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# In Defence of the Senate

*James Paterson*

The Samuel Griffith Society's role today is more important than ever. It seems that every day brings a new, novel, bad idea to change the Constitution – whether it is a referendum to allow foreign citizens to serve in Parliament, a bizarre two-step plebiscite and referendum process to become a republic, radical proposals to recognise Indigenous Australians in the Constitution, or a change to fixed four-year terms for the Commonwealth Parliament. Defenders of the Constitution have our work cut out for us.

It has become so bad that I recently read an article – by an ABC journalist, of course – seriously suggesting that there are lessons for Australia in the French approach to constitutional reform. Presumably they meant without the military coups and bloodshed, although with the ABC you can never be certain.

The Society's role of fostering an appreciation for, and understanding of, the origins of our Constitution has never been more needed. We can thank our founders for having the foresight to make changing the Constitution appropriately difficult. It has meant that, over time, most bad ideas to change the Constitution have fallen by the wayside – if only thanks to their advocates' pragmatic judgments about the poor prospects of success.

But we cannot be complacent. It is not enough to assume that bad ideas will continue to fail on their own. We all have an obligation to explain patiently the dangers of constitutional change and the merits of our existing system.

That is why I have come out early, in advance of my party adopting a formal position, warning about the increasingly extreme proposals for Indigenous constitutional recognition – including the novel idea adopted at Uluru for a consultative or representative body enshrined in our Constitution.

You might not realise it, but today's debate is more common than you might think. Not so much a freshly-minted backbencher like me sharing the stage with a former prime minister. But in Canberra, a member of the House of Representatives complaining about the Senate, and a senator objecting, is a fairly common occurrence.

I promise that my reservations about weakening the Senate are not entirely motivated by self-interest. I held the same view not long ago, before I became a senator. I must admit, nevertheless, that my appreciation for the chamber has been enhanced by my new responsibilities.

I should declare upfront that I am not only not a constitutional lawyer, I am not even a lawyer at all. So I offer you a practitioner's view of this debate.

### **Another bad idea for constitutional reform**

I am sorry to say that I regard Mr Abbott's proposal to reshape the Senate as yet another bad idea of constitutional reform. But, in Mr Abbott's case, I acknowledge the principled and considered position it comes from.

I also accept that my task of defending the Senate has not been made easy by recent events. Just last week we had a member of the Senate treat it like just another stage for a political stunt. Pauline Hanson's use of a burka as a prop to

illustrate a political point, in my view, only served to undermine the chamber further in the eyes of the Australian public. Senator Hanson would have been entirely within her rights to ask a question about banning the burka. It is a question on which people of goodwill can disagree legitimately. But when some of the most common phrases used to describe the Senate are “a joke” and “a circus”, we have a serious problem.

At a time of declining faith in our democratic institutions, this was an unhelpful intervention. And given the central role our parliamentary system has played in upholding our unique freedoms and prosperity, we all have a stake in preserving it.

The 2017 federal Budget also has not helped my cause. Some of the measures to increase revenue have been characterised as “Senate taxes”. The Government has been appropriately frank in admitting this is not our preferred path to fiscal responsibility. But in light of the Senate’s rejection of many spending reduction measures, the Government felt it had no other choice.

It is on fiscal issues that those proposing Senate reform are on the strongest ground.

Many reasonable measures proposed in budgets since we were elected in 2013 have been refused by a chamber seemingly unconcerned with the moral and economic problems caused by ever-spiralling debt. Indeed, they were the sorts of reforms that, in a previous life, I and my former colleagues at the Institute of Public Affairs urged the Government to adopt. While I accept that the Senate was unlikely to agree to all of them, the sheer number and magnitude of measures that were rejected demonstrate that the Senate is abrogating its responsibility to future generations who will bear the burden of our debt.

But even these legitimate frustrations are not enough for me to endorse a proposal along the lines John Howard explored in 2003. This is because it would fundamentally undermine the

role of the Senate as a house of review, reducing it to a house of delay. Allowing a government to hold a joint sitting of the Parliament in order to use its numbers in the House of Representatives to push through any reform that the Senate has twice rejected in just three months would render it toothless.

### **The achievements of the Senate**

I admit that the Australian Senate does not have quite the same storied and celebrated history as the United States Senate. The first 100 pages of Robert's Caro's *Master of the Senate* powerfully document some of the most significant moments in the political history of the United States, which occurred in the Senate – like its roles in preventing a wholly-political impeachment of President Andrew Johnson in 1868, and stopping Franklin Delano Roosevelt's attempt to pack the Supreme Court in 1937.

But there are some less spectacular achievements of the Australian Senate worth remarking on to provide some context for this debate:

- In 1917, it stopped an unorthodox plan by the Hughes Government to extend the term of the House of Representatives via an Act of the Parliament of the United Kingdom.
- In 1967, the Senate compelled disclosure of the misuse of VIP flights during the Holt Government. Today details of government expenditure like this are routinely tabled in the Senate as an important public accountability mechanism.
- In 1975, the Senate used its powers, when the Whitlam Government was in office, to summon officials to answer questions about the Loans affair. The process helped draw public attention to the crisis and demonstrated that there were serious questions to be answered.
- In 1987, it was not just the Senate's power to block

legislation that defeated the Hawke Government's Australia Card, but also its power to disallow regulations that meant the Government never bothered to hold the joint sitting it was entitled to after a double dissolution election to push through the proposal.

- In 2002, a batch of five anti-terrorism bills passed the House of Representatives only one day after they were introduced. But, after an inquiry which received more than 400 submissions, the Government-controlled Senate Legal Affairs and Constitutional Committee proposed extensive amendments. Evidently they were reasonable and worthwhile as the Government accepted them and secured the passage of the laws.
- In 2016, a committee I chaired used its powers to reveal publicly the previously secret salary of the Chief Executive Officer of Australia Post, which led to significant policy changes for executive remuneration in government business enterprises.

## **The issues that advocates of Senate reform overlook**

Scrutiny committees – which go some way to protecting civil liberties and rule of law principles – like regulations and ordinances, and scrutiny of bills, are unique beasts of the Senate. And it is hard to imagine the government-dominated House of Representatives fulfilling this role effectively. Nor could the estimates process – which routinely exposes government misuse of public money and other mismanagement – occur in any other chamber.

In my view, advocates of reform to the Senate's powers overlook seven key issues:

## **The benefits of obstruction**

Firstly, and most importantly, while I accept that these changes would make it easier for good governments to do good things, it would also make it easier for bad governments to do bad things.

The way the Senate frustrates us now on fiscal issues is the same way it could limit a future government's attempts to enact reforms we disagree with. Indeed, we do not need to rely on hypothetical future examples. The Senate's defeat of the Rudd Government's proposed Carbon Pollution Reduction Scheme, in 2009, was not only essential to our eventual return to government in 2013; the delay it caused in the subsequent legislation of an emissions trading scheme is what ensured we were able to repeal it upon returning to government.

Had the legislation passed in 2009, Kevin Rudd might still be Prime Minister today! And, even if he were not, his scheme, or Julia Gillard's revised version, would have proceeded to the tradeable property right stage that some experts argued would have required a massive compensation bill under the just terms provision of the Constitution. This would have made the task of repealing it much less straightforward. As it was, Gillard's scheme never went beyond the fixed price or carbon tax period, which smoothed the path to repeal.

And do we really think the Rudd-Gillard era would have been better if those governments had had no obstacle in the Senate to contend with?

For me, one of the iron laws of politics is never to give a power to yourself that you would not be equally happy to see wielded by your political opponents. All else being equal, they will be in government about as often as you will. And they will use that power for their own ends at least as effectively as you will for yours.

In an ideal world we would have a system that allowed

good governments to do good things but prevented bad governments from doing bad things. But since Australians disagree about what is a good and what is a bad government, I doubt that that is possible.

We therefore have to accept either a system which paves the way for both good and bad governments to do as they wish, or one which places some limitations on their ability to govern.

Ultimately, if forced to choose, I would rather a system of limited government, as frustrating as that may be whilst we are in government.

### **Our bicameral system has served us well**

Secondly, advocates of reform are relying on too narrow a snapshot of Senate history on which to base their calls for change. It is wrong to assume the current frustrations are a new normal or permanent fixture. They have not been historically, and it is far from certain to assume this current dynamic will continue forever. Governments, even in recent history, have found ways to grapple with and accommodate the concerns of the Senate.

Our bicameral Westminster system has served us remarkably well for the vast majority of its 116 years. This includes an unprecedented era of growth post-1948, when proportional voting was first introduced for Senate elections and it first began to resemble the chamber we have today.

While there are many things we would all like to change about Australia, it is hard to identify a system of government that has produced better outcomes than ours. This is the ultimate test. Virtually no other country can match our recent record-breaking period of economic growth and prosperity, or our peaceful and harmonious society. Our freedoms have remained largely intact. The very fact that such a young country is one of the longest continuous democracies is a testament to our existing

political system.

Perhaps if the current obstinacy were to persist for many more years, and if it were to have continuing, demonstrably negative effects, it could be worth re-evaluating. But right now we do not have anywhere nearly a sufficiently large sample size to justify such a radical change.

### **Blame the parties for gridlock, not the Senate itself**

Thirdly, much of the frustration is currently misdirected at the Senate itself and not the parties within it. To be sure, the Labor Party, the Greens, and much of the cross-bench have used the Senate's powers to full effect. But that is a choice they have made and they deserve to bear responsibility for it. It is not the fault of the Senate as an institution that Bill Shorten has failed to recognise the mandate of Coalition governments. Blaming the Senate lets them off lightly. We will make our task of sheeting that responsibility home to them easiest when we earn a mandate for as many of the policies that we propose as practical, and we effectively campaign for them to earn genuine community support.

### **Do not ignore the Government's achievements in the Senate**

Fourthly, advocates of reform fail to recognise recent achievements of the Government in the Senate. This is particularly clear in the industrial relations space. Against all predictions, the Government has successfully negotiated the passage of long-held priorities like restoration of the Australian Building and Construction Commission, and establishment of the Registered Organisations Commission. And we are well on the way to implementing the full recommendations of the Heydon Royal Commission – the most recent of which, the banning of corrupting payments between businesses and unions,



passed just last week. Since we are here in Western Australia, it is only appropriate I recognise the particular success your very own senator, Michaelia Cash, has had in this area.

Another of your senators, Mathias Cormann, has also had notable successes in negotiating with the cross-bench. After the 2016 election, he even managed to convince the Senate to vote for spending cuts in the omnibus savings bill!

To be sure, this does not represent the Government's entire agenda, but it does represent a substantial part of it, and no one could suggest it has been uncontentious.

### **Undermining the Senate's mechanisms of review**

Fifthly, we have to consider the full costs of change. If we were to implement this reform, in my view, we would lose more than just the Senate's power to block legislation. The vital review mechanisms in the Senate, including the committee process, only have weight because every government knows ignoring them could cause their legislative agenda to be derailed. Many a minister has been saved from drafting errors and unintended consequences by amendments proposed in the Senate. While these would likely still be offered, it is very easy to foresee governments increasingly ignoring them as the consequences of doing so are removed.

### **Changes can be made that do not require amendment to the Constitution**

Sixthly, there are other changes that can be made to improve the functioning of the Senate that do not require amendment of the Constitution. One such change has already been made, and we are yet to see the full benefits of it: the reforms to the Senate voting system that the Government introduced before the 2016 election will, with time, lead to a more genuinely representative Senate. It will not eliminate minor

parties or the cross-bench entirely, but it will ensure that those who are elected have a genuine community mandate to be there.

Because the 2016 election was a double dissolution, we have not yet seen the full benefits of this reform – although this new Senate has certainly been easier for the Government to work with than the last. In the previous Parliament, of which I was briefly a member, if the ALP and the Greens opposed the Government, it needed six out of the eight cross-benchers to pass a bill. That often meant the Government had to strike six political deals to secure its legislation, and because of the disparate nature of that cross-bench, striking a deal with one of them often cost the support of others.

Although the new Senate has a larger cross-bench of 12 senators, the fact that they are now partly comprised of larger groupings – like the four One Nation senators and the three in the Nick Xenophon Team – means that there are fewer negotiating partners with whom the Government needs to work.

Assuming the next election is a normal half-Senate one, there is reason to believe the Senate cross-bench will shrink considerably. The quota for election will obviously rise from 7.7 percent to 14.3 percent, which substantially raises the bar for minor parties and independents.

And of the 12 cross-benchers, seven are up for re-election. Of the nine Greens, six face re-election. If the results of the 2016 election were replicated exactly, only three of the cross-benchers would be returned. Two of the Greens would lose, with another highly vulnerable.

These results would make life easier for the Government in a new Parliament. At the very least, we need to wait a few election cycles to see the full effects of these reforms before we prematurely declare the Senate unworkable.

While it is true that relatively declining support for the major parties means neither is likely to win a Senate majority

again, the reforms should ensure that the trend of runaway growth in election of unrepresentative minor party senators who have managed to cobble together elaborate preference deals, which began in 2013, should be arrested.

### **Restoring the Senate's committee system**

Finally, there are other ways the Senate could improve its own functioning and standing in the community. The Senate committee system does not hold the same respect it once did. A principal cause of that is the shamelessly partisan way committees have been used not for scrutiny of government bills or programs, but as just another tool in the campaign arsenal.

For example, the Senate's Community Affairs References Committee, dominated by the Opposition, recently held an inquiry into the Centrelink debt recovery program. This is a worthy topic for an inquiry, but probably not one that required no less than nine public hearings all over Australia in order to get to the bottom of any policy issues.

More generally, Senate committees have been overloaded with inquiry after inquiry. This week, committees I am a member of held seven inquiries. Even if I wanted to attend them all, it would have been physically impossible, and there are colleagues who have it worse than I.

The effect of this overloading means that, for many hearings, only the bare minimum of two senators attend to provide a quorum, which shows no respect for the witnesses who appear. It is increasingly difficult to be across all the submissions to each inquiry, meaning senators are not across the detail even when they do attend. And the hard-working professional secretariat staff of committees are swamped with work, meaning the reports they help us write are much less substantial and authoritative than they once were.

This could be easily overcome by agreement of the parties

in the Senate to limit the number of inquiries that take place, if necessary by amending the standing orders to mandate it.

### **The risks of weakening the Senate far outweigh the potential benefits**

I am not here to argue that the Senate is perfect – far from it. But the risks of weakening the Senate far outweigh the potential benefits. As frustrating as my side of politics may presently find the upper chamber, I have no doubt there will be times in the future we will cherish it when we are not in power.

While our founders may not have foreseen Jacqui Lambie or Sarah Hanson-Young, we know they designed the Senate as it is for a purpose. From the debates at Federation, it is clear they looked to the United States Senate for inspiration in the knowledge that it had often frustrated administrations.

In the words of Edmund Barton, “The Constitution designed the Senate to be a House of greater power than any ordinary second chamber.” In my view, the founders were right to do so.