Senate lecture, Australia Institute

Ben Oquist, Executive Director, The Australia Institute

Bill Browne, Senior Researcher, The Australia Institute’s Democracy & Accountability Program

# Introduction

Australians are confused about the Senate.

That is the unmistakable conclusion of the Australia Institute’s national poll of Australians on their knowledge of and attitudes towards the upper house, the largest and most comprehensive poll of its kind.

However, that does not mean the Senate is not important in the public’s democratic engagement. In fact, the Senate – with its unique powers and proportional voting system – could be key to restoring the electorate’s diminishing faith in our democracy. In the face of long-term loss of trust in government and an increasing appetite for secrecy and executive power, we want to make the argument in this lecture that the Senate remains the best hope for a saviour of our democracy.

Today, we will examine the power, proportionality, diversity and possibilities embodied in and by the Senate.

First, I will give a short word about the institute and how we work. I will introduce the broad areas we plan to talk about today, and take you in detail through the results of our polling on Australians’ knowledge of and attitudes to the Senate. Then, my colleague Bill Browne will take you through the origins of the Senate’s powers, and the effect of proportional representation on its makeup and activities. I will come back at the end with what we believe can be done to strengthen the Senate and thereby our democracy.

The Australia Institute is one of the country’s most influential public policy think tanks, with an interest in democracy and accountability since it was founded in 1994, and are based here in Canberra, physically as close to Parliament House and the Senate as we can be. In recent years, we collaborated with anti-corruption campaigner Tony Fitzgerald to put his four “Fitzgerald principles” to politicians in the 2015 Queensland election, made the case for truth in political advertising laws nationally and saw them legislated right here in the ACT in 2020, and founded the Democracy & Accountability Program last year to research the solutions to our democratic deficit and develop the political strategies to put them into practice.

The program’s first major paper was *Representative, still,* a collaboration between myself and Democracy & Accountability Program head Bill Browne. The paper finds that the Senate is a unique, powerful legislative body, but Australians are confused about key details of its powers and operation. The paper was launched by Scott Ryan, then President of the Senate and Senator for Victoria and a champion of the role and power of that chamber, on our webinar series.

At the outset, I want to note the great debt the paper owes to this lecture series and the Papers on Parliament series. By my count, our original paper cites fifteen articles from the Papers on Parliament series, as well as Senate monographs by David Hamer and Stanley Bach, and numerous reports and briefs by the Department of the Senate. We very much stand on their shoulders.

Crucially, our polling research adds quantitative data to the discussion – this lecture explores for the first time what Australians as a whole do and do not know about the Senate and its implications for our democracy.

At first blush, Australians are confused over even basic questions about the Senate. Our research reveals they see distinctions between the Senate and the House of Representatives that are not there, wrongly answering that ministers must come from the House, that senators and MPs are paid differently and that question time is not held in the Senate. Only three in 10 identified that the House is green and the Senate red.

The public’s shaky understanding of the Senate is in spite of its importance to our democracy. Unlike some upper houses in other Westminster-style democracies, our Senate is active, powerful and representative of the public.

As well as a legislature in its own right, the Senate is a house of review – of bills, regulations, government administration and policy. It also exercises accountability functions, like ordering the production of documents by the government and conducting the estimates process where ministers and senior public servants are questioned.

The founders wrote into the constitution a Senate, not a states’ house, with almost co-equal powers to the lower house. Unlike conservative upper houses in other jurisdictions, the Senate has always been elected, and with the same franchise as the House of Representatives. Since proportional representation in 1949, the Senate has been more willing to exercise the powers bestowed upon it by the constitution.

Proportional representation makes the Senate a diverse and representative body. The first two Indigenous Australians elected to Parliament – Neville Bonner and Aden Ridgeway – were senators. Senator Bonner was appointed in 1971 and won election in his own right in 1972, 38 years before an Indigenous Australian – minister Ken Wyatt – would be elected to the House of Representatives.

In our Parliament, the first Indian-Australian, the first Muslim woman and the youngest woman were all senators.

Senator Bob Brown was the first openly gay man elected to Parliament, and the first openly gay party leader, and Senator Penny Wong was the first openly gay woman elected to Parliament, the first Asian-Australian woman elected to Parliament, and the first openly gay member of cabinet.

While women were simultaneously elected to the Senate and the House of Representatives in 1943, the first female party leader, the first woman to administer a federal department and the first woman in cabinet with portfolio responsibilities were all senators. To this day, the Senate much better reflects Australia’s gender balance than the House does. Women hold 40 of 76 Senate seats (53 per cent), but only 47 of the 151 seats in the House of Representatives (31 per cent).

The Senate is also more prepared to stand up to the executive arm of government than the House of Representatives. The most visible example is the crossbench, which has held the balance of power for most of the period since 1955. But party lines are also more fluid in the Senate. As a senator, Barnaby Joyce crossed the floor 28 times. Liberal senators Reg Wright and Ian Wood have him beat, having crossed the floor 280 times between them.

The Senate also serves as an important “ideas bank”, developing and advocating policies that will, in time, be taken up by governments. The legislation for same-sex marriage began in the Senate, as has much progressive climate legislation. The Hawke government saved the Franklin River from being dammed, but only after the Democrats introduced and passed legislation in the Senate. Hawke would later adopt the legislation as his own. Looking further back, Australia owes its compulsory voting to a private senator’s bill in 1924.

With trust in government declining, the Senate is more important than ever. However, it needs to find its feet to fight back against efforts to stymie its powers. Answers to the legitimate questions of senators in estimates have become more evasive and derisory. The government’s interpretation of public interest immunity bears little resemblance to the Senate’s. Orders for the production of documents have been disregarded. Bills originating in the Senate are ignored in the House of Representatives, even though they would pass if brought on for debate.

The Senate has the tools it needs to remedy the situation. Foremost among them is one that is fundamental to its status as a co-equal legislature: the Senate can block the government’s legislative agenda until the government accounts for itself.

The Senate has used this power with success. For example, when the government wanted to implement an ethanol subsidy scheme in 2003, the Senate did not pass the relevant bills until the government provided documents relevant to the scheme. However, it is rare that executive intransigence is challenged. Every remedy at the Senate’s disposal depends on its strength of will, and the Senate has often baulked.

One comfort for the Senate is the evidence, in previously unreleased Australia Institute polling, that the Australian people back the Senate. Six in 10 Australians agreed that when the Senate and the government disagree on whether the government has to hand over information, the Senate should insist on its interpretation

Australians may be confused about the details of how the Senate operates, but they expect it to be a vigorous, powerful chamber that holds the government to account. Seeing the Senate hold the government to account would give the community renewed confidence in the body. Indeed a stronger Senate could help renew confidence in democracy itself.

# Public understanding and opinions on the Senate

In July 2020, the Australia Institute polled a nationally representative sample of 1,600 Australians on their knowledge of and attitudes towards the Senate. The results show that understanding of the Senate is relatively poor, underscoring the importance of lifelong civics education on the role of the Senate in our democracy.

Australians assumed that the two chambers were more distinct than they actually were.

When asked if government ministers must come from the House of Representatives, 39% of Australians incorrectly said that was true, with only 24% correctly saying that was false. 37% chose “Don’t know / Not sure”.

Australians are also unclear on whether senators or members of the House of Representatives are paid more, or if they are paid equally. 45% did not know, 23% said senators are paid more and 17% said members were. Only 16% gave the correct answer, that they are paid equally.

Only 25% of Australians correctly identified that Question Time is held in both chambers, with 34% thinking it was held in the House of Representatives only, 11% the Senate only and 1% saying Question Time is held in neither chamber.

There was also general confusion about how long the terms of senators for the states run. For this question we did not give a “Don’t know / Not sure” option, telling respondents instead to give their best guess. Only 15% gave the correct answer, of six years. 5% selected “none of the above”, presumably suspecting a trick question. 27% chose “until the next election”, and 53% chose a year length that was wrong.

As for one of the basics, what colour the Senate is, only 30% correctly answered red. Half of respondents knew that they did not know, and about 20% confidently chose a wrong answer.

Finally, we tested people’s knowledge of the balance of power in the Senate. We have now asked this question three times, most recently last month in preparation for this talk.

“Does the Coalition Government currently have a majority in the Senate?”

In 2018, 50% correctly answered that it does not, which fell to 36% in 2020 and to 34% when we asked again last month. The shrinking size of the Senate crossbench might contribute to confusion here.

Overall, the results paint a concerning picture of the limits of the public’s knowledge of the Senate. In conversations around our findings, we heard from many people that their political education was limited to primary and high school. Civics education targeted at adults is clearly needed, not just as a refresher but also because it is when someone gets the right to vote that information on how our democracy works is most salient.

There were two silver linings in the polling research.

The first is that despite the confusion about how long senators serve, there is little sense that the Senate’s electoral system is unfair. In 2020, we asked respondents which system they thought was fairer: the one used elect to the House of Representatives or the one used to elect the Senate. The most popular response was that the systems are equally fair, selected by 37%. A further 35% chose “Don’t know”, leaving 19% who thought the House system was fairer and 10% who thought the Senate system was fairer.

Last month, we conducted a new poll asking Australians a related but more provocative question: whether the *House of Representatives* should adopt proportional representation. Today, I want to share the results for the first time.

One in three, 34%, preferred the proposition that in the House of Representatives a party should win seats proportional to the overall number of votes that it receives. More Australians, 44%, prefer the status quo – that a party should win a seat for each electorate where it receives a majority of the vote.

In the absence of a concerted push for PR in the lower house, I thought these numbers were impressive. On the face of it, one in three Australians prefer proportional representation to the status quo. Of course, how that support would translate to enduring policy reform remains to be seen.

The second silver lining is that while Australians are confused about the Senate, they recognise its power and importance. We presented Australians with eight powers that the Senate may or may not have, and asked them whether each was a power that the Senate actually had.

A majority (56 to 59%) correctly identified that the Senate can pass, reject or delay legislation from the lower house, whether it is a private member’s bill or a government bill. More answered correctly than incorrectly that the Senate can propose new legislation and set up its own inquiries.

Where Australians went astray was with three powers that the Senate does not have: to confirm or reject treaties, to confirm or reject government appointments and to introduce tax and spending legislation. More Australians thought the Senate had these powers, than that it did not have these powers.

# Importance of the Senate

Australians’ confusion about the Senate would be less concerning if the Senate were not an important part of our democracy. But the Senate is important, in two key ways: it is a co-equal legislature, with substantial if too-rarely used powers, and its election via proportional representation means it represents people that the House of Representatives fails to represent.

## Power

The Senate’s powers have remained mostly unchanged since Federation and the Australian Constitution.

Unlike many upper houses, the Senate has almost as extensive legislative powers as the House of Representatives. It is a good thing too, since the Senate is “effectively the sole legislature” in the words of David Hamer.

When we talk about reserve powers in Australia, it is the Governor-General’s powers we mean. But the House of Representatives and the Senate have unwritten powers as well, thanks to section 49 of the Constitution. It provides

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

It is from these reserve powers that the two chambers can trace parliamentary privilege, orders for the production of documents and the tremendous, though rarely used, power to fine and imprison those in contempt of Parliament. What would it take for the Senate to use these powers more often, or more penetratingly?

And while government is formed on the floor of the House of Representatives, the Senate – through its power to block supply – proved in 1975 that it has a kind of veto over the government, the power to force an election. The fallout from the Dismissal demonstrates that this power should rarely, if ever, be exercised, and it is unlikely to be used again. However, this ultimate sanction protects and preserves the Senate’s status and power.

That the Senate has this robust role in our Commonwealth was the intention of the Founders, who at the time of drafting had the UK House of Lords, the US Senate and the Canadian Senate to draw on for their models. Alfred Deakin, a future prime minister, called the two chambers the irresistible force and the immovable object.

Nor was the Senate ever intended to limit its scrutiny to state issues. The name “States’ House” was debated and rejected in the Constitutional Conventions for the more general Senate, and the Founders would have known from the United States that senators have never limited themselves to protecting states’ rights.

## Proportionality

Though the Senate’s powers are pretty much the same as they were in 1901, its use of those powers has waxed and waned over the decades. The winner-takes-all electoral systems in the Senate before proportional representation led to dramatic swings, with the Government or the Opposition in control of the Senate in most instances.

Knowing that a loss in the upcoming election was likely, the Chifley Government legislated proportional representation ahead of the 1949 election. While preserving its numbers in the Senate was a motivation for the Chifley Government, this manoeuvre also fulfilled the promise of the Constitutional Conventions and the expectations of the Founders, and was a reform that both Labor and non-Labor politicians had argued for over the decades.

Within six years of PR a consistent minor party presence emerged in the Senate thanks to the Democratic Labor Party, followed by the Australian Democrats and now the Australian Greens.

### The Senate has as much of a claim on the title “people’s house” as the House of Representatives

People still persist with the claim that the House of Representatives is the “people’s house” and the Senate the “states’ house”. Until the Senate is elected on the principle of one vote, one value, the House of Representatives will have a powerful claim on that title.

However, the mechanism of proportional representation means that in many ways the Senate is more representative of the popular will than the House of Representatives. John Howard observed as much in 1987, when there were Democrats on the crossbench amenable to Opposition proposals. He said:

… the Australian Senate [is] one of the most democratically elected chambers in the world – a body which at present more faithfully represents the popular will of the total Australian people at the last election than does the House of Representatives; that is a fact in terms of the proportional representation system

It remains true today, with then Senate President Scott Ryan observing in 2019 that:

… the current Senate is actually very reflective of the national vote despite the differences in state populations.

This popular representation gives the Senate a vigour and authority lacking from appointed or – even worse – hereditary upper houses. In 1873, well ahead of the Constitutional Conventions, Walter Bagehot observed of the UK House of Lords that: “Being only a section of the nation, it is afraid of the nation”.

While mathematically, it is possible for senators from the smaller states to control the legislature, in practice it is impossible. Senators are tied to their parties and to broader policy interests, not their states.

### Diversity

The Senate’s proportionality means it is more representative of class, cultural and gender interests. Women were simultaneously elected to the House of Representatives and the Senate in 1943, but today women make up half of the Senate but just 30% of the House of Representatives.

And while the party system means that for the most part a major party senator’s vote does not vary no matter what state they come from, independent and micro-party senators are often more explicitly representative of their state’s interests – for example, Brian Harradine and Jacqui Lambie from Tasmania and Nick Xenophon and affiliates from South Australia.

The Senate has been a source of diversity, even though there are half as many senators as there are MPs. An explanation for this might be given by a profile of Penny Wong in the Sydney Morning Herald, which said:

When [Penny] Wong won preselection for the Senate before the 2001 election … the joke went around that she would never have been able to contest a lower house seat, being not only a woman, but Asian and gay to boot.

Hopefully, if that were ever the case, it is no longer true – and indeed there have been people of diverse backgrounds elected to the House of Representatives. But it is true that proportionality means that a significant minority that is distributed across the country can be appealed to in the Senate in a way that wouldn’t necessarily work in the House.

Diversity milestones set in the Senate include:

* the first Chinese speaker and child of a Chinese person elected to Parliament: Thomas Bakhap – elected in 1913 for the Liberal Party, Bakhap was the adopted child of a Chinese immigrant and an advocate for the Chinese community in the face of the White Australia Policy.
* the first two Indigenous Australians elected to Parliament: Neville Bonner and Aden Ridgeway
* the youngest woman elected to Parliament, Sarah Hanson-Young (although the youngest person was Wyatt Roy, in the House of Representatives)
* the first Asian Australian elected to Parliament: Tsebin Tchen
* the first openly gay man elected to Parliament, and the first openly gay party leader: Bob Brown
* the first openly gay woman elected to Parliament, the first Asian Australian woman elected to Parliament, and the first openly gay member of Cabinet: Penny Wong
* the first member of Parliament with a partner who is transgender: Louise Pratt
* the first female party leader: Janine Haines
* the first woman to administer a federal department: Annabelle Rankin
* the first woman in Cabinet with portfolio responsibilities: Margaret Guilfoyle
* the first Muslim woman elected to Parliament, Mehreen Faruqi (although the first Muslim elected is Ed Husic, in the House of Representatives).
* The first person of black African descent, Lucy Gichuhi and
* The first person of Indian heritage, Lisa Singh.

# The Senate’s use of its powers

## Orders for the production of documents and Estimates

A powerful demonstration of the reinvigorated Senate is in orders for the production of documents.

This broad power comes from the ancient privileges of the House of Commons, and it extends to the creation of documents that do not yet exist, not just the publishing of documents already created. In this way, as well as scope and timeliness, it distinguishes itself from freedom of information requests. I think anyone who has put in a freedom of information request, and often waited months or years for a reply which turns out to be unsatisfactory, would envy the Senate its power here.

Orders for the production of documents are also a quantitative measure of the Senate’s activity as a house of accountability. The first Senate was a prolific user of this power, but after the non-Labor parties combined into the Liberal Party in 1909, its use dropped off until the 1970s. It wasn’t until the 1990s that the rate of orders for the production of documents returned to that of 1901-1906. By contrast, the number of bills considered each year had increased ten times over during the same period.

Thanks to a 1999 report by the Department of the Senate, we get a window on some of the documents that the first Senate, 1901 to 1906, was particularly interested in.

* statistics on the death rates of white people compared to Pacific Island workers in Queensland
* the Governor-General’s expenses
* any papers relating to the statement from the General Officer (that is, Chief of Army) that Japan and China were “casting longing eyes upon the northern portions of Australia”.

Times may change, but the Governor-General’s expenses remain of interest. In Senate estimates a few years ago they were going over a tender for the Government House kitchens. Labor Senator for Queensland Joe Ludwig admitted he didn’t know what a “Thermomix” was. Committee chair Cory Bernardi asked him where he’d been. Ludwig replied, “Queensland”.

There are now almost 20 orders for documents with continuing effect, among them

* the Harradine motion requiring departments and agencies table a list of files, making freedom of information requests easier,
* the Murray motion requiring departments and agencies disclose high-value contracts they have entered,
* the motion requiring Australia’s National Greenhouse Gas Inventory to be published quarterly, in a timely manner, and
* monthly reporting of vaccination statistics.

The Australia Institute is proposing a new standing order for the production of documents, following our research into the growing use of private consultants to do government work. The proposed order would, firstly, require tenders and contracts with consultancies to include information about the purpose and scope of the work and, secondly, require the government to table the final reports and written advice received from a consultancy. With such an order, the public would be able to see what research, advice and recommendations consultants are giving government, and check consultants’ reports for themselves to see if they make a convincing case for any actions the government ends up taking.

### Senate-driven reform

The Senate has also been the parliament’s “ideas bank”, introducing good ideas, sensible policies and effective reforms years or decades before they are picked up by the government and the House of Representatives.

To give just a few examples,

* Same-sex marriage legislation and progressive climate legislation had their origins in the Senate, as did
* The legislation introduced by the Australian Democrats to stop the Franklin River from being dammed – which passed the Senate. The incoming Hawke Government would end up adopting the legislation as its own.
* And an end to mandatory jail sentences for petty theft in the Northern Territory.

But examples of the Senate’s forward thinking can be found earlier than this.

In rereading John Uhr’s biographical paper on Catherine Helen Spence, I was reminded that the original Australian electoral legislation was initiated in the Senate – most notably giving women the right not only to vote but also to stand for election. The Senate’s bill extended suffrage to Aboriginal and Torres Strait Islander Australians – but the House of Representatives struck that part out. It wasn’t until 1962 that that grievous wrong was righted.

Likewise, we owe compulsory voting to a private member’s bill from a Nationalist senator, Herbert Payne, in 1924.

Of course, in politics the credit goes to those who get reforms done, regardless of who started them. But we can still treasure the Senate for its role as an ideas bank, proposing reforms that are treated as heresy until they become cornerstones of our system.

# The Senate is its own worst enemy

We have devoted a great deal of this speech to the argument that popular authority, thanks to being democratically elected through proportional representation, gives the Senate the confidence to act even in defiance of the government. But we have also seen the Senate’s will falter, on matters of whether to censure ministers, question the government’s claims of privilege, hold senior public servants in contempt for defying orders for the production of documents, or disrupt the government legislative agenda.

In a 2018 speech, Senator Rex Patrick contrasted the Senate to the House of Commons. When a software company refused to hand over documents relating to Facebook at the request of a House of Commons parliamentary committee, the Serjeant at Arms was dispatched to bring the owner of the company before the Parliament, where it was explained that he faced fines and imprisonment. When Thales was similarly in risk of being in contempt of the Senate, no such measures were deployed.

The Australia Institute has some reassuring evidence for the Senate. In preparation for this speech, we polled a representative sample of Australians on what they think of propositions about the Senate’s power and independence. Today we detail the results for the first time.

* Seven in 10 Australians (71%) agree that the Senate should use its powers to make reports written for the Government by private consultants public. Only 12% disagree
* Six in 10 Australians (63%) agree that when the Senate and the Government disagree on whether the Government has to hand over information, the Senate should insist on its interpretation, compared to 14% who disagree.
* 46% of Australians agree that the Senate should refuse to hold a vote on bills that the House of Representatives passes if the House of Representatives is refusing to hold a vote on a bill that the Senate passed, while 27% disagree.

It is the final example that I want to linger on. Senate enthusiasts talk willingly about the chamber’s power to fine and imprison those in contempt, but these measures would be polarising and fraught if actually exercised – although as reserve powers they remain important. The Senate’s power to hold up government business, on the other hand, not only has strong precedent, but also is clearly proportionate.

We saw the Senate use its legislative powers to impose procedural penalties on the government in 2003-2004, when the Government wanted to implement an ethanol subsidy scheme. The Senate had ordered the production of documents related to the scheme – which the government had advised multiple times that it would do. The Senate refused to pass the bills until the documents were tabled. In a subsequent sitting, the Government tabled some, though not all, of the documents – and the legislation passed.

Odgers tells us that something similar happened in 2009, when the Senate ordered information about the National Broadband Network. The legislation only passed after the Government produced a summary business plan.

Similarly, the former MP and Senator David Hamer proposed in *Can responsible government survive in Australia?*, finalised in 2001 and published posthumously in 2004, that responsible ministers should front Senate legislative committees, even if they were from the House of Representatives. If the minister did not comply, in Senator Hamer’s words “the answer of the Senate would be simple. The bill will not be proceeded with until the responsible minister has given evidence”.

As well as support for the Senate acting as an institution, there is even support for direct action by individual senators.

Last year, Senator Rex Patrick named and criticised a senior public servant who made an FOI decision in defiance of the findings of the Administrative Appeals Tribunal.

Andrew Podger, a retired senior public servant and former Public Service Commissioner, has said that Senator Patrick’s language went too far, but that the senator was justified in naming the public servant, that the public servant’s decision was almost certainly not justified, and the decision demonstrates the loss of expertise in and increased political pressure on the public service.

The *Canberra Times’* weekly survey asked its readers whether they thought Senator Patrick’s naming and shaming was fair and reasonable. As the municipal paper of a public service town, you might suspect their sympathies would be with the public servant. As it turns out, almost half of readers – 47%, thought Senator Patrick was fair and reasonable. Only 36% thought he was not.

# Conclusion

The Australia Institute’s polling finding Australians have a limited understanding of the Senate may not surprise, but it should make us concerned. It is a powerful argument for civics education, not just for school students, but in the form of lifelong education for adults as well. Australia’s tradition of compulsory voting makes it even more important that every citizen knows what they are voting for, and why.

The Senate is a neglected, but vitally important accountability institution. Its constitutionally guaranteed co-equal legislative status is the source of much of its power, but it is the Senate’s election by proportional representation that gives it legitimacy and authority. The Senate has been the source of many of Parliament’s diversity milestones, not to mention the diverse movements, interests and constituencies that have been represented in the Senate thanks to its proportionality.

The Senate has been an ideas-bank, the birthplace of much legislation and policy that has – eventually – been taken up by the government.

Unfortunately, the Senate is often its own worst enemy – when it fails to use the powers it has been given to hold the government to account. Our research released today shows Australians are more likely to back the Senate than to oppose it when the Senate faces off against the government. That should strengthen its will.