

HOW (AND WHETHER?) TO EVALUATE PARLIAMENTARY COMMITTEES – FROM A LAWYER’S PERSPECTIVE ¹

1. Introduction

There is a well known quip about “committees [as] being a group of the unwilling, chosen from the unfit, to do the unnecessary”. Despite that, parliamentary committees have an ancient lineage as is attested by the role they played during the historic struggles between the English Parliament and King Charles 1st during the 17th Century. The struggles of course culminated in the English Civil War. Their role was described in the following terms:

“The privilege of freedom of speech enabled it to criticise the conduct of the government and of its agents, and to suggest changes and reforms. And there is no doubt that the growth of the committee system made this criticism very much more effective and more searching than it had ever been before. One of the charges which Charles I. made against the Commons, in his declaration of 1629, was the extension of their privileges by the establishment of standing committees. He complained that ‘there are so many chairs erected to make inquiry upon all sorts of men, where complaints of all sorts are entertained’; that young lawyers sitting there decried the opinions of judges, and maintained that the resolutions of the House were binding upon them; and, last and worst, that they have sent for and examined the attorney - general, the treasurer, chancellor, and barons of the exchequer, some of the judges, and other officials, for matters done in the course of their respective duties, for which they were in no way accountable to the House of Commons. ‘Under pretence of privilege and freedom of speech, they take liberty to declare against all authority of Council and Courts at their pleasure... Their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overruling power to themselves, which belongs only to us, and not to them.’ ”²

The addressed in this article, however, is not their effectiveness, but rather how to assess and evaluate their effectiveness, as seen, in particular, from a legal perspective. The kind of committees dealt with do not include the ‘house keeping’ committees which are concerned with such matters as parliamentary library facilities, publications and also parliamentary privileges despite, in the latter case, their special interest to lawyers.

2. Functions and aims of parliamentary committees

A brief reference is first made to the functions and aims of parliamentary committees. Powers of inquiry possessed by them are best seen as assisting parliament in its role as the “Grand Inquest of the Nation” or the “Grand Inquisitor” performed by the British House of Commons. The provisions of s 49 of the Australian Constitution give

¹ This article reproduces a talk given by the author on 18 November 2004 to a meeting of the *Canberra Evaluation Forum* [in his capacity as a representative of the Clerk of the House of Representatives??].

² W Holdsworth, *A History of English Law* Vol 6 (2nd ed, 1966), 100 (footnotes omitted).

both Houses of the Australian Parliament and their committees the same powers as those enjoyed by the British House of Commons and its committees at the establishment of the Commonwealth on 1 January 1901.

Although parliamentary committees may assist the Houses to perform their legislative functions they are not, it is suggested, limited to those functions (despite the contrary and discredited view expressed by the Northern Territory Supreme Court in 1971).³ Committees can be divided into at least two categories. The first are those concerned with legislation and the second with public policy and the administration of government. Sometimes there will be found in the literature a further distinction between having the power of making decisions and merely influencing the making of decisions.⁴ Most of the work done by committees only influences the decision making process in relation to parliamentary and governmental business.

A useful description of the aims of most parliamentary committees was provided by Joint Standing Committee on Broadcasting as far back as 1943 when it argued strongly in favour of establishing “a Standing Committee System” despite the fact that it was only attempting to describe the aims of standing committees. The aims were said to consist of acting as:

- (a) the Parliament’s ‘watch dog’; assisting it in forming a judgment independent of the Minister's point of view;
- (b) a sounding board for the Parliament’s reaction to contemplated legislation, regulations, etc.;
- (c) a safeguard against hasty, ill considered, legislation due to prior consultation of all interests concerned;
- (d) a place for unprejudiced discussion of problems in an atmosphere where party barriers are substantially eliminated;
- (e) a place where interest groups may be heard by groups of members, and views thereby transmitted to parliamentarians; and
- (f) a means for enhancing the standing of members of Parliament in relation to the Government of the day by their informed contribution to the subject area of the committee.⁵

Those aims will be referred to again later but for the present it suffices to question whether the aim described in (d) involves an element of wishful thinking in regard to many but not all parliamentary committees.

³ *A-G (Cth) v MacFarlane* (1971) 18 *Federal Law Reports* 150.

⁴ M Aldons, “ Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?” *Australasian Parliamentary Review*, Vol 18 (1) Autumn 2003 at 83 – 5.

⁵ C S Reid and M Forrest, *Australia’s Commonwealth Parliament: 1901 – 1988 Ten Perspectives* (1988) at 373

3. Desirability and viability of evaluating effectiveness of parliamentary committees

It is now possible to address the desirability and viability of evaluating the effectiveness of parliamentary committees. As a starting point one would usually assume that all institutions need to be kept under review to justify their continued existence and to improve their performance in the future. The main difficulty however is the viability of evaluating their effectiveness on a comprehensive, regular and systematic basis. Statistics may assist and are of course relevant but it is, as others have pointed out, difficult to evaluate the effect of parliamentary control upon the Executive Government. The main problem relates to the making of subjective judgments about the quality of what is achieved⁶ especially when the effect of parliamentary control is usually indirect and, even then, frequently denied by those affected by it.⁷

Systematic evaluation would seem to entail the adoption of a rigorous methodology. In this regard one should acknowledge the valuable work of Malcolm Aldons - someone who has had practical experience in the field.⁸ His recommended approach would involve collection of much data which will usually take the form of extensive interviewing of participants not only those who were either members or associated with the committees, but also those who the author would like to think are the recipients of the service or products supplied by the committees, namely, the Executive Government and the Public Service. It would also involve the adoption of a rigorous method of rating reports by reference to outcomes and implementation. It should be emphasised that the focus here is on the acceptance and implementation of recommendations by the Government. For this purpose it is necessary to discount what may be described as “soft recommendations” – in other words, those that are inconsequential. For this purpose Aldons has devised and advocated a ratings system, namely, that 1. the report was effective 2. the report was *prima facie* effective 3. doubts exist whether the report was effective 4. the report was ineffective.⁹

Other factors should be added. In order to avoid duplication of effort it would be important to know of the existence of reports and information prepared by committees of the other House or from alternative and non – parliamentary sources where there is no compelling reason for ignoring the same. In addition there is a need to record whether a committee brought to light new information and advanced new criticisms. Then there is the further issue as to who should perform the evaluation. I support the notion that committees should be authorised to remain in existence for monitoring the implementation of their reports (part of the “after sales service” as it were). This has been recommended by the *House of Commons Select Committee on Liaison*.¹⁰ It is I believe a recommendation worth accepting regardless of whether all committees are evaluated on a regular and systematic basis.

⁶ Reid and Forrest at 387.

⁷ *Ibid* at 378.

⁸ “Rating the Effectiveness of Parliamentary Reports” *Legislative Studies* Vol 15 (1) Spring 2000, 22 – 32 and “Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?” *Australasian Parliamentary Review*, Vol 18 (1) Autumn 2003, 79 – 94.

⁹ *Legislative Studies* Vol 15 (1) Spring 2000 at 25 – 6.

¹⁰ First Report on “Shifting the Balance: Select Committees and the Executive” March 2000 para 52.

But the wider issue arises as to who else will be involved in the auditing process with less of a vested interested? Also what will be done with the reports on such matters and the mass of information collected in order to prepare them?

To return to the question about viability, even if there are answers to the questions raised above, there are serious questions about whether the time and effort involved makes this kind of review worthwhile when applied regularly and systematically to *all* committees - as distinct from *some* committees on an *ad hoc* basis. Perhaps it serves as a note of warning that such methodology does not appear to have been used by either the British House of Commons Select Committee on Liaison mentioned above and the Australian House of Representatives Standing Committee on Procedure Report, *Ten years on: A review of the House of Representatives committee system* May 1998. What follows is addressed on the assumption that the exercise is nevertheless thought to be worthwhile

4. Measurement of legal and constitutional effectiveness

So far what has been said does not turn on legal training or expertise and I now wish to offer some observations based on that perspective before I return to other aspects of the general methodology of evaluation.

I have previously adopted, and continue to adhere to, a wide and literal view of the powers of inquiry by parliamentary committees under Constitution s 49. But the correctness of those views remains largely untested. Thus any measurement of effectiveness needs to address the extent to which legal obstacles or limitations to their powers of inquiry have frustrated the work of committees.

This will require collection of information on how often the alleged restrictions on the powers of committees have obstructed their work. Such restrictions include:

- Executive privilege
- Immunity of States and their officials from compulsion to appear and answer questions - implied from the federal nature of the Constitution
- Inability of either House to exercise jurisdiction over Ministers in the other House and their Ministerial staff
- Commercial in confidence clauses in public commercial contracts which could prevent scrutiny over the expenditure of public moneys

Something also needs to be said about the impact on committees of the institutional design of our parliamentary system of government. The High Court has in recent times emphasised that the Australian Constitution creates a particular form of representative government, namely, responsible government.¹¹ This could have legal consequences in the future. In the present context, the main potential for limiting the effectiveness of parliamentary committees as a result of responsible government is the

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

union of the legislative and the executive branches of government. This is so at least as far as the House of Representatives is concerned.

That of course limits the ‘watch dog’ role over the Executive performed by Parliament - at least in the absence of minority governments at the federal but not the State level of government. There has long been a recognition of an inconsistency between the ‘watch dog’ role and the government’s control over the lower House of Parliament. The inconsistency is less likely to arise under a United States system of government which adheres more closely to the separation of legislative and executive powers. The inconsistency has been less in evidence with the Senate in relatively modern times – but perhaps the position is about to change there as well!

The inconsistency is especially evident when responsible government is combined with the control exercised by political parties. There is a need to monitor the effect of politically partisan considerations when measuring effectiveness such as the absence of unanimity and voting along party lines. This is because such considerations have led to the adoption of alternative inquiry mechanisms appointed by the executive eg Royal Commissions and Tribunals of Inquiries in the United Kingdom.

Rights of individuals also deserve mention. As was indicated before I have long been a supporter of the widest powers of inquisition because of my attachment to the literal wording of s 49 of the Constitution. This makes it even more necessary for the Houses to observe due process and recognise and protect the rights of witnesses and other individuals affected by parliamentary inquiries - including their rights to their reputation and privacy. The common law does not make those rights applicable before parliamentary committees. In other words the powers of inquiry enjoyed by parliamentary committees involves the task of balancing the function of inquiry with those rights. Both Houses have adopted procedures for the protection of witnesses, although this is not the place to consider whether these procedures go far enough. Information would need to be obtained from committees and the witnesses who appeared before them, as well as other affected individuals, on the extent to which problems have arisen in this area since effectiveness also needs to be measured by reference to the rights of such persons.

5. Main criterion or touchstone for measuring effectiveness

It remains to address the test for measuring the effectiveness of parliamentary committees. In short, that test is whether each committee performs the stated aim and function of its existence. The gathering of information whether by questionnaires or interviews must be geared towards the application of this test but that is of course much easier said than done.

Perhaps the easiest committees to measure would be the committees whose task it is to scrutinise legislation presented to Parliament. The best known of those committees is the Senate Standing Committee on Regulations and Ordinances which has its central aim the review of subordinate legislation and the making of recommendations where appropriate for the disallowance of such legislation. “Subordinate” legislation usually takes the form of regulations and other similar instruments made by the executive under a delegation of legislative power from the Parliament. The role of the committee is to act as a safeguard against ill considered subordinate legislation in

a place where party barriers are substantially eliminated. It acts according to a set of criteria which are and have been applied consistently. The Committee has regard to a number of factors: the validity of the subordinate legislation; whether such legislation unduly interferes with personal rights and liberties; the extent to which the same legislation provides for non-reviewable administrative decisions which affect those rights and liberties; and the appropriateness of its enactment as subordinate legislation.

The Senate Standing Committee for the Scrutiny of Bills performs a similar function in relation to the review of draft legislation to be passed by the Parliament itself and thus has similar aims. Its criteria for review focuses on the impact of the legislation on personal rights and liberties; as well as whether the legislation contains inappropriate delegations of power to administrative officials or legislative power on the Executive.

I understand both committees have operated largely free of party political conflicts. An evaluation of their effectiveness requires the measurement of their influence on the enactment of legislation by reference to their stated aims. It would seem to be easier to carry out such measurement than it is to measure the effectiveness of other committees although once again statistical analysis is not conclusive. A short single amendment may have much greater significance than a numerous minor amendments. Furthermore, because both committees perform a preventative function the measurement of that function will require information to be obtained by interviewing and questioning legislative drafting officials on the extent to which the guidelines followed by the committees have deterred client departments from seeking the enactment of inappropriate legislation. In other words measurement here is by reference to what was *not* enacted.

Another committee which deserves mention in connection with legal matters consists of the Standing Committees on Legal and Constitutional Affairs of both Houses which have as their aim to inform the parliament on matters relevant to the interpretation and application the Constitution. I have already made mention elsewhere of the embryonic start to the use made by, and the influence which their reports have had on, the High Court (*Parliament: The Vision in Hindsight* (2001) at xxvii – xviii). This is still a far cry from the view accepted in the United States under which the Supreme Court does not have a monopoly on the interpretation of the United States Constitution despite it having the final say on such matters. If work is to be undertaken to measure the effectiveness of this influence, the measurement can be both quantitative, in terms of number of citations of their reports in High Court judgments, and qualitative, which, however, is much harder in terms of attempting to assess the real reliance placed on them by the High Court.

Reference can now be made to parliamentary committees which advise the parliament on matters of policy and administration. These include the numerous *ad hoc* Select Committees appointed to inquire and report on various aspects of public policy. They may sometimes include reports on the possible need for and the examination of proposed legislation. In so doing such committees seek to further many of the typical aims of all parliamentary committees stated at the outset. Thus they provide: a sounding board for the Parliament's reaction to contemplated legislation; a place for unprejudiced discussion of problems in an atmosphere where party barriers are supposed to be substantially eliminated; as well as a place where interest

groups may be heard by groups of members, and views thereby transmitted to parliamentarians; and, finally, they supply a means for enhancing the standing of members of Parliament in relation to the Government of the day by their informed contribution to the subject area of the committee. Measurement of effectiveness must therefore be carried by reference to such aims.

Finally, there are the standing committees which monitor various aspects of administration. Their central aim is to act as the Parliament's 'watch dog' - assisting it in forming a judgment independent of the Minister's point of view. The task here is to measure the extent to which such committees have actually influenced the conduct of Ministers in matters of mismanagement and maladministration. There has been an acknowledged erosion of ministerial responsibility in the sense of Ministers being held to account to Parliament. Therefore the influence that is sought to be measured here is more likely these days to be made by reference to the impact of the work of such committees on electors rather than Parliament itself. This makes the measurement of their impact more difficult to gauge.

It would be surprising these days if there were many occasions when committee investigations and inquiries have resulted in Ministers having resigned or being demoted or being subject to censure motions both in the House of Representatives and the Senate. One such case was the resignation of the then Minister for the Environment, Sport and Territories (Mrs Ros Kelly) over the so-called "whiteboard affair" when her role in that affair was criticised by the House of Representatives Standing Committee on the Environment, Recreation and the Arts in its 1994 Report. As against that it would appear to be less difficult to gauge changes in administrative procedures in the delivery of government programs which occurred as a result of committee inquiries.

6. Efficiency

The present era makes it difficult to deny the need for a systematic and regular collection of information on the cost and time taken up by committee inquiries, the number of staff required to support such inquiries and the number of witnesses interviewed and documents tabled and considered by those inquiries. Some have argued in favour of this information being published annually while others have favoured the publication of the same information at the end of the life of each Parliament.¹² Here emphasis is not on whether each committee performs its stated aim or function but, instead, on how efficiently it performs such tasks. Recent press reports indicate that the British Government has adopted measures to cut the costs and length of public inquiries.¹³ In an era of scarce public resources greater auditing of efficiency seems inevitable regardless of the viability of auditing the general effectiveness of committees in achieving their stated aims. After all even courts of law have had to become familiar with case management of their load.

¹² Aldons, *Legislative Studies* Vol 15 (1) Spring 2000 at 25 – 6.

¹³ *Guardian Weekly* Dec 3 – 9 2004 at p .8

7. Concluding observations

Information may also be needed on the qualifications, ability and motivation of members and supporting staff of committees since it bears on both the quality of the work performed by committees and whether that work can be improved in the future. But at the end of the day, and to conclude, large questions still remain regarding whether the time and effort involved makes the whole evaluation exercise worthwhile. This is so at least when it is applied across the board to the review of all committees on a systematic and regular basis - as distinct from the review of only some committees and also the review of the efficiency of all committees.

Select reading

- ✚ C S Reid and M Forrest, *Australia's Commonwealth Parliament: 1901 – 1988 Ten Perspectives* (1988) at pp 367 – 382 (“Parliamentary Control of the Executive through Parliamentary Committees”)
 - ✚ M Aldons, “Rating the Effectiveness of Parliamentary Reports” *Legislative Studies* Vol 15 (1) Spring 2000, 22 – 32
- “Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?” *Australasian Parliamentary Review*, Vol 18 (1) Autumn 2003, 79 - 94

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Parliamentary Committees Evaluation Article 2.doc

ANNEXURE I

Paras (a) – (f) from *Reid and Forrest* at p 373

- (a) the Parliament's 'watch dog; assisting it in forming a judgment independent of the Minister's point of view;
- (b) a sounding board for the Parliament's reaction to contemplated legislation, regulations, etc.;
- (c) a safeguard against hasty, ill considered, legislation due to prior consultation of all interests concerned;
- (d) a place for unprejudiced discussion of problems in an atmosphere where party barriers are substantially eliminated;

Query whether this involves wishful thinking?

- (e) a place where interest groups may be heard by groups of members, and views thereby transmitted to parliamentarians;
and
- (f) a means for enhancing the standing of members of Parliament in relation to the Government of the day by their informed contribution to the subject area of the committee. `

ANNEXURE II**Passage set out in the article published on Government Witnesses in
(1995) 20 *Melbourne University Law Review* 383 at p 383**

“The privilege of freedom of speech enabled it to criticise the conduct of the government and of its agents, and to suggest changes and reforms. And there is no doubt that the growth of the committee system made this criticism very much more effective and more searching than it had ever been before. One of the charges which Charles I. made against the Commons, in his declaration of 1629, was the extension of their privileges by the establishment of standing committees. He complained that ‘there are so many chairs erected to make inquiry upon all sorts of men, where complaints of all sorts are entertained’; that young lawyers sitting there decried the opinions of judges, and maintained that the resolutions of the House were binding upon them; and, last and worst, that they have sent for and examined the attorney - general, the treasurer, chancellor, and barons of the exchequer, some of the judges, and other officials, for matters done in the course of their respective duties, for which they were in no way accountable to the House of Commons. ‘Under pretence of privilege and freedom of speech, they take liberty to declare against all authority of Council and Courts at their pleasure... Their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overruling power to themselves, which belongs only to us, and not to them.’” (Sir W Holdsworth, *A History of English Law* Vol 6 (2nd ed, 1966), 100 (footnotes omitted).)