party majority is nearly always able to head off any inquiries which would seriously embarrass the government. The Australian House of Representatives should adopt the UK procedure of allocating the chairs of committees among the parties on a fair basis, and should certainly remove the power given to ministers to direct the activities of the committees. This would not make much practical difference—ministers could presumably persuade their colleagues, who nearly always have majorities on the committees, to take the necessary action—but it would remove a public affront to the concept of responsible government.

How useful is the House of Representatives?

It is not that the Australian House of Representatives performs no useful functions apart from its electoral college role. It provides a forum (for about 70 days a year) in which the alternative government and the minor parties can question the government, and (if they choose to) announce alternative policies. It also provides a forum for campaigning for the next election, a campaign which usually begins at the first meeting of the House of Representatives after the previous election, though whether this is beneficial is extremely doubtful.

Committees of the House may also conduct inquiries into matters about which the government wishes advice, or about which the government wishes to try to soothe public disquiet. Political inquiries are sometimes both cheaper and more effective than royal commissions or similar inquiries.

The fact remains, however, that the House of Representatives is certainly not an effective legislature.

The Senate

Although the Australian Senate is the most powerful and effective of the eight upper houses being considered, there are still lessons which can be learned from other parliaments. Only one of the eight upper houses—that of Western Australia—is always fully elected at the same time as its lower house. Two of the other upper houses are non-elective, and the other five are designed to be continuing (only partly elected at each general election). Of the six elected upper houses, four use proportional representation, but all of these use versions which give excessive power to the party machines. The Senate should learn from the proportional representation system used for the Tasmanian lower house, for the use of that system (Robson rotation) would permit voters to choose a party and at the same time select which of that party's candidates they wished to elect.

The Senate has moved, rather hesitantly, to take over some of the roles abandoned by the House of Representatives. The great strength of the Senate is that, since the introduction of proportional representation in 1949, the government party has had only brief periods with an absolute majority, and since the increase in the size of the Senate in 1985 it is unlikely that any government will have such a majority in the future. The Senate has never been a states' house; it was a party house from the outset.

Representation

The Senate's electoral system, which was possibly justified for its original roles of states' house and house of review, is inappropriate for a legislature. Equal representation for the states regardless of population introduces distortions, though these are not as serious as might be thought, for voting patterns across Australia are remarkably consistent, provided one counts the Liberal and National parties as a coalition. The nationwide consistency of party voting is much greater than in Canada or the UK, for instance. It is fortunate that this is so, for it is highly unlikely that the voters in the less populous states would ever support a referendum to amend the Constitution to reduce their representation in the Senate.

There can be no doubt that the proportional representation voting system used for the Senate results in a chamber that represents the balance and variety of political opinion much more accurately than does the House of Representatives. Nevertheless the continuing nature of the Senate, achieved by electing half of the senators every three years, is clearly inappropriate if the Senate is to take over the legislative role abandoned by the House of Representatives. For the Senate to carry out

that role it would be important for the whole Senate to be elected at the same time and for the same term as the House of Representatives, the electoral college; and that term should be a fixed four years.

Handling legislation

Despite the fact that it is certainly not a government rubber-stamp, the Senate's handling of government bills is far from rigorous. It has done some useful work in setting up a Scrutiny of Bills Committee to examine the legal detail of bills; the committee has raised queries on about 40 per cent of bills. The Senate has also taken action to prevent or control abuses of power by the government such as 'legislation by press release' and the failure to proclaim acts passed by the Parliament. But only about a third of the government bills are sent to committees to hear evidence from the bureaucracy and the public, and the Senate has often accepted absurdly short time constraints on these hearings. Moreover, the responsible minister, if a member of the House of Representatives, does not appear before the committee to answer questions from the committee about the proposed legislation. Three of the upper houses—those of Canada, New South Wales and Victoria—permit lower house ministers to attend the upper house to explain their bills and to answer questions on them. Although the procedure has been rarely used, it should be adopted and used by the Australian Senate.

In its legislative role, the Senate should deal with all controversial bills, referring them to committees for input from the public, except for genuinely urgent bills. It would also have to deal similarly with any non-controversial bills not dealt with in a similar way by the House of Representatives. The Senate should also insist on adequate time being available for a committee to consider a bill properly. If a minister from the House of Representatives refuses to appear before a committee to answer questions about his or her bill, the committee should set the bill aside until the minister *does* appear.

The most serious defect of the eight committees available for the consideration of legislation is that all are chaired by government party senators, and the government party has control of all of the committees through the chair's casting vote. Chairs tend to regard their office as a stepping stone to becoming a minister, and as a result many of them try to get government legislation through quickly, without any amendments if possible, an attitude quite incompatible with serious, detailed examination of proposed legislation. The attitudes of committee members on key issues are determined by party meetings, at which senators are outnumbered two-to-one by MPs. The only way to overcome this problem is to remove ministers from the Senate, so that

the efforts of senators would be devoted not to becoming ministers, but to improving the performance of the Senate as a legislature.

If there are to be no ministers in the Senate, the handling of government bills in the Senate should be done, by invitation, by ministers from the House of Representatives, although of course they would not be permitted to vote. Canada and the states of New South Wales and Victoria permit ministers to do this, but the power is rarely used.

Prevention of the by-passing of parliament

The Senate should negotiate with the government to ensure that all treaties are submitted to the Parliament for approval before their ratification, and that an act similar to that in Canada is passed to ensure that the Parliament is fully involved in decisions to commit the defence force to armed conflict or to a position of potential danger.

Delegated legislation

Unlike its handling of government bills, the Senate's examination (and, where appropriate, the disallowance) of delegated legislation is excellent. That is not to say that there is nothing that could be learned from some of the other parliaments. The Senate should press the government to adopt the Canadian model of community involvement in the drafting of its regulations, and to prepare impact analysis statements to accompany approved regulations. The Senate should also press the government to adopt some of the procedures being evolved in the Australian states for the systematic repeal of outdated delegated legislation, and also the New Zealand arrangements which permit the disallowance of a part rather than the whole of a regulation, if that is all that is needed.

Resolution of deadlocks over legislation

If the Senate continues to develop as a legislature, deadlocks between the two houses (or, more accurately, between the government and the Senate) over amendments or rejection of bills will become increasingly common. Many of these deadlocks could be resolved by negotiations between delegates from the two houses, a common practice in the United States, but some deadlocks will be intractable. The present method of resolving them—a dissolution of both houses followed, if the dispute is continued in the new Parliament, by a joint sitting of the two houses—simply does not work. The cause of the election is submerged in the election campaign, and it would be a foolhardy person who

assumed that the result of the election was a decision by the voters on the deadlock issue.

Only five of the eight bicameral parliaments have procedures for the resolution of legislative deadlocks. In all of them, the decision to attempt to resolve the deadlock rests with the government. In Canada, the government can appoint four or eight additional senators, a solution which would be quite inappropriate for an elected upper house. Three others—Australia, Victoria and South Australia—provide for the resolution of a deadlock by an election for both houses. This has proved to be a very unsatisfactory solution. Besides, it is not even an effective threat for the federal government to brandish at the Senate for, with proportional representation, nearly all the senators can be sure of re-election, provided they have kept the support of their party machines. The minor parties, too, who would have to have been part of the deadlock, would actually benefit from the dissolution of the whole Senate, for the quota for election would be nearly halved and their numbers would almost certainly increase.

New South Wales has potentially the best solution. It has provision for a referendum to resolve a deadlock over a particular piece of legislation, but the system is so ponderous that it is not really useful. What is needed is the prompt recognition of the existence of a deadlock and the availability of a prompt resolution of it through a referendum. A government will not opt for a referendum unless the issue is important and there is general community support, for referendums are often lost, and a defeat is politically embarrassing for a government.

Monitoring government administration

Turning to the question of the monitoring of government administration, the Senate has a comprehensive system of eight references committees, which are certainly prepared to tackle matters the government does not wish to have investigated. All eight committees have a non-government senator in the chair, and with the chair's casting vote, all have a non-government party majority. (In 1999, for example, six of the chairs were held by Labor Party senators, and two by Australian Democrats.) In the 1990s the committees were increasingly being used for political harassment of the government, which is valuable but which can be overdone. In particular the routine supervision of government activities should not be allowed to suffer. The committees must take much more interest in the annual reports of government business enterprises and other non-departmental government bodies, summoning the board or the chief executive to appear before them if there are any concerns. At the moment such bodies are virtually unsupervised by the Parliament.

It is an obvious cause of concern that in nearly all of the parliaments the government controls the level of support provided to committees monitoring the government. Only in the House of Commons at Westminster has a satisfactory system evolved. A House of Commons commission prepares the estimates, which are not subject to Treasury 'cash limits'. There is only one minister (the Leader of the House) on the commission. If there is fundamental disagreement between the commission and the Treasury it is resolved on the floor of the House when the estimates are voted, and British MPs have shown themselves willing to defy their whips on such matters. The Australian Senate should be prepared to behave similarly.

Forcing premature elections

The Senate has twice used its power to force a premature election by denying supply to the government, in 1974 and 1975. Although the Senate undoubtedly has the constitutional power to usurp the electoral college role of the House of Representatives in this way, there is nothing to be said in favour of its exercise. Various solutions have been tried to prevent upper houses forcing governments to premature elections by blocking supply. The House of Lords has had its power restricted so that it cannot reject or unacceptably amend a money bill. In Canada the Senate cannot block supply, because the government can grant itself supply under the Financial Administration Act, while in New South Wales the Legislative Council cannot reject or amend any bill dealing with the 'ordinary annual services of the government'.

There are objections to all three solutions. The definition of a 'money' bill in the UK Parliament is far wider than is necessary to prevent the Lords forcing an election. The Canadian system is a clear breach of the principles of responsible government. The New South Wales solution is excellent in principle, but the expression 'ordinary annual services' is not defined nor are the appropriations for such services presented in a separate bill.

The most effective method of preventing an upper house usurping the electoral college role would be to make the term of parliament fixed. There would then be no point in an upper house blocking supply if there *could* not be an election. It is just possible, perhaps, that an upper house might block supply, demanding that the government pass an artificial vote of no confidence in itself, and as a government cannot continue without a vote of supply (except in Canada) it might yield. If that is a serious concern, the best solution is that of New South Wales, although 'ordinary annual services' would need careful definition.

Length of sittings

There are two important reasons why the Senate has as yet failed to develop fully as a legislature, despite the gaping void left by the House of Representatives. The Senate sits far too infrequently—only half as many days a year as does the House of Lords—and as a consequence much work is rushed or neglected. The Senate should have much longer sessions, perhaps doubling the present number of sitting days, so as to complete its business in an orderly fashion. In the past the Senate has permitted its sitting patterns to be dictated by the government, largely to suit the convenience of ministers. Provided they can get their legislation through, their view seems to be that the less the Parliament sits the better. The House of Representatives provides political opportunities for the opposition, but at least that House is under government control. The last thing the government would want would be for the Senate, not controlled by the government, to sit for long periods while the House of Representatives was not sitting. Ministers in the Senate would be questioned on all aspects of government policy, and the opposition and the minor parties would have a tremendous opportunity to gain publicity.

Ministers in the Senate

Senate ministers are the second and more serious obstacle to Senate development. The task of a Senate minister is to get government legislation through the Senate with no delay, no alteration and no embarrassment, and to head off any awkward inquiries. They naturally do not welcome procedures in the Senate which would make their task more difficult. Nor is the opposition any more enthusiastic, for they hope to be in government themselves one day, and do not want any new restraints on their power when *their* turn comes.

The problem is that the aspirations of senators are skewed in the wrong direction, towards membership of the body they are supposed to be critically reviewing. The Senate will never be a fully effective legislature while it continues to provide ministers to the government. It is not only the presence of ministers which affects the performance of the Senate as a legislature. Senators from the major parties who are not ministers tend to shape their actions so that their leaders and colleagues will see them as loyal and effective party members who are worthy of promotion, and such behaviour is rarely compatible with being a legislator.

If ministers are not to be drawn from the Senate, it would be important that major legislative figures in the Senate be appropriately recognised, for if they are not given status and at the same time are

denied the possibility of executive power, the Senate will sink into impotence. The answer would be to give the chairs of major committees the status, salaries and rewards of ministers, for they are, or should be, at least as important. There would have to be some control on the number of senators who would receive such rewards. A figure of half the number of ministers in the House of Representatives would seem fair, for this is about the proportion of Senate ministers under the present system.¹⁰⁶

It is worth noting that in the United States the public profile, and the perceived political power, of the chairs of major congressional committees are much higher than that of most Cabinet ministers. If the positions of chair of the various committees in the Australian Senate were fairly spread among the political parties, one could reasonably expect a competent legislature. The chairs would owe their positions, not to which party was in power, but to their personal standing in the Senate.

The executive government

The size of the ministry has increased four-fold since federation. Typically about a third of the ministers come from the Senate, but they are not personally answerable to the House of Representatives. Many feel that the pool of potential ministerial talent in the Parliament is inadequate, but there is no possibility of bringing talented non-parliamentarians into the ministry, as is done in countries such as Sweden and the Netherlands. The Australian Constitution provides that a minister must be (or become within three months) a member of one of the houses of Parliament.

Of the twenty parliaments we are considering, only five¹⁰⁷ have a statutory or constitutional requirement for a minister to be a member of one of the houses of parliament. Yet in none of the fifteen parliaments where they would be free to do so have governments brought outsiders into the ministry, except as a temporary measure while a seat is found for a newly appointed minister. The failure of any of the fifteen parliaments to make use of this power stems in part from the belief that

¹⁰⁶ That would result in about ten Senate chairs receiving the rewards. As an example, it would seem appropriate that the chairs of the Regulations and Ordinances Committee, the Scrutiny of Bills Committee and the eight legislation and references committees should be so rewarded. (Each legislation and references committee would be divided into two sub-committees, one dealing with legislation and the other with references.)

¹⁰⁷ The five are Australia, New Zealand, Victoria, South Australia and Tasmania.

it would be contrary to the Westminster system. It is true that when Bagehot wrote in 1867, all ministers at Westminster were in either the Lords or the Commons. But, as Bagehot recognised, responsible government was then still evolving, and there have been substantial changes since his day; it is now unacceptable for the prime minister to be in the upper house, for instance.

Since the introduction of life peerages in 1958, it has been possible to bring an outsider directly into the UK ministry, to cover weaknesses or to recruit an outstanding individual. In Canada the prime minister can similarly appoint an outsider to the Senate, provided that there is a vacancy or one can be created by a resignation. A life peerage or a Senate position, both effectively granted by the prime minister, would certainly not be acceptable in the other parliaments, but they surely should be looking for alternative ways of achieving the same objective. The desirable requirements of ministers are their collective responsibility to the lower house and their personal answerability to that house. This personal answerability *to* the lower house is much more important than voting membership *of* that house.

Why then has none of the other parliaments tried to bring in outsiders? The answer lies in the aspirations of MPs. The chance of ministerial office is regarded as one of the spoils of electoral victory, and a prime minister or premier who brought in outsiders as ministers would have some very angry and disappointed MPs on his backbench. For that reason any attempt to amend the Australian Constitution to eliminate the requirement for a minister to be a member of one of the two houses would face implacable resistance from politicians (of both sides) and would certainly fail.

The only prospect of the change becoming acceptable is for the plunge to be taken by a government in one of the parliaments without a formal prohibition on an outsider becoming a minister. If such a minister clearly raised the standard of the Cabinet—and that would not be difficult—and at the same time it was demonstrated that responsible government did not disintegrate as a result of the appointment, the change might become acceptable. But such a dramatic step is unlikely.

The Governor-General

The position of the *de facto* Australian head of state, the Governor-General, is very anomalous. The powers of the office are not clearly defined, there is no security of tenure, and the selection and removal are effectively made by the prime minister. There have been problems in the past, and there will be in the future, unless the issues are tackled.

None of the other nineteen countries, states or provinces has given a lead in codifying the powers of the head of state. Only one has a solution to the problems of security of tenure and method of selection of the head of state. That country is of course the UK, but the solution adopted there would not be acceptable in any of the other nineteen parliaments.

In Australia, even when it was proposed to have a president to replace the Queen and her representative, the Governor-General, the powers of the president were not defined, but were left as they are in the existing Constitution. Because of the possibility that the president might actually use some of the extraordinary powers listed in the Constitution, powers which he is never intended to use, the republican model put to the voters included giving power to the prime minister to dismiss the president. Such an arrangement does not exist in any other republic.

Defining the powers of the head of state would be relatively easy, with one serious problem. The traumatic events of 1975, when the Governor-General dismissed the prime minister for not agreeing to ask for an election when the Senate was refusing to grant supply, have left deep party divisions on the issue. As things stand, a referendum on the powers of the head of state would founder on this issue. Similarly, it would not be possible to pass an amendment to the Constitution to remove the power of the Senate to block supply for the 'ordinary annual services of the government' (the New South Wales model). Such an amendment would be opposed on party lines, and would inevitably fail.

A fixed term for the House of Representatives would solve the problem, for then the Senate would lose any power to force an election by blocking supply. Once this was in place, the difficulty over drafting the powers of the head of state would disappear. The changes should be made when Australia makes the transition to a republic, which is inevitable though not imminent, for that is the moment when the attention of most Australians will be focussed on the Constitution and it will be the opportunity to fix the constitutional defects which have emerged in the past century. Referendums to amend the Constitution have been very difficult to pass in ordinary times, for the voters have shown themselves extremely conservative in their voting on such proposed changes. One of the reasons some people who favoured a republic voted against it in the 1999 referendum was that the model put to the voters missed the opportunity to bring the Constitution up to date, an opportunity which would not have come again if the 1999 model had been accepted.

It would be helpful if the Parliament could agree on the desirable powers of the head of state and then circulate them for discussion in the

community, but this is such an obvious stepping stone on the path to a republic that the pro-monarchists would do their utmost to block it, and would almost certainly succeed. Nevertheless when the transition to a republic is finally made, the powers of the president must be clearly and realistically defined.

The results of the changes

If all these changes were made, the system of government in Australia would have the same outward form as it does now, but it would operate very differently.

The role of the House of Representatives would be unchanged. It would continue to be the efficient electoral college it has been in the past. It would also continue to be the place where the government explains its policies and its proposed laws, though in the absence of a powerful and independent Speaker many important policies would continue to be announced outside the House of Representatives. Legislation 'by press release' would however continue to be controlled by the Senate.

The opposition would have the chance to question and criticise the government's actions, and if it chose, to put forward its alternatives. The quality of debates would be improved by adopting the Canadian procedure whereby there is a period at the end of each MP's speech when there can be brief questions and statements on points raised by the MP in his or her speech, with the MP having right of reply. There might be, though this is a forlorn hope, an independent Speaker. The committees of the House would conduct investigations into matters the government wished or was prepared to have investigated. The House of Representatives would have no significant legislative role on controversial bills, merely registering the bills the government wished to have passed, but with non-controversial bills (some 90 per cent of the whole) House of Representatives committees would conduct examinations, inviting public comment and investigating matters raised by the Senate Scrutiny of Bills Committee.

The control of delegated legislation would be ignored. This would continue to be left to the Senate.

The term of the House of Representatives would be four years, shortened only if no government possessing the confidence of the House could be formed. The term could be extended for a further year by a three-quarters majority of both houses if war or other commotion rendered an election highly undesirable. The term could be further extended if the instability persisted.

The whole of the Senate would be elected concurrently with the House of Representatives, but would continue to use proportional representation. Ending the bias in favour of the less populous states is desirable, but would almost certainly be impossible to achieve. Fortunately the consistency of voting patterns across Australia results in the Senate representing the national balance of political views with reasonable accuracy.

There would be no ministers in the Senate. The Senate would be the legislature. Ministers from the House of Representatives would, by invitation, attend the Senate to handle government bills for which they were responsible, but of course they could not vote. The chairs of the major committees would have the status and rewards of ministers. The chairs would be divided among the various parties on a pro rata basis, so that the chairs would owe their position, not to who was in government, but to their standing in the Senate.

Ministers from the House of Representatives would be available for a question time in the Senate on a roster basis, with the initial question given to the minister in writing, the minister making a prepared answer, and supplementary questions on the minister's answer being permitted until, in the opinion of the president, the subject was exhausted.

The Senate's critical examination of controversial government bills would be much more thorough than at present, and the Senate would have much longer sessions—possibly twice as many sitting days a year—in order to get through its business. Legislative deadlocks between the two houses would be resolved by meetings between delegates from the two houses, and if these failed the matter could be resolved by a referendum if the government so wished.

The Senate would continue its excellent arrangements for the control of delegated legislation, but there would be more consultation with community groups in the preparation of regulations, impact analysis statements would accompany approved regulations, and it would be permissible to disallow parts of regulations rather than just the whole regulation. There would also be systematic arrangements for the repeal of outdated regulations.

The Senate would continue with the excellent work done by the Scrutiny of Bills Committee, and the control of unreasonable delays in proclaiming bills passed by the Parliament.

The deployment of the defence force for warlike operations or placing units in positions of danger would also require parliamentary approval, on the Canadian model. All treaties would be submitted to the Parliament for its approval of their ratification by the government. The UN covenants and conventions on human rights which Australia has

ratified would be incorporated into domestic law, so Australian courts would make decisions on the contentious issues.

The Senate would also continue its useful work with investigative committees, keeping a closer eye on government business enterprises. It is to be hoped that the change in direction of the political aspirations of senators would reduce the amount of party electioneering on these committees.

The executive government would be chosen entirely from the House of Representatives, and the number of ministers (and departments) would be reduced, for having ministers in the Senate does inflate the size of the ministry. Although there is much to be said for bringing outsiders into the ministry, there is no likelihood of this happening in the near future; some other parliament will have to take the first step. The Cabinet would continue to control nearly all legislation, since its party normally controls the House of Representatives, where all government bills would originate.

How could the reforms be achieved?

In practical terms, how could these reforms be carried out? Some would require amendments to the Constitution, some would need acts of Parliament, while others could be done unilaterally by the government or the Senate, or achieved by negotiations between the government and the Senate.

By far the most important change would be the removal of ministers from the Senate. It is within the power of the government simply to cease appointing ministers from the Senate, but it would be important to put the change in the Constitution, for otherwise some senators would be constantly campaigning for the restoration of the possibility of ministerial office for senators and ignoring the development of the Senate as a legislature.

If the Senate became an independent legislature, not beholden to the government, its negotiating power would be greatly increased. It would have to persuade the government to present treaties to the Parliament for approval of their ratification, to involve the Parliament in the commitment of the defence force to warlike activities, to incorporate into Australian domestic law the UN covenants and conventions on human rights which Australia has ratified, to improve the arrangements for the production and disallowance of delegated legislation, to give the Senate reasonable control over the level of its own support staff, and to grant the chairs of major Senate committees the status and rewards of ministers. On the last, which might seem difficult to achieve, it should

be remembered that the Senate has to approve the allowances of ministers, which gives it considerable leverage.

Increasing the term of Parliament to four years, making the term fixed, and giving the House of Representatives the power to extend the term in times of national crisis, would all require changes to the Constitution. These should not be impossible. After all, the lower house of every state parliament except Queensland now has a four year term, and New South Wales has a fixed term. The power to extend the life of parliament at a time of national crisis is an obvious necessity, which the other three national parliaments already have. A change in the method of resolving a legislative deadlock from an election to a referendum would also require a constitutional amendment. Elections have so obviously been inappropriate as a means of resolving such deadlocks, and Australians are so used to referendums, that the change should not be too difficult to achieve.

The remaining changes are all within the control of the Parliament—when it has the will.

For that is the crunch. How are the reforms to begin? The urgent requirement is to recognise the Australian system as it really is, and not to continue to pretend that it is still the system described so eloquently by Walter Bagehot more than a century ago, a system that no longer exists in that form anywhere. The debate over republicanism is directing some attention to Australia's political institutions, but the debate is as yet unfocussed. Nevertheless the transition to a republic, if properly handled, offers a unique opportunity to make some other important parliamentary and constitutional changes.

The crucial first step would be the removal of ministers from the Senate. After that the other steps would follow almost inevitably, for the Senate is now a proud institution and would not accept obscure impotence. The transition to a republic, which is ultimately inevitable, will offer a unique chance to update our political system. We must seize it, for such a chance will not soon recur.

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