Parliamentary traditions, innovation and "the great principles of English parliamentary law"

Paper presented at a workshop on "Parliamentary traditions and procedural innovation: what works for parliamentarians as legislators in the 21st century?"

Professional development seminar of the
Australian and New Zealand Association of Clerks-at-the-Table (ANZACATT)

Canberra, 22-24 January 2012

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Quaint traditions and risky innovations

In 2004 the former Clerk of the Australian Senate, Harry Evans, questioned the continued relevance of some "traditional" and "quaint" parliamentary practices.

> Some parliamentary procedures and practices are valued simply because they are traditional and quaint, and have no other substantial legislative value. Some are not merely empty of value, but obscure or damage substantial values. Their value may be symbolic, but the symbolism may be inappropriate to the point of subversion of legislative values. Their symbolic content may be misinterpreted or corrupted.[1]

He went on to discuss a number of examples of what he saw as quaint, unhelpful parliamentary traditions: the custom that the head of state does not enter the lower house; the ceremonial opening of parliament; the pro forma bill; the "dragging" of members by sponsors; wigs and gowns and associated traditional dress; and the "unhealthy obsession with the Mace."[2]

The real danger, according to Harry Evans, was that in their zeal to jettison this sort of "mumbo jumbo", reformists might be tempted to do away with procedures and practices that whilst "traditional" and even "quaint" remain really useful. The example given was an actual proposal to "streamline" the procedures for the consideration of legislation, which along with the removal of arcane terminology, in an effort to facilitate the expeditious passage of legislation, actually removed some important opportunities for scrutiny and amendment.[3]

Assessing traditions and innovations

How should we assess parliamentary "traditions" to ensure their continued relevance? Moreover, on what grounds can we assess the benefits and risks of "innovations" to parliamentary practice and procedure? This will no doubt become an increasingly important issue for all of us as we seek to find ways of doing things more efficiently in response to the need to deal with resource constraints, and as we explore the opportunities for the take up of new technologies.

This brief paper attempts to set out a number of fundamental principles of parliamentary law, practice and procedure, against which both the continued relevance of "traditions" and the appropriateness of innovations can be assessed. These principles are drawn from two dusty, old, and perhaps all too often now overlooked books.

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[1] Harry Evans, "The Traditional, the Quaint and the Useful: Pitfalls of Reforming Parliamentary Procedures", Paper presented to the 35th Conference of Australian and Pacific Presiding Officers and Clerks, Melbourne, 2004, published in Department of the Senate, *Harry Evans: Selected Writings*, Papers on Parliament No 52, December 2009, p 145.
[2] Ibid, pp 145-149.
[3] Ibid, pp 149-150.

A note on sources

Also in 2004, the Clerk of the Western Australia Legislative Assembly, Peter McHugh, gave a paper at the ANZACATT professional development seminar in Sydney on the topic of interpreting standing orders. Mr McHugh suggested that the starting point for interpreting standing orders was the basic principles of parliamentary law that has developed over time. Amongst the sources quoted was a former Clerk of the Canadian House of Representatives.[4]

Sir John George Bourinot KCMG

Sir John George Bourinot was born in Sydney, Nova Scotia in 1836. Following a clerkship with an Attorney and jobs as a parliamentary reporter, short hand writing and novelist, he was appointed second clerk assistant of the House of Commons in 1873. In 1879 he was appointed first clerk assistant and in 1880 became Clerk, a position he held until his death in 1902. Bourinot served with distinction and became "an institution in the commons." An 1894 newspaper article described him as "seemingly the busiest person in the House", and one who maintained a "grave and dignified silence" at all times. He was awarded a CMG in 1890 and a KCMG in 1898, together with honorary doctorates from almost all Canadian universities.[5]

Bourinot's *Parliamentary Procedure and Practice in the Dominion of Canada* was first published in 1894 Compared favourably with *Erkine May*, the third edition was published in 1903, the year after Bourinot's death.[6]

In the context of a discussion of the "Origin of the Rules, Orders and Usages of the Canadian parliament", Bourinot lists "the principles that lie at the basis of English parliamentary law," and which have been adopted in Canada.

The Hon William Edward Hearn QC MLC

Bourinot sources his list of the principles of English parliamentary law back to the work of an Australian academic, William Edward Hearn. Hearn was born in Ireland in 1826. By the early 1850's he was both a barrister and professor of Greek at Queens College in Galway. In 1854 he was selected to be the initial professor of history and literature, political economy and logic at the newly established university of Melbourne. In 1873 he was appointed Dean of the Faculty of Law. Amongst his students were three of the early judges on the High Court of Australia and Australia's first Prime Minister. In 1878 he was elected to represent the Central Province in the Victorian Legislative Council. From 1882 he was regarded as the "unofficial leader" of the

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[4] Peter McHugh, "Interpretation of Standing Orders", paper presented to ANZACATT professional development seminar, January 2004.
[5] BOURINOT, Sir John George – Dictionary of Canadian Biography Online: www.biographi.ca/009004-119.01-e.php?BioId=40695, accessed 18/12/2012.
[6] Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada with Historical Introduction and an Appendix*, Third Edition, Canada law Book Company, Toronto, 1903.

House. Although some of his ambitious legislative goals were not always successful, Hearn's lasting legacy was through his widely recognised academic publications and his teaching. Hearn died in Melbourne in 1888.[7]

One of Hearn's major works, and the one quoted by Bourinot, was his account of *The Government of England*, concerned with the growth of constitutional law and conventions.[8] It is in the context of an analysis of the various checks on parliament (Hearn being very concerned to explain the diffusion of power in English government) that he discusses the "Lex et Consuetudo Parliamenti", the law and customs of parliament.

Hearn describes the code of rules which has developed to govern the mode of proceeding in parliament as "one of the most striking phenomena in our polity."[9] He even goes so far as to claim that "It has silently been developed to a degree of almost absolute perfection."[10] Hearn quotes from various political theorists who support his view of parliamentary procedure and practice as an essential guarantee of freedom and liberty.

"The great principles of English parliamentary law"[11]

What then are these "great principles" written about by Bourinot and Hearn? They identify five such principles:

1. *Public business shall be conducted in a decent and orderly manner*

Hearn contrasts English parliamentary law and practice with that practiced in revolutionary France. He refers to the work of one Sir Samuel Romilly, who prepared a translation of the rules of the House of Commons for use by the French National Assembly. Those rules were neither adopted or followed. He quotes Sir Samuel Romilly:

> Much of the violence which prevailed in the Assembly would have been allayed, and many harsh measures unquestionably prevented, if their proceedings had been conducted with order and regularity. If one single rule had been adopted – namely, that every

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[7] J A La Nauze, "Hearn, William Edward (1826-1888), Australian Dictionary of biography, abd.anu.edu.au/biography/hearn-william-edward-3743, accessed 18/12/2012.
[8] William Edward Hearn, *The Government of England: Its Structure and Its Development*, Second edition, Longmans Green and Co, London & George Robertson and Co, Melbourne, 1887.
[9] Ibid., p 555.
[10] Ibid., p 556.
[11] The use of the phrase "the great principles of English parliamentary law" and the emphasis upon English parliamentary practice arises from the works of Bourinot and Hearn which are the focus of this paper. This is not to suggest that Australian parliamentary law and practice has exclusively English origins, or that it does not have its own unique character. For a discussion of the influence and relevance of US parliamentary law, including Thomas Jefferson's *A Manual of Parliamentary Practice*, see Harry Evans, "The Pedigree of the Practices: Parliamentary Manuals and Australian Government", published in Department of the Senate, *Harry Evans: Selected Writings*, Papers on Parliament No 52, December 2009, pp125-129; and Dr Rosemary Laing, "Are standing orders keeping pace with the needs of the modern parliament?", paper presented at ANZACATT professional development seminar, Canberra, 23 January 2013.

> motion should be reduced to writing, in the form of a proposition, before it was put from the chair, instead of proceeding as was their constant course by first resolving the principle as they called it (*decreter le principe*) and leaving the drawing up what they had so resolved (or as they called it *la redaction*) for a subsequent operation – it is astonishing how great an influence it would have had on their debates and on their measures.[12]

2. *The minority is protected*

Hearn states that, "The minority is protected, and the violence or the improvidence of the majority is restrained. Every individual member and the public at large alike find this system their appropriate security."[13]

According to Bourinot:

> Each House is bound by every consideration of self-interest and justice to observe strictly its rules and standing orders, and to rebuke every attempt to evade or infringe them. The political party which controls the House at one time may be in a different position at another, and is equally interested with the minority in preserving the rules of the House in all their integrity.[14]

Quoting Hatsell, Bourinot continues:

> ... the only weapons by which the minority can defend themselves from ... [improper measures proposed by] those in power, are the forms and rules and proceedings which have been found necessary from time to time, and are become the standing orders of the House, by strict adherence to which the weaker party can alone be protected from those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities. Consequently the Senate and House of Commons never permit their rules and standing orders to be suspended, unless by unanimous consent; but they may be formally amended or repealed on giving the notice required in the case of all motions.[15]

3. *Every member is able to fully and freely express their opinion*

Hearn states that, "There is no room for stratagem; there is no stifling of debate. The utmost discussion is ensured..."[16]

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[12] Ibid., p 558.
[13] Hearn, op cit, p 556.
[14] Bourinot, op cit, p 306.
[15] Ibid, pp 306-307.
[16] Hearn, op cit, p 556.

4. *Full opportunity is provided for the consideration of every measure*

Bourinot notes that the opportunity for debate has tended to be the subject of some restrictions, which have tended to increase the powers of the Speaker and of the majority, however, he justifies these as taken with a view "to prevent organized obstruction."[17]

Hearn states that, "The utmost latitude of discussion is ensured; but, after free deliberation, the action of the majority is unimpeded."[18]

5. *Heedless or impulsive legislative action is prevented*

Hearn states that:

> No House of Commons could, in a fit of enthusiasm, sacrifice upon the altar of their country in a single evening their own rights and those of their constituents... Those rigid rules have a sobering effect. They give time for the fits of excitement that are incident to large assemblies to subside or pass away. They cannot, indeed, exclude errors, but they fix the limit of error. Our deliberate judgment may be wrong, but we can hardly be guilty of rashness or improvidence.[19]

Some observations about these principles in the 21st century

It would be all too easy to dismiss the "great principles" identified by Hearn and Bourinot as no longer relevant to contemporary parliamentary practice in the 21st century, or at best merely aspiration. However,

Public business shall be conducted in a decent and orderly manner

Barely a day goes by without some media comment lamenting the standards of parliamentary behaviour.[20] A cursory search on YouTube brings up video footage of violent scuffles in parliaments around the world. As a parliamentary clerk who spends a great deal of time sitting in a parliamentary chamber listening to debate, I am certainly in favour of civilized and erudite debate, as opposed to unruly behaviour. However, I do not think this is what Hearn and Bourinot necessarily had in mind when they referred to the English tradition of business being conducted in a decent and orderly manner. There were certainly plenty of examples of unruly

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[17] Bourinot, op cit, p 303.
[18] Hearn, op cit, p 556.
[19] Ibid.
[20] E.g. "Burke laments "brutal" parliamentary behavior", *Herald Sun*, 1/6/2012.

behaviour by members of colonial parliaments at the time both Bourinot and Hearn were writing.[21]

Parliaments are the venues for great ideological battles and impassioned debates. Whilst civil behaviour and erudite debate are no doubt greatly appreciated, and unruly and boorish behaviour are rightly critiqued, the decent and orderly conduct of business is more about the rules and procedures that are followed than the content of speeches and the conduct in the chamber of individual members. Hearn's observation in relation to the national assembly in revolutionary France is apposite here, highlighting the importance, for example, of there always being clarity as to the specific question before the House.

Other key aspects of contemporary parliamentary practice which ensure business is conducted in a decent and orderly manner go well beyond the rules of debate and rules concerning the conduct of members, and include:

- The requirements for notice to be given of most items of business
- Restrictions on the suspension of standing orders
- The routine of business
- Procedures for the calling on, postponement and adjournment of items of business
- Procedures for putting the question on motions and amendments
- Procedures for communication between Houses
- Procedures for the consideration of legislation.

Of course, the decent and orderly conduct of business is also facilitated through the efficient preparation and publication of business papers and the provision of clear and consistent advice by Clerks-at-the-Table.

The minority is protected

Perhaps the ideal of protecting the rights of the minority is still to be found in the United States. A minority party can exercise enormous power in the US Senate. While the majority party can decide when the Senate begins considering legislation or other items of business, the minority can greatly influence when the Senate concludes it or whether it concludes at all. This is based on two characteristics that distinguish the US senate from most if not all other parliamentary bodies: debate times are fundamentally unrestricted; and amendment opportunities are fundamentally unrestricted. The Senate Standing Rules are remarkable for the relative absence of restrictive provisions on the minority.

Of note is the well-known right to filibuster. The Senate Standing Rules do not specifically authorise filibusters; rather extended debate is possible in the absence of debate restrictions. One

[21] See for example the accounts of the conduct of Members of the NSW Legislative Assembly in the late nineteenth century, John Norton, William Patrick Crick and William Willis in C Pearl, *Wild men of Sydney*, Angus & Robertson, 1977.

of the few ways debate, including filibusters, can be curtailed is by cloture. However for a cloture motion to be moved, a day of session must intervene before it is moved, and for it to succeed, it needs the affirmative votes of three fifth of all senators (60 senators). Even where that is achieved, there is still up to thirty-hours of debate on the proposition on which cloture has been imposed.

Minorities or oppositions have less power in Westminster parliaments. Mechanisms which facilitate the "efficient" passage of legislation, the curtailment of debate, the tendency to leave responsibility for timetabling sittings and the provisions of the vast majority of time to government business all restrict the rights of the minority in many parliaments.

On the other hand, Presiding Officers take very seriously the responsibility to protect the rights of the minority and of all members to participate in debate and to fulfil their parliamentary roles.

The reality of the situation is perhaps best summarised by another Clerk of the Canadian House of Commons, Robert Marleau:

> Commentators on Canadian parliamentary history have argued that, over the years, the ideal of "protecting the minority" has had to adapt to the modern dictates of an efficient legislative body. Closure and time allocation rules ... as well as other rules adopted by the House, have long since given the government majority greater ability to advance its legislative program over the objections of the minority. Nevertheless, it remains true that parliamentary procedure is intended to ensure that there is a balance between the government's need to get its business through the House, and the opposition's responsibility to debate that business without completely immobilizing the proceedings of the house. In short, debate in the House is necessary, but it should lead to a decision in a reasonable time.[22]

However, the fact that various procedures have combined to gradually erode the rights of the minority does not mean that this principle should be abandoned. Indeed, it perhaps makes it even more important, in this context, that the protection of the minority remains foremost amongst considerations when the continuance of parliamentary traditions or the inclusion of innovations is being contemplated.

Every member is able to fully and freely express their opinion

The main restraint on members "fully" expressing their opinions in contemporary parliaments is the volume of business considered and the resulting pressures on the limited time available. It is now routine in most parliaments for there to be time limits on debate for particular items of business and time limits on some speeches. Whilst such time limits certainly restrict the opportunity for members to "fully" express their opinion in debate in the House, provided the

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[22] Robert Marleau & Camille Montpetit, *House of Commons Procedure and Practice*, Cheneliere / McGraw-Hill, Montreal Toronto, 2000, p 210.

time limits are reasonable, legislation and government actions are still open to rigorous scrutiny.[23] On the other hand, the regular exercise by a majority of blunt instruments for the curtailment of debate and the expedition of the consideration of legislation can significantly inhibit the ability for members to "fully" express their opinions.

Contemporary parliaments also provide a range of mechanisms by which members can exercise their roles of scrutinising legislation and holding executive governments to account, including through the work of parliamentary committees, oral and written questions and orders for the production of documents.

The opportunity for members to "freely" express their opinions is safeguarded by the privilege of freedom of speech in parliament. This privilege exists at common law, through the application of article 9 of the Bill of Rights of 1688 and, in many jurisdictions, through privileges legislation. Members' freedom of speech is regulated within parliament by standing orders providing for the rules of debate, the body of precedent of Presiding Officers rulings and, in some cases by guidelines (privilege resolutions). Whilst in the hurley burly of the most controversial debates, members' ability to "freely" express their opinion is often attempted to be constrained by opponents, Presiding Officers are careful to protect the rights of all members to express their opinions, subject to the rules and practices of the House:

> Members should allow the free flow of debate in this Chamber. The prime privilege of members in this place is the ability to be heard. Members should not interject solely for the purpose of preventing another member from expressing a point of view.[24]

Full opportunity is provided for the consideration of every measure

Neither Hearn nor Bourinot provide any detail as to the content of this principle. They merely suggest that after due consideration and full debate, a clear decision is able to be taken on each matter. Further, organized obstruction is not permitted to impede the view of the majority prevailing and being implemented.[25]

Clarity of decision making is no doubt related to the first principle identified above, of the decent and orderly consideration of business and the rules of procedure that ensure this is the case (eg clear procedures for the putting of questions and the consideration of amendments.

However, before there can be clarity of decision making, items of business need to actually be considered. This requires parliaments to sit regularly enough and for enough days and hours to

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[23] The impact of the introduction of time limits on debate of government legislation in the NSW Legislative Council was discussed in a paper presented at the 43rd Presiding Officers and Clerks Conference in Honiara in July 2012: http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Threeunusualanddramaticrecentsittingdays/$File/Three+unusual+days+-+David+Blunt.pdf

[24] NSWPD, 24/09/2009, p 18093.

[25] In her paper delivered at the ANZACATT professional development seminar in 2013, Dr Rosemary Laing identified one of the fundamental rules of procedure as "arrival at conclusions which reflect the will of the majority."

consider the volume of business. It also requires a fair share of time between, for example, government business and non government business – it has been a regular concern of non government in many Westminster parliaments that there are inadequate opportunities for the consideration of private members business.

Heedless or impulsive legislative action is prevented

On average each piece of legislation is before the NSW parliament for approximately 30 calendar days or 8 sitting days. The legislative process begins well before a notice of motion is given for the introduction of a bill, with the development of policy proposals within agencies, consultation with stakeholders, consideration by cabinet, legislative drafting and consideration by party rooms often taking many months. Of course, there are always examples of urgent or so called "urgent" legislation that is developed, drafted and enacted within a short period, sometimes as short as one week or even less. Likewise, regardless of the time taken to enact legislation there will always be occasional examples where legislation is enacted despite the warning of perhaps a small minority that the proposal is flawed and may be, for example, liable to successful challenge in the courts.

The standing orders generally prescribe a number of discrete stages in the passage of legislation. In order for legislation to be considered through more than one stage at any one sitting requires the suspension of standing orders, or the following of a prescribed procedure for the declaration of a bill to be urgent. Attentive members have the opportunity to vote against such procedural motions, and a limited right to debate the declaration of urgency. Whilst such actions may not prevent the impulsive enactment of perhaps flawed legislation, they do provide an opportunity for concerns to be recorded on the public parliamentary record and for members with such concerns to seek to persuade the majority of the merits of their point of view.

Other threats to contemporary parliaments' abilities to constrain impulsive legislation include the broad scope of delegated legislation. Another example is where national scheme legislation is introduced with the suggestion that, having been agreed to at a ministers' council or COAG meeting, it would somehow be impertinent for a parliament to amend or reject the proposed legislation.

An important contemporary practice and principle absent from Hearn and Bourinot's' lists

Hearn and Bourinot's lists of principles of English parliamentary law are focussed on one aspect the work of parliaments, namely the making of legislation. There is nothing explicit in their lists about the other key role of parliament, to hold the executive government to account.

The dual roles of parliament were recognised and articulated most clearly by the high Court of Australia in the *Egan* cases of the late 1990's.

> It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government."[26]

The balance between these two roles is neatly summarised in a quote from an English political scientist in the 6th edition of *Odgers*:

> Parliamentary procedure exists ... both to put through government business in an acceptable manner and to launch into the public air criticisms of the Government's conduct of its business and public grievances of all kinds. Things are both lawful and politically just when these two functions of Parliament are perfectly poised at each other's throat.[27]

Conclusion

The "great principles" identified by Bourinot and Hearn remain an excellent starting point for our thinking about parliamentary practice and procedure. With the addition of explicit reference to the role of parliament in holding the executive government to account, I would like to suggest that their great principles can be turned into the following brief questions, or checklist, which can be considered when reviewing the ongoing relevance of parliamentary traditions and the appropriateness of proposed innovations:

- **Does it assist in the orderly conduct of business?**
- **Does it assist to protect the minority?**
- **Does it assist all members to fully and freely express their opinion?**
- **Does it provide for full and proper consideration of every measure, including at the conclusion, arrival at decisions which reflect the will of the majority?**
- **Does it help prevent heedless or impulsive legislation?**
- **Does it assist in holding the executive government to account?**

If these questions are applied to an existing parliamentary tradition and the answer to every question is "no", it may be that tradition has lost its contemporary relevance.

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[26] *Egan v Willis* (1998) 195 CLR 424 at 451.
[27] J R Odgers, *Australian Senate Practice*, 6th edition, Royal Australian institute of public Administration, Canberra, 1991, p 116.

If these questions are applied to a proposed innovation and the answer to one of those questions is "No", caution is required as, whatever the benefits; the innovation may not be in the best interests of parliamentary democracy.