State upper houses and parliamentary democracy

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Strong upper houses are a distinctive and important part of Australia’s constitutional heritage. While the Senate is the most visible and celebrated example, State upper houses (the Legislative Councils) are now also vital components of Australian democracy. Changes in the Legislative Councils over the past half-century, particularly with regard to their electoral systems, have subtly transformed their status and potential. The design of the Councils no longer casts them as conservative checks upon the ‘people’s houses’, or hand brakes on democracy, but makes them key elements within an improved version of parliamentary democracy. Further, the enhanced potential of the Legislative Councils has been increasingly realised as they have equipped themselves with the means to perform new tasks or to perform old tasks better.

The major argument for strong bicameralism in a parliamentary democracy is that it can act as a counterbalance to executive domination of parliament, a key feature of modern parliaments elected from single member constituencies. Upper houses do not determine the composition of the executive and, therefore, their control by the executive of the day is not a requisite for continued office holding by the executive. For this reason, they have greater potential for autonomy vis-à-vis the executive than do lower houses. An upper house with substantial power may be almost a necessary condition for significant separation of legislative and executive power – that is, for there to be strong and independent parliamentary functions of any kind.

The strength of the contemporary Legislative Councils is a function of both their constitutional powers and their capacity to use those powers against the wishes of the executive. That capacity, in turn, depends on the Councils being regarded as legitimate political actors and, in a polity with disciplined parliamentary parties, on their having a different partisan composition to the lower houses. Over the past half century or so, the democratisation of their electoral systems has greatly enhanced the legitimacy of the Legislative Councils, while the adoption of proportional
representation (PR) by the mainland Councils has recast their failing mechanisms for producing differently composed chambers. Electoral reform and changing electoral behaviour have made it increasingly difficult for a major party to win a majority in an upper house. This means that upper houses can typically no longer be taken for granted by Australian executives, nor can they normally be hijacked by the opposition and used purely as an instrument of war with the government of the day. The same is true for Tasmania, with its history of differentiated electoral systems for its two houses of parliament and an upper house dominated by Independents.¹

The enhanced status and autonomy of the Councils has encouraged them to become increasingly active and credible in the performance of their key roles of review of legislation and scrutiny of executive action. By comparison with lower houses, they operate as legislatures, considering the detail of legislation and effecting significant legislative revision. Councils have for some time had committees dedicated to the scrutiny of delegated legislation to ensure its conformity with fundamental principles of administrative law, and have begun to extend this work to the scrutiny of primary legislation. They have experimented with machinery to enhance their capacity to develop policy.

With regard to scrutiny of the executive, the Councils’ procedures have in some ways evolved to become more similar to the lower houses. Thus question time (questions without notice) has grown quite rapidly from a marginal or non-existent practice to a prominent one. However, the distinctive character and composition of the Councils has tended to influence the conduct of question time, in part through innovation in the order in which questions are asked. In some Councils, question time now seems to operate more effectively than it does in the lower houses. At least as importantly, the Councils have outstripped the lower houses in the development of committee systems.

In modern parliaments, the role of question time has been increasingly supplemented with scrutiny through systems of committees. In Australia, national and state upper houses have led the way in this area. Their committees include those with specific scrutiny functions, for instance with regard to budgetary estimates or semi-

¹ Queensland abolished its Legislative Council in 1922, making it the only Australian State not to have an upper house.
autonomous administrative bodies, as well as those with broad investigative functions related to policy or portfolio areas. Overall, there is little doubt that both the quantity and quality of review and scrutiny is superior in upper than in lower houses across Australia.

Nevertheless, there are significant differences among the Legislative Councils in their record of procedural innovation and their general effectiveness. These are partly explained by partisan balances and, in turn, by electoral systems. The absence of major party dominance appears to be crucial. In a number of the upper houses which utilise —for instance the New South Wales and Western Australian Councils, as well as the Senate—the boost to autonomy provided by the absence of major party majorities has stimulated procedural evolution and stronger performance.

By comparison, the Victorian Legislative Council, with its record of virtually unrelieved non-Labor party majorities before 2002, has historically possessed significant independence of the governing party only during periods of Labor government, when there has been a strong tendency for it to become a servant of the opposition in the lower house. As a result, the Victorian Council has lacked a strong stimulus to differentiate its role from that of the lower house. The pattern has been preserved since the 2002 election, when the Labor party won substantial majorities in both houses. The procedural consequences of low autonomy are illustrated by the Victorian Council’s heavy reliance over many years on a system of committees shared with the lower house, with the constituent committees often controlled by members of the governing party. The adoption in 2003 of PR for the Victorian Council might be expected, therefore, to shift the evolutionary trajectory of that chamber towards that of other PR-based Australian upper houses.

However, partisan balance alone cannot explain differences in the operation of the Councils. Size is also a key factor, and probably a more fundamental one, as there would seem to be a size beneath which it is extremely difficult for a chamber to equip itself with, and operate, the machinery of a modern house of review and scrutiny. Australian State parliaments are small and their upper houses especially small. This limits their resources of talent and their capacity to develop an elaborate internal division of labour in organizing their tasks. But the State upper houses differ in size,
with the largest (Victoria, 44) nearly three times the size of the smallest (Tasmania, 15), and considerable differences among the others (SA, 22; WA, 34; NSW, 42).

The small chambers in Tasmania and South Australia are severely constrained. They too have been attracted to participation in joint committee systems, apparently as a means of enabling their limited membership to participate in a greater range of committees. But the cost is a weakening of upper house autonomy, together with coordination difficulties. Despite having more than twice the membership of the Tasmanian Council, the Western Australian Council also appears to be smaller than necessary. Its size seems to explain, at least in part, its decision not to develop a system of policy or portfolio related committees like those in the New South Wales and Victorian parliaments and the Senate. There seems little likelihood of significant enlargement of these chambers, although the Western Australian Council will grow by two seats as a result of the passage in 2005 of legislation aimed primarily at reducing electoral malapportionment. Indeed, there have been pressures in the other direction, as exemplified by the shrinking of the Tasmanian Council from 19 to 15 members in 1998, a change whose adverse effects are keenly felt in that chamber.

In general, the state upper houses, like the Senate, are major supports of parliamentary democracy in Australia. The procedural evolution and strengthening of performance which has been stimulated by electoral system change will undoubtedly continue. Institutional reform has a contribution to make to this process, but only if it can shake off ancient prejudices about upper houses. A reform agenda should include at least two items. One is the issue of size, noted above, which limits the capacity of at least two or three of the Legislative councils. The other is the electoral system.

Past electoral reform has increased the autonomy of the mainland Councils by greatly reducing the possibility of control by either governing or opposition parties. But the system of *de facto* closed-list PR used in all mainland upper houses has maximised party discipline among major party representatives and, together with conjoint elections, has harnessed Council members to the mission of their lower house party colleagues to get and hold government office. Electoral system reform to weaken these characteristics would arguably strengthen the differentiation of roles between the houses, with advantages for parliamentary scrutiny of government and review of
legislation.

For elaboration of the above, and related, points, see the following:

Stone, Bruce, 2005b ‘Constitutional Change and Bicameralism in Australia: the Perversity of “Reform”’, *Australasian Parliamentary Review* 20(1).