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Reforming the Dewan Negara

Part 2: Comparative Study and Options for Reform

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Introduction

In the first part of this paper series, we explored the historical evolution of the *Dewan Negara*. This, and a critical examination of the chamber revealed that not only has the chamber diverged from its founding intent, but that it also suffers from a variety of organisational and structural flaws. As a result, the *Dewan Negara* has declined and departed from its founding ideals of being an "influential forum of debate and discussion", meant to contribute "valuable revision" to legislation. Indeed, the chamber is perceived not only as functioning as a rubber stamp to legislation passed by the *Dewan Rakyat*, but also as a method of appointing failed election candidates to ministerial positions to satisfy a ruling party's internal politics. Evidently, this demonstrates that the *Dewan Negara* has fallen short of its founding ideals.

Reform of the chamber must necessarily be aimed at addressing the wider flaws inherent to the chamber rather than being confined to treating surface-level symptoms. As previously identified, these flaws and issues revolve around the quality of the chamber's legislative work, the quality of its Senators, as well as in the chamber's democratic accessibility.

In seeking to shine a spotlight on reform of the *Dewan Negara*, this second part of the paper series will undertake a comparative study of the Australian and Canadian Senates to gain a better understanding of the role and operations of a functioning and competent upper House. The paper will then address potential options for reform of the chamber.

Comparative Study

The Australian and Canadian Senates were chosen for this study due to the Westminster heritage that is shared with the *Dewan Negara*. Both nations are also federations with their Senates fulfilling a states' representation function similar to the *Dewan Negara*; The Australian and Canadian Senates also represent two opposing types of Upper Houses, with the former being a fully elected Senate and the latter being fully appointed. This will allow us to gain better understanding of the characteristics of Upper Houses of both types, and better aid in considering reforms for the *Dewan Negara*.

State and Provincial Representation

Both the Australian and Canadian Senates function as an arena for state (or provincial) representation to a far greater extent than the *Dewan Negara*, with all Senators representing a particular State or Province. This is reflective of the historical origins of the two nations, both being federations of separate British colonies with established political and legal systems, albeit with some amount of economic disparities amongst each other. The fact that the territories of the federation stood on an equal footing was given heavy emphasis, particularly by the smaller colonies. In the case of Canada, the presence of a large French population in Québec, and the later additions of established British colonies to the west that were similarly keen to have their rights and status protected, were additional factors that crystallised the need for a provincial-representative Senate.

In Australia, all 76 Senators represent the 6 States[1] and 2[2] (of 3[3]) mainland Territories that makeup Mainland Australia. The equal representation of States in the Senate is a principle enshrined in the Australian Constitution[4]. Under the provision, each Original State[5] is to have no less than 6 Senators each. The intent behind this formula then was to protect the less populous states against domination by the two richest and most populous states - New South Wales and Victoria. This translates into the 6 States electing 12 Senators each, and the mainland territories electing 2 each. Senators representing the States are elected for 6 year terms with half being elected every 3 years, whereas those representing the Territories are elected for 3 year terms.

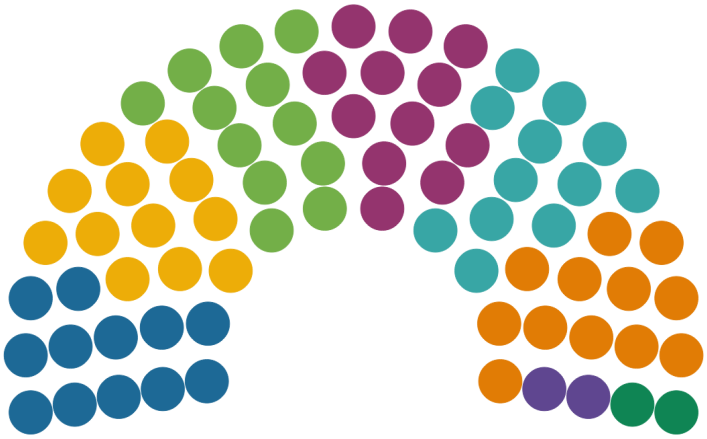

Figure 1: A representation of the Senator allocations for the States and Territories of Australia

State / Territory	No. of Senators
New South Wales	12
Victoria	12
Queensland	12
South Australia	12
Western Australia	12
Tasmania	12
Northern Territory	2
National Capital Territory (Canberra)	2
TOTAL	**76**

Table 1: The States and Territories of Australia and Senator allocations

1 New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia
2 Canberra (the National Capital Territory), and the Northern Territory
3 Jervis Bay Territory residents are represented by Canberra NCT Senators
4 s.7, *Constitution of the Commonwealth of Australia*
5 "Original State" refers to the 6 Australian States that, as separate colonies, federated to form the Commonwealth of Australia.

Like their Australian counterparts, all 105 Canadian Senators represent the 13 Provinces[6] and Territories[7] of Canada. At the inception of the Senate, it was determined that a population based representation was unsuitable[8] for Canada, and instead a favourable weightage was given to less populous Provinces[9], granting them better representation (population per Senator) than more populous Provinces.

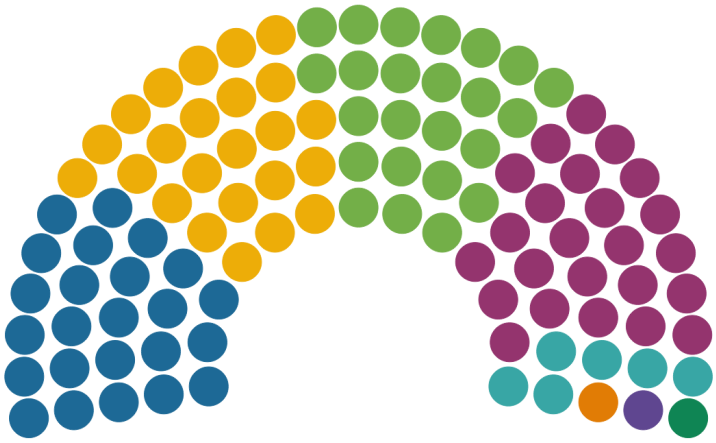

Figure 2: A representation of the cumulative Senator allocations for the Senate Regions and Territories of Canada

6 Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, and Newfoundland & Labrador.

7 Northwest Territories, Yukon, and Nunavut.

8 The Senate of Canada, *The Canadian Senate in Focus 1867-2001* (2001) ch 1 pt 1 para 3

9 ibid para 4

Province / Territory	Senate Region	No. of Senators
Ontario	Ontario	24
Quebec	Quebec	24
British Columbia	Western Canada	6
Alberta	Western Canada	6
Manitoba	Western Canada	6
Saskatchewan	Western Canada	6
Nova Scotia	Maritimes	10
New Brunswick	Maritimes	10
Prince Edward Island	Maritimes	4
Newfoundland and Labrador	Newfoundland and Labrador	6
Northwest Territories	(Territory)	1
Yukon	(Territory)	1
Nunavut	(Territory)	1
TOTAL		**105**

Table 2: The Provinces & Territories of Canada, their Regions and Senator allocations

Senate Committees and Legislative Work

While both the Canadian and Australian Senates feature committees as part of their legislative processes, the Australian Senate's committee system is particularly notable. Most of the Senate's legislative work is performed by its committees rather than the Senate sittings, illustrated by the fact that in the year 2018, the Committees met for a total of 2081 hours versus the Senate's 577 hours[10], the equivalent of 86.7 and 24 full days respectively. This is in stark contrast to the *Dewan Negara*'s allocated 25 days of sitting in year 2019 with no Committees: With a typical sitting day lasting only 8 hours, this means the *Dewan Negara* sat for at most a total of 200 hours in year 2019.

There are a large variety of committees[11], each designed to perform a specific task or to cover a specific policy area. Generally speaking, there are two main types of committees: the Select Committees and the Standing Committees. Select Committees are created by way of a resolution of the Senate to inquire into and report upon a particular matter. As such, its size and scope are defined within the founding motion, and the committee usually ceases to exist upon the presentation of its final report, or when the allocated time for its function expires; Standing Committees on the other

10 Parliament of Australia, 'Senate Brief No. 4: Senate Committees' < https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief04> accessed 20 December 2019

11 ibid

hand, are appointed at the beginning of each Parliament and continue to function until the end of the day of that particular Parliament[12]. The term itself is an umbrella category, as it covers a range of committees with various functions.

Standing Committee Category	Description
Domestic Committees	Comprised of 8 committees. Deals with the internal operations of the Senate.
Legislative Scrutiny Committees	Comprised of 2 committees. Forms part of the legislative process.
Legislative and General Purpose Committees	Examines legislation, government administration, and references of a general nature.
Joint Committees	Established for the consideration of matters that should be the subject of simultaneous inquiry by both Houses.

Table 3: An overview of the categories of Standing Committees of the Australian Senate

The Legislative Scrutiny Committees are particularly significant due to the nature of scrutiny they perform. There are two committees under this umbrella: the Scrutiny of Bills Committee and the Regulations & Ordinances Committee. The former examines proposed legislation before they are debated by the Senate, and assesses them against a criteria of personal rights and liberties to ensure that the legislation does not overstep its legal boundaries. This Committee does not usually recommend specific changes but merely highlights provisions that do not meet the criteria, and so the onus is on Senators to propose any changes in the Chamber; On the other hand, the Regulations and Ordinances Committee performs similar scrutiny on legislative instruments and regulations drawn up by the government. With the assistance of an independent legal adviser, the Committee checks all legislative instruments tabled in the Senate to ensure that they are each in accordance with the scope granted by its parent Act, that it does not trespass unduly on personal rights and liberties, and does not contain matter more appropriate for parliamentary enactment instead.

Another notable Standing Committee is the Legislation Committee[13] which inquires into and reports upon proposed government expenditure, legislation, and also considers and examines government administration and annual reports. This is very notable as Westminster style upper Houses do not usually examine and question government expenditure at this level of detail.

The legislative procedure of the Canadian Senate is identical to that of the lower House of Commons. Legislation goes through first and second readings, then a Committee and Report State, and is then put through its third reading. Committees are thus also a feature of the procedure of the Canadian Senate, with there being 6 main types of committees[14]: Standing Committees, Special and Legislative Committees, the Committee of Selection, Joint Committees, Subcommittees, and the Committee of the Whole. While there is some commonality with the committees of the Australian Senate, the Canadian committees are less thorough than their Australian counterparts, covering only specific legislations and issues without delving into the government's proposed expenditure and regulations and ordinances as the Australian Senate does.

12 That is, until the next Parliament meets after an election.

13 A type of legislative and general purpose standing committee.

14 The Senate of Canada, *Fundamentals of Senate Committees* (2015) ch 5

In terms of commonality both Senates feature standing committees and joint committees; Of particular interest is the Special and Legislative committees, functioning as the Canadian Senate's mechanism to scrutinise or study specific pieces of legislation or particular issues[15]. These committees are established by a corresponding motion adopted by the Senate that also sets out the parameters of the committee's study, with no deviation permitted without the Senate's permission[16]. Due to the focused and limited nature of the scope, these committees cease to exist upon presentation of their final report.

Canada and the question of an elected Senate

Unlike the Australian Senators, Canadian Senators are appointed by the Governor-General on the advice of the Prime Minister. The choice of an appointed Senate in Canada rather than an elected one was informed largely by experience gained from the legislature of the Province of Canada[17]. Experienced candidates had been disinclined to run for election to the Provincial legislature due to the cost of seeking votes in what were "very large" 19th century constituencies[18]. The Legislative Council[19] of the Province also started seeing its elected councillors being appointed to the provincial Executive Council[20], which in turn diminished its role as a check on legislation; An additional problem faced by the Council that is also of interest was the gradual acquiring of career politicians of dubious quality[21], which evidently threatened to undermine the expected quality and traditional role of an upper House. Indeed, it was envisioned that the duties and role of Senators would require "impartiality, expert training, patience, and industry"[22], and that the Canadian Senate's role was to provide "sober second thought"[23] on legislation.

Additionally, the experience of the United States Senate and the American Civil War also further shaped Canadian opinion on elected upper Houses, with the Civil War being seen as a power struggle between the states and Union government[24], and the State Senators having contributed to that dynamic[25]; There was also the fear of deadlocks between the lower and upper Houses, as both Houses would be able to claim the popular mandate if both were elected – this being described as a "recipe for conflict and disaster"[26]. As this ran counter to the purpose of the Senate, the fathers of the Confederation thus chose an appointed Senate rather than an elected one.

Lessons for the *Dewan Negara*

There are key differences between the Canadian and Australian Senates despite both Parliaments sharing a common Westminster heritage. The most prominent contrast is that Australian Senators are fully elected by the people of the States and Territories. This has led to key differences in the role and public stature of both Senates, with

15 ibid para 5

16 ibid para 6

17 A precursor of modern day Canada. The Province was formed out of the merger of the Provinces of Lower and Upper Canada in 1841, and spanned the territory of the modern day provinces of Ontario and Québec.

18 ibid para 5

19 The upper house. The lower house was the Legislative Assembly.

20 The Senate of Canada, *The Canadian Senate in Focus 1867-2001* (2001) ch 1 para 5

21 ibid

22 ibid para 8

23 ibid para 1

24 ibid para 5

25 ibid para 6

26 ibid

the Australian Senate enjoying far more prominence than its Canadian counterpart. In turn, the Australian Senate is able to claim the popular mandate, and is entitled to scrutinise the government to a greater extent than unelected counterparts like the *Dewan Negara*. But it is important to observe that the Australian Senate is far removed from Westminster tradition, and closer instead to the United States Senate. This is in contrast with the Canadian Senate and the *Dewan Negara*, as both chambers were designed to be secondary to their lower Houses. For example, Sir John A. Macdonald described the Canadian Senate as a chamber "that will never see itself in opposition against the deliberate and understood wishes of the people"[27], whereas the *Dewan Negara*'s power to delay legislation was to be exercised only in exceptional cases.[28] [29]

While the partisan element in an elected Senate could drive opposition Senators to scrutinise the Executive better, it does not guarantee the competence and calibre of incoming Senators - a lesson learnt by the Canadians in the old Legislative Council. Issues could be raised simply to score political brownie points with the electorate rather than provide any actual scrutiny. Nor does it guarantee Senators having the most agreeable ideological background: An example is the representation of One Nation in the Australian Senate with its well-publicised extreme right-wing, racist and Islamophobic views and antics; Another example is former Senator Fraser Anning, who gained worldwide prominence after the 2019 Christchurch Mosque Shooting for his highly insensitive, racist remarks following the incident, together with his sympathetic views towards the shooter.

At the same time, neither are unelected chambers free from partisan sentiments due to the ease with which the executive could nominate Senators of its choice to ensure a favourable balance of power in the chamber – a scenario frequently seen in the Dewan Negara. The chamber would take on an inherently partisan character, thus negating the possibility of an independent and technocratic chamber. Similar concerns are present in the Canadian Senate, with the officially non-affiliated Independent Senators Group voting with the government "94.5% of the time" in 2017[30]. This demonstrates that partisanship can and will remain present in unelected Senates, especially if Senators retain their existing party affiliations.

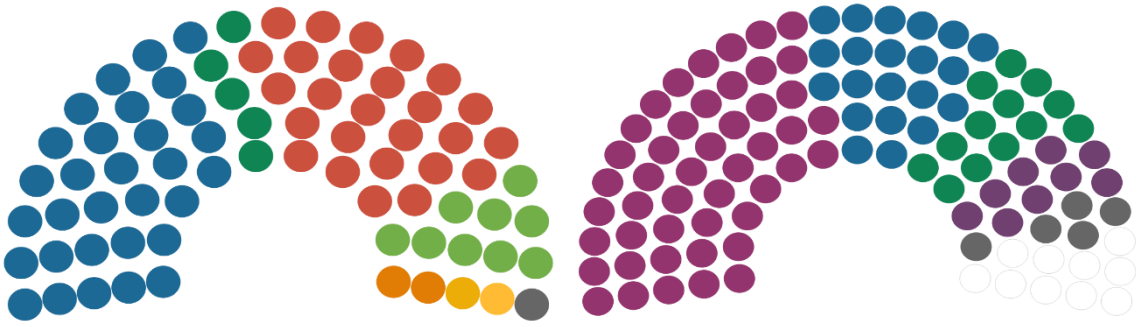

Figure 3: A representation of the diversity of political affiliations in the Australian and Canadian Senates respectively

27 The Senate of Canada, *The Canadian Senate in Focus 1867-2001* (2001) ch 2 para 1

28 Reid Commission, Report of the Federation of Malaya Constitutional Commission (1957) para 64 (iv)

29 Likewise, while the Canadian Senate possessed an absolute veto on constitutional amendments until the patriation of the Canadian Constitution in 1982, it only ever used its veto powers twice – in 1936 and 1960.

30 Éric Grenier, 'Why the Senate is unpredictable - and its independents not so independent' (CBC News, 19 June 2017) <https://www.cbc.ca/news/politics/grenier-senators-votes-1.4162949> accessed 20 December 2019

Another crucial lesson is the importance of committees within the legislative process. The Australian and Canadian Senates' committee system allows for extensive scrutiny of both government legislation & expenditure, and allows the Senate to function as a second layer of check and balance on the Government in every sense of the phrase; Pertinently is the fact that primary and secondary legislation are scrutinised by the Australian committees to ensure they do not infringe on personal rights and liberties. This is an important function, particularly as government regulations are not created under the oversight of Parliament or any other body. The fact that the *Dewan Negara* does not have any such committees mean that it is unable to perform such detailed scrutiny despite being in a position to do so, and is a glaring omission that limits its role and authority greatly.

While the Australian and Canadian Senates can be starkly different from the *Dewan Negara* in many ways, they nonetheless provide important lessons into the elements needed for a fully functioning upper House. In particular, it is clear that the *Dewan Negara* has inherent organisational and structural issues. In order for the shortcomings of the chamber to be fully addressed, reforms would have to be targeted at these issues rather than at treating symptoms at the surface level.

Reform of the *Dewan Negara*

The Role of the *Dewan Negara*

The reformed *Dewan Negara* should be an esteemed and influential forum for debate[31]. It must be democratic, be composed of competent and qualified Senators, and must be able to hold members of the Executive to account to a greater extent than before. Yet our critical examination of the *Dewan Negara* in Part 1 of this paper series revealed that the chamber suffers shortcomings in exactly these areas, collectively impeding the *Dewan Negara* from functioning at its full potential.

Thus, any attempts at reform must address these key issues. Successful reform can turn the *Dewan Negara* into an effective legislative chamber and raise its public profile, allowing it to be the influential forum it was supposed to be. Furthermore, the trend of Executive overstep and dominance in Malaysia can be reversed with this empowerment of the *Dewan Negara* if it provided useful check and balance, particularly on the overreach of the federal government into state matters. This can reduce Executive dominance of Parliament, making Parliament a truly independent and professional institution.

While this paper will explore the available options for reform of the chamber, it must be emphasised that this exploration is intended for academic discussion, rather than an absolute guide to reforming the *Dewan Negara*.

A Professional and Competent *Dewan Negara*

It is necessary for the *Dewan Negara* to be well regarded by the general public for it to be an influential debating forum, and perception of the chamber must evolve to one of professionalism and competency. The chamber is not regarded highly largely due to two main factors: the quality of its legislative work, and the quality of Senators themselves. Arguably, these are important metrics against which legislative chambers are frequently measured, and efforts to reform the *Dewan Negara* should aim to bring the chamber up to standard.

31 This is a return to the chamber's original founding intent.

The first step to creating a technocratic and professional *Dewan Negara* is the establishment of select committees specialising in a wide range of policy fields. This can be implemented very easily, as it only requires the *Dewan Negara* to pass a motion[32] establishing the committees and defining their composition and assigned areas. As we have learned from the Australian Senate, these committees allow Senators to conduct in-depth scrutiny of policies implemented by the Executive as well as incoming Bills from the lower House. This allows the *Dewan Negara* to function more effectively as a legislative chamber beyond its traditional role as a chamber for debate, giving it a professional and technocratic character distinct from the more partisan *Dewan Rakyat*.

Additionally, committees also allow the chamber to manage its workload more effectively. The scrutiny of Bills and policies require a large amount of time and attention to detail, potentially intruding upon the time allotted for other businesses. The main chamber's primary function as a debating chamber also renders it inherently unsuited for the task of performing detailed examinations on policy and legislative matters. This is because scrutinising policies and Bills tend to require a focused approach on a specific subject matter -- Committees, with their defined policy and subject areas, provide a setup and environment more suited for the detailed questioning and examination that forms part of the scrutiny process.

The professional competency of federally appointed Senators is also a crucial element. Under the current provisions, appointed Senators are required to have:

> *"…rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of aborigines"*[33]

As observed in the previous paper, while this provision gives a general overview of the standards expected of appointed Senators, it lacks any specificities to aid in evaluating nominees. The most realistic form of evaluation that the Prime Minister can perform on the nominees is a superficial appreciation of their skills and qualifications, rather than a comprehensive appraisal of their merits. Additionally, the lack of any form of oversight over this process also allows for the Prime Minister to conduct the barest of evaluations, allowing nominees with questionable background and merits to be appointed as Senators despite scepticism over their value to the *Dewan Negara*.

The Prime Minister simply cannot remain in possession of a wide latitude of discretion for the nomination of candidates without scrutiny. Given that the Prime Minister is the sole person responsible for the nomination of candidates to the Yang di-Pertuan Agong, the solution would be to remove the Prime Minister entirely from the process, or to reduce their role and prominence in the process. Either solution necessarily requires the creation of a *Dewan Negara* appointments committee composed of a set number of Senators, and similar in function to the House of Lord's Appointments Commission in the United Kingdom.

32 In terms of procedure, it is the House Committee (Jawatankuasa Dewan) that will make the appropriate recommendation to the Dewan Negara on the list of select committees to be established, together with its composition and assigned policy areas and functions.

33 Federal Constitution of Malaysia, Article 45(2)

This may require an amendment to Article 45(2) of the Federal Constitution, admittedly making it difficult to implement as constitutional amendments require a two-thirds majority to pass in the *Dewan Rakyat*. Alternatively, a simple majority legislation may be introduced to create a committee responsible for recommending candidates to the Prime Minister, with the caveat that the Prime Minister's ability to reject the recommendations be limited[34].

Like the Commission, such a committee should be empowered to thoroughly vet all nominations for federally appointed Senators to ensure the professional competency of nominees in their given fields, the highest levels of propriety, as well as their overall merits and suitability for the position of Senators. To ensure a rigorous vetting process, this paper proposes that nominees be subject to a comprehensive evaluation involving the use of public interviews to ascertain their professional background and competencies, as well as to address any controversies involving the nominees in the past (if any). In the interest of transparency, the qualifications of the nominees and the findings of this vetting process should be made publicly available as much as possible to ensure wider public awareness over the nominees and the vetting process itself.

The effect of this committee would be a significantly raised barrier of entry for federally appointed Senators. The Federal Government would have to ensure that their nominees are capable of meeting the standards enforced by the committee, in turn discouraging the existing practice of nominating individuals on the sole basis of their political loyalty; Furthermore, the committee would also be able to ensure that the federally appointed Senators are professionally competent and qualified, able to contribute meaningfully to the chamber's legislative and policy work, in turn raising the quality of the chamber's performance and output.

Together with the aforementioned broad range of select committees, legislation and government policy will be subject to effective and robust review. Not only will Bills and policy be subject to stricter and more effective scrutiny than before, but Senators will also be able to propose more holistic and meaningful amendments to Bills and government policy. This will raise the quality and equity of legislation and governmental policy, and at the same time cement a reputation for the *Dewan Negara* as a forum for serious and effective discourse on legislation and policy, making reform in this area the most important out of all.

Democratising the *Dewan Negara*

The chamber's democratic deficit is centred on the lack of public engagement in the appointment of Senators[35] together with a lack of a mechanism for the public to hold them to account. Under the current framework, the public is unable to vote for their choice of Senators[36], and neither do Senators face the consequences of public dissatisfaction in their actions. In seeking to address this deficit, a potential option may be to implement elections for Senators. This option is easily (partially) implemented as Article 45(4)(b) already allows Parliament to pass a Bill implementing elections for State Senators[37]. Hypothetically speaking, this democratises the chamber

34 A proviso could provide for the Prime Minister being unable to reject the recommendations, or to allow rejections subject to the Prime Minister providing reasons for the rejection, and for a replacement candidate to be chosen from the same list of recommended candidates.

35 Here, "State Senators" refers to both State and FT Senators.

36 This is particularly evident in the case of State & FT Senators, as despite representing a defined territory the local residents are unable to vote for their choice of Senators to represent them.

37 "State Senator" here does not include the Federal Territory Senators.

almost instantly -- The public will be able to vote for their preferred candidate and Senators can be held to account through the electoral process.

However, this is an unsustainable reform option in the long term. As we have learned from the Canadian and Australian Senates, elected Senators are able to claim the popular mandate alongside the elected MPs of the lower House[38]. This may contribute to instances of conflict and deadlock between both chambers, for example over Bills forming part of the governing party's manifesto. In this scenario, elected Senators could claim the popular mandate to oppose such Bills despite the governing party's own popular mandate to implement their manifesto; Additionally, focusing on elections for Senators without properly addressing the underlying organisational issues will result in a superficial reform effort that will not yield tangible improvements in the chamber's performance and stature.

While the Australian Parliament resolves deadlock between the Houses with a double dissolution[39] [40], the Malaysian Parliament is not so equipped. It must be remembered that the *Dewan Negara* was created specifically to be secondary to the elected *Dewan Rakyat*, and only to delay legislation in exceptional circumstances; Furthermore, the appointment of Senators also allow professional individuals and ethnic minorities to be appointed to the chamber in accordance with Article 45(2), thus maintaining a professional standard in the chamber and ensuring minority representation in the legislative process. These would be difficult to achieve in a fully elected *Dewan Negara*, as individuals may be reluctant to stand for election[41], and neither can minority representation be guaranteed unless ethnic quotas are introduced[42].

Recall Mechanisms

As an alternative, this paper proposes the implementation of a mechanism to recall State and FT Senators[43]. This would entail the revocation of a Senator's (indirect) election or appointment once certain criteria are met. The basis for this mechanism is taken directly from the UK's Recall of MPs Act 2015, under which a petition to recall a Member of the House of Commons can be initiated if one of three criteria are met:

1. where the MP is convicted of an offence and sentenced or ordered to be imprisoned[44],

2. where the MP is suspended by the House following a report from the Committee on Standards[45], or

3. where the MP is convicted of an offence under s.10 of the Parliamentary Services Act 2009[46] [47].

38 In this case, the Dewan Rakyat.

39 s.57, *Constitution of the Commonwealth of Australia*

40 In the event of an unresolvable conflict between the House of Representatives and the Senate, both chambers are dissolved. If the conflict persists in the reconvened Parliament after the elections, the Governor-General is empowered to call a joint session to resolve the matter.

41 This was a reason raised by the Reid Commission when justifying an unelected Dewan Negara.

42 The topic of ethnic quotas itself is a sensitive one, and will be difficult to implement for the Dewan Negara

43 A recall mechanism is more suited for State & FT Senators as, unlike their 40 federally appointed colleagues, State & FT Senators represent the residents of a defined region.

44 Recall of MPs Act 2015, s.1(3)(a)

45 ibid s.1(4)

46 ibid s.1(9)

47 The offence of providing false or misleading information for allowances claim.

Petitions are deemed successful if signed by at least 10% of elected voters in the MP's constituency[48], and will result in the seat being vacated, thus triggering a by-election.

The Federal Constitution already provides for a list of criteria governing automatic disqualification of Members of both chambers, one of which is the conviction of a Member of an offence and their sentencing to imprisonment for not less than a year. However, the current list omits any criterion relevant to public dissatisfaction over a Senator's performance, negating the possibility of disqualifying a Senator on those grounds. Rectifying this requires a constitutional amendment[49] to insert public dissatisfaction as a criterion, and to provide for a recall mechanism to be created and utilised when the criterion is triggered.

It is foreseeably necessary to involve the State Legislatures (DUN) in the recall process for State Senators to conform to Malaysia's federal structure. Hypothetically speaking, recall petitions for a State Senator would be debated by the relevant DUN once a minimum quota of signatures is reached. Assuming the motion passes in the chamber, the DUN then informs the President of the Senate on the Senator's recall and their seat's vacancy. In this hypothetical process, the inclusion of a minimum quota of signatures and the subsequent debate in the DUN plays the role of a safeguard to filter out spurious and vexatious petitions; Conversely, the absence of devolved legislatures in the Federal Territories makes it necessary for petitions to recall an FT Senator be sent directly to the *Dewan Negara* for debate. To ensure a higher level of safeguard, it may be necessary to set higher thresholds for petitions to recall FT Senators.

This mechanism can be challenging to implement, as constitutional amendments require a two-thirds majority to pass. In the event a governing party does not possess such a majority it will have to enter into discussions with other parties to garner sufficient support for the amendments, delaying passage further; There is also the issue of "public dissatisfaction" being extremely vague and being open to misuse should it be made a criterion, requiring a relevant specific criterion to be defined[50] instead if this were to be taken up as a reform option.

State Representation

The primary issue facing State Representation in the *Dewan Negara* is the numerical majority of federally appointed Senators over State Senators, despite State Senators having formed the majority of Senators in the early days of the chamber. This numerical imbalance creates the possibility of federal overstep in the chamber, theoretically allowing federally appointed Senators to vote down and override the concerns of State Senators on matters affecting their States. The solutions available to address this imbalance is to either increase the number of State Senators to 3 per

48 Recall of MPs Act 2015, s.14(3)

49 Further operational specifics for the process could be inserted in the Seventh Schedule. These should cover the signature quotas to be met, the requirement for the DUNs to debate a qualifying petition, and for priority to be given to motions to debate the petition over State Executive and Federal Government business (if appropriate).

50 In practice, this is likely to be an action that would cause widespread public dissatisfaction, such as the utterance of controversial and widely criticized statements, or even a sudden switch in partisan allegiance.

State[51], reduce the number of (non-FT) appointed Senators[52], or to abolish appointed Senators outright[53]. These are options already provided for in the Federal Constitution and require a Bill passed by a simple majority of both Houses to implement.

It must be acknowledged that altering the composition of the chamber may cause new complications. For example, abolishing appointed Senators or reducing their numbers would directly reduce the opportunities available to appoint professionally qualified individuals and ethnic minorities as Senators, as the partisan nature of State Senatorship requires a level of political involvement[54] that may discourage politically inactive individuals from seeking election; Additionally, there may also be calls to improve Sabah and Sarawak's representation in Parliament in line with the spirit of the Malaysia Agreement 1963 by increasing their allocation of Senators. This is likely to be difficult, as while the Sabah and Sarawak state governments possesses powers not available to their Peninsular counterparts, the principle of equality[55] [56] [57] would dictate that Sabah and Sarawak are not superior to the Peninsular states in the Malaysian Federation, and may prompt the other states to demand an increase in their Senator allocations as well. Clearly increasing the Senator allocations of only Sabah and Sarawak may initiate wide-ranging discourse on federalism and states' rights in Malaysia. Unless the intent is to trigger such a discourse, it is evident that the simplest option here is to increase the Senator allocation of all States while retaining the current amount of federally appointed Senators. This will give the *Dewan Negara* a new breakdown of 43 State & FT Senators versus 40 federally appointed Senators, returning the chamber to its old majority of State Senators.

Conclusion

The effective reform of the *Dewan Negara* is crucial for the chamber to regain its function as a professional and competent legislative chamber, thereby allowing it to play an important role in the legislative and political process of Malaysia. It must be emphasised that effective reform requires a multi-pronged approach: A robust committee system will build legislative and professional capacity in the chamber, and the implementation of a recall mechanism will further mitigate the existing inherent democratic deficit, and while the question of State representation in the Dewan Negara may take longer to be resolved, returning to a majority of State Senators can nonetheless be a catalyst for better State representation at the Federal level. In short, a singular surface-level approach to reform, no matter how politically popular, will likely be unable to accomplish significant improvements in the current state and stature of the *Dewan Negara*.

Bearing in mind the importance and the potential of the *Dewan Negara* within Malaysia's legislative and political process, it would thus be appropriate to affirm that reforming the chamber deserves an equal amount of attention as reform of the Dewan Rakyat.

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51 Federal Constitution of Malaysia, Article 45 (4)(a)

52 ibid, Article 45(4)(c)

53 ibid

54 It is to be expected that individuals would have to be active enough within the State's ruling party to be nominated as a State Senator.

55 That is, the principle of equality in federalism.

56 This principle requires that all member governments within a federal state be of equal status vis-à-vis each other.

57 Khairil Azmin Mokhtar, 'Confusion, Coercion and Compromise in Malaysian Federalism' in Andrew J. Harding and James Chin (eds), *50 years of Malaysia: Federalism Revisited* (Marshall Cavendish 2016)

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