

Parliament: An Unreformable Institution?

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The Senate Department has been conducting these occasional lectures since 1988. The very first lecture in that year was on the Revolution of 1688. Little did we know then that we were living in a revolutionary era all of our very own. Since that time, we have had a long line of very distinguished lecturers. You might say, 'The long line comes to an end here', but I hope this one will not be the start of the decline of the series.

There are two reasons for this lecture: having on so many occasions introduced other lecturers, I had a strong inclination to get in my two cents worth, and secondly, it is very difficult to get speakers to come to Canberra in the middle of winter. I am tempted to use the Shakespearian line 'Now is the winter of our discontent . . .', which is somewhat appropriate because the subject of this lecture is the discontent with the workings of the parliamentary system of government over the last thirty years or so, and the outcome of that discontent.

By the parliamentary system I mean the system whereby government is carried on by a ministry formed by the majority party in the lower house of the parliament, the system which has been inherited from the United Kingdom by many other countries, and particularly by the 'old Commonwealth' countries, Australia, Canada and New Zealand. In all of those countries the workings of the parliamentary system have been perceived to have similar problems, and the discontent with its operations has led to a parliamentary reform movement, or movements, which have waxed and waned over that period. In recent times those movements have undergone a significant change. The purpose of this lecture is to examine the perceived problems with the institutions, the parliamentary reform movement and its manifestations and significance, and suggest some conclusions, particularly with reference to Australia.

The fundamental reason for the discontent with the parliamentary system to which I have referred, is the tendency in all those countries towards stronger and stronger executive government control over parliament through the operation of the party system. Executive domination of parliament has been the great theme of the parliamentary reform movements. The phrase which catches this theme is that parliament has become a 'rubber stamp'. It is perceived that there has been a significant change in the role of parliament, in that it has ceased to perform its traditional role as a check on executive government, in both senses of scrutiny and restraint, and has become a mere tool of those wielding the executive power. Instead of executive governments being responsible to parliaments, parliaments have become responsible to executive governments. The body which is supposed to be scrutinised and controlled by parliament has actually come to control the body which is supposed to be doing the scrutinising and controlling — a reversal of roles.

The reason for this change, it is universally agreed, is the rise of the modern political party, a highly cohesive and tightly disciplined organisation, the aim of which is to

ensure that all its members in parliament always vote with the party and, when the party is in the majority, always support the government formed by the party. The executive government was supposed to be responsible to the lower house of parliament. The modern political party has grown up as a device for avoiding that responsibility, to make sure that the executive is responsible to the party and not to the parliament, and that the parliament, particularly the lower house, never administers that responsibility. Members of parliament no longer see themselves as the scrutineers and controllers of executive power, but as either the supporters of the government or the supporters of the would-be government. This system of two highly disciplined parties, competing for the executive power and turning parliament into a mere electioneering forum, is no more than one hundred years old, having emerged in the United Kingdom in the 1880s and gradually spread to the colonies in the early years of this century. The parliamentary reform movements to which I have referred are essentially about what to do to correct this problem of the reduction of parliament to a rubber stamp and the degeneration of its scrutiny and control function.

It is very easy to be cynical about the demands for parliamentary reform, as it is about the workings of parliament itself. A Canadian correspondent of mine, who is a long-time student of parliamentary matters, observed that when the government had a secure and compliant majority in the Canadian House of Commons, people complained about parliament being a rubber stamp, and when there was a minority government and parliament operated as the UK Parliament did between the two reform bills, as the scrutineer and controller of the executive, people complained about instability of government. There is a good deal of truth in this, but underlying the demands for parliamentary reform are very real problems with parliamentary institutions as they now operate.

It could be said that the parliamentary reform movement began at the same time as the modern party system. No sooner had Mr Gladstone won the 1880 election and the modern two-party system was established, than authors such as Sir Henry Maine were warning of the dangers of the control of parliament by latter-day Napoleons claiming a popular mandate and using their party majority to overwhelm all opposition.¹ The discussion and agitation for parliamentary reform, however, was particularly a phenomenon of the 1960s and 1970s. Starting in the late 1950s, there was assembled in the UK a vast literature on the subject of parliamentary reform, beginning with diagnoses of the ailments of the 1950s House of Commons and extending into elaborate programs of specific reforms. Probably the high-water mark of the movement occurred in 1964 with the publication of a book entitled *The Reform of Parliament*², by Professor Bernard Crick, a professor of political science who became a high priest of the movement, and whose program became the established orthodoxy. Discontent with parliament was by no means confined to radicals, and some of the most devastatingly critical and significant contributions were made by the conservative Lord Chancellor, Lord Hailsham. It is not true, by the way, that he became a parliamentary reformer only when there was a Labor government in office, and some of his most trenchant observations were made after some years under Mrs Thatcher³, which may be significant.

1. *Popular Government*, 1885. Also speech by Lord Salisbury, in A. Beattie, ed., *English Party Politics*, vol. 1, 1660-1906, 1970, pp. 157-8.

2. 2nd ed., 1968. The prefaces and the first chapter refer to some of the other literature.

3. 'Elective Dictatorship', BBC address, published in pamphlet, 1976. 'The role of an Upper Chamber in a modern Parliamentary Democracy', *The Parliamentarian*, October 1982, p. 290, esp. at 293.

The demand for parliamentary reform spread from the UK to the dominions, as they were then still called, extremely quickly, and it is easy to identify a parliamentary reform literature and agitation in each of the countries I have mentioned by the mid-1960s. Of all those countries, the movement was the weakest in Australia, a matter to which I shall return, although it was still much in evidence. I recall reading in 1965 or thereabouts, an essay by a well-known member of the House of Representatives, H.B. Turner, in which he described the problem of executive control of parliament and set out his own remedies, particularly an expanded committee system.⁴ Perhaps the most conspicuous proponent of parliamentary reform in Australia was the late Professor Gordon Reid, who subsequently became Governor of Western Australia, and whose writings may be taken as representative of the parliamentary reform literature in Australia.

In the parliamentary reform movements there were two schools of thought: those who believed that the problem of parliamentary government could be rectified only by radical constitutional or institutional changes, and those who thought that moderate institutional and procedural changes could help to ameliorate the situation.

The radicals tended to consider that the parliamentary system contained a fatal flaw in the combination of the legislative and executive powers in the cabinet, and that supervision of the executive by the legislature could not be restored except by major changes to the institutions of government, generally speaking involving some greater separation of the executive and the legislature. This school of thought often manifested itself as a hankering after the American system of the separation of the legislative and executive branches. It was reflected in the editorials of *The Economist* for some years, if not in recent times.⁵ It is not generally known that the then Leader of the Labor Party, Mr Arthur Calwell, in a speech in the House of Representatives in 1965, said that the parliamentary system was hopeless and that Australia would have to embrace a presidential/congressional system⁶; this may have been an expression of frustration rather than his considered view of the matter.

The dominant school of thought, however, was that of the moderate procedural reformers. They thought that the problem of parliament failing to supervise or control the executive could be at least partly overcome by modest and piecemeal procedural reforms. This was the dominant view in the 1960s and 1970s. In his seminal work, Professor Bernard Crick made much of his avoidance of radical institutional changes, in which category he included, for example, proportional representation. His program involved equipping the House of Commons with the procedural means of better scrutinising the executive.

The great remedy which nearly all parliamentary reformers embraced was an expansion and enhancement of the parliamentary committee system. This was the one measure which was adopted by virtually all shades of opinion, from the most radical to the most moderate. It would be no exaggeration to say that the whole parliamentary reform movement was a movement for parliamentary committees. A comprehensive, subject-specialised, standing committee system for the House of Commons was the centrepiece of Crick's program. Expanded committee systems were

4. 'The Reform of Parliament', *Australian Quarterly*, December 1965, pp. 56-64. Also 'Backbenchers', *Current Affairs Bulletin*, 18 April 1966, which also contains a bibliography of reform literature.

5. 'Blowing up a Tyranny', *The Economist*, 5 November 1977; 'The British Constitution, cont', 11 May 1991; 'Time to Change', 6 July 1991.

6. *House of Representatives Debates*, 14 October 1965, pp 1818-19

seen as the means of redressing the balance between parliament and executive. They would provide parliament with the procedural machinery to scrutinise executive activities more effectively and to exert a greater influence over legislation and administration. 'Get the business of parliament into committees', was the cry, 'and there the stranglehold of the ministry will be weakened, the business will be dealt with in a more parliamentary fashion and the government held more effectively accountable'.

This remedy was not only propounded in the literature in all the countries about which I am speaking, but was adopted as a practical measure in various guises, at one time or another. After a period of experimentation with various kinds of committees, the British House of Commons established a comprehensive committee system, one of the first measures of the then newly-installed Thatcher government in 1979. The Canadian House of Commons and the New Zealand House of Representatives strengthened and enhanced their systems of committees in the 1960s and again in the mid-1980s. Also after a period of experimentation with select committees, the Australian Senate established a comprehensive standing committee system in 1970. It was a remarkable instance of the way in which practical measures are influenced by the prevalence of an idea whose time appears to have come. Accompanying the establishment or improvement of the committee systems were many other procedural measures which can also be traced back through the literature of the parliamentary reform movements.

What was achieved as a result of this spread of reform measures? It is generally agreed that the expansion of committee work has improved the performance of the various parliaments as monitors and scrutineers of policy and administration, and that the committee systems have done a great deal of good work. It is fairly clear that all of the parliaments concerned perform better in this regard than their predecessors of the 1950s. Contrary to the expectations of some of the more optimistic reformers, however, not much of a dent has been made in executive government control over parliaments, particularly lower houses. There may have been a minor shift in the balance of power between the legislature and executive, but everywhere the initiative in policy and legislation still rests very firmly with the executive, and the influence of legislatures as such is marginal.

Perhaps because the balance has not radically changed, discontent with parliamentary institutions has not gone away. On the contrary, there has been a noticeable radicalisation of the parliamentary reform movements and a tendency for reformers to move towards radical constitutional and institutional changes. There has been a shift to a view that parliament is unreformable, and that it is necessary to go over parliament's head, so to speak, to the people and the constitution. This radicalisation of the reformers is apparent in all countries, but with variations which are significant.

It is ironical that this phenomenon of the radicalisation of the reformers is most noticeable in the UK where, of all places, the parliamentary reform movement had the greatest success. It would appear that the committee system which was established in the British House of Commons has been the most successful of all. The committees have now become a conspicuous and important part of the parliamentary and political landscape. Their inquiries appear to be nearly always topical and on important subjects. Their success may be measured by the amount of trouble they cause the government, and that is very significant indeed. They habitually inquire into matters which the government would prefer to keep under cover, and are often present in great political crisis. The most recent example of this was the way in which the Social Security Committee was able to pursue the matter of the Maxwell pension

funds and act as a focus for the concerns about superannuation to which that affair gave rise. There is now an extensive literature analysing the work of the committees⁷, and it is difficult not to feel a certain admiration for what they have achieved when one goes through that literature.

Whether there is any connection between the establishment of the committee system and the noticeable decline in government control over the House of Commons is a moot point; that decline appears to have begun in the 1970s but to have been accelerated by the committee system. Although a government with a reasonable majority still has a very strong hold over the House, there has been a notable increase in the number of occasions on which the House does not do what it is told. This weakening of executive control has been chronicled by Philip Norton, one of the moderate parliamentary reformers.⁸ The most recent manifestation of the Commons kicking over the traces was the election of Betty Boothroyd as Speaker; apparently the government took note of past hints and kept right out of the matter. As for the House of Lords, its praises as a non-partisan restraint on government have been sung in many places, and a constitutional author recently suggested that, as the Lords is now a restraint on governments of both parties, contrary to the demands of reformers over many years it should be left as it is.⁹ It would be a great irony if that view prevailed and people came to the conclusion that the only way to get a properly functioning house of parliament is to keep the old House of Lords.

Notwithstanding this apparent improvement in parliamentary performance, the parliamentary reform movement in the UK has become very radical and more vociferous. The reformers have turned to fundamental constitutional and institutional reforms as the solution to the perceived problems of the system of government. It is not possible even to dip into the literature on government and politics in recent years without coming upon programs calling for a written constitution, an elected second chamber, a bill of rights and a federal system, with provincial parliaments for Scotland and Wales. Much of this agitation has to do with Britain's membership of the European Community: that has made many Britons feel that their old constitution is out of date compared with those of their neighbours. The jurisdiction of the European Court has greatly added to the demands for a domestic bill of rights, so that constitutional rights cases will be heard in Britain rather than Strasbourg. While this is a significant factor in constitutional agitation, it is easy to see that the more radical reform movement of the late 1980s and 1990s is a direct descendant of the earlier, more moderate movement. Apart from anything else, it has much the same membership: Bernard Crick announced in 1989 that the earlier reforms which he had so successfully championed were largely a waste of time and that more radical constitutional changes are now required.¹⁰ There is a body known as Charter 88, formed at the time of the tercentenary of the Revolution of 1688, which advocates wholesale constitutional change starting with a written constitution.¹¹ The program of the reformers has found its way into the platform of the Labor Party, which went into the last election committed to an elected second chamber and some sort of federal

7. For example G. Drewry, ed., *The New Select Committees: a study of the 1979 reforms*, 2nd ed., 1989; also 'Select committees: progress report 1989-90', *Contemporary Record*, April 1991, pp. 29-30.

8. *Parliament in Perspective*, Hull University Press, 1987. Also 'No to a new constitution', *The House Magazine* (UK), 20 May 1991, p.14.

9. R. Brazier, *Constitutional Practice*, Oxford, 1988, pp. 220-3.

10. 'Beyond parliamentary reform', *Political Quarterly*, Oct-Dec. 1989, p.396.

11. R. Holme and M. Elliott, eds, *1688-1988: Time for a New Constitution*, Macmillan, 1988.

system. Recently I was visited by a Labor peer who had come to look at an elected upper house to see how one might function with proportional representation in the UK. I do not know whether he went away enlightened or frightened, but he found it interesting because, as he said to me, 'we might be in office and we might have to put one in place; people will hold us to it'. The result of the last election may postpone any result of this constitutional fermentation, but it is a fairly sound prediction that it will be a postponement only. The majority of judges and lawyers now accept at least an incorporation of the European Convention on Human Rights into the domestic law of the UK.¹²

Turning to Canada, we find nothing less than the unravelling of the whole country. The constitution and the whole system of government has been thrown into the melting-pot in the most remarkable turn of events in any of the countries under consideration. It is obvious that the main cause of this is the problem with Quebec.

The collapse of the Meech Lake Accord on constitutional reform, brought about by the demands of Quebec for special status and the refusal of some other provinces to accept such a status, is obviously the major factor and the major difficulty in the constitutional deliberation process which is still going on. It is also fairly obvious, however, that discontent with the performance of parliament and a continuation and a radicalisation of the parliamentary reform movement has been a major ingredient in the current situation. In particular, a constant theme which runs through the literature and agitation on constitutional change is discontent with the performance of the House of Commons and the appointed Senate. The enhanced committee system of the House was not a great success; the committees acted like miniature Houses in a way in which that phrase was not intended, because the party whips exercised rigorous control over their membership and activities. The poor performance of the committees is a recurring theme in the remarkably strident attacks on the House of Commons, which is seen as something even less than a tool of government of the day. As for the Senate, the replacement of that body with some sort of elected second chamber has been close to the top of all reform agendas for over ten years. The less populous provinces, particularly the western provinces, feel a great sense of alienation from the political system, which they regard as dominated by Ontario and Quebec, and they attribute this to the swamping of their representatives in the House of Commons. The principal demand from the western provinces has been for what they call a 'Triple-E Senate', a Senate which will be elected, equal and effective. They have demanded equal representation in a directly elected Senate which would have sufficient power to correct the imbalance in the House of Commons.¹³ This has obvious significance for Australia, to which I will return. In recent months the federal government has drawn up its preferred constitutional change package, and an elected Senate is one of its principal proposals, although questions about composition and powers are only vaguely answered. A few days ago it was announced that the government had capitulated to the demand for equal representation of the provinces in the Senate.¹⁴ A significant feature of the constitutional discussion is the recognition that the new constitution should have the authority of adoption by referendum. It can be predicted with considerable confidence that there will be radical constitutional changes in Canada because there is nowhere else for the country to go.

¹². *A British Bill of Rights*, Institute for Public Policy Research, Constitution Paper No. 1, 1990. Also K.D. Ewing and C.A. Gearty, 'Civil liberties: decline in 1980s', *Contemporary Record*, April 1991.

¹³. Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: reform of Canada's Senate*, March 1985; also R. White, *Voice of Region: the long journey to Senate reform in Canada*, Dundurn, 1990.

¹⁴. 'Premiers break unity log-jam', *The Globe and Mail*, Toronto, 8 July 1992.

When one talks to New Zealanders about their parliamentary system, two observations keep recurring. One is that they are closest of all to what Lord Hailsham described as the elective dictatorship, with no written constitution, no entrenched rights, no second chamber and no provincial governments. There are many New Zealanders who claim to lie awake at night worrying about the fact that nothing stands between them and the unlimited power of a majority of the House of Representatives. The other frequent observation is that the select committee system of the House is meant to be a substitute for a second chamber. On paper the committees look impressive. They are very active, most bills are referred to them, they habitually take evidence from affected groups and interested members of the public on legislation, and legislation is frequently extensively amended in the course of their deliberations. Governments still appear to have the final say, however, even on the committees, through their party majority. The home-grown reformers are certainly not satisfied with the system, and radical criticism of parliament and the system of government has grown noticeably in recent years.¹⁵ It does not seem to have been satisfied by the measures of the National government or by its noticeably weaker party discipline. I have a New Zealand correspondent who writes on parliamentary matters and who habitually likens the House of Representatives to its Albanian counterpart, which must be at least a mild exaggeration.¹⁶ Since the revolution in Albania he will no doubt have to find a new analogy. There have been strong movements in recent times in favour of an elected second chamber of some sort, and of the election of the House of Representatives by proportional representation. The National government, before its election, flirted with both of these ideas, and decided to hold a referendum on proportional representation, which is due later this year. It is difficult to believe that the existing parliamentary system will emerge intact from this period of constitutional agitation.

Looking at Australia, it is found that most of the parliamentary reform measures have been concentrated in the Senate, with the establishment of the standing committee system and, in more recent times, the enhancement of the scrutiny of legislation through the establishment of the Scrutiny of Bills Committee, and the new procedures for the reference of bills to committees. A conspicuous feature of Australia's recent history has been the diversion of reform demands into non-parliamentary channels, and the establishment of a structure of non-parliamentary safeguards and institutions which are still the subject of intense foreign interest. I refer particularly to the freedom of information legislation, the overhaul of administrative law and the establishment of the administrative appeals jurisdiction through the Administrative Appeals Tribunal, the enhancement of other review mechanisms, and the establishment of a host of other institutions such as independent prosecutors, independent commissions against corruption, criminal justice commissions and so on. The establishment of these institutions has put Australia well ahead of other countries in this field, and it could be said that, of the four countries under consideration, Australia has exhibited the most radical changes in its system of government, through purely legislative and non-constitutional means. The parliamentary reform movement, however, remains fairly strong; nearly everyone who writes about parliament is a reformer, and the literature is full of the compulsory lamentations about the party system and executive government dominance. The pace of change in

¹⁵. The *New Zealand Law Journal* had a series of articles on constitutional reform: 'A second chamber for the New Zealand Parliament?', January 1988; 'Constitutional arrangements', October 1990; 'Electoral reform', November 1990; 'A second chamber', December 1990; 'The form and powers of a new second chamber of Parliament', January 1991.

¹⁶. T. McRae, 'National's upper house plans need rethinking', *National Business Review*, 17 April 1990.

parliamentary procedures has quickened noticeably in the last few years, and undoubtedly will not slow in the near future.

The conspicuous difference between Australia and the other three countries, however, is that there has been no real radicalisation of the parliamentary reform movement into an agitation for changes to the fundamental institutions of government. It might be argued that the recently-revived republican movement provides some evidence of a demand for fundamental changes, but, on the contrary, the agitation of the republicans is clear evidence of the absence of a demand for changes to the basic institutions of government. The republican movement, following the line taken by its principal academic proponent, Professor George Winterton, is very anxious to convey that it aims only to replace the head of state with some sort of indirectly elected presidency which would amount to a governor-general without the crown.¹⁷ The republican literature stresses that the two Houses of the Parliament and the basic structure of the Constitution would be left alone. This may be merely a tactical line, and may not reflect the real views of a good many members of the movement, but even as a tactical line it is strong evidence of the absence in Australia of any widespread demand for radical changes to the basic institutions of government, and particularly to the Parliament.

It might also be contended that this is another example of Australia having not completely caught up with the overseas intellectual fashion, which will arrive and gain a hold on these shores just as it is weakening in other places. This might be so if one could dismiss the constitutional agitations in the other countries as merely the latest preoccupation of the 'chattering classes'. This, however, is clearly far from a sufficient explanation of the discontents which have arisen in those countries. They clearly reflect real problems affecting real people. In the UK the inhabitants of the provinces feel burdened with the centralisation of Whitehall, and people caught up in the toils of government have real frustrations with the seeming immovability of the system and the absence of clear legal remedies except through the institutions of the European Community. In Canada the alienation of the smaller provinces, which has given rise to the demand for an overhaul of the Parliament, is clearly a major political factor to be reckoned with. In New Zealand there is a real sense of frustration with the system whereby a government winning forty-odd percent of the vote can virtually instantly dismantle all the economic and social measures put in place by the party which won the forty-odd percent in the last election, and the ghost of the Muldoon Government, with its close regulation of the economy, hangs over the system. These or similar factors are simply not present in Australia in anything like the same strength.

This leads to the major significance for Australia which I would draw from the radicalisation of the reform movements in the other countries. The most striking feature of those reform movements is that they are demanding the very institutions which Australia already possesses: written constitutions with the authority of popular approval, elected second chambers as brakes on the powers of governments with entrenched control of lower houses, constitutional and legislative safeguards against excessive executive government power, and real federal systems. The demand by the alienated provinces of Canada for equal representation in an elected second chamber should demonstrate how much that institution has contributed to Australia's stability without our really being aware of it.

¹⁷ G. Winterton, *Monarchy to Republic: Australian Republican Government*, Oxford, 1986, Chapter 7; also his model constitutional amendment bill and introductory article in *The Independent Monthly*, March 1992.

The significant thing about these reform movements as I have characterised them is that they do not really have any new ideas. The ideas they are propounding are old ideas of the last century. I maintain that that is because in government there are very few new ideas. In many of their aspects the reform movements are a rediscovery of the liberal constitutionalism and the constitutional devices which were propounded in the last century. This may be seen as part of a general cultural phenomenon of the present era. The first eight decades of the 20th century were something of a mini-dark age politically, and the mini-renaissance which is now taking place is a rediscovery of political principles formulated in the 18th and 19th centuries. This is clearest in relation to Eastern Europe where, as some commentators have suggested, there has been what might be called a great leap forward into 19th century liberalism. A Russian academic visited me a year or so ago and somebody said to him, 'Who was the greatest Western author who influenced your recent revolution?' He answered in a half-ironical tone: 'John Stuart Mill', which I think characterises the nature of the revolutionary changes that we are now going through, a rediscovery of principles of previous centuries and a rediscovery of the validity of those principles. The same phenomenon is evident in the West.¹⁸

In this situation, the fact that Australia has preserved intact a constitution framed in accordance with the principles of late-19th century liberalism and constitutionalism, puts it ahead of the other countries we have been considering. Australia already possesses those institutions which they are now seeking to establish or revive. The allegedly out-of-date character of the Australian Constitution is actually an advantage. To some extent this is due to our founding fathers being cleverer than theirs. The people who drew up our Constitution did not stick with the Westminster model as it had been handed down to them; they were willing to adopt institutions and ideas from elsewhere, to draw on the radical liberalism of the 19th century and the institutional remedies that were propounded by that school of thought. The determination of the framers of the Canadian and New Zealand systems to follow the British pattern as closely as possible and avoid such things as genuine federalism and elected second chambers can now be seen to be a serious mistake in need of rectification. In large part, however, credit is due to the relative difficulty of changing the Australian Constitution, which has meant that we have preserved intact the very institutions of 19th century liberal constitutionalism which they have lost and are now painfully rediscovering.

This is not to say, of course, that constitutional and institutional improvements cannot be made in Australia, but it does mean that we can afford to eschew fundamental constitutional changes and concentrate upon improving the operation of the institutions we already have. In the absence of any real demand or need for changes to the basic institutions, we can afford to be 1960s-type moderate parliamentary reformers, seeking modest institutional and procedural adjustments to ameliorate the difficulties to which the parliamentary system gives rise. In so doing we can actually adopt some of the institutional and procedural changes which have worked in other places.

There are several such measures which the Australian Parliament could adopt to improve our system. To give a simple example, in the UK House of Commons not only do the party numbers on committees reflect the party strengths in the House, but the chairmanships of the committees are divided up in a similar way. This is probably a reason for the relatively impressive performance of their system. In Australia the

¹⁸. The 20th century has contributed nothing radically new to political thought or practice, except totalitarianism. To continue the Renaissance analogy, thinkers like F.A. Hayek and Karl Popper may be considered to be our Petrarch and Boccaccio, leading the way in a revival of the lost learning.

chairmanships of committees are held by government members and they tend to be seen as government jobs. It could greatly improve the operation of the committee system if we adopted this device of sharing the chairmanships. The same principle could well be applied to other parliamentary offices, including those of the Presiding Officers and their deputies.

One area in which the Australian Parliament has been relatively backward is the consideration of legislation in committees, which has great potential to improve the scrutiny of legislation as well as save time in each House. There is a great deal of potential for expansion in this area in the Australian Houses, building on the tentative step taken by the Senate in 1989 and 1990. The most important advantage of this proposal is that it allows an expansion of public participation in law-making.

Another area in which the Australian Houses have been relatively backward is in time management. This means not only management by the Houses of their available time but better management by the executive government of its legislative program. No other houses are asked to pass so much legislation in such a short time, and no other houses put up with such a lack of appropriate information about the government's program. There is great scope for better organisation in this area.

One of Australia's great strengths is the highly developed system for the technical scrutiny of legislation, through the two Senate legislative scrutiny committees. This is also a feature of the Senate which foreigners frequently come to study. A recent report by a House of Lords committee, for example, seeking to improve the scrutiny of legislation in that House, drew heavily on the Australian experience.¹⁹ In accordance with the principle of building on established strengths, useful work could be done in this area, for example, by strengthening the links and coordination between the various committees and with expert bodies, such as law reform commissions, concerned with legislation.

There is already occurring, mainly through amendment of legislation in the Senate, a considerable expansion of the parliamentary control over delegated legislation and quasi-law made by the executive government. There is great scope for improving parliamentary control over legislation and administration in this area. This is also an Australian strength on which we can build. These sorts of reforms will not remove the control of lower houses by governments, but will strengthen the institutional arrangements we already have which ameliorate that control.

This is the lesson which I would draw from this little essay in comparative government. Of all the countries which adopted the so-called Westminster system, Australia, by amalgamating it with the kinds of safeguards favoured by 19th century liberal constitutionalists, ended up with probably the most durable and soundest version. By the kinds of improvements I have mentioned a fundamentally sound system can be made better, and can continue to provide an example to other countries.

Questioner — Do the new British House of Commons committees have a significant influence on legislation? Are bills referred to them, for instance? Does the executive take any notice of them?

Mr Evans — Bills are referred to them only on an ad hoc basis at present, and there is a strong move to refer other bills to them. As you probably know, the British have

¹⁹. Select Committees on the Committee Work of the House, HL 35 of 1991-2.

strange things called standing committees which look at legislation. They are not like our standing committees; they just do what we do in the committee of the whole. They virtually always vote on party lines, although government defeats in standing committees are not unknown on particular pieces of legislation. But there is a move to send legislation off to the specialised select committees. They have dealt with a number of bills and, like our Senate committees, whenever they get hold of a bill they almost invariably change it quite extensively, and people think that they have done a fairly good job and there ought to be more of it. If that happens, the committees will impact in a very significant way on legislation, I believe. Government control over legislation is much less rigid there than it is here anyway. Governments do not expect to get their legislation through intact. They certainly do not expect to get all their legislation through intact as they do here. A certain amount of amendment of legislation goes on anyway. But if these committees become more active, I think there will be a very significant impact on legislation.

Questioner — I have two questions on Australian reform. I want to know what the status is of the call for a bill of rights as part of your Constitution and also whether you would have to radically revise the Westminster system to have any mechanism where the minority party in power could also introduce legislation so that there would be more of a bipartisan approach to some of the debate.

Mr Evans — Bills of rights are high up on the agendas of the reformers in the countries that I have mentioned, including, as I said, in the UK. There is a very sound intellectual case that can be made against bills of rights in so far as they transfer legislative power to judges. You get judges law-making to a far greater extent than they do now. Some people are frightened by the example of the United States, where important public policy questions, such as abortion, are decided by the Supreme Court. While an intellectually respectable case can be made out against bills of rights, it is significant that bills of rights feature high in the agendas of the reformers in those countries. The Canadians adopted one of sorts; that will no doubt be built into their new structure, whatever their new structure is. But people do feel that governments are too powerful vis-à-vis the individual, that individual rights are insufficiently safeguarded and that bills of rights and judicial remedies will be a solution to that problem. It is probably inevitable that every country will end up with a bill of rights of some sort. The British have already acquired one through the European Convention. It is inevitable that they will end up with that in their domestic law in one form or another. I think the same thing will happen in other places. Even though one can make out a case that it is not a very good idea in some respects, it is an idea which will come, I am sure.

In regard to the other question about opportunities for non-government people to participate in legislation, that has been the most marked feature of the development of the Westminster system. Governments have insisted on keeping total control over legislation. They want their legislative program enacted, preferably without changes at all, and they do not want anybody else's legislative program enacted. I think that will break down to a certain extent. I think that governments will maintain the initiative basically, but in the future in all so-called Westminster countries that will break down. You can see it to a certain extent in some places now. Possibly it will break down by the adoption of proportional representation, and by greater representation of independents and minority parties in parliaments. That will be one mechanism which will bring it about. But I think that apart from such changes there will be a breakdown in rigid government control over legislation. There again, we are one jump ahead of everybody in that respect because, as an author pointed out not so long ago, Australia has always had strong bicameralism and troublesome upper

houses that interfere with government programs and reject legislation²⁰, so it is nothing new to us.

Questioner — You brought up the point of delegated legislation. Are there any countries where parliaments can actually amend regulations, as opposed to just knocking them out? That seems to me to be a major area where the Parliament is thwarted. Even though it thinks it has done what it wants to do, it then cannot get the regulations it wants in.

Mr Evans — While we have a very good system for controlling delegated legislation through the Senate Regulations and Ordinances Committee, some countries are ahead of us in this because there is a much greater use of delegated legislation which does not come into effect until it is approved by both houses, and delegated legislation which can be amended by both houses as well as merely vetoed by either house. Even some of the Australian States have got into that area. It is starting to creep in at the federal level in Australia by ad hoc amendment of bills in the Senate. Senators look at bills and think, 'Here the Minister is empowered to make guidelines. These guidelines are pretty important. We will put in an amendment to make them subject to the approval of both Houses, or subject to amendment by both Houses'. We have instruments that are subject to amendment now by a process of ad hoc amendment of bills in the Senate. I think that area will expand. One of the things I have suggested as a reform we can undertake is greater use of delegated legislation as an alternative to primary legislation. That frightens people because they think that it increases the power of the government. But if the two Houses keep control of it by the sorts of devices that we have mentioned, you can make greater use of delegated legislation while still enhancing the power of the two Houses. Delegated legislation subject to amendment and to parliamentary approval could help to ease the legislative log-jam that we have in the two Houses at present.

Questioner — It was said in the recent claim by the Australian Democrats that they regard the vote for the Australian Senate as entirely different from the vote for the House of Representatives, which brings the prospect of major legislation initiated in the lower House being different from the intention of the majority of members of the Senate. Are there any moves afoot to make resolution of such a prospective dispute easier than the current double dissolution method?

Mr Evans — We have the situation already where the government does not control the Senate and is at the mercy of a minority party, or the combination of the minority party and the Opposition. I do not think that situation is going to change. Governments have learned to live with it over the years and they will probably continue to live with it. As for an alternative to the double dissolution mechanism, I think the only alternative is compromise. The founding fathers, as you know, proposed referenda as one possible deadlock-breaking device, and there are other propositions, but I think the only practical alternative to double dissolution is compromise.

I mentioned before that part of the program of the reformers is proportional representation. They promote proportional representation because they say it leads to no party getting a majority and to a European-type situation whereby the parties have to compromise, to come to agreement about measures. That is seen as a good thing because the alternative is having someone who, as I said, has 40 per cent of the vote,

²⁰. C. Sharman, 'Australia as a compound republic', *Politics*, May 1990.

running the country. So it is significant that proportional representation is a large part of reformers' programs in other countries.

I think in the future we will move away from the idea that government is all about electing a government which can do what it likes for three years, at the end of which time we decide whether to throw it out or not, having regard to whether the other lot are any good. Other countries do not run their affairs like that, and I think eventually the so-called Westminster countries will come not to run their affairs like that.