What is a House of Review?

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Introduction

Speakers from Canberra might be expected to address lessons arising from the Commonwealth experience. But I want to begin by taking note of the ACT experience in self-government, which is an object lesson in not having an upper house.

Then I do want to draw back and identify some lessons from the Commonwealth’s experience of the Senate as a ‘house of review’. Here I will argue that review at its most basic means legislative review, including reviews which take the policy initiative and set appropriate legal standards for government.

Finally, I want to conclude with a warning about misapplying concepts of review (as in a ‘house of review’) that are foreign to Australian constitutionalism and regrettable in this, the centenary year, of Federation. And I want to do this and leave plenty of opportunity for other speakers, tonight and in subsequent seminars, to look more closely at the configuration of the house side of ‘houses of review’ eg. who gets in and under what electoral terms and conditions.

The Canberra option

The ACT has now had over a decade of experience of self-government, and I have to begin by acknowledging that we govern ourselves without an upper house. Or a state governor for that matter or indeed a formal head of state. We next go to the polls in October, but we only vote for seats in the Legislative Assembly. We have no upper house. But what we do have is a very powerful lower or single house.

The ACT has a very unusual parliament: unusual in its total reliance on proportional representation based on three multi-member seats. And unusual also in that this highly responsive parliament has the very public responsibility for determining, through formal vote in the Legislative Assembly, who holds office as chief minister. Further, the ACT parliament has the express power to throw out any chief minister. The last one was Kate Carnell who, despite many achievements, resigned just before a probable vote of no-confidence, which all the experts say she would have lost. And note that in the ACT scheme, the chief minister has no power to act first and dissolve the parliament: we have a genuine fixed-term parliament. So at the October elections, we will not be voting for seats in any upper house, because we do not have one --- and do not want one.

I dwell on this because it many ways it helps clarify the options facing Victoria. One very real option, down the track if not tomorrow, is to get rid of the upper house. The case for reform has to be balanced against the case for abolition. But I wonder if those who favour this abolitionist option are prepared to go the full distance and copy Canberra, with a reformed lower house based on proportional representation and with a premier capable of being dismissed by a parliament in circumstances where governments might never have a secure majority of their own.

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Living without upper houses

Having grown up in Queensland, I know the value of a unicameral parliament. It makes for decisive government, if swift decision-making is what you really want. The Queensland political tradition is one of strong executive government dominating a single-chamber parliament. But it is also one of weak protections for the rights of ordinary citizens, not to mention the rights of oppositions and elected representatives from non-government parties.

But as a young citizen in Queensland, I thought it was just natural not to have an upper house. This conviction was reinforced when I lived in Canada as a graduate student where none of the equivalents of our state parliaments has an upper house. They abolished the last of them over 50 years ago. And at the national level, the Canadian Senate is the envy of every government in the world, mainly because it is a toothless tiger, with very little effective power precisely because it is not an elected body. The government of the day appoints senators. Not surprisingly, such a Senate lacks public legitimacy. This is precisely why it is the envy of governments around the world: governments have total control over who gets in and over what they do when they get there. The situation only gets interesting when governments change, as happened during the 1980s after the defeat of Trudeau when the conservative Mulroney government faced persistent opposition from the liberal-dominated upper house --- until the government summoned up its courage to swamp the Senate with new government members.

So it is certainly possible to live without upper houses and also possible to live with Canadian-style non-democratic upper houses. New Zealand also abolished its upper house over 50 years ago, as have other countries: Denmark and Sweden for example, both now with interesting unicameral parliaments capable of genuine review. Hence it is worth stating right at the outset: upper houses are dispensable. But --- and this is a big ‘but’ --- I think that it only makes sense to dispense with them if you are prepared to reshape your parliament so it has real power over the life and death of governments. The New Zealand situation is worth noting, because over the last decade they have bowed to popular referendums for more popular control over government. Against the express preferences of the major political parties, the voting public in New Zealand have reformed their unicameral parliament by making it more openly and fairly representative of the social spectrum of community groups and minority interests. The result is a unicameral parliament that is just bristling with the business of parliamentary review, even though there is no separate ‘house of review’.

We can look further afield. In Australia we rarely hear about the German upper house or about the fact that the state parliaments in the German federation (all except Barvaria) are unicameral. Why not adapt German practice and make our existing state upper houses places where local government could be represented, just as the German national upper house comprises (appointed) representatives of the state governments? This is just one of a number of structural changes that could enliven our state parliaments.
What do houses of review really do?

But I think that the structural possibilities matter less than the content of the review activities appropriate to a ‘house of review’. The role and reform of upper houses has to be seen in the wider context of governance. Reform is possible, just as is abolition. So too is retention of the status quo, on the basis that reform it too hard and retention will not really threaten anyone. It all depends on what sort of review you want a ‘house of review’ to perform. And here we get into the very heart of the matter. Upon what principles or institutional blue-print should a ‘house of review’ be reformed or renovated or reshaped? Is there an institutional design associated with effective ‘houses of review”? What can history teach us about how best to construct a ‘house of review’?

Let me try to clarify the nature of review with a concrete story.

Let me take you back to the days of the Great Depression. During the Great Depression of the early 1930s, many critics called on the Commonwealth government to take drastic measures to cut back unnecessary public spending. Even parliamentary committees felt the axe of restraint. For instance, the Lyons government suspended the operations of the Commonwealth public accounts committee as an economy measure. The public accounts committee which was founded before the Great War was not re-instituted until the early 1950s!

Many of the institutional reforms to national governance were canvassed in the 1929 report of the royal commission into the Commonwealth constitution: the Peden royal commission which might have lessons to teach later commissions of inquiry into constitutional matters. The 1927-29 royal commission anticipated this mood of economy and cutback, and entertained many interesting calls for reform of the Senate to allow it to contribute greater value to national politics. There were even calls for the abolition of the federal upper house, on the grounds that it then contributed so little to national governance. The most widely-cited ground was that the federal upper house had failed to live up to its role as a states’ house and should therefore be either abolished or fundamentally restructured to make it work as a states’ house eg, by directly representing the governments of the states.

Not a great deal came of the 1929 Peden report. It did not feature highly when the Senate got around to debating its own future, except to the extent that the royal commission generally supported the persistent call for the introduction of a reformed electoral system based on proportional representation (PR). This call for PR pre-dated the 1929 royal commission and survived well after it. The 1929 royal commission was yet another medium to carry forward the argument, until it finally came to fruition with the Chifley government’s scheme to enlarge and transform the national Parliament with the introduction of a system of PR for the Senate beginning with the 1949 elections, which were won by that great Victorian, Robert Menzies.

Learning from the Senate’s experience

But my point is that the real story of the transformation of the Senate began with a few modest institutional steps that were barely noticed at the time and escaped the attention of those associated with the 1929 royal commission, and indeed most other observers and commentators. Just as the royal commission completed its business, the Senate established its own committee of inquiry into Senate reform. This inquiry reported in
1932, the same year that the Lyons government was preparing to close down the public accounts committee for reasons of economy. The one great result of this Senate inquiry was the establishment of the first really enduring and sustainable Senate committee: the Regulations and Ordinances Committee established to review government regulations ie, delegated legislation made by the political executive under the authority of enabling legislation passed by parliament. The Senate committee on delegated legislation is now the oldest and most venerable scrutiny mechanism in this particular ‘house of review’. The history and performance of this committee tells us much about the repertoire of review in a ‘house of review’.

Two points are worth emphasising here.

* First, the Senate entered on this journey of institutional renewal free from any traditional prejudice that its role was fundamentally that of a states’ house. Instead, the Senate saw its own role primarily in terms of a ‘house of review’, where the primary task was reviewing the government. Note the emphasis: reviewing the government, not simply reviewing the House of Representatives. It took the Senate many years to work through just what a ‘house of review’ might mean in Australian circumstances. There were plenty of commentators who told the Senate to ape the UK House of Lords and adopt a minimalist approach to the work of review. The House of Lords evolved into a house with a limited suspensive-veto which could be over-ridden by the House of Commons. So too many Australian commentators thought that the Senate’s exercise of its right of review should be confined to minor and transitory fine-tuning of legislative blemishes arising from the lower house, short of any substantial overhaul of government policy.

But under the Australian Constitution, the Senate is virtually the equivalent to the lower house in terms of legislative power, with only a few significant limitations on its institutional initiative: eg, the Senate can not initiate a taxation bill or an appropriation bill (or amend supply bills for the ordinary annual services of government). I will say a little more in my conclusion about this important limitation on the power of upper houses to get in the way of the rule of the majority as expressed in lower houses. But for the present, I want to note that the Constitution does however allow the Senate to reject or suggest changes to these core government initiatives. This is very different from the House of Lords situation where review means temporary restraint on government initiatives. For the Senate, review does not rule out taking the initiative. For example, the Senate delegated legislation committee has taken the initiative on legislative policy and over its 75 years or so set the standards for government compliance with the manner and form of regulatory instruments. All this with barely a whimper of partisan division in its quiet history of cross-party consensus when developing appropriate legislative policy.

* Second, the Senate example illustrates that the most energetic forms of parliamentary review are extensions of the chamber’s legislative charter. The federal upper house began its internal transformation by attacking the weakest links in its own regime of review, which was in relation to the legislative process. The committee on regulations was established to fix up the weakest side of the legislative process, which was the scrutiny of sub-ordinate legislation ie, the power of the political executive to make regulations and related statutory instruments in order to give effect to grants of such legislative power delegated to the executive by parliament. One of the first enactments of the original Commonwealth parliament was the Acts Interpretation Act. This law
provided that either house of parliament could disallow government regulations. That is, both chambers have long had the legal authority to disallow government regulations. Yet only the ‘house of review’ has devised a committee mechanism to manage this basic legislative function. The 1932 establishment of a dedicated committee on regulations is an indication that the Senate understood that ‘review’ required specialist committees to properly advise the Senate over the appropriate policy framework for such momentous matters as disallowance of government regulations.

Review means ‘going back to the beginning’

The original aim behind the Senate’s most venerable review committee was to establish a committee with two legislative functions: to monitor the parliamentary flow of delegating provisions in bills to try to keep them to a minimum; and then to scrutinise the subsequent exercises of delegated legislation to ensure that they complied with the standards parliament expected of executive law-making. History shows that the original hope of scrutinising bills as well as regulations was not to come about for some 50 years, with the eventual establishment of the Senate Scrutiny of Bills Committee in 1982.

But the really important point is that the Senate understood its review role in remarkably constructive and proactive terms. Review did not mean reactive scrutiny, even though the two legislative scrutiny committees only went into action after the executive acted: either by introducing a bill or by declaring regulations. The conventional meaning of review in the ‘house of review’ literature is much the same as it was when commentators like Walter Bagehot, the worldly editor of *The Economist* (and the same Bagehot highlighted at p15 of the Commission’s Discussion Paper) originated the term. In his classic *The English Constitution* (1861), review means a sober second look, a pause for reconsideration of fine detail, an examination of legislative errors that might have crept in through the haste of initiating governments.

This is good as far as it goes, but to my mind it does not go far enough --- now, a century and half later. This quite timid original embrace of review might make sense when dealing with an unelected upper house. But the spirit of Australian constitutionalism which is being celebrated in this centenary of Federation suggests a more energetic version of review. The conventional and reactive approach to a right of ‘review’ is to distinguish it from a right of ‘pre-view’, which is presumed to belong exclusively to lower houses. I disagree: review can mean ‘to look anew’ and not simply ‘to look again’. Review means re-visiting the beginning, going back to the starting point, revising so as to improve the basic framework. It means, in other words, re-examining the fundamentals of government initiatives, and not simply proof-reading policy.

The larger point is that the two Senate review committees have understood their role in terms of setting and policing standards: standards for legislative content and process. To be sure, both committees have attracted complaint from executive government for allegedly changing the goal-posts or, to use an alternative image, raising the standards in the spirit of continuous improvement. But this is simply evidence that both committees have seen their reviewing function in terms of standards-setting and not meekly in terms of compliance-checking, based on the executive’s own declared standards.
I harp on this history for a reason. ‘Houses of review’ should not necessarily confine themselves to reactive checks of compliance by executive authorities with the executive’s own declared standards, whether it be in legislative drafting, financial reporting or indeed standards of ministerial responsibility. Sure, there will be theories about that justify such restrictive regimes of review; and no red-blooded political executive would fail to circulate and promote such restrictive views. But equally, no red-blooded parliament or parliamentarian should fail to respond with the historically informed view that Australian constitutionalism celebrates democratic accountability, including such fundamental democratic values as accountable legislative procedures. At its best, review is simply accountability in action.

I could give another Senate example to show how modest first steps in parliamentary review can later grow into quite substantial instruments of legislative and policy initiative. My favourite example is the Senate estimates hearings. These began in the early 1970s as minor experiments in parliamentary control over the budget. Then and now the estimates hearings consist of public hearings on the government’s core legislative business ie, its annual budget. The Senate hearings have become quite formidable forums of public accountability, modelled loosely around the country in all state and territory parliaments. Bureaucrats as well as ministers appear, in theory to help the upper house deliberate on the merits of the budget bills, and in practice to comply with parliamentary interests in many matters of public accountability, some relating to high policy but many relating to lowly administration --- but all relating to the management of public expenditure authorised by the parliament.

My point here is that the estimates are now the most public and visible forms of legislative scrutiny performed by the Senate. I am sure that the estimates hearings could be done better and I do not want to defend their worst excesses, which do detract from their public value and reputation. But estimates hearings are the public side of the other forms of legislative scrutiny mentioned earlier: performed by the committee on delegated legislation and the Scrutiny of Bills committee. These three types of legislative scrutiny are good reminders of what ‘review’ means in an active ‘house of review’. ‘Review’ thus understood includes the very proactive task of standards-setting (from standards for legislative drafting, through standards for financial reporting and accountability, right through to standards for budget decision-making) and should not be confined to the reactive world of fine-tuning initiatives derived from the political executive.

_A final warning_

One last task is to issue a warning against drawing too heavily on supposedly ‘Westminster’ doctrines about the useful but limited role of a ‘house of review’. The so-called ‘Westminster system’ might be an accurate term when describing the situation in the United Kingdom. But it is inappropriate as a description of Australian constitutionalism, certainly as far as the Australian Constitution and the Commonwealth Parliament are concerned. At the centenary of Federation, it makes little sense to presume that Australian parliaments can be constrained within the ‘Wesminster’ mould. The spirit of Australian constitutionalism is going in other directions, as is illustrated by the most recent instrument of governance, the ACT framework, with which I began.
Advocates of minimal review in upper houses tend to draw on quite dated accounts of ‘Westminster’. They transfer the resentments held against the un-elected House of Lords to Australian upper houses. This resentful transfer makes no sense in the case of the Senate and very little sense in the case of many reformed state upper houses. What the advocates of restrained upper houses have in mind is the threat posed by reactionary conduct by a House of Lords to democratic governments formed through popular election of the House of Commons. But these advocates tell only half of the story: they identify the defects of un-elected upper houses but they do not identify the defects of elected lower houses. Every good idea and institution, including lower houses, have their limitations, one of which is the undue concentration of power in the hands of the political executive. The review function of upper houses makes most sense when we begin to acknowledge the limitations of popularly elected lower houses.

And here we can draw on ‘Westminster’ doctrine, although it is not the part featured in conventional accounts of ‘the Westminster system’. Take any of the classic accounts of ‘Westminster’ doctrine well-known to nineteenth century Australian constitutional framers, eg, those of John Stuart Mill in his Considerations On Representative Government (1861) or better still Bagehot’s The English Constitution mentioned earlier. Even though Bagehot rejected Mill’s defence of bicameralism and of proportional representation, Bagehot argued that some sort of reviewing chamber was necessary to balance the government-dominated lower house. What it relevant today is not so much Bagehot’s timid model of the reviewing solution but his account of the reviewable problem. And the problem is the body that dominates the lower house: ‘The most dangerous of all sinister interests is that of the executive Government, because it is the most powerful’ (English Constitution, Fontana Library edition, 1963, p135).

It is a mystery to me why Bagehot did not go on to support the agenda of parliamentary reform promoted by John Stuart Mill, which is still the agenda of upper house reformers today: bicameralism to break the hold of elective despotism, and proportional representation to guarantee the rights of representation of those vulnerable to the power of governing majorities. This includes not simply numerical minorities but vulnerable and excluded majorities, such as women, to cite the cause closest to Mill’s own heart.

Conclusion: what about the rights of majorities?

I said earlier that I wanted to return to the challenge posed by upper houses to the rule of majorities. The shorthand formula for ‘democracy’ is rule by the majority, because this is the proven, practical and effective way of political decision-making among equals. The standard complaint against many traditional upper houses is that they represent entrenched and privileged minorities, usually because their franchise or electoral basis is restrictive compared to those used in lower houses. This suspicion against certain types of minority power is also evident in many democratic constitutions. For example, note the historic limitation on the power of the upper houses over money bills. Some form of this limitation is found in most modern constitutions, including that of the United States. This restriction is also found in the Australian Constitution.

The restriction rests on the principle that the more popular house should hold the initiative in relation to money bills. That is to say, numbers count: democracy tries to being together (or ‘constitute’ as in ‘constitutional government’) the rule of the majority and the rule of law. But as good democrats, why not bow to the rule of the majority?
Why not deny upper houses any rights to interfere in policy and legislative processes managed by the people’s elected representatives in their lower houses? If democracy means effectively the rule of the majority, why not let the majority in the lower house get on with the job of governing until the next election, when the people themselves can determine who should rule?

The answer turns on what we mean by ‘majority’ in ‘majority rule’. When referring to the majority represented in lower houses, do we mean the initial majority of popular votes, or the secondary majority of elected representatives? A party possessing a majority of lower house seats does not necessarily represent a real majority of voters. This is now routinely the situation at the national level: the Howard government has a majority of seats in the House of Representatives, but has never won anything like the support of the majority of the electorate.

The surprising thing in all this is that the case for upper houses rests on the case for majority representation and majority rule. Upper house advocates do themselves a disservice when they claim that upper houses exist to represent ignored or vulnerable minorities. With appropriate electoral systems based on proportional representation, upper houses can certainly give minorities a good chance of parliamentary representation. But this is a means towards an even more valuable end, which is majority representation properly understood in terms of support right across the electorate.

Confining my evidence again to the Commonwealth parliament: at the 1996 general elections, the coalition government won a comfortable majority of lower houses seats (63.6% of House seats) with less than a majority of popular votes (47.3%). At the 1998 election, the governing coalition was returned with 54% of House seats, even though its electoral support dropped to under 40%. The figures for seats won in the Senate give a more accurate and balanced picture of genuine majority representation, including the protection of the minority groupings which tend to get ‘screened out’ of the allocation of lower house seats.†

With that plea for the rights of the majority so defined, I thank you for your patience and conclude my presentation.

References


PARIAMENTARY MANDATE AND ACCOUNTABILITY

Richard Mulgan*

I

The topic for discussion is the role of the so-called parliamentary ‘mandate’ in the context of the powers of the upper house and the part played by that house in holding governments accountable to Parliament and the public. We are all familiar with the claims of newly elected governments that the voters have given them a mandate to govern and to enact the policies which they proclaimed on the hustings. Such claims are typically employed to forestall potential resistance from political opponents who may be in a position to obstruct the government in exercising power and implementing its program. They are particularly relevant in connection with upper houses. Upper houses, it is said, should respect the government’s mandate and allow safe legislative passage to the government’s election commitments. The mandate is thus linked to the concept of a ‘house of review’ which is essentially a limiting concept. Emphasis on the upper house as house of review is intended to limit the upper house to scrutinising government and to prevent the upper house from challenging the government’s right to govern and to implement its program. Respect for the government’s mandate is part of this self-imposed limitation.

On the other hand, the concept of the mandate is often vigorously contested. It is said to imply a false view that majority governments have been literally instructed by the voters. It is considered a hangover from British struggles with an undemocratic House of Lords and out of place in relation to Australia’s elected upper houses. More recently, the attempt by non-government parties such as the Australian Democrats in the Senate to claim their own mandate has further muddied the waters. Most expert commentators consider the notion to be fallacious and misleading rhetoric and one generally to be avoided in serious political analysis. However, the notion of mandate should not be dismissed outright. Though containing some questionable implications, it also asserts some important democratic principles. We need to rescue the baby from the more disposable bathwater.

This talk is in two parts. The first deals with the various meanings of mandate and seeks to distinguish the valuable core of democratic conventions from the more debatable accompaniment. The second concentrates more on challenges that have been posed to these conventions and points to some difficulties of maintaining traditional conceptions of mandate in relation to elected upper houses.

II

The doctrine of the mandate has been used to express a set of political rights and obligations as well as a theory about the basis for these rights and obligations. The first right is that the party or parties who have secured a majority of seats in the lower house have a right to govern (the so-called ‘general’ mandate). An upper house has an obligation to respect this general mandate by not forcing the government from office by blocking supply. Secondly, the government has a right to implement its election program in the sense of enacting the specific policy commitments it promised in its campaign (the so-called ‘specific’ mandate). An upper house therefore has an obligation not to impede the government in the passage of these polices into law. The

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specific mandate has sometimes been extended to include all written policy commitments, perhaps collected together in a ‘manifesto’. Alternatively it may be confined to those policy commitments which were given media prominence in the campaign.

The basis for these rights and corresponding obligations lies in the democratic electoral process. Because a majority of voters voted for them, the majority party or parties and their policies ought to be allowed to prevail. The government should not be blocked by other institutions which lack the same degree of democratic legitimacy. When applied to upper houses, this principle of restraint therefore depends on an assumption that the upper house is less democratically legitimate than the lower house where the government holds a majority. This assumption of the lower house’s superior democratic legitimacy may be called into question, an issue to which we will return later. We should also note that the right of the government to govern and enact its policies applies not just to upper houses but also to other institutions of government. For instance, the bureaucracy and even the courts are also expected to defer to the elected government and to respect its election commitments.

What gives the majority party this superior democratic legitimacy? Here, the notion of a mandate appears to offer a rationale. ‘Mandate’ literally means a ‘command’ or ‘instruction’ and suggests that the voters have formally instructed the majority government to hold office and to enact its campaign promises. It is at this point that the doctrine of mandate starts to become unstuck. Particularly in relation to the specific mandate, it is clear that few voters actually make their decision with the deliberate purpose of instructing their preferred party to enact any particular policy or policies. Most voters are ignorant of the details of their chosen parties’ programs. Even if they are well informed, they have only one vote with which to express an opinion across a large range particular policies. Treating an election as a referendum on a large number of policy options is clearly fallacious. Even in relation to the general mandate, it is stretching reality to say that a majority has consciously chosen the majority government, that the people have ‘spoken’. Some voters vote tactically or unthinkingly follow how-to-vote cards. They thus have little real intention of supporting the party their votes help to elect.

However, that fact that the literal mandate is unfounded does not invalidate the rights which it was intended to justify, namely the right of majority parties to govern and their right to enact their campaign commitments. Though the attempt to base these rights on the conscious intentions of the voters fails, there may still be other good reasons for supporting these rights. Such reasons, I would argue, are grounded in the preconditions for effective democratic elections.

The general right of the government to govern follows from its having acquired a majority of seats and votes (however mediated through particular intricacies of the electoral system). It does not depend on every member of that majority having consciously chosen the outcome though it is not unreasonable assumption that most will have preferred the outcome to the nearest alternative. The fairness of the procedure is what counts, not the actual intentions of the voters. Admittedly, the authority of the majority is not overwhelming and should not be allowed to override the rights of individuals and minorities. Where minorities need protection, other non-elected institutions such as the judiciary are clearly justified in challenging the executive. But
the basic principle that the executive power should be held by those who attract a majority of voters for whatever reasons we can take to be beyond serious challenge.

The right of an elected government to pursue its specific campaign policies can also be grounded in democratic principle. If elections are to provide the voters with meaningful choices between alternative party governments, the candidates and parties should present the voters with a reasonably clear idea of what type of regime they will provide if elected. Admittedly, much that a government will do cannot be laid down in advance. But voters have a right to be given a sense of a prospective government’s general policy direction as well as some of the specific policies it intends to implement. Once a government is elected, we have a legitimate expectation that it will keep faith with the electorate by seeking to implement its election promises. Governments that break their electoral commitments threaten the integrity of the electoral process and undermine public trust in politician and politics.

Moreover, the fact that a policy featured in an election campaign gives added democratic legitimacy to that policy which perspective opponents ought to respect. For instance, if a party has campaigned vigorously with a particular policy and then wins government, the bureaucracy and the media will usually accept that further opposition to the policy is unwarranted. Opposition is certainly less warranted than if the policy had been sprung on the public after the election. The fact that a policy has been widely debated and subjected to political scrutiny in an election campaign means that it has received a degree of popular authentication and endorsement which gives it added democratic authority. In this sense, a government can reasonably expect easier passage for the implementation of its electoral premises. The policy may not have been consciously favoured by all those who voted for the government. But, at the very least, the policy may be said to have run the gauntlet of public exposure and not to have prevented the government from being elected. For these reasons, it is reasonable for governments to claim a right to enact electoral commitments, a right that they can expect other political actors to respect. One of the clear advantages of such a right is that it may force prospective governments to put potentially unpopular policies before the electorate. In this way they can hope to defuse subsequent opposition, as the federal Coalition did with the GST. In 1993, the reason that the Hewson-led Coalition parties published their reform program in such detail was to secure added legitimacy for the program when it faced opposition on the Senate. Democracy and the voters stand to gain by a convention that encourages parties to garner electoral support for their policies.

We can therefore identify two sets of what may be called election-based rights and corresponding election-based obligations: first, the general right of a government to govern based on its having secured a majority of seats and the obligation of non-government parties to respect that right; secondly, the right of a government to enact its election policies based on the exposure of these polices to the electorate in an election campaign and the corresponding obligation of other parties not to resist such enactment. Whether or not these rights and obligations are to be described as a ‘mandate’ is perhaps best left open. For my own part, I have argued that most politicians and media commentators understand the concept of mandate in the way I have been suggesting. That is, the implication of command or instruction is understood loosely or metaphorically rather than literally. On the other hand, a government’s opponents sometimes choose to understand the term literally. This enables them to undermine the
claims as unrealistic. They can also rely on sceptical support from expert political scientists.

In such circumstances, the term mandate continues in a perpetual state of confusion, because it is in the interests of different sides in politics to understand it differently. I return, however, to my initial conclusion, adopting wherever possible the more neutral language of election-based rights. Thus the general mandate can be understood as the election-based right of the government to govern; the particular mandate refers to the ‘election-based right’ of governments to enact campaign policies. The precise reason why elections should give rise to such rights is left undefined in such a formulation, thus avoiding some of the problems associated with mandate.

III

We can now turn to these election-based rights in practice, particularly as they affect the role and design of upper houses. In this connection, the doctrine of election-based rights has been used to limit the powers of upper houses. Upper houses are not to vote down the government supported by the majority in the lower house. Nor should they unreasonably block or amend government policies which were part of the government’s election campaign. These constitutional conventions of a deferential upper house respecting the government and its election promises are derived from historical Westminster precedents where a non-elected upper house was obliged to yield before a democratically elected lower house.

The convention of the general election-based right to govern can be written into the constitution by banning the upper house from blocking supply. The specific right to enact campaign promises, however, is less precise and cannot be written into law. Its recognition depends on the voluntary acceptance by the government’s political enemies. They must choose not to exercise their legal right to reject government-sponsored legislation. In present-day Australia, the specific election based rights are under threat from a number of directions.

One stems from general scepticism about the validity of election promises. For instance, some critics argue that election promises should only be kept if they constitute what these critics would count as sound public policy. This view is common among economists and business leaders who tend to subscribe to a cynical view of the democratic political process. Election campaigns, it is said, require politicians to enter into a bidding war for the popular vote, offering irresponsible bribes to the voters. Once in office, ministers should forget about their election promises and govern in the public interest. Leaders who break their promises are thus praised for their political courage and sense of public responsibility. From this perspective, the notion of a specific mandate, with its commitment to enacting election promises, is a doctrine of very dubious value. Opposition parties controlling upper houses should instead be encouraged to block the government’s election policies particularly if these policies threaten the critics’ own view of the public interest.

By contrast, another reason for questioning the authority of election commitments sees them as insufficiently democratic because they are unreliable evidence of public opinion. As already indicated, the fact that a party gains majority support in an election in no way guarantees majority support for their individual policies. Voters are generally ignorant of policy details. Even if they are fully informed they have only one vote with which to express an opinion across a large range of individual policies. If we want government in accordance with popular opinion, then
public opinion polls provide a much more reliable guide than election results to what the public are thinking. Opposition parties in an upper house are therefore fully justified in resisting an electoral commitment if it can be shown to be unpopular, as the Democrats argued in relation to the Howard government’s proposed privatisation of Telstra.

Constraints of time prevent an adequate rebuttal of such scepticism about election promises. Let me must simply reassert that effective representative democracy depends on parties’ offering policy commitments during election campaigns and on their making every effort to enact the commitments if elected. One of the main reasons for public disillusionment with politicians is that they do not keep their promises. Any notion that promise-breaking is legitimate for whatever reason, whether elitist or populist in inspiration, must be damaging to the integrity of our political system.

More directly relevant for present purpose is a third line of scepticism about the government’s election-based rights. This derives from the growing democratic legitimacy of upper houses. Respect for the election-based rights of the government majority in the lower house depends on the superior democratic legitimacy of the lower house. The classic example, of course, is the UK House of Lords in relation to which the mandate doctrines were originally formulated. As an hereditary and unrepresentative chamber, the House of Lords came under increasing pressure to respect the superior authority of the elected chamber, first in relation to choice of government (the general mandate) and then in relation to campaign commitments (the particular mandate). Such conventions have survived the change from hereditary to appointed peers in the United Kingdom. In Australia, they worked well with upper houses elected on a restricted franchise.

So long as the upper house is less democratic in its selection procedure than the lower house, it can reasonably be expected to respect the election-based rights of the lower house majority. However, such restraint becomes less reasonable if upper houses are elected on a more democratic basis. Indeed, if upper houses were to become even more democratic than lower houses, the principle of upper-house restraint becomes untenable. It can be argued, for instance, that proportionally elected upper houses are more democratically legitimate than lower houses elected on single-member electorates because they more accurately represent levels of party support in the community. Of course, there are the countervailing issues of the length of parliamentary term and the method of allocating seats to population. These detailed issues of election systems were no doubt canvassed in earlier seminars. I would just point out that, from the Commonwealth experience, the perceived democratic legitimacy of the Senate is growing and placing the election-based rights of the lower house under steadily increasing strain.

For instance, the Democrats, with the support of the Labor Opposition, have recently challenged the election-based right of the government to enact its campaign policies. Initially, the Democrats were respecters of the government’s campaign policies, recognising the authority derived from the government’s exposure of its polices to the electorate.
Since then, however, the Democrats have become bolder in the pursuit of their own policy agenda. Rather than supinely conceding to the government’s right to enact its election program, they have made their own election commitments to resist elements of the Coalition’s program if they hold the balance of power. They have then subsequently used these commitments as justification for countering the Coalition government in the Senate. Thus in 1996, they claimed a right to oppose the privatisation of Telstra and in 1998 they opposed the GST, forcing the government to negotiate substantial changes.

In claiming the right to oppose the government on the basis of their own campaign commitments, the Democrats claimed that they too had a ‘mandate’ for their stance. This upset traditionalists who argued that only governments can have mandates. Such criticism is too easy and amounts to bald reassertion of traditional practice. The reason why only governments have usually claimed mandates is that only governments have traditionally had the democratic authority to enact electoral commitments. But once we understand the mandate as an election-based right, there seems no reason to deny the Democrats the opportunity to base their own right to resist in the Senate on a campaign commitment to do so. Every elected member of Parliament has a right and obligation to keep his or her campaign commitments, whether they end up in a governing majority, an opposition or holding the balance of power. Once the Democrats had committed themselves to blocking a government they had secured an election-based right to do so. The conflict between the government and the minor parties in the Senate thus becomes a quite understandable clash of election-based rights and thus a clash of so-called ‘mandates’.

Of course, one can object to the growing assertiveness of the Democrats and other opposition parties in upper houses. It can be seen as undermining the clarity of a two-party contest between alternative governing parties each with its own program which the victor should be able to implement. But to make this objection requires an argument about the dangers of strong upper houses and should not rely simply on an assertion about the scope of the term ‘mandate’.

It should also be clear that the relative strength of upper and lower houses and the willingness of the upper house to respect the election based-rights of the lower house depends critically on their comparative degrees of democratic legitimacy. The Westminster conventions of responsible lower house government were forged in an era of democratically illegitimate upper houses. We are witnessing a gradual erosion of these conventions by democratically elected upper houses. So far the erosion applies only to acceptance of the government’s right to enact its electoral program. But it could also start to affect the continuing acceptance of the so-called general mandate, that is the obligation on the upper house to accept the right of the lower house majority to hold government. If the upper house is more or less equally democratic in composition, why should it not have a say in who forms the government? What is so God-given about of lower-house supremacy? One must surely doubt the long-term capacity of this ancient imported principle to withstand pressures from upper houses with roughly comparable equal democratic legitimacy.
All of this suggests that there are hard choices to be made. Those who cling to the idea that only governments should have mandates, ie that upper houses should accept the power and policies of lower house majority parties, should make sure that the upper house cannot reasonably claim equal legitimacy with the lower house. Some element of comparative weakness must be deliberately inserted, not just in the powers of the house but in also in its composition. From this perspective, the Legislative Council should certainly not be made proportional. Rather it should rather be made even less democratic than now. However it is doubtful, in this democratic day and age, whether deliberately making an upper house undemocratic in order to protect the lower house is justifiable. The logic of maintaining lower-house supremacy drives remorselessly to the radical solution of abolishing the upper house altogether, ie to unicameralism. This option is by no means unthinkable. On the other hand, retaining an elected upper house may lead to the adoption of alternative models of democratic government in which much more is left to parliamentary negotiation and more than party is on a position to assert a so-called ‘mandate’ or election-based commitment. Such consensual systems have their advantages in imposing greater checks and balances and alternative, less direct means of accountability. The choice between them depends on the type of democratic system one wants. In making this choice, little will be gained by arguing about the meaning or scope of ‘mandate’. Much more important is our judgment of the reality that lies behind the terminology.

**Further Reading:**


Murray Goot, ‘Mulan on Mandates’, *Australian Journal of Political Science* 35 (2), 323-6