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978-0-521-62465-7 - Deliberative Democracy in Australia : The Changing Place of Parliament

John Uhr

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## DELIBERATIVE DEMOCRACY IN AUSTRALIA

### The Changing Place of Parliament

Parliament is central to the democratic claims of our system of governance. This book evaluates the role and performance of this centrepiece of Australian government. It explores the institutional design of the parliament, and its principles and practices, presenting a compelling case for reform. Uhr discusses parliament's representative and legislative roles, and the issue of accountability. He looks at the place of representative assemblies in liberal political theory and assesses current institutional performance. He argues that republicanism can be seen as a form of deliberative democracy, examining ways in which such democracy might be made more effective and meaningful in Australia. Combining an authoritative knowledge of political theory with a familiarity with the inner workings of the Australian parliament, the author makes an important contribution to debates in Australia and internationally.

John Uhr was formerly head of the Federalism Research Centre at the Australian National University and is now in the Public Policy Program at that university.

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*Abbreviations*

ABC	Australian Broadcasting Corporation
AFC	Australasian Federal Convention
AG	Auditor-General
AGPS	Australian Government Publishing Service
ANAO	Australian National Audit Office
ATSIC	Aboriginal and Torres Strait Islander Commission
CIR	citizen-initiated referenda
CLR	Commonwealth Law Reports
CPD	Commonwealth Parliamentary Debates, 1901–53
CPD HRv	Commonwealth Parliamentary Debates, House of Representatives volume, beginning with new series in 1953
CPD Sv	Commonwealth Parliamentary Debates, Senate volume, beginning with new series in 1953
DLP	Democratic Labor Party
HPC	House of Representatives Procedure Committee
HRSCF&PA	House of Representatives Standing Committee on Finance and Public Administration
HRSCL&CA	House of Representatives Standing Committee on Legal and Constitutional Affairs
MAB	Management Advisory Board
SL&CALC	Senate Legal and Constitutional Affairs Legislation Committee
SO	Standing Orders
SSCF&PA	Senate Standing Committee on Finance and Public Administration
SSCL&CA	Senate Standing Committee on Legal and Constitutional Affairs

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ABBREVIATIONS

SSCLP	Senate Select Committee on Legislative Procedures
WPORSLC	Working Party of Representatives of Scrutiny of Legislation Committees (throughout Australia)

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## *Preface*

This book investigates the changing place of parliament in Australian national government. At both national and State levels, Australian parliamentary institutions are undergoing close scrutiny and examination, in no small part inspired by the emerging public policy debate over the merits of various proposals for a republican form of national government. At present, analysts of Australian parliamentary institutions make little reference to the wider debate over republicanism, and participants in the republicanism debate make little reference to the international interest in republicanism as a form of deliberative democracy.

My investigation of the institutional characteristics of the Australian Parliament suggests a number of refinements of accepted views about what comprises an effective or properly deliberative democracy. This might seem an unduly ambitious claim to make for a study of the Australian Parliament, but I contend that Australian political institutions lend themselves to more sophisticated theoretical analysis than is usually appreciated. The looming centenary in 2001 of Australia as a political nation is eliciting many reappraisals of the distinctiveness of Australian practices of government. Parliamentary government in Australia is in a process of change and the political arguments surrounding these changes raise issues of a wider democratic significance than simply the processes of Australian self-government.

Australia is experiencing a national policy debate over the implications of various proposals for republican models of a head of state – a change which could well have unforeseen effects on the routines of parliamentary government. I share the view that many of Australia's existing political institutions already possess many republican qualities – in fact if not in name (Galligan 1995, 12–37; McKenna 1996, 163, 168, 190–4, 257). What is missing, of course, is an explicit constitutional orientation

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to republican concepts of popular sovereignty, although the High Court with its 'rights reorientation' is doing its fair share of work to alter Australian expectations on that front. Although Australia has many republican institutions, the parliamentary institutions have only relatively recently begun to display their capacity as instruments of deliberative democracy: and as I argue in this book, practices of deliberative democracy are a test of the republican credentials of parliamentary institutions. Australia is a political community which is formally a constitutional monarchy but substantively a parliamentary democracy, arguably with many of the working attributes of a modern republican regime: attributes such as regular democratic elections; limited and constitutional government; the rule of law with widespread protection of individual rights and liberties; separation of powers, especially between the political and judicial arms of government; and a division of legal power and policy responsibility between national and State governments. This is not to argue that the performance of Australia's political institutions complies with the highest republican standards – certainly not in the case of all of Australia's parliaments.

My aim in this book is threefold: to provide a fresh account of the place of parliament in contemporary Australian national government; to enhance the Australian policy debate over republicanism by using republican theory to tease out an agenda of institutional reform for the Australian Parliament; and to relate the Australian experience to the wider international debate over deliberative democracy. The title refers to the theoretical dimension of this study which draws on the analysis of Australian parliamentary institutions to engage with debates in contemporary political theory over the requisites of effective or properly deliberative democracy. The literature on deliberative democracy is an application of modern republican political theory to the institutional analysis of democracy, and this book provides a fresh articulation of Australian interests into an international debate in political theory over the dynamics of democracy (cf. Marsh 1995, 339–51).

In common with political and constitutional studies exploring the norms which legitimate and justify political institutions, this is a book about political doctrine and argument. I compare and evaluate the merits of contending justifications of parliamentary power and its institutional arrangement. This focus on theories and practices of justification does not pretend to exhaust our curiosity about what might explain the far from exemplary performance of Australian parliamentary institutions. But even exemplary explainers need some political standard against which to assess institutional behaviour and, through its analysis in Part II of appropriate norms, this book attempts to provide such a standard. My answer in Part II is framed in terms of the properties of three core

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components of parliamentary deliberation: the ends of representation, the means of legislation, and the various arenas and instruments of parliamentary accountability. In Part III, I examine the practice and theory of Australian parliamentarism, taking that term broadly to refer to the principles of responsible parliamentary government which have influenced the operation of Australian political institutions by setting the broad boundaries of appropriate institutional conduct.

Although legislative power is central to the historical traditions of republicanism, it is marginal to much of the current Australian debate over republicanism. The competing versions of a republic focus on reshaping one important formal aspect of executive power: arguing the merits of possible alterations to the head of state, shifting it from the Queen to a new office of President, either popularly elected or appointed after parliamentary confirmation through a two-thirds vote of approval. These important proposals for constitutional change are at the centre of a robust debate over a republican form of government for Australia, but that policy debate barely begins to investigate alterations to the forms of legislative power and to the parliamentary institutions – or ‘deliberative assemblies’, as they were known in the republican tradition – in which representative government is anchored.

Needless to say, parliaments are not everything, even in regimes of representative government. The wider process of self-government is conditioned by many elements in civil society which parliaments cannot be expected to direct or control. Australian political history illustrates that the early colonial calls for self-government were directed more at the relaxation of government controls over the press and at the introduction of trial by jury than at popular election of a deliberative assembly. Popular assemblies certainly arose, but not as the first priority in the agenda of political development. In politics, it pays to keep things in perspective; hence, it is prudent to heed the caution of seasoned political scientists when they restrain those who demand that legislative bodies be reformed to perform a greater deliberative role in government. For a start, the legislative branch is not the sole representative branch in modern systems of government and it is important to appreciate the larger context of government in which the executive and judicial branches also play essential roles. Legislatures are generally collections of ill-assorted parts, and they tend to work best as filtering institutions – in theory sifting the flow of executive decision-making but frequently, in practice, threatening to block or congeal the governmental process. For all our enthusiasm about parliamentary government, we ought still to listen to the warnings about misplaced faith in parliament which were aired by early theorists and later critics of ‘government by discussion’ (see, for example, Barker 1945, 38–65; cf. Hindess 1983, 54–65). Legislatures cannot, and probably should

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not, try to govern: their primary role is as a check on executive abuse and, to quote one political science authority, as 'yet another forum (there are many others) for the debate, discussion, and investigation of governmental matters'. The same respected authority endeavours to moderate expectations that legislative institutions can be transformed through reforms designed to enhance the quality of parliamentary candidates, to increase the package of staff assistance to elected members, to boost the size and scope of parliamentary committee systems, and to relax the controlling hand of party in voting procedures (King 1981, 78–89). But, of course, realism about the limits of parliamentary reform is not the same as passive acceptance of the status quo. We can still be thankful that hopes for parliamentary reform are rarely extinguished in Australia and more broadly in modern democratic regimes (see, for example, Held 1993, 214–20).

Against this background, my investigation is organised in four instalments. Part I reviews and revises the theoretical literature on deliberative democracy to refocus attention on the place of deliberative assemblies. Part II examines the concept of parliament or the deliberative assembly in the historical development of liberal and republican political theory, with frequent reference to the influence of those orientations on the evolution of the Australian constitutional framework. Part III assesses the performance by the Australian Parliament of three core tasks of a political assembly in a liberal-democratic system of government: representation; law-making; and the pursuit of accountability. Part IV brings together theory and practice with a specification of my preferred model of a deliberative assembly and an agenda of institutional reform designed to enhance the deliberative capacity of the Australian Parliament within the three spheres of representation, law-making and accountability. This last chapter also suggests lessons for other parliamentary systems of the Australian experience in designing institutions of deliberative democracy.

I have many debts of gratitude to colleagues who have patiently tolerated my slow progress on this project. For the purposes of linking government, community and academy, no one could hope for better than a university in a national capital, and in my experience the Australian National University has proved its worth. Much of the writing of this book took place in the Research School of Social Sciences at the Australian National University, where Paul Finn, then professor and head of the Division of Philosophy and Law, provided an environment of support and encouragement and the stimulus for me to see the project in terms of the world of public law rather than that of private scholarship. The Research School's fascinating program of activities associated with the project on Institutional Design and that on the Reshaping of Australian Institutions lent important support to this and many of my related

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research endeavours. I have pleasure in recording my gratitude to the former Director of the Research School of Social Sciences, Geoffrey Brennan, and to his colleague John Braithwaite, foundation director of the Reshaping project during my association with it and an astute critic of earlier versions of this book. My immediate colleagues in the University's Public Policy Program, then led by Francis G. Castles, who is the current director of the Reshaping project, provided me with undeserved latitude to wander away from the main pathways of public policy, confident that I would somehow pay my way in what must stand out as one of the most exciting graduate professional programs in the crowded field of public policy. Frank Castles in particular has repeatedly provided invaluable advice and assistance which has greatly improved the argument of this book.

Between 1995 and 1997 I served as the last Director of the ANU's Federalism Research Centre. After being with the Centre I now appreciate why it is that federalism is a core part of modern representative government, to anticipate a theme of chapter 4. My appreciation benefited greatly from the fresh orientation brought to the topic of federalism by my American colleague Beryl Radin, who was one of the final set of visitors to the Centre and whose work demonstrates the spirit of social inquiry which the political science study of federalism should strive to attain. Many ANU colleagues provided advice and valuable comment on this book as it evolved. The book would be much worse but for the advice of a number of honest critics of earlier versions of my ideas, including my ANU colleagues Barry Hindess, Richard Mulgan, Philip Pettit, John Hart, David West, Leslie Zines, Peter Self, Michael Di Francesco and especially former Chief Justice Sir Anthony Mason, whose presence as a regular visitor in the Research School of Social Sciences has enhanced debate on the institutions of Australian democracy. Other colleagues who deserve special thanks include Robert Parker, Marian Sawyer, Patrick Weller, Duncan Iveson, John Nethercote, Brian Galligan, John Wanna, as well as the publisher's reviewers. Going back further, it is a pleasure to acknowledge intellectual debts owed to University of Toronto political scientists, especially Walter Berns, Allan Bloom, Peter Russell and Don Forbes, and to Dick Staveley of the University of Queensland well before them.

Finally, I must acknowledge the unfailing assistance of many staff of the Australian Parliament, especially Lyn Barlin, former Clerk of the House of Representatives, and Harry Evans, Clerk of the Senate, who are editors of two most remarkably useful handbooks on parliamentary practice. The frequent reference in my text to Barlin 1997 and Evans 1995 is proof enough of the essential contribution which the parliamentary clerks are now making to the understanding of Australian

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parliamentary government. Unless otherwise indicated, officers of the House and Senate provided the statistics on parliamentary operations used in Part III. Also helpful among the staff of the Parliament have been a number of important advisers on parliamentary procedure, especially my good friend Anne Lynch, as well as Bernard Wright, Peter Fowler, Derek Abbott and June Verrier, among many others. Wayne Hooper and the staff of the Senate Procedure Office provided invaluable assistance to this as to many other research projects. The Senate Table Office and the Bills and Papers Office of the House of Representatives never failed to find the many parliamentary documents I needed. The Parliamentary Library first opened the door to my interest in parliamentary institutions when it offered me a Fellowship in 1980–81, where I was tutored in the parliamentary essentials by such knowledgeable officials as Mary McKenzie, Christopher Fogarty, Frances Cushing, Margaret Healy, Vivian Wilson and Collette Ormond. Finally, I owe a special debt of thanks to Stephanie Hancock who managed the publications of the Federalism Research Centre and formatted the final copy of this text.