

PARLIAMENT AND PUBLIC DELIBERATION: EVALUATING THE PERFORMANCE OF PARLIAMENT

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I INTRODUCTION

This article uses the centenary of the *Australian Constitution* ('Constitution') to promote a new approach to evaluating the institutional performance of the Commonwealth Parliament, judged against standards derived from theories of deliberative democracy. This is not intended to be a comprehensive evaluation. My focus is much narrower, with the aim of exploring qualitative performance standards appropriate to a parliament's role as a deliberative assembly. I test my approach to evaluation with evidence drawn from the Commonwealth Parliament's century of development of the federal electoral system, which captures much of the importance about a parliament's relationship with the citizens it claims to represent. I use this as a test-case of a parliament's capacity-building potential as a deliberative assembly.

Reviewing a century of deliberative experience, I identify a succession of what I term 'domains of deliberation', marking three distinct phases in the slow development of the Commonwealth Parliament's institutional capacity for political deliberation. This review clarifies standards useful for evaluating parliamentary performance more generally. My hope is that the new approach to evaluation sketched here will open up fresh possibilities for the critical review of legislative institutions.

II CONSTITUTING PARLIAMENT

The centenary of Federation presents an opportunity to take stock of many elements of the Australian constitutional system. This article relates legal forms to political purposes. In many respects, the Constitution is a political document: it was prepared by politicians meeting publicly in elected conventions, approved by voters at the Federation referendums, and set in motion by the first

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Commonwealth Parliament which did so much to devise appropriate institutions to give effect to the design for constitutional government.¹

Opinions differ about how successful Parliament has been since that founding era, in the century after Federation. This article demonstrates a new approach to evaluating the performance of a parliament, testing its capacity to use its own deliberative processes to construct arenas for parliamentary and public deliberation. Changes to the electoral system reflect Parliament's repeated attempts to round out the minimalist provisions of the Constitution relating to franchise and representation. Parliamentary consideration of the electoral system is one of the most enduring of parliamentary interests, and illustrates not only important policy content (a sustainable policy preoccupation with election systems) but also valuable policy process (a long record of related parliamentary debate). Parliamentary debate over the electoral system gets about as close as possible to the core of a parliament's relationship with the citizenry it is meant to represent.²

Taking electoral policy as a case in point, one can test a parliament's capacity to work through competing models of the electoral system. One test would be the nature of the legislative results – a parliament's construction of a public arena for community deliberation to manage the public contest of political views over candidates and political parties. But another test is the internal construction of parliamentary arenas for deliberation over competing laws and policies. My focus is on this internal test, using the record of debate over the developing electoral system as a mine of valuable information illustrating a parliament's own institution-building capacity. The record will show to what extent a parliament can promote itself as an effective deliberative assembly.

Why the emphasis on deliberation? Recent political theories about 'deliberative democracy' have highlighted the importance of structured public deliberation as a core ingredient of effective democracy. For effective democracy, the values of the decision-making process are no less important than the value of the decision itself.³ Used in this sense, 'deliberative' does not simply refer to debating norms, that is, a structured balance of alternating viewpoints. When used in relation to shared deliberation by elected representatives in political assemblies, 'deliberative' refers as much to the institutional structure as to the procedural norms of parliamentary decision-making. Deliberative structures are not 'givens' – they are shaped by parliamentary decisions on the franchise, on eligibility for representation, on parliamentary resources, on who sets the timing and content of the parliamentary agenda, on who participates in

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- 1 J A La Nauze, 'The Framers and Their Constitution' in *The Making of the Australian Constitution* (1972) 270-88. Cf John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (2000).
 - 2 G S Reid and Marilyn Forrest, *Australia's Commonwealth Parliament: 1901-1988* (1989) 84-131; Joan Rydon, *A Federal Legislature* (1986) 6-45. More generally, see Arend Lijphart, *Patterns of Democracy* (1999).
 - 3 See, eg, John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998); James G March and Johan P Olsen, *Democratic Governance* (1995) 91-139; Jon Elster (ed), *Deliberative Democracy* (1998); J Bohman and W Rehg (eds), *Deliberative Democracy* (1997).

parliamentary inquiries and debates, even on who determines when decisions are final.

What constitutes a deliberative process turns as much on *who* participates as on *how* they participate. Parliamentary determination of the rules for representation is a classic illustration of the construction of political deliberation. We judge the structure of parliamentary deliberation according to how adequately it protects the rights of all elected representatives to participate in the deliberative process, including the rights of those challenging the balance of institutional powers held by the dominant political parties. At the operational level, deliberative democracy promotes better deliberation by protecting the rights of minorities to get a fair hearing to contest majority views, including views about what is contestable. Thus, deliberative democracy shades into Pettit's model of 'contestatory democracy'.⁴

In ideal circumstances, a parliament might be expected to model the sort of informed, considerate and yet passionate public debate expected of a democracy committed to wide-ranging public deliberation (or deliberative contest) over law and policy. The Australian record since Federation is a relevant test-case of the problems facing a newly constituted parliamentary democracy attempting to build new deliberative institutions of national governance and civil society.

III APPROPRIATE PERFORMANCE STANDARDS

Is there a realistic model of deliberative measures of parliamentary performance? The attempt to evaluate the performance of parliament at large is clearly daunting.⁵ Evaluating democratic institutions depends greatly on the choice of appropriate performance standards. This, in turn, depends largely on what the institutions were established to achieve, or are capable of achieving. My approach to performance evaluation tests a parliament's institution-building capacity by reviewing its construction of deliberative procedures for decision-making. International interest suggests that performance evaluation of political assemblies requires careful specification of appropriate qualitative measures of political decision-making. Attempts by the Organization for Economic Co-operation and Development ('OECD') to assess the 'quality of legislation' across political assemblies points to the importance of capacity-building within parliaments. Ideals of 'government by debate' can be tested by reviews of concrete institutional practices of parliamentary deliberation. These tests need not be confined to conventional parliamentary debates. According to the OECD, they can extend across all three spheres of institutional activity considered as

4 See Philip Pettit's article in this issue of the *University of New South Wales Law Journal*: Philip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24 *University of New South Wales Law Journal* 724.

5 See David Beetham, 'The Idea of Democratic Audit in Comparative Perspective' (1999) 52 *Parliamentary Affairs* 567, 570-4; more generally, see Kenneth Clinton Wheare, *Legislatures* (2nd ed, 1968); John Garrett, *Westminster: Does Parliament Work?* (1992); Ferdinand Mount, *The British Constitution Now* (1992) 156-205.

core parliamentary responsibilities: representation, law-making and executive oversight.⁶

Over twenty years ago, two Canadian scholars predicted that ultimately 'all evaluations of legislative performance will depend on value judgments about the purposes of legislatures'.⁷ These scholars highlighted a range of external purposes – legislative and policy outputs. My approach here deals more directly with internal purposes: processing regimes or domains for parliamentary deliberation over possible outputs. Performance evaluation in this, as in any other area, turns on the choice of standards (ie, benchmarks or measures) which, when dealing with political assemblies, can be more difficult to identify than the usual hazard of finding reliable cost information.⁸ My new approach to parliamentary evaluation is designed to help clarify this puzzling issue of appropriate performance standards, isolated for convenience from issues of costing.

Clearly, comprehensive evaluation of parliamentary institutions requires, as it does of all public sector organisations, assessment of the value of the performance relative to the full cost of the service provided. However, efficiency ratings are not all there is to evaluation. The program evaluation literature separates institutional evaluation into three measurement steps: the first dealing with *efficiency* (ie, waste minimisation); the second with *effectiveness* (ie, goal maximisation); and the third and most challenging dealing with *appropriateness* (ie, merits of the goal, whether it be process or policy). These three steps move from the necessary but insufficient sphere of quantifiable measures to the inevitably controversial sphere of qualitative measures. Peter Baume, a former senator and minister who has contributed much to the Australian interest in program evaluation, has called on political analysts to step up their institutional evaluation from the levels of efficiency to effectiveness but more especially to the higher levels of appropriateness.⁹

A useful start is to ask the question: how appropriate is 'parliamentary deliberation' to the purposes of a parliament? It all depends on the roles expected of parliaments in particular regime settings. Although democracy comes in many shapes and guises, recent political science research shows that it is possible and feasible to evaluate the performance of democratic institutions – as the experience of the United Kingdom 'democratic audit' shows.¹⁰ The Constitution promotes parliamentary democracy, through a form of representative government often called 'responsible parliamentary government'.

6 Organization for Economic Co-operation and Development, *OECD Report on Parliamentary Procedures and Relations* (2001) 3-4. Compare this suite of responsibilities with Uhr, above n 3, 103-209.

7 Robert J Jackson and Michael M Atkinson, *The Canadian Legislative System* (2nd ed, 1980) 175.

8 See, eg, Ciarn O'Faircheallaigh and Bill Ryan (eds), *Program Evaluation and Performance Monitoring* (1992); John Wanna, Joanne Kelly and John Foster, *Managing Public Expenditure in Australia* (2000), especially ch 8; John Uhr (ed), *Program Evaluation* (1991).

9 Peter Baume, 'Getting the Policy Right: Recovering the Golden Rules of Evaluation' in John Uhr (ed), *Program Evaluation* (1991) 35-8. See also John Uhr and Keith Mackay (eds), *Evaluating Policy Advice* (1996).

10 Beetham, above n 5, 567-81.

The ideal is that the political executive holds office on the condition that it retains the confidence of Parliament, which is in turn dependent on the electoral confidence of the voting public as judged at regular elections.¹¹ While the political executive is *responsible* for day to day 'governing', it is *responsible to* Parliament for its continued legal authority to draw on parliamentary appropriations of public funds.

This account of a parliament's role in the constitutional system of government suggests that the performance of government depends substantially on the quality of a parliament's own performance. This is generally consistent with the importance in liberal-democratic theory of elected political assemblies and their contributions to representative government. Over recent years, political theorists have revived concepts of the 'deliberative assembly' as a way of reconsidering the role of parliaments in contemporary political systems.¹² Within parliamentary systems, political assemblies have responsibilities for many constitutional functions, of which one of the most basic but least understood is the institutional management of public deliberation about law and policy. A parliament's legislative process is a prominent instance of a wider parliamentary promotion of structured deliberative processes examining government performance. The grander stage for this revival of interest in the deliberative capacities of political assemblies is the debate over deliberative democracy. Versions of deliberative democracy are now among the most prominent, and prominently contested, focal points in contemporary political theory.

IV MODELLING MEASURES OF DELIBERATION

What framework of analysis can we use to evaluate the institutional capacity of the Commonwealth Parliament as a deliberative assembly? The Constitution constructs Parliament by identifying its mode of composition and its legislative powers, but does not identify Parliament in terms of any specification of deliberative capacities. Yet we know that many of the constitutional framers drew on their own, often quite extensive, parliamentary experience and understood that Parliament would function as the new nation's primary arena of public deliberation. As a deliberative assembly, Parliament was expected to play a prominent part in reflecting, refining and reframing public deliberation. It is true that as a representative assembly, Parliament was obliged to take note of the *explicit views* of those it represented; but as a deliberative assembly, it was also obliged to search out and weigh contending views of the *implicit interests* of those it represented. Thus, Parliament not only reflects but also refines electoral

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- 11 Helena Catt, *Democracy in Practice* (1999) 4-18. A standard classic is Kenneth Bradshaw and D Pring, *Parliament and Congress* (2nd ed, 1981). Australian evaluations include Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (1980); David Hamer, *Can Responsible Government Survive in Australia?* (1994).
 - 12 Uhr, above n 3, 66-81. See also Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game* (1987); Michael Saward (ed), *Democratic Innovation: Deliberation, Representation and Association* (2000).

opinion, drawing on community views while promoting a more demanding scheme of public deliberation than simply the reflection and endorsement of current public opinion.¹³

The Constitution's design for a national parliament includes important deliberative functions, with the representative assembly balancing electors' explicit views against their often implicit and unacknowledged interests. Deliberation literally means 'weighing', as on the scales of justice – for instance, balancing electors' *claims* or indeed representatives' *demands* against assessments of community *needs*.¹⁴ The standard of 'appropriateness' mentioned earlier points to the importance of taking account of the larger institutional purpose informing the institutional design of political institutions – in balancing community needs for legitimate democratic decision-making against the competing requirements of governments for efficiency and effectiveness. Deliberative decision-making requires procedural fair-play, including protections against the might of the majority to dominate such core procedural elements as the timing, the publicity and the agenda of parliamentary business.¹⁵

The integrity of the parliamentary process depends on institutional structures protecting the debating and investigative rights of participants drawn from the full range of party and partisan viewpoints. The weighing mechanism must itself be balanced, taking due note of the spectrum of relevant viewpoints. To some extent, balance can be structured through various procedural protections against flawed decision-making; for example, standing orders to guarantee a fair hearing to all participants.¹⁶ But what if 'the system' is biased against the inclusion of a certain range of potential participants; for example, independents or minor parties or citizens not yet of voting age? Thus, one particularly important if often neglected measure of balance is derived from the electoral system – through its definitions of the franchise (defining who may vote) and of the rules of parliamentary representation (defining who gets elected).

Conventional accounts of parliamentary performance generally rely on the rather simplistic standard of the degree of 'legislative activity', with rough measures of 'strong' or 'weak' parliaments.¹⁷ The indicators of strong or weak parliaments are usually taken from records of legislative initiative. The extent of legislative domination by governing parties is usually taken as a measure of an institutionally weak parliament; and the incidence of amendment of government legislation is conventionally taken as a measure of an institutionally strong parliament. But the conventional approach loses much of its analytical force when we broaden the test of performance to measure parliamentary means and legislative ends for their consistency with deliberative norms. 'Strong'

13 Philip Norton, *Does Parliament Matter?* (1993); John Uhr, 'Parliamentary Measures: Evaluating Parliament's Policy Role' in Ian Marsh (ed), *Governing in the 1990s* (1993) 346-75. See also Catt, above n 11, 96-115.

14 Uhr, above n 3, 12, 22, 93-4.

15 Ibid 219-31.

16 OECD, above n 6, 12-16; cf ibid 214-31, and C E S Franks, *The Parliament of Canada* (1987) 116-42.

17 N J Ornstein (ed), *The Role of the Legislature in Western Democracies* (1981); P Norton (ed), *Legislatures* (1990); Gary W Copeland and Samuel C Patterson (eds), *Parliaments in the Modern World* (1994); and for an instructive single nation case study, see Jackson and Atkinson, above n 7, 174-90.

parliaments can then turn out to operate through defective deliberative processes, despite their large legislative output. 'Weak' parliaments can be seen as having greater deliberative value, despite their lesser legislative outputs.

In what follows, I demonstrate an alternative approach: evaluating deliberative performance by mapping a sequence of deliberative domains evident in the Commonwealth Parliament's century of responsibility for electoral law and policy. The purpose of this mapping is not to identify precise locations and levels of performance, but to illustrate a fresh start to parliamentary evaluation that tracks capacity-building within parliamentary institutions. My three 'domains of deliberation' tell a story of capacity-building that begins in the early decades after Federation with largely unstructured deliberative practices of what I term 'exclusive partisanship', reflecting the interests of the developing party machines. I call the second domain 'bipartisan bicameralism' because it moves beyond earlier interests to reform the electoral system, in part to protect the rights of those excluded under the original domain. My final domain is that of 'multi-party management' with the establishment of a dedicated electoral committee capable of helping to devise acceptable new standards of electoral law and policy.

V THE DELIBERATIVE DOMAIN OF 'EXCLUSIVE PARTISANSHIP'

The first deliberative domain is one where Parliament displayed 'exclusive partisanship' in constructing its own arena and the arena of the electoral system. The preferred deliberative model would be one of inclusive non-partisanship but I am under no delusions about the pride of place of party at the foundation of the Commonwealth Parliament. This phase covers the period from Federation through to the early 1920s, when the electoral system was consolidated around the rules of the two-party contest favoured by the parties dominating Australian politics. The exclusive character is seen in the rejection of minority calls for the introduction of proportional representation to balance the glaring defects of the evolving majoritarian system. The partisanship is seen in the spirit of party convenience characterising such electoral features as compulsory enrolment, plus preferential and later compulsory voting.¹⁸

Over this period, this deliberative domain displayed very little independent parliamentary scrutiny of electoral policy or administration, and scant systematic investigation by committees of Parliament. This is not to suggest that there was little parliamentary activity on electoral matters – the historical record reveals near constant tinkering with electoral law and practice, including frequent parliamentary debate over the merits of the many proposals for change that were introduced into Parliament. The stock forms of parliamentary deliberation are there for all to see; what is missing is the deliberative substance. By contrast, the most incisive investigations into electoral matters came from non-parliamentary

18 Reid and Forrest, above n 2, 94-118; Ian Marsh, *Beyond the Two Party State* (1995) 271-302.

sources: either electoral officials themselves when advising Parliament of matters requiring legislative attention, or from other commissions of inquiry established by the executive at arms-length from Parliament. One result is that parliamentary consideration and debate appears much more self-serving than the non-parliamentary inquiries, which have as an overall theme the public interest in a professional system of non-partisan electoral administration.

It is impossible to over-emphasise the importance of the legislative activity of the first Parliament. This period saw the establishment of firm foundations for an electoral system that was consolidated at the end of World War I and refined in subsequent decades. The extensive debate that took place in the first Parliament established not simply the machinery of government to administer elections but also the dynamic of deliberation that was to prevail for many years. Procedurally, the deliberative process associated with the passage of the original electoral legislation was unpredictable and in many cases disorderly. The typical picture of an executive power dominating the legislature does not fit the circumstances here. The Barton Government withdrew its original franchise and representation Bills, switched from the House of Representatives to the Senate for their reintroduction, and displayed its inability to manage the legislative process in an environment where individuals moved in and out of party discipline. As is well known, party cohesion then was generally less prominent than later in the first decade when Deakin consolidated a stable and remarkably enduring two-party system, with government alternating between Labor and non-Labor parties.

One result of the freewheeling environment of the first Parliament is that many of the Barton Government's most far-sighted provisions were removed from the Bills during the course of debate and amendment. The ministry clearly appreciated the constitutional importance of what was at stake. O'Connor identified the larger significance of this period of parliamentary activity which to his mind had 'the purpose of bringing the Constitution of Australia into operation'.¹⁹ What came into operation was an electoral system far less liberal and inclusive than many federation framers had hoped. The Government's Bills emerged with substantial amendment, including the deletion of the Government's preferred schemes for voting rights for Indigenous Australians; and also optional preferential voting at House and Senate elections and proportional representation for the Senate.²⁰

This result poses something of a challenge to theorists of deliberative democracy, who tend to harbour suspicions over the legitimacy of strong party government and idealise the spirit of the non-aligned independent representative. The ethical basis of deliberative democracy respects the rights of individuals to speak up and to be heard, and promotes the norms of rational dialogue among considerate and civil equals. Free consent is valued as the core of the decision-making process, and submission to coercive parties is dismissed as an intolerable

19 Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 30 January 1902, 9529 (Richard Edward O'Connor, Senator for New South Wales, Vice President of the Executive Council).

20 Marilyn Lake, *Getting Equal: The History of Australian Feminism* (1999) 27-8, 151.

intrusion into the free space of freely consenting decision-makers. Why then complain about the lack of party discipline surrounding the passage of this foundational electoral legislation? Is it not the case that extensive amendment of government legislation is one of the most basic indicators of an effective legislature and of an active deliberative assembly?

The answer is that the original Bills were themselves the result of very careful and deliberate consideration by the Barton Ministry, and that the parliamentary process left the Ministry's proposed legislation vulnerable to ill-considered amendment by the sheer weight of numbers lined up against various legislative provisions. The Government found itself in a legislative minority on many of its most rights-oriented electoral provisions. Drawing on valuable public service reports, the Ministry attempted to justify the benefits of their proposed liberalisation of electoral practice.

After the passage of the original electoral package, Parliament regularly tinkered with the evolving electoral system. One of the very few committee inquiries into the electoral system was the House of Representatives Select Committee on Electoral Act Administration ('Electoral Act Administration Committee').²¹ The Electoral Act Administration Committee's report had little immediate impact but it clearly stated the case for separating electoral administration from party politics. That the establishment of a professional electoral service was recommended highlights public complaints about administrative incompetence.²²

Although there were frequent annual amendments to electoral law, Parliament allowed the system to emerge without any deliberate or public stock-take. By 1911, the electoral system had been moulded around the interests of the emerging two-party system. The Fisher Labor Government introduced legislation for 'a system of compulsory enrolment' which was (correctly) feared by its opponents as a precursor to compulsory voting.²³ Pearce drew inspiration from the compulsion found in relation to schooling and medical vaccination to argue that voting was a duty and not a voluntary privilege.²⁴ The subsequent introduction of preferential and compulsory voting secured the rights demanded by the major parties. The emerging components of the later Country Party were prominent among the promoters of preferential voting, as an easy way of sharing the non-Labor vote without risking defeat at three-cornered elections.²⁵

A national system of preferential voting arrived with the 1918 consolidation of the various electoral laws, and the 1919 extension of preferential voting to Senate elections. The stated purpose of preferential voting was 'to secure majority representation' in single-member seats by giving more effective voice

21 Commonwealth, *Report from the Select Committee on Electoral Act Administration* (1904) vol 1, 317-26; cf Joint Select Committee on Electoral Reform, *First Report* (1983) 4-5.

22 See Commonwealth, above n 21, 319, 326.

23 Joint Select Committee on Electoral Reform, above n 21, 6-7.

24 Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 6 October 1911, 1177-80 (George Foster Pearce, Senator for Western Australia, Minister of Defence).

25 C A Hughes, 'Prime Ministers and the Electorate' in Patrick Weller (ed), *Menzies to Keating* (1992) 145-6; Elim Papadakis and Clive Bean, 'Minor Parties and Independents: The Electoral System' (1995) 30 *Australian Journal of Political Science* 97, 97-110.

to 'neutral or non-party opinion' to ensure that the seat is won on the basis of 'an absolute majority of operative votes'.²⁶ On the heels of declining voter turnout after the end of World War I, the Bruce-Page Government finally introduced compulsory voting with the 1924 amendments to the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*').²⁷ It is worth noting that even the most vocal of critics of compulsory voting who tend to see it as 'the most insidious feature of Australian electoral systems' do acknowledge that there 'is no evidence that it has given an advantage to any party'.²⁸

Looking back over this formative period from Federation through to the 1920s, we can contrast the frequent (if scattered) legislative energy of Parliament with the infrequent but more focused contributions made by other public bodies. For example, soon after the 1903 general election, the Government tabled a valuable report on electoral practice by the Chief Electoral Officer, which exemplified the virtues of professional administration of elections through its careful and impartial sifting of the lessons of early Commonwealth experience.²⁹

Another example is the 1914-15 Royal Commission into the electoral administration of the Minister for Home Affairs, O'Malley, who allegedly sought undue influence over electoral officers to promote his own partisan interests. The inquiry broadened into a general review of electoral practice. After warning the Minister, the inquiry went on to recommend in favour of compulsory voting 'as a natural corollary of compulsory enrolment' and also in favour of *preferential* voting for the House of Representatives and indeed a system of *proportional* representation for the Senate. The common premise here was the importance of 'many shades of political opinion' and 'distinct broad tones of thought' for a fully effective Parliament. To be sure, Parliament went on to adopt many of these sound recommendations. The more the pity, then, that Parliament generally spent so little time openly discussing such advisory reports.³⁰

VI THE DELIBERATIVE DOMAIN OF 'BIPARTISAN BICAMERALISM'

The second deliberative domain takes up the middle years of the 20th century. During this period, Parliament acted with cross-party agreement to reform the Senate through the introduction of proportional representation. Elsewhere, I have

26 Commonwealth, *Parliamentary Debates*, 1918, 6676-8. See also Commonwealth, *Parliamentary Debates*, 15 October 1919, 13308-13; Colin A Hughes and B D Graham, *A Handbook of Australian Government and Politics, 1890-1964* (1968) 283.

27 Rydon, above n 2, 18; Joint Select Committee on Electoral Reform, above n 21, 12-13; Hughes and Graham, above n 26, 283; Hughes, above n 25, 151; Ian McAllister, *Political Behaviour: Citizens, Parties and Elites in Australia* (1992) 28.

28 Joan Rydon, 'The Electoral System' in Henry Mayer and Helen Nelson (eds), *Australian Politics 5* (1982) 377, 386.

29 Commonwealth, *Report of Conference of Commonwealth Electoral Officers*, Parl Paper No 12 (1904) 459-82.

30 Ibid 441, [11]-[13].

analysed the mixture of motivations associated with the decision by the Chifley Government to transform the Senate electoral system.³¹ At the very least, all major parties agreed that the House of Representatives needed to be expanded from its original size of 75 to 121. This could not be done without a corresponding increase in the size of the Senate, from 36 to 60, and at this point there was less cross-party agreement. Both parties saw the merits of an enlarged House with smaller, more stable and hence more secure seats.

The Menzies Opposition wanted to delay the House changes until a referendum had been held to remove the nexus provision from the Constitution. This indicates a substantial reservation about the relative importance of the Senate, but this did not prevent Menzies from supporting the Chifley decision to introduce proportional representation. For Menzies, the existence of the constitutional provision for double dissolutions and subsequent joint sittings was proof enough of the subordinate place of the Senate in Australian government. In his view, the 'will of the people' must trump the representation of minority groups in the Senate; and it is the people's house which 'makes and unmakes governments'.³²

The 1948 legislation to introduce proportional representation was really the final stage in a frequently deferred plan of parliamentary reform that goes back to Federation.³³ The Barton Government had included Senate proportional representation in the original Electoral Bill, but this had been rejected in the Senate on the plausible ground that it would undermine the established conventions of strong party government. However, over time, even the partisans of strong party government came around to see the merits of the original plan. At many stages between the first Parliament and 1948, advocates of proportionality moved for its adoption for Senate elections, with many party leaders joining the ranks of parliamentary reform. They included conservative leaders such as Cook, Page, Bruce, McEwen, and Menzies; and even Labor leaders such as Scullin, Curtin and Chifley.³⁴

The extensive 1948 parliamentary debate on the expansion and reform of representation was a sign that Parliament was slowly bringing greater cohesion to its management of the electoral system. Parliament appreciated that it was about to enter a new era and the wide-ranging and informative debate in 1948 stood in bold contrast to many of Parliament's early timid attempts at electoral management. One important effect of the introduction of proportional representation was 'to modify the two-party system in Australia' by placing the leadership of the major parties on notice of the potential for breakaway or protest parties.³⁵ Both major parties have experienced this effect: the Labor off-shoot,

31 John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change* (1999) 13-40.

32 Ibid 19.

33 Ibid 18-20.

34 Ibid 27-39. Cf Joint Select Committee on Electoral Reform, above n 21, 8-9, 16-17. See also Senator John Faulkner, 'A Labor Perspective on Senate Reform' in Brian J Costar (ed), *Deadlock or Democracy?* (2000) 42-3.

35 Gough Whitlam, *The Whitlam Government 1972-1975* (1985) 657.

the Democratic Labor Party, found a home in the Senate from the mid-1950s as did the Liberal off-shoot, the Australian Democrats, from the late-1970s. This very presence marks the development of the third deliberative domain, where minor parties have held their place, in public as well as in Parliament, as co-managers of the electoral system.

VII THE DELIBERATIVE DOMAIN OF 'MULTI-PARTY MANAGEMENT'

The third deliberative domain is one of 'multi-party management'. In its latest form, this illustrates the acceptance, even by the major political parties, that the Commonwealth Parliament provides for a *de facto* system of multi-party governing, if not a *de jure* system of multi-party government. This deliberative domain slowly emerges in the wake of the Senate reforms of the 1940s, reinforced by the later emergence of the sustained presence of minor parties in the Senate. This emergence was also bolstered by the resurgent activism of the Senate from the late 1960s, when even the major parties began to appreciate its capacity to allow non-government parties to contribute substantially and constructively to law and policy.

A feature of this domain is the growing importance of parliamentary committees as deliberative forums. Prominent examples here include the 1956-59 Joint Committee on the Constitutional System; and the 1959-61 House of Representatives Committee on Electoral Administration. This feature is crowned by the establishment in the 1980s of the Joint Standing Committee on Electoral Matters ('Electoral Matters Committee'),³⁶ the Parliament's first permanent dedicated committee on the electoral system. The focus on 'management' in this domain acknowledges that Parliament belongs to all parties, who jointly share responsibility for managing the electoral system in the interests of the community as a whole. A consequence of this new sense of shared management responsibility has been the growing use of the Electoral Matters Committee as a specialist public forum for deliberation over electoral issues, bringing together elected representatives and community activists.

The most significant institutional driver for reform in the 1950s was the Report of the Joint Select Committee on Constitutional Review ('Constitutional Review Committee'), established by the Menzies Government in 1956 and reporting initially in 1958 and more comprehensively in 1959.³⁷ Part two of the Report dealt in considerable depth with 'Commonwealth Legislative Machinery', covering options relating to the number of elected representatives, their terms, casual vacancies, electoral divisions, and census assessments of

³⁶ Originally 'electoral reform'.

³⁷ See Prime Minister Menzies' motion: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1956, 2453-4 (Robert Menzies, Prime Minister). See also Joint Committee on Constitutional Review, *Report from the Joint Committee on Constitutional Review* (1959); cf Joint Select Committee on Electoral Reform, above n 21, 18-20.

population numbers.³⁸ Although the Constitutional Review Committee's recommendations were not debated by Parliament and not taken up by the Menzies Government, they became the mainstay of electoral reformers over the next decade.³⁹ A number became the basis of referendum proposals. Two of the successful measures were the 1967 repeal of s 127 excluding Indigenous Australians from the census, and the 1977 rules on party-parity in the filling of Senate casual vacancies.⁴⁰

The most significant evidence of the Commonwealth Parliament's contribution to reform of the voting rights of Indigenous Australians is the October 1961 *Report from the House of Representatives Select Committee on Voting Rights of Aborigines*.⁴¹ This committee recommended replacement of the 1949 legislation with a new scheme of voluntary enrolment for Indigenous people, followed by compulsory voting once enrolled. The impact of this committee can be seen in Parliament's passage of the 1962 amendments to the *Electoral Act* implementing these recommendations. This stands out as one of the very few bipartisan electoral measures to have succeeded in a century of the Commonwealth Parliament.⁴²

Parliamentary debate over electoral reform gathered pace in the early 1960s, with reformers drawing on the recommendations of the 1959 Report of the Constitutional Review Committee, which were adopted as Labor policy in 1961. Although these debates failed to change many electoral provisions, they sharpened the differences between government and opposition and prepared Parliament for the intensification of public scrutiny into electoral law and practice experienced in the early 1970s. The Whitlam Government (1972-75) spent considerable energy in devising plans for electoral reform, conscious of 'the Australian tradition for experimentation in electoral laws'.⁴³ Many elements were subject to repeated rejection, with only a few securing a place on the pages of the statute book by the time of the fall of the Whitlam Government.⁴⁴ Overall, the Whitlam Government introduced some 16 Electoral Bills which were either blocked in the Senate or allowed to lapse in the face of a lack of support from the Opposition.⁴⁵

The last great wave of electoral reform was associated with the 1983 election of the Hawke Government and the establishment of the Joint Select Committee on Electoral Reform, chaired by Dr Klugman.⁴⁶ From 1983 to 1987 this committee maintained its role as architect of the new policy framework. Since the 1987 election, the role has changed to that of overseer and the name has

38 Joint Committee on Constitutional Review, above n 37, 6-56.

39 Whitlam, above n 35, 658-60.

40 Joint Committee on Constitutional Review, above n 37, 6-56.

41 Commonwealth, *Report from the House of Representatives Select Committee on Voting Rights of Aborigines*, Parl Papers 23rd Parliament third session (1961) vol II, pt two, 1391-406.

42 Joint Select Committee on Electoral Reform, above n 21, 20-1.

43 Whitlam, above n 35, 654; cf Joint Select Committee on Electoral Reform, above n 21, 23-7.

44 Joint Select Committee on Electoral Reform, above n 21, 24-5; Reid and Forrest, above n 2, 117; Whitlam, above n 35, 671-2.

45 Whitlam, above n 35, 676-82.

46 Joint Select Committee on Electoral Reform, above n 21, vi.

changed to the Joint Standing Committee on Electoral Matters. The original terms of reference for this committee were comprehensive and its early reports provide a public record of the emergence of the new reform agenda. Prominent among these changes were three sets of reforms which defined the new electoral framework established during the 1980s. Firstly, the size of Parliament was increased in 1984 with the enlargement of the Senate from 10 to 12 senators per State, and enlargement of the House of Representatives from 123 to 148 members. Secondly, political parties were granted legal recognition and public funding. Thirdly, a statutory non-partisan 'electoral bureaucracy' known as the Australian Electoral Commission ('AEC') was established, under the non-ministerial direction of an Electoral Commissioner, assisted by two part-time commissioners.⁴⁷

This new regime of electoral administration benefited greatly from the public accessibility of the parliamentary watchdog. The Electoral Matters Committee's watchdog role was enhanced by its ability to act as a forum for wide-ranging exchanges of perspectives on the effectiveness of electoral practices. The Electoral Matters Committee has provided an avenue for electoral officials to publicise their own interests and responsibilities, and for community bodies to come together and deliberate with relevant officials. Not only party activists but also interested individuals and groups have learnt to use the Electoral Matters Committee's public inquiries and hearings as opportunities to raise their concerns about electoral policy and administration.

Two important illustrations stand out as examples of the new phase of parliamentary consideration of the electoral system. The first is the unsuccessful attempt by the Hawke Government to establish a level playing field for electoral competition by banning electoral advertising in the electronic media. The second is the increased participation by minor parties in parliamentary deliberation over the electoral system. There is room for only brief mention of both developments.

The attempt to legislate against political advertising highlights the growing importance of the Joint Committee as an agenda-setter of electoral law and policy. The Government's response to the Electoral Matters Committee's 1989 report on risks to the funding of political campaigns took the form of a new legislative scheme to try to level the playing field of electoral advertising in Australian elections at State as well as federal level.⁴⁸ The primary target of the Government's scheme was the capacity of the major political parties and their financial supporters to dominate radio and television coverage of an election through comprehensive but expensive election advertisements.

In many ways, Labor's ban on political advertising constituted the most challenging contribution to practices of deliberative democracy. This legislation was subsequently struck down by the High Court of Australia ('High Court') as an unconstitutional breach of the right of free political communication, also justified on deliberative democracy grounds by the Court. This legislative

47 Reid and Forrest, above n 2, 24-31; Whitlam, above n 35, 682-3.

48 Joint Select Committee on Electoral Matters, *Who Pays the Piper Calls the Tune: Minimising the Risks of Funding Political Campaigns* (1989).

initiative and judicial reaction help define this third domain of deliberation as one of managed co-operation. Within Parliament, a new form of co-operative management has emerged with the important contribution of the minor parties; and with the external arena of public deliberation, the courts have dealt themselves in as interested managerial parties. The details of the unconstitutional Labor legislation matter less than the prominence it gave to arguments over the public management of political deliberation. The scheme was justified by Labor in terms of winding back the undue media domination of powerful parties, and opposed by others who successfully found a constitutional and indeed deliberative case for unrestricted community access to partisan political argument.⁴⁹ The argument advanced by the Government, and generally supported by the minority on the High Court,⁵⁰ was that Parliament had authority under the Constitution to legislate to protect the public interest at risk during election time. The majority of the High Court held that genuine political choice as protected by the Constitution was incompatible with wholesale government restrictions on voters' access to relevant political information.

Finally, a brief comment on the growing participation of minor parties and independents in parliamentary consideration of electoral policy. Three useful recent examples of this participation are the two extensive minority reports from the Australian Democrats included in the Electoral Matters Committee's reports on the conduct of the 1996 and the 1998 elections.⁵¹ The two minority reports are consistent with the general commitment of the Australian Democrats to elevate public accountability to a pre-eminent policy position. But these minority reports also canvas the merits of reforming the House of Representatives' electoral system to give greater representation to the smaller parties preferred by the growing minority of voters disenchanted by the major parties. Another distinctive feature is the Australian Democrat's call for the restoration of 'truth in political advertising' provisions which existed in the *Electoral Act* briefly in the early 1980s. Senator Murray has since introduced Bills to establish a new legislative scheme for 'political honesty' which has grown out of his participation on the Electoral Matters Committee.⁵²

VIII CONCLUSION

In concluding, a final word of caution is warranted. To identify Parliament as the primary deliberative institution is not to deny that important responsibilities

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3478 (Kim Beazley, Minister for Transport and Communications); *Australia Capital Television v Commonwealth* [No 2] (1992) 177 CLR 106 ('*Electoral Advertising Bans Case*'); cf George Williams, *Human Rights Under the Australian Constitution* (1999) 165-73.

50 See, eg, *Electoral Advertising Bans Case* (1992) 177 CLR 106, 147-67 (Brennan J).

51 For the two Australian Democrats minority reports, see Joint Standing Committee on Electoral Matters, *Report* (1997) 135-65; and Joint Standing Committee on Electoral Matters, *Report* (2000) 161-83.

52 See Charter of Political Honesty Bill 2000 (Cth) and Electoral Amendment (Political Honesty) Bill 2000 (Cth).

of public deliberation were expected to be conducted by the political executive within the closed walls of Cabinet and by the judiciary in the proposed High Court. The deliberative process at its most general includes the discussion of policy initiatives within Cabinet and the later review by the judiciary of the legality of contested conduct. But the federation framers understood that Parliament would play a key and distinctive role in the deliberative process by staging the most public forms of political debate over proposed law and policy. Parliament is thus the centrepiece in the deliberative process and has an important role to play as the deliberative assembly where competing views of community interests can be debated and weighed. This implicit set of expectations made at the time of Federation can now be joined a century later by a much more explicit and theoretical set of expectations relating to norms of deliberative democracy.

I have presented the three domains of deliberation as one illustration of parliamentary evaluation measured against deliberative capacity-building. The larger aim is to clarify standards for assessing deliberative performance in parliamentary institutions. The three domains of deliberation are not historically watertight reconstructions but simplified models of how the Commonwealth Parliament has used its deliberative capacities when developing the electoral system. The institutional history detailed reveals a path from exclusive to more inclusive modes of deliberation. Whether a national parliament actually improves its deliberative performance depends in part on what its citizens ask of it.⁵³ The Constitution permits the Commonwealth Parliament to rest content with the least democratic domain of exclusive partisanship, or to experiment institutionally with the more inclusive domain of bipartisan bicameralism, or indeed to develop further the increasingly open and public domain of multi-party management. It is not the Constitution but the citizenry that ultimately determines the fit between political ideals and parliamentary practices.

53 As is argued with force by David Solomon, *Coming of Age* (1998) 60-88.