

## **Senate Occasional Lecture**

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### **TIME, CHANCE AND PARLIAMENT LESSONS FROM FORTY YEARS**

One of my predecessors, Rupert Loof, having retired in 1965 at the age of 65, lived to the age of 102 years. When he was in his nineties he was pursued by the National Library for their oral history program. He kept telling them that he would grant them an interview “in the fullness of time”. I thought that this displayed a lack of regard for posterity. Eventually he did give an interview, and it was extremely fruitful. I intend to show more respect for posterity, and certainly not wait for another 35 or so years. I thought that it would be useful at this stage to set down some reflections on the changes in the parliamentary institution over the forty years of my association with it.

With that perspective, it is possible to identify long-term trends which have an appearance of inevitability about them. It is also impressive, however, how many significant events were determined by pure chance, particularly the presence at crucial times of somewhat peculiar individuals. I am constantly reminded of the biblical quotation: “the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all”.

The most significant change over that period has been the end of the Westminster hegemony. When I first came here, every constitutional, parliamentary and procedural issue launched a bevy of appeals to the Westminster model. Whatever was allegedly done at Westminster was thought to be our infallible guide. Fortunately, those appeals often produced contradictory results. On one occasion, Gough Whitlam, no less, referred to the Australian Parliament as a British Parliament. He appealed to Westminster in two memorable situations, once to tell us that the Gorton government should resign if its budget was defeated in the Senate when the Labor Party voted against it, and once to assure us that budgets should never be defeated in the Senate. Regardless of the dispute, both sides invoked Westminster. How this situation came about is an interesting story. It was obvious to the framers of the Australian Constitution that they had chosen a very un-British system of government. One of the framers, Richard Baker,

later first President of the Senate, was very insistent that Australian governance should not be thought of as British, and that it should develop its own practices and conventions under the Constitution. While he remained in office he was quite successful in doing so, but by about 1920 the Westminster hegemony was well established. There were many historical and cultural factors that brought this about, which may be analysed in more detail at another time.

Nowadays invocations of Westminster are only occasionally made, and lack the air of authority they once had. We now appeal to general principles of governance and our own practices.

The most significant shift from the Westminster hegemony occurred in 1970 with the establishment of the Senate committee system. It is difficult to appreciate this now, because virtually every house of parliament has a system of standing committees. In many cases they are largely fake systems, Potemkin village systems, in that they do not assist the legislature to scrutinise and hold accountable the executive government, but are firmly under the control of government, principally through ministers determining the subjects of inquiry. Until 1979, Westminster itself did not have a comprehensive committee system, and that system is still criticised for the degree of control exercised by the government. The Senate committee system was and is different because it enables the Senate to conduct inquiries into matters independently of the executive government. A sage former senator, who will be mentioned again later, used to say that the subjects most worthy of parliamentary inquiry are in the areas where the executive government wishes to avoid any inquiry and would prevent if it had the power. The establishment of the Senate system equipped one half of our legislature with the ability to uncover information other than the information the government wished it to know.

How radical the establishment of the Senate committee system was may be gauged from the resistance to it. In 1955, another of my predecessors, the great Odgers, who was definitely one of those peculiar people in the right place at crucial times, won a scholarship to travel to Washington to examine the congressional committee system. He chose to go there, rather than to make the compulsory pilgrimage to Westminster, because he was aware of the non-British foundations of the Australian Constitution. On his return he composed a report, which was tabled in the Senate, recommending a comprehensive congressional-style committee system for the Australian Senate. He was tolerantly patted on the head by the powers that be, and told that his desire for reform was very commendable, but that he should be patient and prepared to hasten slowly. In reality, the powers that be had no intention of making any such change. They were content with the executive-dominated, Westminster system, in which they were very comfortable, and in which the nuisance role of the Senate was seen as an historical anomaly. Odgers did not give up, and after becoming Clerk in 1965 prepared another paper on the subject which was provided to the President of the Senate and the government. It was referred to the Cabinet, as the supreme decision-making body of the Parliament, the approval of which was necessary for any innovation. Thanks to the 30 year rule, we know the reaction of the real powers that be to Odgers' subversive efforts. The Secretary of the Department of

Prime Minister and Cabinet, Sir John Bunting, advised that Odgers' proposal would be "erosive of government authority", and would undermine sacred tenets of responsible government. I like to quote this memo because the illustrious secretary could not spell the word "erosive". While he could not spell, he knew best how to preserve the Westminster system. His correspondence subtly suggested that some sort of action should be taken against Odgers for exceeding his clerical role. Reading it, you wonder that Odgers remained in his job, given that the appointment was made at that time by the Governor-General on the recommendation of the government. Odgers was skating on thin ice.

In 1969, however, the time had come. It is well known that this was partly because of the presence of another of those peculiar characters, Lionel Murphy. He succeeded in convincing his party that the establishment of a committee system in the Senate was in the party's best interests and a desirable reform for it to pursue. This was an amazing achievement, given that the Labor Party was traditionally hostile to upper houses and comfortable with Westminster and the total power it tended to deliver to the executive of the day. It is not generally appreciated that Murphy, who was regarded as a member of the extreme left and a militant opponent of western foreign policy of the time, was actually an Americophile, if that is the right term. He was a great admirer of all things American, apart from their foreign policy, and particularly of the congressional system. He would have been quite at home on the left wing of the Democratic Party in Washington. Paradoxically, this tendency was only reinforced by the great foreign policy issue of the time, the Vietnam War. When I worked in the Parliamentary Library Murphy was a regular customer. He was always seeking transcripts of the latest hearings of congressional committees. In the absence of email and the Internet, considerable lengths were gone to to get these transcripts at the earliest possible time. What he was looking for were the latest exposés in those hearings of the failings of the conduct of the war. In a long series of hearings, those failings were relentlessly exposed. It was a great object lesson in the virtues of the congressional system. More importantly, it was extremely valuable for an Australian Opposition leader. No sooner had the Australian government taken up some position or loudly proclaimed some facts about the war than a congressional hearing exposed the position as fallacious and the facts as false. It was extremely embarrassing to be de facto part of a great empire when the legislature of the imperial government had more open processes of scrutiny than our own Parliament.

So Murphy promoted a committee system for the Senate. Odgers was asked to do a paper on the subject. He had learned the lesson of his experience in the 1950s and 1960s. He devised very modest proposals for committees on neglected and relatively non-contentious subjects. He avoided all references to the congressional model. In fact, he instructed his colleagues not to refer to his 1956 report and his 1965 paper, lest the powers that be were alarmed and aroused by the radical step they were being asked to take. Murphy was not satisfied. He told Odgers to "go for the big one". So a second paper was prepared outlining a comprehensive system of standing committees able to inquire into any subject. Still the pretence was maintained that it would not be a radical departure from Westminster, and innocuous

Westminster models, such as New Zealand and Canada, were cited. In effect, the whole proposal rested upon a mild deception.

The government, however, was under pressure from its own backbenchers in the Senate to enhance the chamber's committee role. They had been given a taste for committee work by a series of select committees appointed in the 1950s and 1960s, and at the same time were looking for a better method of dealing with the budget than asking questions of ministers in the chamber. The government put forward a proposal for estimates committees to conduct hearings into the estimates as an alternative to the committee of the whole. This proposal also involved going down the congressional road, because once public servants were brought before committees and directly questioned about government expenditure, there was no limit to the information that might be gathered.

Due to the presence of yet another of those peculiar characters, Liberal Senator Ian Wood of Queensland, who was famous for voting against his own government whenever he disagreed with its decisions, a very un-Westminster habit, both reform proposals were adopted by one vote, and so the Senate gained its committee system.

It is not generally known that this Senate committee system came close to being rendered ineffective in 1987. In that year, the Labor government, in office since 1983, was returned in a general election. There was an unexplained delay in the government putting forward the necessary motions to reappoint the committees. By this time enthusiasm for the free range committee system had waned. The powers that be had come to the conclusion that committees should be feedlot animals, kept under close control and supervision. Ironically, this may have come about partly because of the inquiries in 1984 of two Senate committees into the conduct of Mr Justice Murphy, as he had become, the first inquiries into the possible removal of a federal judge under section 72 of the Constitution. That again is another story. There were rumours that the government intended to nobble the committee system, and that some plot was afoot. When the necessary motions were finally put forward, the plot was revealed. The government had recently established a standing committee system in the House of Representatives, a system of course under the control of government through the medium of references to committees of subjects of inquiry by ministers. The motions for the reappointment of the Senate committees provided that their names and responsibilities would be changed so as to exactly reflect the House committees, and that the committees of the two Houses could meet together and perform their functions as joint committees. It was clear that the intention of this change was to replace the Senate committee system with a structure of joint committees under government control. Fortunately, there were some more of those peculiar characters who could see the plot and were ready to foil it. David Hamer, a Liberal senator from Victoria, and the source of those sage words about inquiries that governments would rather not have, rallied the majority of the Senate against the government's proposal. He was supported by Michael Macklin, a Democrat from Queensland with a keen interest in accountability of the executive, an interest which, he told me, won him no support whatsoever

in the electorate. When the motions were moved Macklin moved an amendment to the effect that the Senate committees could meet with their House counterparts as joint committees with the approval of the Senate. This would have meant that every joint meeting would require a motion moved in the Senate, with the possibility of debate about the merits of whatever subject of inquiry a minister had put forward. In the event, the joint meetings did not occur. Nobody had the energy or the perseverance to pursue the plot, and the Senate committee system resumed its former independence.

Committee scrutiny was greatly enhanced by the adoption in 1988 of procedures for the regular referral of bills to committees. It is now accepted that all significant bills will be subjected to committee hearings. This reform, by the way, was promoted by that same David Hamer.

Since that reform there have been many smaller accountability measures adopted, such as the procedure to allow senators to pursue in the chamber unanswered questions on notice.

The continuance of the Senate committee system has meant that one House of the Parliament has been able to perform the legislative role that the theorists of parliamentary government and the framers of the Constitution envisaged, and has been able to hold the executive government more accountable than would otherwise have been the case. The committee system has also reinforced a culture of independence in the Senate which goes back to the days of Richard Baker and which has been nurtured by long periods of non-government majorities and lack of government control of the chamber. A recent curious incident illustrates that culture. The New South Wales Legislative Council has had non-government majorities for many years, and has been very successful in imposing accountability on successive governments, in some respects more successful than the Senate. Recently, however, the Council was effectively closed down because ministers refused to attend, and by a good old Westminster custom, the House cannot function in the absence of a minister. The Council has previously been hobbled by the government exercising its power of prorogation to prevent both Houses meeting. The Senate does not have any such Westminster custom, and has guarded against the prorogation dodge by regularly empowering its committees to continue to meet after a prorogation. These curiosities are all part of the culture of independence laboriously built up since 1901.

More than ever before, independence in the legislature depends on the ability to obtain information that governments would rather conceal. Knowledge has always been power, but the management of information has become the key to government. The executive wants the public to receive only the information favourable to it, and strives to manage the release and the presentation of unfavourable information, and to keep much secret. A functioning legislature is essentially an instrument for breaking down that information management in the interest of the public's ability to judge governments. It is in this role, however imperfectly, that the Senate, with its committee system and its culture of independence, has performed.

At the 2020 Summit I suggested 20 parliamentary reforms, none of which was adopted by the government. Perhaps the most significant was for an independent body to finally determine government claims to keep information concealed from Parliament. It was the proposal most decisively rejected.

Unfortunately, independence in the legislature is not as appreciated as it should be amongst the public. We do not have, as they have in some of the countries we like to compare ourselves with, a public appreciation of the distinction between Parliament and government, legislature and executive. Australians still think of government and parliament as one and the same thing, as well they might given the rigidity of executive control of lower houses, and independent upper houses are still seen as something of an anomaly. Again, a recent but largely unnoticed development illustrates this. In our two great role models, the United Kingdom and the United States, there has been since 2003 a great deal of soul searching about the failure of their legislatures on the occasion of the commencement of the Iraq war. It is lamented that Parliament and Congress so readily went along with the war plans of their respective executives, and did not ask the questions that should have been asked and insist on the answers. In the United Kingdom this has led the Brown Government to commit itself to comprehensive constitutional reform designed to strengthen the Parliament against the executive, including a partial surrender of the war-making power. In the United States the perceived legislative failure had a great deal to do with the Democratic Party capturing both Houses of Congress and the subsequent change of administration. There have been doleful cries that never again must the Congress allow itself to be so led astray. The interesting point is that there has been very little such soul searching in Australia. Apart from the Australian Democrats, succeeded by the Greens, reintroducing their old bill to provide for parliamentary approval of warlike actions overseas, there has been very little attention given to whether the Parliament should be looked to to provide a solution to the perceived policy failure. Paradoxically, the Australian Parliament performed rather better on the occasion than its great counterparts, as I have pointed out to visitors from those countries: one House of our Parliament wanted other steps taken before agreeing to the commencement of the war, but was ignored.

While very positive changes have overcome the institution in those forty years, there have been significant failures to change or changes for the worse. Party discipline, which is the foundation of executive control of lower houses, is stronger than ever. If anything, it has been strengthened by the new techniques of spin doctoring and news management that governments have perfected. It is now the case, which it was not in the past, that a government party majority in the Senate means government control of the Parliament. It is an historically accurate statement that the Howard Government, with its Senate majority in 2005 to 2007, was the first government to control the Senate. Previous governments, especially non-Labor governments, lacked that control because they could not control their senators. During the time of the Fraser Government's majority in the Senate, from 1976 to 1981, there were up to twelve Coalition senators willing to vote against the government, particularly on

accountability issues. Due to their votes, the Senate's accountability role survived during that period. For all those years up to that time, we managed to get along with a Parliament that was half-functional, one House not functioning as a legislature but as a compliant tool of the executive, but the other House performing some traditional parliamentary roles because of that culture of independence. That independence is now entirely dependent upon a non-government party majority in the Senate, because in the future a government majority, even of one, will probably mean government control.

Apart from party discipline, the trends of modern politics have greatly strengthened the central power within parties in government. The PMO, not the Cabinet, is now the supreme governing authority of the country, and seems to have greater power than some ministers.

We still have one of the weakest legislatures of the democratic world, especially compared with our great and powerful friends. The Parliament here is under a degree of executive domination that would not be tolerated elsewhere, even at Westminster. Perhaps the ultimate stage in the degradation of the House occurred last September, when the government wanted to reject a non-government bill passed by the Senate. The Speaker made a statement supporting the government's position, and then a minister moved a motion to declare the bill "unconstitutional", and immediately gagged the debate. The House was not permitted to debate a matter supposedly relating to its own constitutional powers. This sort of thing is regarded as normal House proceedings. The only barrier to total parliamentary irrelevance is the system of proportional representation for Senate elections.

We have to be ever on our guard against so-called reform proposals that would simply exalt the concentration of power and make government less accountable. At the same time, we have to be aware that reforms that strengthen accountability are not likely to be easy. Criticism is always heaped on Queensland because of failures of governance there, criticisms recently stirred up again by the conviction of a minister for receiving large sums of money from various benevolent persons and the network of mateships again exposed by that incident. There is again a movement to establish an upper house in Queensland, now adopted as policy by the official Opposition. An upper house, however, would be useless if it were to be dominated by the same party as the government, with the same party discipline and centralised control that have now become normal. Before embarking on an upper house, it would be necessary to ensure that it contained members with an interest in accountability and not simply in rotating in and out of office. It would be difficult to bring about that situation by any constitutional design. Reform of political parties, a topic dear to the heart of one of our departed senators, Senator Andrew Murray, would be more likely to lead to a better functioning Parliament. That, however, would be a really difficult reform.

We are now told that we live in an age of crises, economic and environmental. In crises the greatest danger comes from those who claim to know all the solutions and who demand immediate implementation of them. Such people are likely to be found holding executive

office. The greater the crisis, the more likely it is that mistakes will be made in attempting to deal with it, and the greater the need for scrutiny of proposals based on sound information. The legislature should provide that scrutiny. The Australian Parliament cannot be well equipped to provide that scrutiny when one House is not permitted to make its own inquiries into significant issues and proposals, and the other struggles to make up the deficiency against executive resistance. Parliamentary reform is never more necessary than in this age of crisis, and further subordination of Parliament never more perilous. The proponents of openness and scrutiny should be more militant than ever before.

Harry Evans