

ORGANISATION OF PUBLIC POWER WITHIN STATES

REPRESENTATIVE DEMOCRACY

- Provided for within the Constitution, see s 7, Senators directly chosen by people of the state; s 24, House of Representatives to be chosen by people of the Commonwealth; s128, referendum.
 - Note issue with s 7 with respect to population – a Tasmanian voter has more power in the Senate because there are less Tasmanians and states have equal representation.
- Exercised via Parliament. Representative Democracy proves a source of legitimacy for both Parliament and Government. Provides the justification for the supremacy of the legislature in the exercise of its law-making function and the basis for the assumption that this power will not be abused (*Saunders*).
- We go to the polls and directly choose our representatives. Important – what is the role of parties? Do we see them as **delegates** or **trustees**? With delegation, the representative is tied to the people's preferences and there is accountability to the people. As a trustee, the representative has a degree of autonomy and makes choices based off of their own ideas/thoughts. This allows a level of expertise to develop and representatives can be more informed and have more time to dedicate to politics. Because of this, we assume that they understand policy better than we do.
- In practice, regular elections and a sense of self-preservation ensure that members individually and collectively keep a close eye on public opinion. In the case of the Commonwealth, elections are held at least every three years. Parliamentary terms have now been extended to four in most States, but these are not synchronised with each other (*Saunders*).
- Relationship with the UK? (*Saunders*)
 - The Commonwealth and all State Parliaments originally were modelled broadly on the Parliament at Westminster and they continue to share its functions and many of its procedures. Most Australian parliaments, for example, adopted the privileges of the House of Commons at the date of their establishment (have since been modified by legislation).
 - However, the structure of Australian Parliaments also differ from Westminster, especially in the way that Bicameralism has evolved. Conflict between the Houses of bicameral legislatures has been a recurrent theme of Australian constitutional history.
 - Efforts to craft a distinctive role for upper Houses as Houses of 'review' lead to further changes in their composition, functions and powers.
 - On any view, however, this is a departure from a model under which a government with a clear majority in the lower House of Parliament governs without hindrance during its term of office.
- How will this change over time? To what extent are senators actually "directly chosen by the people? Implication that whatever changes we make (e.g. moving age to 30) is that there must be a substantial reason why to alter representation. Voice Institution?

RESPONSIBLE GOVERNMENT

- Consists of two dimensions:
 - Relationship between the Government and the House of Representatives
 - The Government is to be responsible, meaning it must have a majority in the House of Representatives.
 - Remember, the Government can draw people from the Senate but the concept is that it must have a majority in the House of Representatives.
 - The Governor General must take the advice of the Government (i.e. PM & Ministers)
- Provided for within Ch 2 of the Constitution – mentions executive government but overall is quite short and the Prime Minister and Cabinet are not mentioned.
 - Key institution is the Federal Executive Council (s 62 Constitution) where two people sit and it essentially acts as a rubber stamp body; is not actually engaged in any formulation of policy.
 - The constitutional provision for an Executive Council makes it clear that the Governor-General is expected to act on advice in some circumstances, but it does not necessarily determine when (*Saunders*).
- Aspect of constitutional convention? Don't see a distinct correlation between the Governor General taking advice from the constitution but it's there. There are only 10 points within Ch 2 so most aspects are by convention and not actually spelt out textually.
 - *Ask: to what extent does Australia have an unwritten constitution?*

Saunders:

- The defining feature of responsible government is the dependence of a government, based in the Parliament in accordance with the Westminster parliamentary tradition, on the continuing support of a democratically elected lower House
- The executive government holds office because it has the support of a majority in the House of Parliament deemed to be the more representative, described in Australia as the 'lower' house.
- Ministers are responsible to the Parliament, individually and collectively, for the conduct of the business of government, defined broadly to include both policy-making and implementation under the auspices of apolitical, continuing departments of state and other agencies.
- Ministers are held regularly to account by the House of which they are a member during their term of office.
- A government that loses the confidence of the lower House cannot continue, but must either seek re-election or surrender office to another group of ministers whom the House is prepared to support.
- The dependence of the government on the Parliament derives from s 64, which precludes 'Ministers of State from holding office for more than three months without having a seat in one or other of the Houses of Parliament.

SEPARATION OF POWERS

Hamilton, Madison and Jay re The Federalist Papers:

- Separation of powers in its pure form does not exist, but this is not overly detrimental.
- **Acknowledges the importance of SOP**
 - 'The accumulation of all powers, legislature, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny' (247) (also cited in **Dignan**)
 - However, whilst the ideal of SOP is valuable, it does not exist in practice
- **Madison's conception of SOP does not argue for absolute separation**
 - Partial agency or control over another branch is normal, beneficial, and perhaps unavoidable.
 - 'The legislature, executive and judiciary are by no means totally separate and distinct from each other' (247)
- **Tyranny from centralised power** was the evil that concerned Montesquieu
 - I.e. One branch having too much of the power of another branch of government, or of all three powers being in the one hand
- **Key point: There can be overlap, and such overlap does not mean the whole principle has been breached**
 - Overlap is unavoidable; a partial mixture of powers is often admitted
 - In Australia: No neat separation between the executive and the legislature
 - Notion of having **checks and balances** - there is a balance in which SOP is achieved

FEDERALISM

- Enumerated powers in s51 protects the states from the Commonwealth taking over all their legislative capacity.
- We have a relatively weak federalist system here in Australia comparatively. This is because national identity here is stronger than state. We also have quite a mobile population, along with the principle of responsible government.
- Should Australian federalism be reformed? Perhaps incorporate "progressive federalism" like in the US (e.g. ACT & SSM) but overall it's working well now. While it is somewhat inefficient with Canberra having overlapping bureaucracies with the states, how efficient should government be?

Saunders:

- Without federalism, the six Australian colonies would not have come together in a single political system at the end of the nineteenth century. The Constitution on which they agreed was designed to establish and protect the autonomy of two spheres of government that federalism requires.
- The few express rights protecting provisions apply only within the sphere of authority of the Commonwealth, leaving the States to determine their own standards.
- Australia has strong federal features. The six powerful States predated the Commonwealth as political communities. While the Constitution transformed them, formally, into the Original States

of a new federation, it presumed their existence and preserved their structure and powers, subject to the agreed demands of federal union.

- The states are conceived as equals for constitutional purposes, despite disparities in wealth and population size.
- The Commonwealth has no constitutional authority to direct the States in the performance of their own functions.
- The Commonwealth and each state has its own set of institutions to exercise its allocated authority. The dualism of the institutional arrangements in the Australian federation further reinforces the autonomy of the respective orders of government.
- Considered as a check and balance, the federal division of power is a blunt instrument, with somewhat random effect. Sometimes, however, it operates to restrain excess of power, with rights-protecting effect. The Commonwealth can override State legislation that infringes human rights commitments under any international instrument to which Australia is a party.
- Federalism involves limited government and values diversity and pluralism, including pluralism in electoral choice.