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SCRUTINY OR SECRECY?

COMMITTEE OVERSIGHT OF FOREIGN AND
NATIONAL SECURITY POLICY IN THE AUSTRALIAN PARLIAMENT

Dr Kate Burton
2004 Australian Parliamentary Fellow



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Presiding Officers' foreword

Since its establishment in 1971, the Australian Parliamentary Fellowship has provided an opportunity for academic researchers to investigate and analyse aspects of the working of the Australian Parliament and the parliamentary process. The work of Dr Kate Burton, the 2004 Australian Parliamentary Fellow, examines the effectiveness of parliamentary committees' scrutiny of foreign and national security policy.

Dr Burton's research involved interviewing a number of committee members and staff, current and former members of the intelligence community, and foreign policy and public policy experts. She also examined Hansard records, media reports and Australian and overseas literature on committees. Dr Burton draws on the deliberations of three recent committees in her practical assessment of how Australian parliamentary committees scrutinise foreign and national security policy.

PAUL CALVERT
President of the Senate

DAVID HAWKER
Speaker of the House of Representatives

November 2005

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Interviewees

Dr Sarah Bachelard	Researcher (various committees), Parliament House, Canberra
Senator Andrew Bartlett	Australian Democrats
Senator George Brandis	Liberal Party of Australia
Dr Kathleen Dermody	Secretary, Senate Foreign Affairs, Defence and Trade Committee, Parliament House, Canberra
Harry Evans	Clerk of the Senate, Parliament House, Canberra
Senator John Faulkner	Australian Labor Party
Dr Frank Frost	Special Director Research, Foreign Affairs, Defence and Trade Section, Parliamentary Library, Canberra
Brenton Holmes	Senior Clerk, Senate and former Committee Secretary (various committees), Parliament House, Canberra
Dr Margot Kerley	Secretary, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament House, Canberra
Anne Lynch	Former Secretary, Senate Privileges Committee, and Deputy Clerk of the Senate, Parliament House, Canberra
Senator Sandy MacDonald	The Nationals
Alistair Sands	Committee Secretary (various committees), Parliament House, Canberra
Margaret Swieringa	Secretary, Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament House, Canberra
Professor Michael Wesley	Director, Griffith Asia Pacific Research Institute, Griffith University, Queensland
Professor Hugh White	Strategic and Defence Studies Centre, Australian National University
Current and former officials from various intelligence agencies (interviewed on condition of anonymity)	

Glossary

ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
AUSFTA	Australia-US Free Trade Agreement
CIA	Central Intelligence Agency (US)
CMI	Certain Maritime Incident
DIO	Defence Intelligence Organisation
DSD	Defence Signals Directorate
HUMINT	Human intelligence
INR	Bureau of Intelligence and Research (US)
MoPS	<i>Members of Parliament (Staff) Act 1984</i>
NSSC	National Security Committee of Cabinet
SIGINT	Signals intelligence
WMD	Weapons of mass destruction

Outline

This study examines the barriers that impede robust scrutiny of foreign policy by parliamentary committees in Australia. Its conclusions may disappoint some—committees are often regarded as parliament’s last hope in terms of scrutiny because, as this study demonstrates, several factors militate against parliament as a whole holding the government to account for foreign policy decisions. These include a small number of sitting days, the fact that the conduct of foreign policy rarely requires the consent of parliament, and the emergence of an inner sanctum within the Prime Minister’s department which has largely displaced the Department of Foreign Affairs in making sensitive foreign policy decisions. Committees, with their powers to call for witnesses and documents in their role as the watchdog of the government, are regarded by many as the last bulwark against irresponsible and unaccountable executive behaviour.

This study found that this optimism is often misplaced, especially in relation to committees that oversee foreign and national security policy. For a start, the usual barriers that confound most parliamentary committees come into play, including: obfuscatory techniques employed by public servants; serving and former ministers who refuse to appear before an inquiry; and committees that are unwilling to exercise the full range of their coercive powers, for fear of being accused of heavy-handedness or suffering retribution when the political tables are turned.

More intractable barriers, however, appear in inquiries into foreign and national security policy. Bipartisanship is the first. Foreign and security policy are seen as too important to be left to the minor players in the political scene. Senior figures in the two main parties share the privileges and responsibilities of managing what some regard as parliament’s most sensitive committees. Consensus, rather than dissent and rigorous questioning, is the normal *modus operandi*. As a result, difficult questions about the rights and wrongs of certain foreign policy decisions are not always asked, or are not asked of people in a position to know.

The second barrier is self-censorship. ‘Once brought into the tent, people recognise their responsibilities’, is how one person interviewed for this study explained the phenomenon. National security, it is argued here, has a powerful pull that leads its self-styled keepers, including those on committees, away from principles of open and accountable government and into a murkier world which can encourage obfuscation, complicity and, sometimes, deliberate misrepresentation of the facts.

Outline

It is argued in this study that this protection of national security information is often driven as much by political as security considerations. Instances in recent years in Australia, the UK and the US demonstrate that governments can and do reveal sensitive security information when it suits them. The study also shows that parliamentary committees can be complicit in this behaviour. The vested interests of the two major parties, in particular, and the lure of secrets shared, will ensure that the role of committees overseeing foreign and security policy remains strictly limited.

Introduction

Numerous Australian studies have assessed parliament's ability to influence foreign policy and found it largely powerless. Most of these studies conclude with the observation that parliament's committees are the only real means by which parliament can have any meaningful input into foreign affairs—though even that is mainly limited to retrospective scrutiny of government actions rather than input into policy development.¹

This study begins where those studies stop. It examines the processes involved in committee inquiries into foreign policy—especially issues and events that are particularly sensitive for political or security reasons—and the barriers that prevent rigorous scrutiny of this area. Some barriers are peculiar to foreign policy and security issues, such as access to information from intelligence agencies. Others are the product of the adversarial relationship between the executive and parliament, in which the executive attempts to avoid scrutiny, while non-government members of parliament do their best to uncover examples of maladministration, policy failures or other government blunders.

The study also identifies issues that affect accountability more broadly. These include the limits of executive accountability to parliament, misunderstanding of the relationship between intelligence and policy, and the aura of inscrutability which pervades intelligence and national security matters. Much has been written on the first, but the other issues have not been subjected to the same consideration. One of the intended contributions of this study is to raise these issues for discussion.

This discussion is particularly important in an environment in which intelligence agencies and their output are being scrutinised more than ever before, and often by parliamentary committees. The 'war on terror', Australian military involvement overseas and a tendency for governments to draw on intelligence to justify decisions means this interest in intelligence is likely to continue. Phillip Flood, author of the 2004 Government-commissioned *Report of the Inquiry into Australian Intelligence Agencies*, noted that:

Public debate on intelligence has been driven in part by Western governments choosing to draw on intelligence to explain policy. A series of high-profile incidents involving intelligence agencies or staff has contributed to its greater exposure.²

As argued in this study, however, the focus on intelligence to explain decisions distracts from other influences on government decision-making—especially when poor policy outcomes are blamed on ‘intelligence failures’. Flood himself pointed out that ‘[f]or all its value, intelligence is only one of a range of factors that influences the policy decisions of governments, and it is rarely the decisive factor.’³ On the important issue of sending Australian troops to war in Iraq, for example, more is known about the usually opaque world of intelligence than about the policy processes that led to the decision.⁴

Parliamentary committees are often expected to be able to uncover government mishaps or mischief as well as intelligence blunders. As this study shows, however, committee inquiries are limited in their ability to shed much light on policy processes in general, and especially in relation to those behind politically or security sensitive foreign policy issues. An important reason is the executive’s ability to manipulate mechanisms designed to enhance its accountability to parliament—including through committees, as illustrated later. More significant, though, is the power of national security, and the secrecy that so often attaches to it, to stifle debate and the tendency for committee members to allow themselves to be caught up in this silencing. Given the vested interests of governments and oppositions in maintaining a certain silence in these areas, there is little prospect that committee inquiries will perform a more robust scrutiny role.

Method and structure

The research for this study was conducted using three main sources of information: interviews with committee members and staff, current and former members of the intelligence community, and foreign policy and public policy experts; Hansard records, media reports and observation of committee inquiries; and Australian and overseas literature on committees. Many of those interviewed agreed to do so only on the basis that their views would not be attributed to them—this applied to those currently serving in sensitive positions as well as those no longer serving. Quotes from interviewees are therefore used sparingly and are unattributed in the text, although a list of interviewees prepared to be named appears on a previous page. (Those listed account for approximately 60 per cent of the total number of interviewees.)

Though the research did not involve formal case studies, regular reference is made to three inquiries which illustrate various points made in what follows. Those inquiries are:

- ‘Intelligence on Iraq’s Weapons of Mass Destruction’, Joint Committee on ASIO, ASIS and DSD (2003).
- ‘Staff Employed Under the *Members of Parliament (Staff) Act 1984*’, Senate Finance and Public Administration References Committee (2003).
- ‘A Certain Maritime Incident’, Senate Select Committee for an Inquiry into A Certain Maritime Incident (2002).

The study looks at recent committee activity—time did not allow an investigation beyond the last few years.⁵ For similar reasons, references to Australian foreign and national security policy are to the post-Cold War period.⁶

The first chapter looks at the factors behind the executive’s dominance of foreign policy and the lack of scrutiny exercised in this area by most parliamentary mechanisms. Committees, especially Senate committees, are therefore an exception in terms of their ability to perform that scrutiny role. However, a range of barriers impede that role and these are explored in chapter two. They include self-censorship by committee members on national security issues, problems of gaining access to relevant information and a determination on the part of government and opposition committee members to appear ‘responsible’ on national security. The third and final chapter argues that some of these barriers could be overcome by dismantling the mystique that surrounds national security and intelligence. Committee bipartisanship on national security, though, will ensure that this is an area of committee activity that is highly likely to remain protected from the scrutiny it perhaps deserves.

Chapter One: Foreign policy: the executive's domain

It is an ironical aspect of political life in the Westminster system inherited by Australia that if a Commonwealth government wished to declare war simultaneously on the United States and the Soviet Union and thereby guarantee the spoliation of its territory and the destruction of its people, it would be free to do so; if it wished to add a cent in tax to the cost of a packet of cigarettes, it would have to appropriate legislation, survive debate in its own party room, pilot a bill through each of the two houses of Federal Parliament, accommodate publicity and calculate the electoral ire of nicotine addicts.¹

As this quote suggests, foreign policy is a peculiar field of government activity. It can go to the heart of the survival and maintenance of the state, yet, even in democratic states, the representatives of those who constitute the state have very little or no input into foreign policy. This chapter examines the conceptual, historical, political and institutional factors that explain this. It also explores how these factors created and continue to reinforce the dominance of foreign policy by the executive arm of government, sidelining parliament from foreign policy-making as well as from robust scrutiny of decisions and activities made in the past.

The nature of foreign policy

Prerogative power

The exceptional status of foreign policy stems from the notion that the usual democratic and legislative processes that govern domestic law-making should not and do not apply to foreign affairs. Events move quickly and unexpectedly, so the argument goes, and governments are required to respond accordingly; the state's territorial integrity could be at risk. The state's survival is thus uniquely identified with the conduct of foreign affairs.

An early articulation of this view is found in the 17th century work of political theorist John Locke. He distinguishes between domestic and foreign policy on the basis that foreign affairs is not well-suited to the legislative process that governs domestic matters and so should be left to the executive.² Foreign affairs is not the only activity that falls into this category for Locke, but he regards it as distinct because it is an activity directed outside the state, rather than within it. Locke calls the domestic and external manifestations of this executive power 'prerogative' power:

This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called *prerogative* ...³

The notion of prerogative power, which precedes Locke, originates in what is called 'the royal prerogative'. This refers to the Crown's historic common law right to 'administer the realm' without interference. When parliamentary replaced sovereign rule, responsibility for these functions passed to the executive—the prime minister and cabinet ministers.

There is no definitive list of prerogative powers, either in Australia or in the UK. In 2003, however, the Blair Government in the UK released a paper which set out many prerogative powers, though the paper admitted that 'it was not possible to give a comprehensive catalogue of prerogative powers'. The list included domestic and foreign affairs, the latter involving:

- making treaties
- declaring war
- deploying armed forces overseas
- recognising foreign states, and
- accrediting and receiving diplomats.⁴

In Australia, prerogative powers that are within the Commonwealth's legitimate sphere of activity are considered to be included in the executive power of the Commonwealth, which is provided for in Section 61 of the Constitution:⁵

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.⁶

Several commentators on the Constitution, including the High Court, have pointed out that this section obscures more than it defines in regard to the scope of executive power; that conduct of foreign affairs falls under this power, however, is not disputed.⁷

Part of the prerogative's force in foreign affairs stems from practical considerations in the nature of foreign policy making. Much of it is conducted, if not deliberately in secret, then subtly, in piecemeal fashion and beyond the gaze of the public or parliament. This activity does not necessarily rely on or lead to policy

pronouncements—it is routine activity conducted by a state in its relations with other states (though usually in line with a government's stated broad foreign policy objectives). The following extract, from a comparative study of executive and legislative power, gives a sense of what is involved in the conduct of foreign policy:

In the course of conducting discussions and negotiations with foreign states—a sphere in which, in almost all systems of government it is recognized that the executive has sole authority—policy is influenced inevitably. The executive gives assurances, encourages certain lines of action, condemns others, makes public announcements and speeches, or maintains silence at critical moments, recognizes governments or breaks off relations with them, sends congratulatory messages, calls or attends conferences or declines to do so, sends goodwill missions and receives them, and in a dozen other ways by open or secret methods, takes part in the formation of policy. In all or most of this the legislature has no part, although when it comes in due course to be consulted, its freedom of action has been limited by what the executive has done.⁸

As well as historical and practical reasons, executive control over foreign affairs is sometimes justified on elitist grounds. In the 19th century de Tocqueville wrote that the affairs of state were better left to aristocrats because 'foreign politics demand scarcely any of the qualities which a democracy possesses; and they require, on the contrary, the perfect use of almost all those faculties in which it is deficient'. De Tocqueville insisted that the interests of the aristocracy were not in any way distinct from those of the people, so it was safe to leave foreign policy to the executive because it would act in the common interest.⁹

The exercise of prerogative and executive powers might not be as undemocratic as it first appears, however. In Australia, legislation can oust prerogative and executive powers (though decisions of the High Court suggest this can occur only when the law expresses a clear intent to do so¹⁰). Another limit on the exercise of these powers is the convention of responsible government, according to which parliament can sack ministers who abuse the prerogative. Nowadays, though, this rarely occurs.¹¹

A problem with relying on parliament to rein in executive abuses of the prerogative is that parliament does not always know when the prerogative has been exercised, let alone abused. An example is when parliament and the public were first informed about the security treaty that Prime Minister Paul Keating had negotiated with Indonesian President Suharto. Negotiations over the treaty began in mid-1994, and the first the public knew about a treaty was in late 1995 with the announcement that it had been signed.¹²

Secrecy and the national security trump

That episode in Australia's foreign policy highlights another reason why the field is often regarded as unlike other areas of policy—it relies heavily on secrecy. Consider the following exchange between Keating and a journalist in December 1998:

PM: Well, if there had been a more public process there probably wouldn't have been a treaty.

Journalist: Doesn't that prove a point of perhaps needing greater public support for this treaty?

PM: No, this treaty was negotiated privately within the due processes of government, of the Cabinet and in the authority given to the Parliament and to its majority, the government and to its executive the Cabinet. All the appropriate protocols have been followed in the development of a treaty around sensitive issues.¹³

The foreign affairs-secrecy nexus has a number of reinforcing aspects. When international relations is regarded as a struggle for power amongst states—as it is by most foreign ministries¹⁴—information about other states is a crucial resource. Military and intelligence capabilities, and the dispositions of governments and significant individuals, are the types of information states want to protect, at the same time as they attempt to extract this information about other states. So states keep their secrets from one another, but conduct operations to ferret out others' secrets, thus reinforcing the need for secrecy.

The struggle for power domestically also pushes governments to use secrecy to protect their right to conduct foreign affairs. If Keating is believed, had the treaty negotiations been made public there would not have been a treaty. In other words, governments keep secrets from parliament and the public partly in order to preserve the effectiveness of executive power in this area. Its right to do so is often expressed as a claim to 'executive privilege', now known as 'public interest immunity'.

This highlights two ways in which governments are able to draw on the notion of executive privilege in foreign policy to escape scrutiny. First, a government might make what it believes is a legitimate claim for immunity. It is difficult to challenge such a claim without knowing the nature of the information or of the threat that disclosure might present—neither of which the government is obliged to provide. The courts have determined their own procedures for adjudicating such claims but not so the parliament. *Odgers' Australian Senate Practice* advises that:

the question is a political, and not a procedural, one. There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgement as to whether disclosure of the information will be politically more damaging than not disclosing it, the latter course perhaps involving difficulty in the Senate or public disapprobation.¹⁵

Immunity is discussed in more detail in a later chapter. For now it need only be noted that executive power in foreign affairs entails a level of secrecy at home, ostensibly in the name of 'the national interest'. At times secrecy may be justified, but there is scope for it to be used less than honestly. This point was made by the Joint Committee on the Parliamentary Committee System in a 1976 report:

It is clear that crown privilege is relied on by governments to protect themselves. The protection of the confidentiality of advice to Ministers on security matters is a shield behind which witnesses sometimes retreat.¹⁶

Second, governments can conflate the national interest with the government's interest, and claim immunity when their own rather than national interests are threatened. Australian foreign policy academic Joseph Camilleri argues that the term 'the national interest' often masks more than it reveals, and that this suits most governments:

Indeed, given the importance of the issues likely to be raised by notions of national interest, it is proper and legitimate that the government's formulation be subjected to sustained and continuous debate. A wise government would be one that invites and encourages such debate. In practice, governments are just as likely to use the rhetoric of national interest for purposes of propaganda, political point-scoring, or legitimisation of policies otherwise derived.¹⁷

Recent examples of such behaviour are discussed in the following chapter.

The intelligence-policy relationship

Just as national security is used as a trump to silence debate, governments also exploit misunderstandings about the nature of intelligence and its relationship to policy-making. The public and those outside a fairly narrow band of the federal bureaucracy know very little about the nature of intelligence that is collected and assessed by Australia's intelligence agencies, and probably even less about the way that material feeds into governmental decision-making.

The secrecy surrounding the intelligence-policy relationship means foreign policy blunders can, if needed, be blamed on false or misleading intelligence. This takes the focus away from inappropriate or flawed policy advice and, as a corollary, distracts attention from a government's accountability for its decisions and decision-making processes. Intelligence becomes politicised while debate about policy becomes de-politicised, making it difficult for accountability structures to focus on the appropriate points of breakdown.

An example of this occurred during the debate about intelligence on Iraq's weapons of mass destruction. Faults were legitimately found on the intelligence side, but neither of two inquiries—one by a parliamentary committee and another by the former head of the Office of National Assessments and the Department of Foreign Affairs and Trade, Phillip Flood—was tasked to investigate other parts of the process that fed the decision to go to war in Iraq, particularly the policy advice the Government received from its policy agencies.¹⁸ Despite these inquiries there remains an accountability gap: we know what intelligence was provided to the Government, and we know what decision the Government took, but how the intelligence fed into the decision process—how was it weighed with other factors—has not been investigated.

According to Hugh White, former head of the Australian Strategic Policy Institute and now professor of strategic studies at the Australian National University, misunderstanding (or more mischievously, misrepresenting) the intelligence-policy relationship has enabled this breakdown in accountability:

[the Flood report] leaves open big questions about the nature of the policy process that led to decisions about Australia's commitment to Iraq, and about the complex relationship between intelligence and policy. ...

We still know very little about the policy advice and decision-making process. In fact, in a strange inversion, we now find that intelligence, usually regarded as the most opaque and secretive element of the machinery of government, is more open, contested, and reviewed than the policy processes that lead more directly to the key decisions.¹⁹

That Flood's report stopped short of examining the policy process behind the Iraq decision probably reflects the limits of his inquiry's terms of reference.²⁰ Flood nevertheless inserted what should be read as a veiled warning to governments (and the public) against attempts to shift blame for their actions to the intelligence community, Flood reminds us that intelligence is imperfect:

Insofar as it seeks to forecast the future, assessment based on intelligence will seldom be precise or definitive ... The history of major intelligence failures [including the World Trade Centre attack in 2001] provides a cautionary lesson for any policy-maker who believes intelligence is always accurate or that it can provide guarantees.²¹

And he suggests that governments, for the most part, recognise this, which is why intelligence rarely determines foreign policy decisions:

For all its value, intelligence is only one of a range of factors that influences the policy decisions of governments, and it is rarely the decisive factor. Commentators can sometimes ascribe an importance to intelligence as a factor in decision-making that fails to recognise the range of broader considerations, such as strategic issues, political and economic objectives, long-standing alliance relationships, legal considerations or other interests that might determine policy.²²

So while governments may not deliberately misrepresent the relationship between intelligence and policy (John Howard's announcement that Australia will join the US in Iraq, for example, listed factors including the importance of the alliance and the brutality of Saddam's regime), it can be in their interests not to dispel misunderstandings in the wider community about that relationship.

The impact of domestic politics

Domestic factors, including responses to international events, have also played a part in entrenching executive control over foreign policy in Australia. For example, a changed international environment after 11 September 2001, construed to be full of risks for Australia, made conditions conducive to an overhaul of the architecture of and power balances between Australia's foreign and security policy-making bodies. The bombings in Bali entrenched the belief that Australia needed to centralise its counter-terrorism work.²³ Other domestic factors, discussed below, include parliament's limited role in foreign policy debates, and bipartisan consensus not to subject the political use of the term 'national security' to serious questioning.

The blurring boundary between foreign and domestic politics

It might appear strange to suggest that the domestic political environment impacts on foreign policy. But there are a number of ways in which this is the case. Partly as a result of economic and other forms of globalisation, more aspects of Australian politics and society now have international dimensions than in the past. For example, most federal government portfolios now have occasional or enduring international aspects to

their work. It also means that Australia's international policy is conducted through a multitude of departments, not just the Department of Foreign Affairs and Trade. Authors of a 2003 text on Australian foreign policy, Allan Gyngell and Michael Wesley, point out that:

No longer able to concentrate solely on bilateral, political, strategic and trade relations, foreign policy makers are now required to address environmental, financial, legal, health, policing and many other issues. They are joined in addressing these issues by other federal departments, and are brought into contact with a range of additional interest groups and societal concerns.²⁴

Another way in which the foreign-domestic boundary is blurred is that foreign policy, or the management of it, is becoming increasingly politicised. For example, in the lead up to the 2004 federal election, management and the politicisation of national security featured more often in the major parties' criticisms of one another than did policy differences. At a press conference in September Mark Latham commented on the Government's lack of consultation with him before SAS troops were sent into Iraq:

This is clear evidence of a Government that is putting political interests ahead of national interests. ... I'm jack of a Government that is always putting political interests ahead of the national interests, playing politics instead of doing the right thing by this country's security. I will always stand up and say that because the first responsibility that I have as the leader of the alternative Government in this country is to the safety and security of the Australian people. I'm not playing politics. I'm putting their security and their interests first and I just wish the Howard Government started to do the same thing.²⁵

The Prime Minister's statements also focused on management: 'This election will also be a decision about who best to manage our national security and our defence.'²⁶ In another pre-election interview Howard questioned the Opposition Leader's competence on national security:

Now I unhesitantly said it would be my duty as Prime Minister to do that [act to prevent a terrorist attack]. Asked the same question this morning Mr Latham rejected my approach. Now this illustrates more starkly than anything else that would be said during this election campaign who is more reliable, who is stronger, who's more unequivocal on issues of national security ... I think the greater danger is that you have an alternative prime minister who doesn't understand the first responsibility of the office, and that is always to put the defence and the security of this nation ahead of all other considerations. That's the problem.²⁷

Another aspect of the blurred foreign-domestic boundary is that foreign policy calculations are increasingly articulated in terms of domestic policy. The link between the two realms is the protection and projection of 'values'. According to the

Government's most recent foreign policy statement, for example, 'the values of the community' underpin its foreign policy.²⁸ An earlier statement makes the link even more clearly:

In a democracy, governments must also act to give expression to the aspirations and values of their national communities in foreign policy as much as in other areas of government.²⁹

In the Labor Party's foreign policy, too, domestic values are the basis upon which a successful foreign policy must be built:

Australia's international relations must reflect our nation's core values ... A foreign policy that does not incorporate and give active expression to these universal values will fail to win respect at home or abroad and undermine our long-term national interests.³⁰

The centrality of the Department of Prime Minister and Cabinet

The increasing contemporary impact of foreign affairs on domestic politics has helped governments to further strengthen executive control over foreign affairs by controlling the bureaucracy. This tendency to control is not a new trend but it is often, though not always, driven by foreign or security policy.³¹ Twenty years ago academic William Hudson and Senator John Knight wrote:

The office of prime minister has come at times to overshadow that of foreign minister and the Department of the Prime Minister and Cabinet has come to loom large in the bureaucratic input into foreign affairs.³²

The trend is not unique to Australia, as foreign affairs journalist Greg Sheridan notes:

Politics in the Western world is increasingly presidential and more decisions are taken by heads of government and their offices ... The speed of modern communications means that embassies and the machinery of traditional diplomacy are less central than they once were. Decisions down to a much lower level can now all be micro-managed in a nation's capital.³³

Allan Gyngell and Michael Wesley suggest additional reasons for prime ministerial dominance in foreign affairs. Under Australia's political system 'the Prime Minister enjoys relatively unconstrained authority in most areas of policy, but the fetters are nowhere looser than in foreign policy.'³⁴ Constitutional arrangements which give the executive prerogative power in foreign affairs provide a further boost. It is the prime minister, rather than the monarch or their representative, who has 'responsibility for expressing a national identity' when representing Australia overseas. And these overseas visits reinforce the prime minister's foreign policy role—'[o]ver time in

office, prime ministers grow familiar with their overseas counterparts in a way their officials can not, and become more confident in their capacity to make decisions.’³⁵

The attack on the World Trade Centre in September 2001 and the 2002 Bali bombing were opportunities for John Howard to further consolidate his prime ministerial control and that of his department. For example, after the Bali attack the Department of Prime Minister and Cabinet took responsibility for counter-terrorism policy work. The National Security Division was created in 2003 to co-ordinate a ‘whole-of-government’ approach to national security. The new division covers domestic and external issues: counter-terrorism, at home and abroad; defence; intelligence; law enforcement and border protection.³⁶ As a result, argues the Australian Strategic Policy Institute’s Peter Jennings:

PM&C is now far more likely to set the basic shape of key security policies. This process will continue to consolidate the Prime Minister’s position as the unrivalled source of power and authority for national security policy making.³⁷

Howard’s and his department’s policy pre-eminence are also a result of changes to the machinery of government, such as the creation of the National Security Committee of Cabinet (NSCC). The NSCC in its current form was established by the Howard Government in 1996. Its make-up of senior Cabinet members means it is the primary decision-making body on security issues, domestic and international.³⁸

An episode in 2004 illustrates one way in which Howard and his department exert their dominance of security policy. In March 2004 Federal Police Commissioner Mick Keelty said it was ‘likely’ that there was a link between the Madrid train bombings and Spain’s involvement in the war in Iraq, and that Australia’s involvement also made it a likely target.³⁹ The media reported claims that Howard’s staff contacted Keelty privately to rebuke him; Keelty was also criticised publicly by the Prime Minister.⁴⁰ Three days after making his initial statement Keelty released a ‘clarification’ of his earlier statement, this time articulating a view closer to the Government’s position—that terrorists sought to attack Australia’s values, regardless of involvement in East Timor, Afghanistan or Iraq.⁴¹ Whether or not Keelty was subject to direct pressure to correct his previous statement, he would have been aware that his position of Police Commissioner was untenable if the rift between himself and the Prime Minister continued.

Bipartisanship

Many commentators have noted the growing divergence between the two major political parties over foreign policy and national security issues.⁴² For example, the parties maintain subtle but clear differences over the centrality of the alliance with the US versus the importance of multilateral institutions to Australia's security, with the Labor Party more clearly situating the US within a web of other alliances than does the Liberal Party.⁴³ The parties also differed over the war with Iraq, with Labor supporting invasion only under UN auspices and the Government stating that it did not believe UN backing was necessary for a US-led invasion.⁴⁴ Finally, Labor pushed for amendments to the Australia-US Free Trade Agreement which, until outmanoeuvred in the Senate, the Government opposed.⁴⁵

In more fundamental ways, however, bipartisanship has triumphed in Australian foreign policy since the end of the Cold War.⁴⁶ There are three dimensions to this. Two are clear from the following statement by Senator Robert Ray, made during debate in the Senate in 2003 over the Australian Government's decision to commit troops to Iraq: 'Bipartisanship is often misunderstood. It is not about agreeing on all matters to do with foreign affairs and defence. It is more about agreeing on general principles and ceding to executive government the right to make tough decisions without being subject to opportunist attack.'⁴⁷

The first aspect of bipartisanship is therefore agreement on the executive's prerogative in foreign affairs. Oppositions are probably committed to this as much out of principle as from a desire to see that prerogative protected for their turn in government. (In the next chapter we will see how this works as a barrier to scrutiny of foreign policy.) The second aspect is agreement on 'general principles' of foreign affairs. As we saw above, those general principles are that foreign policy should advance the national interest and that the national interest must be built upon national values.

These principles are presented as straightforward and incontestable. They signal that enduring, national interests will always be pursued above short-term and sectional ones.⁴⁸ But such principles do not point to which specific foreign policy goals should be pursued, or how to pursue them. In other words, the meaning of 'the national interest' is subjective, which explains why the major parties can both claim that they will govern in the national interest despite substantively different foreign (and domestic) policies. Political scientist Arnold Wolfers wrote in 1952 that:

when political formulas such as 'national interest' or 'national security' gain popularity they need to be scrutinized with particular care. They may not mean the same thing to different people. They may not have any precise meaning at all. Thus, while appearing to offer guidance and a basis for broad consensus they may be permitting everyone to label whatever policy he favors with an attractive and possibly deceptive name.⁴⁹

This brings us to the third aspect of bipartisanship on foreign affairs. 'The national interest' is a politically potent term because the flexibility of its content gives it an appeal beyond sectional or short-term interests.⁵⁰ Both parties want to protect the rhetorical political power of the term, so neither questions how the other employs the term—though each is quick to discredit the other's competency in the field—because this would render it useless to both. The executive's dominance in foreign affairs is effectively bolstered, therefore, by a tacit agreement not to subject the use of the phrase 'the national interest' to serious critique.⁵¹

A role for parliament?

According to *House of Representatives Practice*,

The Ministry is responsible for making and defending government decisions and legislative proposals. There are few important decisions made by the Parliament which are not first considered by the Government. However, government proposals are subject to parliamentary scrutiny which is essential in the concept of responsible government.⁵²

Australian academic J.D.B. Miller pointed out what this means for foreign policy:

[t]he role of the Australian Parliament in foreign policy is the same as that of any other Parliament working to the rules of responsible government. It cannot make foreign policy; this is the task of the executive ... Short of a revolt against the Government of the day, there is no way in which Parliament can exercise independent control of the details of direction of foreign policy ...⁵³

It is the executive's role to make policy, including foreign policy; parliament's role is to call the government to account for the administration of its policies. Parliament has a number of means available to it to fulfil this role, including Question Time, debates, censure motions and so on. (Parliamentary committees are another means but they are the subject of the next chapter.) In practice, though, these vehicles for scrutiny usually fall short, limiting parliament's ability to hold the executive to account for its conduct of foreign policy.

Party discipline and executive domination of parliament

During the so-called 'golden age of parliament'—in Britain in the mid-1800s—the executive courted rather than battled with parliament. Parliament consisted of mainly independent members with no strong allegiances to any party or group, who could therefore not be relied upon to support the government. Australian parliamentary observer Malcolm Aldons states that '[t]his lack of executive control gave the Commons its collective will and made it the most important check on the executive.'⁵⁴ This arrangement is referred to as 'responsible government'. As Henry Parkes described, the executive's 'term of office shall depend upon their possessing the confidence of the House of Representatives, expressed by the support of the majority.'⁵⁵

Extensions of the franchise, starting in 1867 in Britain, fundamentally altered the operation of responsible government by facilitating the rise of modern political parties. Independent members became rare. Governments were formed from the dominant political party, which meant governments could rely, for the most part, on the support of a majority of parliament. The emergence of strict party discipline reinforced this government control.⁵⁶ The framers of Australia's Constitution anticipated but underestimated the emergence of strict party discipline in parliament. They were also concerned to keep some flexibility in the accountability arrangements between the government and the parliament. The framers thus failed to build into the Constitution measures to counter the way that party discipline would undermine the operation of responsible government.⁵⁷

Many Australian commentators conclude that, as a result, responsible *parliamentary* government has been replaced by responsible *party* government (at least in the lower house)—the executive is more responsible to its governing party in the lower house than to the lower house as a whole, and certainly than to the Senate. 'The trinitarian struggle' is the label used by constitutional commentators Gordon Reid and Martyn Forrest to describe the modern interaction between the executive, the House of Representatives and the Senate.⁵⁸ In this struggle, the executive usually triumphs, mainly because of party discipline in parliament and executive control of the bureaucracy. Australian political scientist Elaine Thompson wrote:

Around a bipolar party system, party discipline and responsible government, was built a system which enabled the Executive to overwhelm the Parliament and which overwhelmed the constitutional conventions of ministerial responsibility and Cabinet responsibility. Party discipline ensured that the Cabinet not the Parliament dominated. Ministers were far more

answerable to Cabinet (and indeed to the Prime Minister alone) than to the Parliament as a whole.⁵⁹

The structure of parliament

Several commentators have argued that the relatively small size of the two houses of the Commonwealth Parliament also limits their ability to effectively scrutinise the executive in certain areas, and particularly in foreign policy. A small number of members and senators will mean that vocational representation is fairly narrow. Expertise in foreign affairs is rare and the volume of constituency work leaves many members and senators with little time to focus on or acquire knowledge about subjects outside their electorate work.⁶⁰ The low number of sitting days of the federal parliament also reduces the time available for debates and questions.

Sitting days and times of various lower houses of parliaments*

Country	Parliamentary year	Days per parliamentary year	Hours per year	Average daily length
UK House of Commons	2003–4	157	1215.3	7.75
UK Westminster Hall**	2003–4	103	411.2	3.99
USA House of Representatives	2003	138	1015	7.6
Canada House of Commons	2003	108	750	6.9
NZ (unicameral parliament)	2004	97	583	6.0
Australia House of Reps	2003	74	656.5	8.7
Australia Main Committee	2003	45	167	3.7

* Figures for last non-election year before 2005.

** Debates in the UK Hall of Westminster are, like the Main Committee in Australia, restricted to non-controversial matters, committee reports, and so on.⁶¹

Opportunities for debate

Foreign policy is rarely implemented through legislation, giving parliamentarians few opportunities to debate and discuss foreign affairs.⁶² Budget appropriation bills give parliament the opportunity to question the government's priorities and activities, particularly on extraordinary appropriations such as for Australia's 2005 billion-dollar tsunami aid pledge to Indonesia and for additional funding of national security-related activities, such as those performed by the Australian Secret Intelligence Service (ASIS). But it would be a brave opposition which questioned too closely additional funding for

humanitarian aid and, particularly in the current security environment, national security-related intelligence operations.

Other mechanisms for discussion such as Question Time, ministerial statements and debates on matters of public importance usually are not useful for debating foreign policy. Parliamentary debates on foreign policy are rare, partly because ministers tend to use Question Time to outline policy, in response to opposition or government questions.⁶³ As one commentator points out,

Overall, the value of parliamentary debates and questions as a method of presenting intelligence (and intelligent) exchange of opinion on foreign policy is strictly limited ... the opportunities for such exchanges rarely occur and parliamentarians who are interested in specific foreign affairs matters are unlikely to see them discussed.⁶⁴

Executive control of the lower house means that it controls the legislative timetable and uses various means to suspend or otherwise shorten debate.⁶⁵

Interest in foreign affairs: the parliament and the public

Opinion polling suggests that, except during foreign policy crises, Australians generally attach a low priority to foreign affairs. Of course, there are groups that display strong ongoing or general interest in the subject, but for the large majority, their interest in foreign policy is roused only by a foreign policy crisis, or when a foreign policy issue becomes a domestic one.⁶⁶

The public's lack of interest in foreign policy is one reason often given for the lack of scrutiny by parliament of this area of government activity.⁶⁷ J.D.B. Miller noted in 1969 that:

If [a parliamentarian] wishes to concentrate on foreign affairs in Parliament, he must recognise that this aspect of his work may earn him little electoral advantage and may indeed cause him disadvantage, since, while those who agree with him may not take much notice of what he is saying, those who disagree certainly will.⁶⁸

A changing, and larger, role for Australia in world affairs, and the establishment of foreign affairs committees by parliament, seem to have been accompanied by a greater ongoing interest shown by some parliamentarians in foreign policy issues.⁶⁹ But it remains the case that constituents' interests continue to drive the work of most parliamentarians. As long as those interests are focused on domestic more than international issues, so will those of most members and senators. The view of

Australian foreign policy academic Brian Hocking, written in 1976, probably still holds:

Parliamentarians conform to public expectations regarding their functions and these do not allow for an expanding foreign policy role. Significant change will only occur in response to fundamental modifications of the political culture, one of which would be the development of a greater awareness on the part of the public as the [sic] importance of its international environment to Australia and of policy impinging on that environment ... until this awareness begins to develop, Parliament is unlikely to improve on its present performance.⁷⁰

The media is another factor behind public and parliamentary interest, or lack of, in foreign affairs. Its role as a shaper of public opinion has been well-documented, as has its tendency to relay information according to the perceived interests of its audiences—Australians receive what the media thinks they want. Thus reporting on foreign affairs is largely Australian-centric, driven by crises or mishaps and is largely reactive.⁷¹ An ill-informed public that is only sporadically interested in foreign policy will not generate the 'greater awareness' Hocking sees as necessary for a more robust parliamentary role in foreign policy.

Parliament has a minimal role in foreign policy, not only in its formulation but also in scrutiny of policies and actions already undertaken by the government of the day. There are a number of reasons for this, some constitutional, others political and still others associated with the particular nature of foreign policy.

A 2004 report on parliament's role in foreign policy exercise by Australian academic John Uhr concluded that parliament was 'infirm'. He drew this conclusion not because of the structural and other factors outlined in this chapter, but because of parliament's 'uncertainty about its role in national security'. As a result, Uhr argues, parliament can be cowed by the executive: 'Parliament is unduly persuaded by the anti-terrorist drumbeat of the political executive and tends to delegate many of its own national security responsibilities to the executive government.'⁷²

But Uhr sees signs of hope in recent years. He cites examples of the ways in which parliament has become more assertive on national security issues, demonstrating that 'parliamentary participants are no longer so respectful of "executive prerogatives"'. Uhr points to the Senate's 'interventionist' role in the Australia-US free trade negotiations, the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiries into involvement in the World Trade Organisation and the United Nations and its 'watching brief' on terrorism, and the Joint Treaties Committee's responsibility for reviewing the final text of the Australia-US FTA.⁷³ In Uhr's view, like that of other

commentators, parliament's committees are an important remedy for the 'infirmity' it displays in other opportunities to investigate national security and foreign policy issues.

The following chapter, however, demonstrates that there is cause to be less sanguine than Uhr about parliament's prospects in this regard. The chapter examines the role committees play in holding the executive to account on foreign policy matters and examines the barriers to what Uhr sees as an emerging independence and willingness to probe the exercise of executive power in these areas.

Chapter Two: Barriers to scrutiny

The lack of parliamentary involvement in foreign policy-making prompted Allan Gyngell and Michael Wesley to observe that ‘it is hard to find any significant role played in the formulation of Australian foreign policy by Federal Parliament’.¹ In response, a Senate committee opened its report in the same year with the following statement:

The Senate Foreign Affairs, Defence and Trade (FADT) Committee—through the inquiries and reports on which it is engaged—is giving notice that this assessment is being challenged. As foreign policy considerations become increasingly important features of Australia’s political and economic landscape, and as the domains of international and domestic law-making become increasingly enmeshed, it is vital that Australia’s national parliament engages more fully in foreign and trade policy development.²

The clear message from the committee is that committees can and should play an important role in devising foreign policy goals and major policies. Two of the report’s four recommendations propose ways in which committees can be more involved in these processes. As noted earlier, other commentators also view committees, particularly Senate committees, as the chief means by which parliament can hold the government to account for and have its voice heard on foreign policy. The question is, are committees up to the task?

The aim of this chapter is to investigate the barriers that prevent committees from fulfilling these hopes. As we see, the barriers appear to be the result of two forces. The first is the adversarial relationship between the executive and the legislature. In this battle, information is power. The executive wants to make and implement policy with minimal interference from parliament. It is therefore likely to try to keep parliament in the dark about its activities. For its part, parliament’s primary means of holding the executive to account—and the opposition’s means of scoring political points—is itself to be as well informed as possible, as well as to obtain information that demonstrates any maladministration, policy failure or other government blunder.

The second force which generates barriers to scrutiny is self-censorship on the part of committee members. This is partly the result of bipartisanship—a shared understanding between government and opposition members on the importance of protecting sensitive foreign policy and security matters—which produces caution rather than thorough probing and critique. Self-censorship is also explained by the secrecy surrounding some

foreign policy and security issues; committee members exchange public accountability for the confidentiality necessary to continued participation in national security policy.

These barriers are not all unique to inquiries into foreign and security policy. This chapter therefore makes a number of observations about limits to committee powers of scrutiny in general, not least of which is the extent of executive dominance in Australian politics and the implications of this for accountability.

Information is power

In the struggle to avoid or enforce scrutiny, information is a vital weapon. Australian public policy academic and former bureaucrat Stephen Bartos observed that a characteristic of accountability is that:

It is based on the provision of information. The party being held to account must produce information sufficient for a judgement to be made on its performance. It follows that inaccurate or misleading information undermines the accountability relationship.³

Within the accountability relationship between the executive and parliament, the executive seeks to control what information comes before parliament in order to minimise its embarrassments, maximise its triumphs and generally evade scrutiny—or that scrutiny which will detract from its record. For its part, the parliament—its non-government members—tries to obtain information that will boost its attempts to hold the executive to account for its actions (and at the same time boost parties' and individuals' electoral prospects).

According to Harry Evans, clerk of the senate, however, the executive's control of parliament means accountability to parliament does not really exist:

Governments now expend a large part of their time and energy suppressing parliamentary accountability, seeking to ensure that they are not held accountable by parliament, that old accountability mechanisms do not work and that new ones are not introduced.⁴

The executive's efforts are boosted by a bureaucracy increasingly inclined to secrecy and protection of information—particularly in the face of parliamentary inquiries. Anyone who has witnessed an estimates hearing will identify with the following words of a premier writer on bureaucracy, Max Weber:

In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-

called right of parliamentary investigation is one of the means by which parliament seeks such knowledge. Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.⁵

Since the 1970s, the increasing use of parliament's investigatory powers through its committees has provided some counter to executive power. Together with increasing executive domination of parliament, the existence of a comprehensive committee system means that the burden of parliament's scrutiny role now rests predominantly on committee inquiries. Senate committees, in particular, have traditionally conducted more robust inquiries than their House of Representative counterparts.⁶ In the words of Harry Evans again:

In Australia the combination of rigid government control over lower houses, and the ability of modern governments to control and manipulate information, is deadly, and would stifle the political process were it not for upper houses not under government control employing the traditional methods of parliamentary inquiry.⁷

Parliamentary committee inquiries are recognised as legitimate instruments of both houses of parliament by section 49 of the Constitution:

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

Section 49 gives both houses the power to initiate inquiries, though this power also exists independently of section 49.⁸ Under that section the houses can delegate the power of inquiry, along with certain coercive powers, to committees of their members. These include the power to require the attendance of persons, the production of documents and the power to take evidence in camera. These powers enable committees to fulfil an important role—to keep a check on the activities of the executive. A house controlled by the government could use that control to prevent a committee from having the coercive authority to conduct the inquiry.⁹ (This has implications for Senate inquiries after 1 July 2005, when the Government had a majority for the first time since 1981.)

Though extensive, the investigatory powers of committees are limited. Two conventions establish formal limits on their power to compel witnesses to attend and inquire into certain matters.¹⁰ First, a committee of one house cannot compel the attendance of members of the other house. This has frustrated the work of several

inquiries in recent years, as we see in this chapter. Second, federal parliamentary committees limit themselves to matters over which the Commonwealth has legislative power under the Constitution, though this does not affect inquiries into foreign affairs because the Commonwealth has Constitutional authority in that area. A range of other barriers, though, are more informal and often more subtle in the ways in which they limit inquiries into foreign policy (and indeed other areas of policy).

Executive power tools

Accountability frameworks

In the Australian system of parliamentary government, and consistent with the traditional understanding of ministerial responsibility, the public and parliamentary advocacy and defence of government policies and administration has traditionally been, and should remain, the preserve of Ministers, not officials. The duty of the public servant is to assist ministers to fulfil their accountability obligations by providing full and accurate information to the Parliament about the factual and technical background to policies and their administration. The guidelines are therefore aimed at encouraging the freest possible flow of such information between the public service, the Parliament and the public.¹¹

This excerpt comes from the *Government Guidelines for Official Witnesses before Parliamentary Inquiries*. It articulates the well-accepted notion that ministers are responsible for the administration of their portfolios and must account for that administration before parliament.¹² Public servants ‘assist’ with this accountability by providing ‘factual and technical’ information about the background and implementation of policies, but their ‘advocacy and defence’ is the minister’s job. This interpretation of the notion of ministerial responsibility is also expressed in a Senate resolution:

An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.¹³

As well as being designed to reinforce the notion of ministerial responsibility, the Guidelines and resolution are meant to protect public servants from disputes with committee members over the merits of policy determined by ministers.

While these accounts of the accountability regime are unremarkable in one sense, in another sense they stake out important boundaries for the battle over information: they establish what kinds of information the executive is obliged to divulge to parliament, and what kinds of information parliament can expect to receive. In practice, though,

these boundaries are fluid and can be pushed and pulled variously in favour of the executive or parliament and its committees. We see, though, that the wide range of obfuscatory techniques available to the executive means that it usually has the upper hand in this information war.

Policy and administration

Underlying the understanding that ministers are accountable to parliament for the merits or otherwise of particular policies is a distinction in the policy process between fact—understood as value-free information underpinning a policy and its implementation—and value—meaning the merits (political or otherwise) of policy alternatives. But there are at least two respects in which this distinction confuses rather than clarifies what information committees can legitimately request and obtain.

First, what was once regarded as factual information about policy, and therefore a legitimate area for questions, is increasingly regarded by officials and ministers as subject to immunity. For example, during a Senate estimates hearing on foreign affairs and trade in February 2005 a foreign affairs official and the Minister for Defence, Senator Robert Hill, refused to disclose not just the content but the *form* of communication between the Department and the Minister's office—an immunity claim the Labor committee members felt was a new low in accountability. The following is an excerpt of that exchange:

Senator Chris Evans: What we have got so far, Senator Hill, is the witness saying that last week, or a couple of days ago, or within the last couple of days, he thinks he might have had a telephone conversation—but he is not sure—with an unnamed officer in the office of Mr Downer whose name you refuse to have disclosed to the committee. Now he says the method of conveying that information is too secret to share with us. It was not a problem before lunch, it is just that he was not sure. Now it is a problem.

Senator Hill: I think he could have answered differently this morning. If it was his wish, he could have said that any communications between him and his minister are between him and his minister and that is basically not the business of this committee. What I think he is saying now is that any further detail in relation to a matter of communication between him and his minister is not the business of this committee.

Senator Faulkner: That is high farce, even for you, because never before, at any estimates committee—or, as far as I am aware, any other committee of this parliament—have we ruled out questions on process issues such as the method of transmission between departments and ministerial offices. Never has it been ruled out.¹⁴

The increasingly blurred line between policy-making and its implementation is the second reason why the distinction between fact and value is not so neat. The volume of policy work arising on a daily basis means ministers cannot make all value-laden policy decisions, so some are taken by officials (including ministerial staff, on which more later). And, as Allan Gyngell and Michael Wesley point out, assuming that there is a 'fact-value' distinction ignores the reality that 'even those "facts" that look completely objective will have been selected as important by some underlying values system on the part of the administrator'.¹⁵

Distinguishing between what is fact and what is policy has long posed difficulties for committees trying to obtain information from public servants. In 1951, for example, the Government directed that senior defence officials should not attend a Senate inquiry into national service. The Government's argument was that the officials should not be asked to comment on policy. When the committee responded that it was primarily interested in factual evidence rather than opinions on government policy, the Government informed the committee the officials' participation in the inquiry was 'against the public interest' and that:

It is quite impossible to draw the line between what your Committee may call 'factual' and what is 'policy', and it should not be for any official or for the Committee, in the view of the Government on matters which may touch security, to decide whether it is either one or the other.¹⁶

The fact-policy distinction was also labelled 'far-fetched' in a 1990 House of Representatives report of an inquiry into public sector accountability.¹⁷ One of the report's conclusions was:

that both Ministers and public servants are accountable to Parliament. Ministers are accountable in a direct sense. Public servants are accountable, but in a less direct sense. They have accountability obligations in terms of keeping Parliament informed and assisting parliamentary scrutiny of public administration and expenditure.¹⁸

Furthermore, the report asserted parliament's interest in and right to be informed on a wide range of accountability matters:

ranging from issues concerned with the process and probity of government administration and spending, to the efficiency, effectiveness and appropriateness of government policies and programs.¹⁹

Thus the report made two points relevant to the present study. Matters that are properly subject to parliamentary scrutiny are broad; they are not limited to administrative questions. And public servants carry a direct responsibility to be answerable to parliament, albeit 'in a less direct sense' than their ministers.

In response to the 1990 report, the Government released in 1993 its own statement on accountability. It acknowledged that public servants are preparing increasingly large amounts of information for parliament on behalf of their ministers, and that '[i]t is not surprising, therefore, that it has increasingly become the role of officials to give evidence directly to the Parliament, acting through its various committees.'²⁰ Nevertheless the Government's statement stated firmly that the *Guidelines* establish the parameters for what public servants are obliged to discuss. In the words of two public policy commentators, '[i]t was a defence against direct answerability to parliament for administrative errors.'²¹

Also revealed in the Government's 1993 statement was a desire to limit parliament's ability to scrutinise the activities of the executive. An earlier draft displayed this by referring to parliamentary committees as 'adjuncts to accountability', though the final document was more subtle in its reference to 'too many, or too complex, reporting mechanisms.' It was argued that annual reports, performance statements and other publicly-available information amply met the government's accountability obligations.²²

The statement was ostensibly an outline of the Government's doctrine of accountability, but it could also be read as a clear signal to the parliament not to meddle. This battle between the executive and legislature over access to information continues, and presents another limitation on committee scrutiny, as we see below.

Departmental relations with committees

In Australia's political system the executive makes policy while the legislature scrutinises then passes or rejects it. When faced with opposition to its legislative program, particularly in the Senate but also in committees of either house, the executive often cries foul, drawing on the notion of a 'mandate to govern' to defend its right to implement its program.²³

A number of those interviewed for this study pointed out that this conflict is often played out in committee inquiries, particularly in Senate estimates. The executive, one suggested, regards Senate committees as 'hostile forces to be kept out' of the

government's business, while House committees were 'to be controlled'. Senior public servants, more and more of whose tenure is at the mercy of the executive, often adopt the same attitude. Having observed this attitude, some of those interviewed commented that it is also fed by a dismissive view of parliamentarians 'who do not know how government or departments operate.'

As well as claiming immunity, officials commonly avoid divulging information by referring questions to a senior officer or the minister, taking questions on notice and not venturing information. A former committee chair has written that: 'If they do not ask the right questions, [they] will not get the right answers.'²⁴ Other recent examples of the means by which departments and the executive frustrate the ability of committees to obtain information highlight other obstructive techniques.

For example, the executive instructed departments not to provide submissions to the inquiry into 'A Certain Maritime Incident' (CMI), which investigated events behind a 2001 incident. An Indonesian vessel was intercepted by the Australian navy within Australian waters; asylum seekers aboard the Indonesian vessel were reported to have thrown children overboard.²⁵ In virtually all inquiries individual departmental submissions are routine and form an important basis on which committees frame their initial investigations. During the CMI inquiry, however, at the Government's behest there were no such submissions. This was a significant handicap for the inquiry and raised broader issues of executive dominance and accountability, according to the committee's report:

The Government directed Commonwealth agencies not to provide submissions to the Committee. Such an action is almost unprecedented and contravenes the accountability obligations of the executive to parliament.²⁶

For a related inquiry into accountability arrangements for ministerial staff (the 'MoPS inquiry'), the Department of Prime Minister and Cabinet insisted on a whole-of-government submission, again limiting the information available to the committee.²⁷ Several people interviewed suggested that this approach allowed the prime minister's department to vet departmental submissions, thus ensuring control over what information the committee received.

The refusal of officials, especially heads of departments, to appear before committees—or the refusal of ministers to allow them to appear, as occurred during the CMI inquiry—is another trend in recent years which makes the scrutiny work of committees more difficult. The CMI report notes that:

The Minister for Defence (Senator Robert Hill) has also refused the appearance of certain officials even though, as public servants, they do not fall under the cabinet prohibition on the appearance of *MoPS* Act staff. Such bans and refusals are anathema to accountability.²⁸

Public sector chiefs and the executive do not always constitute a unified front, however. Changes in public sector management, such as the trend for the executive to have a direct say in the appointment of departmental heads, the higher public profile of many chief executives and the increasing reliance of ministers on their own staff, means senior officials can no longer rely on public support from their ministers in times of political controversy. Public policy experts Robert Gregory and Martin Painter note that there is now:

more of a wedge between ministers and their executives, thus transforming the previous two-way relationship between select committees and a fused political and bureaucratic executive into a more uncertain triangular relationship among the parties. Evolving tensions among select committees, the political executive, and public sector agencies, are new features ... and all three sets of players are having to learn to play by new, often informal rules as 'the accountability' game is played out ...²⁹

Australian public administration writer and former public servant John Nethercote has also identified this trend, noting that officials are now 'pretty much on their own' before committee inquiries, particularly estimates committees. This, says Nethercote, 'is a virtual reversal of Westminster practice. Where once ministers defended anonymous officials, now officials must *de facto* defend absent ministers, while virtually anonymous senators look on.'³⁰

Nevertheless, whether to defend themselves, their departments or their ministers, officials employ various techniques of obfuscation, including not appearing before a committee—though as suggested above, this is usually at the minister's direction. Frustrating as this is for committees, most members are not inclined to push for an official to appear. The CMI report suggests one reason is it would be unfair to have to punish an officer who declined to appear at their minister's request:

Faced with the continued refusal of prospective witnesses to respond to invitations to appear, and with correspondence from ministers indicating that advisers and certain officials would not appear, the Committee decided not to seek to compel their attendance, and thereby expose the advisers and officials to the risk of being in contempt of the Senate should they not respond to the summons. Part of its reason not to summon was based on the Senate resolution that it would be unjust for the Senate to impose a penalty on a person who declines to provide evidence on the direction of a minister. The penalties for contempt include a gaol term and/or a heavy fine.³¹

The power to call ministers

The refusal of ministers to appear before inquiries is a further constraint on the ability of committees to obtain information. Interviewees commented that, knowing that ministers in the House of Representatives rarely appear before Senate committees when requested, committees tend either not to call them or not push hard for their attendance. One reason offered is that the executive's activities can be questioned and scrutinised through its ministers, especially during Question Time. However government control of the lower house, and in the current parliament, from mid-2005 also the Senate, makes these sessions largely ineffective vehicles for scrutiny. This suggests there are other reasons why committees are reluctant to insist on the appearance of ministers. They range from the circumstantial to the strategic, as we see below.

The Joint Committee on ASIO, ASIS and DSD inquiry into intelligence on Iraq's weapons of mass destruction did not call the Prime Minister, defence and foreign ministers, even though their actions and the reasons for them were relevant to at least one of the terms of reference.³² In this case, the decision not to call those ministers to appear before the inquiry was probably less a matter of grand strategy than circumstance: Labor was then in the midst of a leadership crisis and two key Labor figures on the Committee—Kim Beazley and Robert Ray—were possibly distracted by leadership issues.

In other cases, though, strategic calculations do come into play. The desire not to set a precedent for insisting on the appearance of ministers means opposition committee members tend not to insist on the appearance of ministers. If they were to insist, a range of procedural means are available to them. For example, a committee could refer a refusal to the chamber where, if a minister or the government continued to resist an order to appear, the matter could go to the courts. As noted earlier, however, the cost of pursuing action in the courts is one deterrent to taking this option. A greater deterrent is that it is regarded by most committee members and staff as too extreme a measure—political penalties are usually preferred. For example, as a result of Peter Reith's refusal to appear before the inquiry into A Certain Maritime Incident (he was requested 'on at least three occasions'³³), the committee ensured that his lack of cooperation was widely telegraphed, both in its report and through the media.³⁴

The committee's report included the following statement:

Mr Reith failed to cooperate with the Senate Select Committee established to inquire into the 'children overboard' controversy, thereby undermining the accountability of the executive to the parliament.³⁵

Ministerial staff

According to the Government's Guide to Ministerial Responsibility:

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments'. Ministers have closer day-to-day contact with, and direction of the work of, members of their staff. Furthermore, ministerial staff do not give evidence to parliamentary committees, their actions are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals. ...

Ultimately, however, ministers cannot delegate to members of their personal staff their constitutional, legal or accountability responsibilities. Ministers therefore need to make careful judgements about the extent to which they authorise staff to act on their behalf in dealings with departments.³⁶

The Guide indicates that, in addition to their accountability for their department's actions, ministers are also accountable for their staff employed under the *Members of Parliament (Staff) Act 1984*. Ministerial responsibility for the actions of these staff is seen to be stronger than for officials because ministerial staff are not expected to appear before parliamentary committees and because of the close and direct working relationship between a minister and her or his staff.

In the last few years, though, concerns have been raised about the accountability regime for ministerial staff. In his book on the 2002 children overboard inquiry Patrick Weller charges that:

Ministerial staff have grown in influence and importance over the past twenty years, to the extent that they have long outgrown existing procedures for accountability and responsibility. They are now the black hole of government, unaccountable in practice, even if not in theory.³⁷

Weller was prompted by a cabinet decision during that inquiry to refuse to allow ministerial staff to appear before the Senate committee. The chair's foreword stated that:

The inquiry was blocked by a cabinet decision. Cabinet decided to fence off ministerial and prime ministerial conduct from the reach of the inquiry by refusing access to ministerial and prime ministerial staff and to public servants serving in ministerial offices at the time.³⁸

Cabinet's decision was based on the claim that ministerial staff are not decision-takers but merely extensions of their ministers. Therefore the minister, not her or his staff, should appear before committees. The issue sparked numerous journal and newspaper articles both in support of the Government's position and in opposition.³⁹

As a result of the controversy, another inquiry was established into the accountability arrangements for ministerial staff. A submission to that inquiry by the prime minister's department states:

By political convention, MoP(S) Act staff have not appeared before parliamentary committees. When, in 1995, a person who was employed under the MoP(S) Act and also responsible for a government-funded programme appeared before a Senate Legislation Committee, Hansard records Government, Opposition and Democrat Senators indicating that the appearance was not setting a precedent for the appearance of MoP(S) Act staff.⁴⁰

On the other hand, others argued that compelling ministerial staff to appear before committees is an important element of accountability. Harry Evans, clerk of the senate, told the inquiry that:

there may be circumstances in which parliamentary inquiries need to take evidence from personal staff to clarify circumstances of fact or to confirm the evidence of others. There should be no barrier in principle to the giving of such evidence by personal staff.⁴¹

The Committee agreed with the Clerk, arguing that personal staff should testify in circumstances where a minister does not take responsibility for the actions of her or his staff. The committee suggested that this would increase the incentive for ministers to take responsibility for their staff's actions.⁴²

The matter has not been settled and is likely to arise again. The CMI and MoPS inquiries demonstrate, though, another impediment to the scrutiny work of committees—the increasingly central role in decision-making of ministerial advisors, and the lack of accountability mechanisms attaching to that role.

Public interest immunity

One of the greatest limits on committee power to obtain information is 'public interest immunity'. This refers to information held by government which, it claims, ought not to

be disclosed before parliament or the courts. According to *Guidelines for Official Witnesses Before Parliamentary Committees*, public interest immunity claims can be made with regard to the following:

- material which ‘could reasonably be expected’ to damage national security, defence, international relations or relations with Australian states and territories;
- material disclosing cabinet deliberations, other than that already published or that does not reveal unpublished deliberations or decisions;
- material revealing advice or deliberations pertinent to the functions of the Executive Council, other than that officially published by the Governor-General.⁴³

Public interest immunity was once called Crown and is now called executive privilege. The different terminology indicates a shift in emphasis, from fear of damage to the Crown’s or executive’s interests through disclosure of certain information, to fear of damage to public or national interests, such as prejudicing legal proceedings or commercial or defence interests.⁴⁴ This change in language could be seen as a win for democratic accountability—the executive now weighs the problem of disclosure with only the national interest, not its own, in mind. But as the previous chapter suggested, this language can also be seen as the executive’s attempt to protect its own interests through a cynical appeal to the public’s fear and insecurity. No doubt both calculations are employed at different times.

As also mentioned in the previous chapter, claims to public interest immunity are treated differently in the courts and in parliament. The courts do not accept as given executive claims to immunity. Nor, in theory, does parliament, but ‘[o]n the other hand the Senate has usually not taken steps to enforce production of documents for which the executive has claimed immunity, other than exacting a political penalty’, according to *Odgers’ Australian Senate Practice*.⁴⁵

If a house of parliament did wish to pursue information in the face of an immunity claim, it has a number of options. These include a motion of censure against a minister, imprisonment, a fine for contempt, or a political remedy such as using the chamber to attack the government for concealing impropriety or mistakes. Censure motions in either house can send a strong message, as pointed out in *Odgers’*:

[a]lthough a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, as an expression of the Senate’s disapproval of the actions

or policies of particular ministers, or of the government as a whole, censure resolutions may have a significant political impact ...⁴⁶

Punishments of ministers or public servants for contempt are rare, partly because convention prevents one house from punishing a minister of the other house. Another reason is the unfairness of penalising a public official who claims immunity on the direction of a minister. And the *Parliamentary Privileges Act 1987* allows a penalty imposed for contempt to be contested in the courts, so the expense of this option is a deterrent.⁴⁷ For these reasons, political remedies are usually preferred, such as occurred in 2002 as a result of the inquiry into A Certain Maritime Incident. Political and public outcry over the government's manoeuvres to prevent committee access to witnesses and documents resulted in a subsequent inquiry into aspects of public service accountability.⁴⁸

The remedies available to statutory committees, such as the Joint Committee on ASIO, ASIS and DSD, are limited by their statutes. For example, the Joint Committee's statute provides that a minister's claim to immunity 'must not be questioned in any court or tribunal.'⁴⁹

Formal claims to immunity, where a minister writes to a committee claiming 'privilege', are rare. Immunity claims are usually expressed informally, such as 'I'd rather not go into that on security grounds.' These informal claims are 'rarely pressed', in the words of one person interviewed for this study, by committee members. This is particularly the case for national security matters, which are regarded by committees as being 'on a higher plane' than other grounds for immunity. So although committees have extensive powers, the same interviewee explained, 'the use of that power is circumscribed, informally'.

The problem with this arrangement is that the executive determines what is in 'the public interest' to disclose. Thus the executive is effectively 'the judge in its own cause'. One parliamentary observer has argued that 'surely it is tipping the balance too far in favour of the executive to allow it to be the judge of what public interests justify non-disclosure.'⁵⁰ *Odgers*' also argues that accountability suffers under this arrangement:

While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny. It may also be

considered that a representative House of the Parliament is the best judge of the balance of public interests.⁵¹

From time to time remedies to the problem are suggested. For example, in 1994 Cheryl Kernot, then Leader of the Australian Democrats, proposed a bill that would have seen immunity claims adjudicated by the courts and, if necessary, empower the courts to enforce the production of documents. A committee inquiry rejected the bill.⁵² Kernot's subsequent motion, to establish an inter-party committee to adjudicate immunity claims, was also rejected. In both cases rejection was based on a wide belief that, as one interviewee put it, it is 'up to committees to be robust in the use of their powers and if they're not, too bad.' But as we see in what follows, committee members are often not prepared to be robust in the use of the powers available to them.

Bipartisanship and the national security mystique

Self-censorship on the part of committee members is an important reason why committees do not always probe rigorously on some issues. That self-censorship seems to be driven by two dynamics—bipartisanship, and the mystique surrounding national security and intelligence matters.

Partisanship and bipartisanship

The following quotes demonstrate two common and opposing views of the place of partisanship in parliamentary committees. First, according to John Nethercote:

Parliamentary committees are ill-equipped for inquisitorial assignments. The already professed perspectives of the principal Opposition personalities rule out anything approaching objective and impartial investigation.⁵³

In contrast, Clerk of the Senate Harry Evans argues that:

The fact that partisan rivalry is the motivation of parliamentary scrutiny and accountability measures [such as committee inquiries] does not invalidate them. That is how free states seek to keep governments both efficient and honest, and no other method has ever worked in any other context.⁵⁴

The first view is commonly held by governments. Committees—particularly of the Senate—are regarded as politically-motivated and aimed solely at embarrassing the government. Non-government committee members are often assumed to begin an

inquiry with their positions already determined, which makes inquiry findings that ‘the government failed’ predictable from a government’s perspective.

The second quote reflects a view often articulated by non-government members in response to the first: committees add to the array of scrutiny and accountability tools for keeping the executive in check. According to this view, though inquiries can be used as political tools, this does not invalidate their other functions. Whether an inquiry is seen as politically-motivated, then, depends on the observer.

Estimates committees, for example, can provide opportunities for non-government members to uncover maladministration and policy failures which can then be used to embarrass the government. Other kinds of inquiries achieve the same dual effects. For example, the Senate select committee that investigated ‘A Certain Maritime Incident’ was dismissed as a political stunt by the government but, as we saw earlier, the inquiry process also raised significant issues of public service accountability.

The probing nature of this inquiry placed on the public record a large body of information on the mechanisms of decision-making surrounding the Government’s border protection strategy, particularly Operation Relex and the Pacific Solution. (Operation Relex refers to the Australian Defence Force-led operation, begun in late 2001, to prevent and deter unauthorised boat arrivals in Australian waters. The Pacific Solution refers to the network of agreements reached between the Australian Government and various Pacific countries, under which asylum seekers detained in Australian waters would be taken to the Pacific countries instead of to Australia. The aim was to deny the asylum seekers the automatic right to claim refugee status in Australia, to which they would be entitled if they landed on Australian soil.⁵⁵)

The committee also uncovered the existence of the Government’s covert ‘disruption’ campaign in Indonesia, something unknown to the public until the committee explored an incident at sea during which 352 asylum seekers drowned. What is good politics for the opposition, minor parties or independents, then, can also have broader policy outcomes—in this case uncovering information which generated debate about the merits of the Government’s border protection policy.

Not all inquiries are seen as politically-motivated, even by the most distrustful government. Inquiries into subjects that have not (or not yet) been politicised have more chance of being seen as ‘objective and impartial’ investigations. In this sense the broader political scene can affect the ways in which committees and their inquiries proceed and are received. A number of people interviewed suggested that, perhaps until

recently, foreign policy was only infrequently an arena used for domestic political point scoring by the two major parties. Partly as a result, inquiries into the subject have a strong history of bipartisanship. Another factor is that, since the end of the Cold War, Australia's two main political parties have moved closer together on foreign policy.⁵⁶

For example, in response to India's and Pakistan's announcements in 1998 that they had detonated nuclear devices, the Liberal and Labor parties took a bipartisan stand in opposing the tests.⁵⁷ An inquiry into the implications of the tests, and the Australian Government's non-proliferation activities, was launched by the Senate's Foreign Affairs, Defence and Trade Committee. The unanimous report produced by that Committee probably reflects the non-partisan nature of the subject matter (though Senator Dee Margetts inserted additional comments about further non-proliferation efforts Australia could make). Two other inquiries by that Committee—one into Australia's relationship with the Asia Pacific Economic Cooperation (APEC) countries and another two-part inquiry into Japan⁵⁸—were also mentioned by respondents as examples of bipartisan inquiries. This was possible because neither topic was the subject of party-political differences.

Bipartisanship also occurs in inquiries that are politically charged. On foreign policy and national security matters, this bipartisanship stems from what one Senator interviewed described as a 'shared understanding' between the Coalition and Labor parties. For example, the 2003 inquiry into Iraq's weapons of mass destruction was referred with Labor support to the Joint Committee on ASIO, ASIS and DSD, which has a government majority, rather than the Senate Foreign Affairs, Defence and Trade Committee which has a Labor majority. When asked the reason behind this choice, several interviewees responded that both parties try to keep 'important issues' such as national security out of committees that have minor party representation because those parties are regarded as potentially 'irresponsible'. Both parties, according to one interviewee, 'conspire to protect against irresponsibility' because of 'bipartisan agreement that some matters are too important' to allow minor parties to be involved. There also appears to be bipartisan consensus that membership of the highly sensitive ASIO Committee remains exclusive to the Coalition and Labor parties.⁵⁹

Experience in government, particularly in defence or related portfolios, and the prospect of being in government, partly explains the prudent approach to national security matters. An individual's background also plays a role. For example, Kim Beazley and Robert Ray have experience in the defence portfolio and consequently are in some ways predisposed to accept certain precepts of national security. They are also

regarded by their political opponents as very ‘sensible’ on foreign policy and security matters. In the words of K.C. Wheare, a writer on comparative political systems, ‘[e]xperience of office or expectation of office can make an opposition too well behaved to make the government behave.’⁶⁰

Prudence in sensitive foreign policy and national security inquiries probably also reflects a certain political pragmatism—there is usually no political advantage in going in hard against a government on national security, particularly in the current environment in which security issues drive many domestic as well as foreign policy agendas. On the contrary, this is likely to be branded as ‘irresponsible’ on national security, a label an opposition hoping to be returned to government cannot afford.

Another aspect of the pragmatism behind bipartisanship is that cooperation rather than conflict is seen as more likely to produce a result that influences government policy. (Though political bickering in hearings can also be a means for backbenchers to attract much-needed media attention.) Cooperation can be less of a motivation for independents and representatives of minor parties, whose political stakes sometimes rest on differentiation from the major parties.

The pervasiveness of security and the mystique of national security

Since the World Trade Centre attacks in September 2001 a range of domestic as well as foreign policy issues has been brought under the rubric of national security. A quick look at the Government’s National Security website shows the breadth of issues covered in the new security climate. Topics listed under the National Counter Terrorism Plan include:

- border control
- transport security
- critical infrastructure protection
- regulation of hazardous materials
- chemical, biological, radiological and nuclear response, and
- postal security.⁶¹

These and other areas of domestic life are now subject to many of the same political and security sensitivities once reserved for intelligence, defence and other more traditional security concerns. Committee inquiries are increasingly coming up against these sensitivities: interviewees commented that a wider range of information is now subject to immunity claims than before September 2001.

It is thus perhaps not surprising that, in turn, committee members are ‘touchy’, as one interviewee put it, about pressing too hard to obtain sensitive information. Some members accept uncritically claims that certain information should not be disclosed on national security grounds. This might be out of genuine regard for the notion of national security, and/or uncertainty about their right to question such claims.

The fear of being branded irresponsible on security also restrains some members. The desire to retain (or establish) ‘political appeal’ on national security was nominated as the main reason why Labor members of the inquiry into Iraq’s weapons of mass destruction were reluctant to push the issue of the Government’s presentation of intelligence. The ‘cloak and dagger’ nature of some inquiries feeds into this caution. Many people interviewed commented that committee members are drawn into the shadowy aspects of foreign and security issues; they become willing to trade a certain level of critical inquiry for what is seen as the privilege and excitement of access to the world of intelligence and security. In the words of one interviewee, ‘[c]ommittees trade public accountability for confidentiality with security matters, in order to maintain closer participation in national security policy and practice’.

One way committees do this is through a strategic choice of witnesses. For example, the inquiry into A Certain Maritime Incident did not hear from the Australian Secret Intelligence Service (ASIS), despite that agency being closely involved in the offshore ‘disruption operations’ in which the committee was interested. The committee’s decision was guided partly by national security concerns: ‘[t]he Committee is mindful of the particular sensitivities and national security interests that attend matters of intelligence.’⁶²

Some interviewees, including a committee member, also suggested that non-government committee members choose not to pursue sensitive information about government activities because they feel that, by promising to protect the information, they are somehow implicated in the government’s actions. Dissent becomes more difficult, particularly if members are concerned about accusations of undermining national security.

This chapter has examined a number of ways in which committees are impeded or prevented from scrutinising government activity in foreign affairs. Some of those obstacles are common to all or most inquiries, while others are peculiar to foreign policy and security matters. Common to most is the battle between the executive and the legislature over access to politically useful information. A factor in some inquiries, but particularly those into sensitive foreign policy and security matters, is self-censorship on the part of committee members. As we saw, this self-censorship can be driven by an overly reverential attitude towards national security and intelligence. It can also be driven by political calculations, especially by opposition parties, such as the need to be seen as responsible on national security and the desire by government and opposition committee members to maintain bipartisan responsibility in this area.

Political and security calculations therefore work to generate a climate of secrecy around sensitive foreign policy and security matters. This impairs the scrutiny function of committees in these areas—unnecessarily so, according to many people interviewed for this study. Experts and non-experts in the security field felt that current levels of secrecy are often not justified, at least in terms of protecting national security—protecting a government’s fortunes was seen as a separate (and less straightforward) matter. The next chapter looks at the security and political issues associated with relaxing the secrecy surrounding foreign and security policy-related information and addresses some of the likely objections to such a move.

Chapter Three: Challenging the national security mystique

... what's in the public interest and what the public are interested in are two different things.¹

As this quote from Immigration Minister Senator Amanda Vanstone suggests, when governments withhold information on the grounds that its disclosure might adversely affect Australia's foreign relations or security, they invoke the idea that there are competing interests: the public interest in open and accountable government versus the need to withhold information that could damage the public, or national, interest. 'The public interest' can therefore be used as a justification to support or deny the disclosure of government-held information.

The executive decides which notion of the public interest prevails, and so whether to practise openness or secrecy. In weighing its options a government will consider the potential internal as well as external damage which could be caused by disclosing certain information. External damage includes damage to relations with other countries, for example by disclosing another country's intelligence material, or threats to Australian (or non-Australian) civilian or military personnel overseas. Internal damage might be caused if the release of government information allows politically-motivated groups or individuals to carry out an attack on people or on critical infrastructure.

Internal damage includes threats to a government's own survival, as the previous chapter showed. In addition to the competing public interests just mentioned, then, another competing interest is at work: the public's interest in open and accountable government versus a government's interest in its own political fortunes. These calculations are not unique to national security and foreign policy issues. However, the secrecy and the mystique attaching to national security ensure that governments can easily avoid disclosure of inconvenient information, and their claims to the need for secrecy also often go unchallenged.

Not all of the secrecy surrounding national security is warranted, and this chapter shows that protecting genuine national security information does not exclude greater openness, and accountability, on security issues. It also demonstrates that the barriers to greater disclosure of information, erected in the name of national security, are not immutable barriers—they shift according to the political and security environment, and according to political interests. The implications are that, while this should create

opportunities to challenge secrecy, decisions about disclosure will remain in the hands of those who have their own, as much as national, interests in mind.

Security issues

Two kinds of considerations are usually advanced to justify the need for intelligence-related material to remain secret: the damage that might be caused by revealing sources and the potential damage in disclosing collection methods. Sources include human sources, such as those engaged by Australia's foreign intelligence collection agency, ASIS, as well as information received from allies, such as under the agreement linking Australia's signals intelligence (SIGINT) to that of the United Kingdom, United States, Canada and New Zealand.²

The need to protect sources stems partly from concern that revealing a source could threaten life. The passing of time can minimise this risk. But the ability to engage sources in future could be jeopardised if an agency acquires a reputation for disclosing information about sources. Another consideration is maintaining the confidence of allies—intelligence is usually passed on the proviso that it will not be distributed without permission. Breaching this could result in the flow of intelligence being 'turned off'.

The danger of disclosing collection methods, meanwhile, is that if made public the nature of some information could disclose collection capabilities. This could threaten continued access by provoking targets to employ counter-measures, such as more sophisticated encryption techniques, or switching to other modes of communication. Al Qaida's responsiveness to SIGINT capabilities is illustrative. The group is known to have used increasingly sophisticated encryption techniques in email and internet communications. Some members of the organisation abandoned mobile and satellite phones in favour of slower but safer modes of communication, such as using couriers to convey information. Osama Bin Laden himself is thought to have displayed his knowledge of SIGINT capabilities against his enemies when he gave his mobile phone to an assistant, probably suspecting that it was being monitored by the US. The US did track the phone to its user, only to capture not Osama but his chauffeur.³

None of these considerations justifies policies of automatic or total non-disclosure. There are many ways that information can be shared without compromising sources or methods. Some are already practised in Australia, though not necessarily in the committee environment. Other options for Australian committees can be found in overseas practices.

In a sign that highly sensitive material can be disseminated using appropriate protection, SIGINT is being distributed in an increasingly wide range of circumstances. Highly sensitive SIGINT and human intelligence, declassified to confidential level to allow it to be communicated more easily, has been used by the Australian Customs Service for Australia's border security operations. Australia's response to other transnational security threats including terrorism and drug trafficking has involved greater sharing of national security information amongst different Australian agencies. For example, investigations into drug trafficking in South East Asia involves cooperation between a number of agencies and departments including the Department of Foreign Affairs, the Office of National Assessments, the Australian Federal Police and the Defence Intelligence Organisation.⁴ Private industry is also now among the recipients of certain intelligence material because of its role in providing and protecting critical infrastructure such as electricity grids and telecommunications.⁵

Documents and other material could be similarly declassified for use by committees. Inquiries into foreign affairs and national security matters will not, after all, always require information that could compromise sources. In most cases they probably only need an agency's broad assessment of an issue. In some cases more detail about the veracity of information, whether it be related to sources or the limitations of different collection methods, might be required if a committee is investigating whether there has been an 'intelligence failure' in relation to a specific event. For example, the committee inquiring into Iraq's weapons of mass destruction, which was tasked in part 'to consider the nature, accuracy and independence of the intelligence used by the Australian government', felt hampered by its lack of access to intelligence material. The chair's foreword stated that:

Unlike the Intelligence Services Committee of the British Parliament, which conducted a similar inquiry, we received excerpts only of the assessments made prior to the war in Iraq. The Committee's conclusions, therefore, must be qualified.⁶

However, the committee inquiring into security threats to Australians in South East Asia (in the wake of the Bali bombings) did not feel hampered by lack of access to intelligence material:

Although the Committee did not have access to the classified material that informed the Australian intelligence agencies' assessments at the time, the Committee is in no doubt that there was no specific, actionable intelligence related to the bombings of 12 October 2002. This was the consistent evidence of the intelligence agencies and was the conclusion reached by the

statutorily independent Inspector-General of Intelligence and Security, who *did* have access to all the relevant material.⁷

On this issue the level of secrecy in the Australian committee system is much greater than that of its intelligence-sharing partners. UK and US committees often receive entire intelligence assessments from their agencies which could include assessments containing Australian material. For example, ONA assessments are passed through ONA's liaison officer in the UK to that country's highest assessments body, the Joint Intelligence Committee—in fact the liaison officer sits in on some of its meetings. Joint Intelligence Committee assessments, some of which contain Australian material, are made available to the equivalent of Australia's Joint Committee on ASIO, ASIS and DSD. There do not appear to be any Australian concerns about this arrangement, which suggests that Australia should not be concerned about establishing a similar arrangement.⁸

Australian practice also sets a precedent for disclosure of intelligence to parliamentarians. Ministers receive security briefings on a regular basis, and the opposition does less frequently, without going through the process intelligence officials do of being security cleared—the electoral process is seen to be sufficient guarantee of their probity. There is no reason why committee members should not also be so regarded. One interviewee commented that:

Thousands of people around Canberra ... see SIGINT and HUMINT [human intelligence] every day. There is no reason why a parliamentary committee could not be briefed on such things. We simply have a tradition of not briefing them.

Other people interviewed questioned whether reluctance to give committees more information could be overcome if members had security clearances. Currently, members (and their personal staff) of the Joint Committee on ASIO, ASIS and DSD, the Joint Standing Committee on Foreign Affairs, Defence and Trade and the Senate Foreign Affairs, Defence and Trade Committee do not require security clearances, though the secretariat staff of the ASIO Committee is required to have security clearances by the act establishing the Committee.⁹ According to several people interviewed, the material these committees dealt with in recent inquiries (for example the inquiry into Iraq's alleged weapons of mass destruction) suggests there is a case for considering the issue of clearances for staff. (As this piece is being written, in mid-2005, a review of clearance procedures is being conducted for the ASIO Committee.)

Technically, committee members do not need clearances—committees have the power to call for documents regardless of classification. Governments and intelligence agencies might be reassured if they knew that those receiving the documents had appropriate security briefings and clearances. Though this would not give members any additional power to demand information, it would signal to the agencies and policy departments that security is taken seriously.

Retrospective inquiries, as opposed to those into current or prospective events, can minimise the sensitivities of revealing certain information. For example, the relevant intelligence might not still be current—though as noted above, the passage of time does not always guarantee this. Also, a government might judge that a past event contains limited scope for embarrassment, or damage to national security, and release information it might not have released at the time the event occurred.

More practically, retrospective inquiries are often the only kind that can occur on foreign policy issues because executives make some foreign policy decisions in isolation and hurriedly. Parliament or its committees thus have no opportunity to question the decision, much less intervene with a committee report, as they might with a policy that requires enabling legislation.

Another measure that might enable committees to see and to use more sensitive information is to produce a public report, stripped of material that could compromise national security, as well as an unedited confidential report for government. In Australia, only extra-parliamentary inquiries, such as that conducted by Phillip Flood in 2004 into Australia's intelligence agencies and various Royal Commissions, routinely produce classified and unclassified reports for disclosure to the executive and the public respectively.

The production of both classified and unclassified committee reports is accepted practice within the UK's Intelligence and Security Committee, the equivalent of Australia's Joint Committee on ASIO, ASIS and DSD. The Intelligence and Security Committee provides reports to parliament with any sensitive material removed. Any excluded material is passed to the prime minister, so that action can be taken if necessary.¹⁰ The practice of and rationale for excluding material are explained by the Committee like this:

the Government, with the Committee's agreement, removes all information that would be prejudicial to the continuing discharge of the Agencies' functions before they are published –

replacing it with asterisks. This means that the reader can see where and how much material has been removed.¹¹

~~TOP SECRET~~

5.j. [In the period from September 8 to September 10, 2001 NSA intercepted, but did not translate or disseminate until after September 11, some communications that indicated possible impending terrorist activity].

Discussion: [In early September 2001, NSA intercepted [] communications involving []. The communications discussed events that were to occur in the near term and appeared to be related to terrorism. In the first communication, [] [] asked whether []. [] responded that []. []].

[Page 34]

[Another communication, between [] and an unknown person [], was a discussion of whether [].

[]]. NSA did not disseminate reports regarding the communications until September 12 and 13, 2001].

Two additional communications that indicated imminent terrorist activity were intercepted by NSA on September 10, 2001. The communications contained conversations between unknown individuals located abroad. NSA Director Hayden described the content of those communications in his testimony before the Joint Inquiry:

In the hours just prior to the attacks, NSA did obtain two pieces of information suggesting that individuals with terrorist connections believed something significant would happen on September 11.

These communications were, however, not translated into English and disseminated by NSA until September 12, 2001.

It remains uncertain whether any of the September [] conversations referred directly to the attacks of September 11. Like the intelligence reporting described earlier, these intercepts did not provide any indication of where or what terrorist activities might occur.

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In the US, the Joint House Committee inquiry into the 11 September terrorist attacks also used the technique of leaving blanks in the public document where classified information had been removed. The ‘uncut’ version was provided to the Administration. To illustrate, below is a page from the public report, which is available on the internet.¹²

In an unusual move for an Australian parliamentary committee, the Joint Committee on ASIO, ASIS and DSD report on Iraq’s alleged possession of weapons of mass destruction also identifies deletions, requested by the Minister (usually, committees remove material without revealing that they have done so). The exclusions were presented in the report as follows:

However, the ONA Liaison Officer, who was in Washington from 2000 to 2003, told the Committee that the dispute between the INR and the CIA was very obvious at the time. Although he said he ‘did not pick up everything,’ he said his ‘access was very good.’

*[quotation deleted at the request of the Minister]*¹³

That committee was provided with excerpts of intelligence assessments from agencies including ONA. However, this arrangement operates on an inquiry-by-inquiry basis—committees cannot rely on access to assessments in future inquiries. When assessments are passed on they are first vetted by the prime minister’s department, which means they are vetted as much for their potential political damage as potential damage to national security.

A range of those interviewed commented that even with appropriate arrangements in place, security concerns would remain because individual members have different ideas about what might be in the public interest to know—hence, there will always be a risk of ‘unauthorised disclosures’. Members of the Greens and the Democrats were regarded by several respondents as a risk in this respect.

Labor and the Coalition parties try to militate against this potential risk in different ways. For example, they have worked together to ensure that no members of the Greens or the Democrats sit on parliament’s most sensitive committee, the Joint Committee on ASIO, ASIS and DSD. As noted above, Labor forfeited some of its power by directing the inquiry into Iraq’s alleged weapons of mass destruction to this committee, which the government controls through the chair, rather than to the Labor-chaired Senate Foreign Affairs, Defence and Trade Committee, because at the time the latter included a position reserved for the Democrats.

Political issues

More intractable than concerns about protecting intelligence sources and methods are concerns governments and policy departments hold about the possible political damage caused by disclosure. Governments are often more worried about the political damage that could be caused by disclosure than damage to the national interest. One respondent noted that ‘policy agencies are at least as careful as intelligence agencies’ about what is released.

One of the reasons is that the disclosure of intelligence assessments could have damaging political consequences for a government. This occurred in 1999 and 2000 when assessments were leaked from the Defence Intelligence Organisation (DIO). The assessments, which revealed that the Government knew violence was likely to occur in the wake of East Timor’s independence vote, allowed the Government’s opponents to suggest the Government had sat on its hands despite the warning. National security was not threatened as a result of the leaks, but the Government was embarrassed.¹⁴

Governments themselves do not subscribe to an absolute prohibition on revealing sensitive information—depending on the political stakes. For example, in his February 2003 attempt to persuade the UN Security Council to back a US-led invasion of Iraq, US Secretary of State Colin Powell presented information derived from SIGINT, satellite imagery and human intelligence. Though technically declassified, the presentation revealed to Saddam Hussein that the US had compromised the Republican Guard’s communications systems and that US satellites had identified and been focused on suspected chemical weapons facilities.¹⁵

In Australia, during a public address in 2001, Prime Minister John Howard quoted from a secret report from the Office of National Assessments (ONA) to support his claims that asylum seekers had thrown their children into the sea.¹⁶ This, in turn, was intended to support the tough border protection policy he was campaigning on for the upcoming federal election. (As it turned out the report was not based on secret intelligence but on media reports of ministerial statements, though Mr Howard stated he did not know this at the time.¹⁷) Nearly a year and a half later at another public address on the looming war in Iraq, Mr Howard, by contrast, stated that he would not release information that was classified:

Journalist: Will you release the ONA reports on Iraq, just as you released the ONA report on the children overboard, here in the National Press Club address 16 months ago?

Prime Minister: Well that particular ONA report, as you know Fran, in relation that I mentioned 16 months ago, merely repeated press reports. I'm not going to release ONA assessments which, almost of all of which remain classified.¹⁸

Journalist Brian Toohey pointed out that:

What would have been an embarrassing admission during the election has since been transformed into a justification of why ONA's sources must be kept secret on this occasion. Such is politics. And the misuses to which intelligence can be put during an election, or a war.¹⁹

This episode shows that the need to withhold any access to national security information is not absolute. Fear of political embarrassment or worse will ensure that governments do what they can to prevent the disclosure of potentially damaging information. It is in no government's interest, then, to facilitate greater provision of information to committees. Nor is it in an opposition's interests; domestic political factors also drive their approaches to national security matters. Anticipating their period in government, oppositions support the principle of executive privilege in foreign policy and the secrecy this entails.

Even if committees were given greater access to sensitive foreign policy and national security information, this may not lead to more robust scrutiny. As one interviewee noted, 'there is no doubt that people, once taken inside the tent, often recognise their responsibilities.' Greater involvement in national security could see committee scrutiny of foreign policy and security issues become less rather than more penetrating.

Conclusions

This study explored the barriers that prevent parliamentary committees from exercising the robust scrutiny over foreign and national security policy that these areas of government deserve. Foreshadowing the theme of chapters two and three, the first chapter demonstrated that the exalted status of foreign policy has contributed to its isolation from the standard (if unsatisfactory) accountability processes of parliament.

Despite committees of the parliament having unique powers to interrogate the workings of the foreign policy apparatus, in practice they are unable or unwilling to use those powers to full effect. Chapter two examined why, and showed that some barriers exist that frustrate even the most willing committee, such as obfuscation by public servants, refusals of serving and former ministers to appear before inquiries and the uncertain status attaching to ministerial staff. On matters concerning especially sensitive foreign policy, however, there are additional obstacles, in particular the power of national security to stifle debate. It was argued that committees become protective of their limited but nevertheless privileged access to national security secrets, and so limit the extent and nature of their probing.

On the face of it, exposing some of the realities of the worlds of intelligence and national security might go some way to minimising the self-censorship exercised in these areas: with the realisation that more information can be safely known and disseminated might come a greater willingness to probe sensitive security matters. However, this study showed that greater exposure of committee members to these fields would not necessarily overcome the self-censorship that stymies inquiries such as those discussed above. That is because political as much as security concerns are behind this self-censorship. Despite claims that national security should remain ‘above politics,’ governments, it would seem, are prepared to make public sensitive information when it suits them, and hide it when it could lead to embarrassment.

Oppositions are often complicit in this behaviour because, as governments-in-waiting, they expect they same latitude when in power. Though this bipartisanship can be a strength of the committee system, in that the two major parties work constructively to examine public policy processes and outcomes, bipartisanship is not always as constructive on foreign and national security policy matters.

The inquiry into Iraq’s alleged possession of weapons of mass destruction, discussed at the beginning of this study, is an illustration. It was cited as the main reason that many

of those interviewed for this paper believe that Australia needs a non-parliamentary inquiry, such as a judicial inquiry, into the use of intelligence by governments. Such an inquiry could investigate issues including government presentation to the public of intelligence material, access to intelligence material by parliamentary committees, and the nature of the relationship between intelligence agencies and policy departments.

This would be particularly useful at a time when governments are increasingly willing to divulge selected intelligence material to justify their actions. An important reason for this is that intelligence is becoming increasingly integrated with a range of foreign and domestic government functions, including offshore counter-terrorism activities, border protection activities undertaken by the Customs Service and Immigration Department and the maintenance and protection of critical infrastructure such as transport, communications and finance. This has seen the birth or adaptation of a range of mechanisms to ensure that appropriate intelligence is fed into the operational and policy-making processes at the right times. A distinctive feature of these mechanisms is their inclusiveness: law enforcement, intelligence and policy officers now routinely participate in working groups and inter-departmental committees, for example, when traditionally they often worked largely in isolation from one another.¹

These mechanisms appear to reveal a new public policy alignment. With security at its centre, it has brought policy, intelligence and operational agencies together in new ways across diverse areas of government. At a minimum, a judicial inquiry might usefully map this new policy arrangement. It could also have ongoing impact, by arming those with the responsibility of keeping governments to account—including parliamentary committees, the press and other media—with the knowledge needed to critically appraise claims to secrecy made by governments and oppositions alike.

However, such an inquiry would not be in the interests of either of the two major parties, and they would most likely unite to defeat such a proposal. As demonstrated in this study, their willingness to work together on foreign policy is highlighted by the near absence of minor parties and independents on relevant committees, which are controlled by senior Labor and Liberal gatekeepers.² Their complicity shrouds the self-important sphere of foreign policy from what are regarded as the irresponsible impulses of those who dare to question the fundamentals of current Australian foreign and security policy—especially the character of the US alliance, how to ensure border security and the choice and timing of participation in foreign wars. Self-censorship and bipartisanship combine to ensure that the outcomes of inquiries into foreign and security matters are, for the most part, controlled and unthreatening to these essential

foreign policy settings. Consensus on these, arising from a belief in the sanctity of national security and intelligence, is therefore likely to remain the main obstacle to greater examination and transparency of foreign policy.

Endnotes

Introduction

1. B.L. Hocking, 'Parliament, parliamentarians and foreign affairs', *Australian Outlook*, vol. 30, no. 2, 1976, pp. 280–303; J. Knight and W.J. Hudson, *Parliament and Foreign Policy*, Department of International Relations, ANU, Canberra, 1983; M. Indyk, *Influence Without Power: The Role of the Backbench in Australian Foreign Policy 1976–77*, Australian Political Studies/Parliamentary Fellow Monograph, Parliamentary Library, Canberra, 1979; J.D.B. Miller, 'The role of the Australian parliament in foreign policy', *The Parliamentarian*, vol. 50, no. 1, 1969, pp. 1–6; A. Gyngell and M. Wesley, *Making Australian Foreign Policy*, Cambridge University Press, Cambridge, 2003; Senate Foreign Affairs, Defence and Trade Reference Committee, *The (Not Quite) White Paper: Australia's Foreign Affairs and Trade Policy*, Advancing the National Interest, December 2003.
2. P. Flood, *Report of the Inquiry into Australian Intelligence Agencies*, Commonwealth of Australia, Canberra, 2004, p. 14.
3. *ibid.*, p. 7.
4. A point also made by Hugh White, former director of the Australian Strategic Policy Institute. See H. White, 'Let's not confuse intelligence failures with policy failures,' *The Age*, 27 July 2004, p. 11.
5. For a history of Australian parliamentary committees see M. Aldons, 'The growth of Parliamentary Committees of the House of Representatives and Joint Committees,' *Legislative Studies*, vol. 6, no.1, 1991, pp. 6–8; J. Halligan, J. Power, R. Miller, 'The three committee systems of the Australian parliament: a developmental overview?', *Australasian Parliamentary Review*, vol. 16, no. 2, 2001, pp. 160–66.
6. For discussion of Australian foreign policy during and towards the end of the Cold War see J. Mackie, *Australia in the New World Order: Foreign Policy in the 1970s*, Nelson in collaboration with the Australian Institute of International Affairs, 1970; M. Wesley and T. Warren, 'Wild colonial ploys? currents of thought in Australian foreign policy,' *Australian Journal of Political Science*, vol. 35, no. 1, 2000, pp. 9–26; T.B. Millar, 'Emerging bipartisanship in Australian foreign policy,' *Asia-Pacific Community*, Winter 1985, pp. 1–15; T. Matthews and J. Ravenhill, 'Bipartisanship in the Australian foreign policy elite,' *Australian Outlook*, vol. 42, no. 1, 1988, pp. 9–20.

Chapter One

1. J. Knight and W.J. Hudson, *op. cit.* p. 27.

2. J. Locke, *Of Civil Government*, Book II, Dent, London, 1960, §143–145.
3. *ibid.*, §160.
4. C. Dyer, ‘Mystery lifted on Queen’s powers’, *Guardian Unlimited*, 21 October 2003, <<http://politics.guardian.co.uk/openup/story/0,11872,1067480,00.html>> Viewed 10/1/05. The release of the paper was prompted by calls from a UK parliamentary committee, which argued for the exercise of prerogative powers to have greater parliamentary scrutiny. See House of Commons, Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, 2004. <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/42202.htm>> Viewed 10/1/05.
5. See for example *Barton v Commonwealth* (1974) 131 CLR 477, 498; *Johnson v Kent* (1975) 132 CLR 164, 169. G. Winterton, ‘The limits and use of executive power by government’, *Federal Law Review*, vol. 13, 2003, p. 425.
6. *Commonwealth Constitution*, s. 61. Section 51 of the Constitution gives the Commonwealth Government, rather than the executive, power to make laws with respect to foreign affairs, and so is not related to prerogative or executive power.
7. See the discussions in G. Winterton, ‘The limits and use of executive power by government’, *Federal Law Review*, vol. 13, 2003, pp. 423–433 and B. Selway, ‘All at sea—constitutional assumptions and ‘the executive power of the Commonwealth’, *Federal Law Review*, vol. 31, 2003, pp. 495–506.
8. K.C. Wheare, *Legislatures*, Oxford University Press, London, 1963, p. 181.
9. De Tocqueville, cited in M. Indyk, *op. cit.*, p. 4.
10. G. Winterton, *op. cit.*, pp. 438–443.
11. H. Evans ed., *Odgers’ Australian Senate Practice*, (11th ed.), Department of the Senate, Canberra, 2004, p. 458.
12. G. Brown, F. Frost and S. Sherlock, *The Australian-Indonesian Security Agreement: Issues and Implications*, Research Paper, no. 25, 1996, Department of the Parliamentary Library, Canberra. <<http://www.aph.gov.au/library/pubs/RP/1995-96/96rp25.htm>> Viewed 29/3/05. The announcement, and the Government’s admission to months of secret negotiations, prompted the Opposition to announce that, when in power, it would establish a joint standing committee to scrutinise treaties before they are signed or ratified. See A. Downer, MP and D. Williams, MP, Press Release, 2 May 1996.
13. P. Keating, MP, Press Release, 18 December 1995.
14. There is long-running debate in international relations circles over whether this assumption is still, if it was ever, true for all states all of the time. It may not be, but the foreign ministries of many states, including Australia, tend to view the world as if it were true. See the discussion in A. Gyngell and M. Wesley on their survey of Australian

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15. H. Evans op. cit., p. 464.
 16. Joint Committee on the Parliamentary Committee System, *A New Parliamentary Committee System*, 1976, p. 87.
 17. J. Camilleri, 'A leap into the past—in the name of the "national interest"', *Australian Journal of International Affairs*, vol. 57, no. 3, 2003, p. 434. For a more detailed theoretical exploration of the national interest, see F. Kratchowil, 'On the notion of "interest" in international relations,' *International Organization*, vol. 36, no. 1, 1982, pp. 1–30.
 18. The parliamentary inquiry was conducted by the Joint Standing Committee on ASIO, ASIS and DSD. Its report is *Intelligence on Iraq's Weapons of Mass Destruction* (2003). The report of the Flood inquiry is *Report of the Inquiry into Australian Intelligence Agencies* (2004).
 19. H. White, 'Let's not confuse intelligence failures with policy failures,' *The Age*, 27 July 2004, p. 11.
 20. Flood's terms of reference were: the effectiveness of the intelligence community's current oversight and accountability mechanisms as they relate to such matters as the setting of priorities, the assigning to the priorities of appropriate resources, and the delivery of high quality and independent intelligence advice to the government; the suitability of the current division of labour among the intelligence agencies and communication between them; the maintenance of contestability in the provision to government of intelligence assessments; and the adequacy of current resourcing of intelligence agencies and in particular ONA.
 21. P. Flood, *Report of the Inquiry into Australian Intelligence Agencies*, 2004, p. 8.
 22. *ibid.*, p. 7.
 23. A. Metcalfe, 'Co-ordinating a whole-of-government approach to national security,' *Australian National Security Review*, June 2004; P. Jennings, 'The policy shift the media missed,' *Policy*, vol. 20, no. 2, 2004.
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 26. J. Howard MP, Press Release, 28 August 2004.
 27. J. Howard MP, Press Release, 19 September 2004.
 28. Department of Foreign Affairs and Trade, *Advancing the National Interest*, Chapter 1. <http://www.dfat.gov.au/ani/chapter_1.html> Viewed 29/3//05.

29. Department of Foreign Affairs and Trade, *In the National Interest: Australia's Foreign and Trade Policy White Paper*, 1997. <<http://www.dfat.gov.au/ini/whitepaper.pdf>> Viewed 10/7/05.
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31. D. Russell, 'A PM with power unparalleled since Federation', *New Matilda.com*, 3 November 2004. <<http://www.newmatilda.com/home/articledetail.asp?ArticleID=308>> Viewed 13/1/05.
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33. G. Sheridan, 'We have friends in high places', *Weekend Australian*, 5 February, 2005, p. 20.
34. A. Gyngell and M. Wesley, op. cit., p. 97.
35. *ibid.*, p. 98.
36. See the Division's website at <http://www.pmc.gov.au/about_pmc/divisions/national-security/index.cfm> Viewed 13/1/05. See also T. Thomas, 'National security apparatus consolidates within PM&C', *Australian Defence*, 31 July 2003, p. 7.
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38. A. Gyngell, 'Death of dualism?', *Griffith Review*, p. 84. See also P. Jennings, *ibid.*, pp. 35–38. See also M. Indyk, op. cit., pp. 27–30 and J. Knight and W.J. Hudson, op. cit., p. 56.
39. R. Peake, 'Terror strike on Australian mainland "inevitable"', *The Canberra Times*, 15 March 2004, p. 1.
40. B. Nicholson and T. Parkinson, 'Police chief "clarifies" his terror fears', *The Age*, 17 March 2004, p. 1; D. McLennan, 'PM dismisses Iraq link,' *The Canberra Times*, 16 March 2004, p. 1.
41. C. Banham and F. Petersen, 'Keelty retreats on terrorism remarks,' *The Sydney Morning Herald*, 17 March 2004, p. 6.
42. See C. Ungerer, 'Issues in Australian foreign policy', *Australian Journal of Politics and History*, vol. 50, no. 4, 2004, pp. 573–587; M. Wesley, 'Issues in Australian foreign policy,' *Australian Journal of Politics and History*, vol. 50, no. 2, 2004, pp. 229–246.
43. See the Parties' respective policies: Labor <http://www.alp.org.au/platform/chapter_15.php>; Liberal <http://www.dfat.gov.au/ani/chapter_1.html> Viewed 10/7/05.
44. K. Rudd MP, Press release, 3 February 2003; J. Howard MP, Press release, 13 March 2003.
45. M. Secombe, 'Rumble on the hill,' *Sydney Morning Herald*, 14 August 2004, p. 28.
46. See Chapter 1, note 2.
47. Senator R. Ray, Senate, *Debates*, 20 March 2003, p. 9837.

48. A. Gyngell and M. Wesley, *op. cit.*, p. 26.
49. A. Wolfers, “‘National security’ as an ambiguous symbol”, *Political Science Quarterly*, vol. 67, no. 4, 1952, p. 481.
50. The term ‘national security’ performs a similar function—its content is elastic yet it ‘is well enough established in the political discourse of international relations to designate an objective of policy distinguishable from others.’ (A. Wolfers, *op. cit.*, p. 483.) But for an explanation of why these terms are nevertheless useful see F. Kratchowil, *op. cit.*, p. 2. He wrote: ‘The notion of the national interest is part of our political reality and is integral to our discourse on public affairs. We cannot eliminate with impunity the part of our political reality for which the term stands.’
51. A recent exception is the Senate Foreign Affairs, Defence and Trade Committee’s report, *The (Not Quite) White Paper*. The report is the outcome of its inquiry into *Advancing the National Interest*, the Government’s foreign affairs and trade policy. The Committee questioned the Government’s use of the term ‘the national interest’, and argued that the White Paper ‘could have provided a more thorough-going explication of the “national interest”, including reasons to justify the inclusion of certain matters and the omission of others in the way the national interest was framed’. Senate Foreign Affairs, Defence and Trade References Committee, *op. cit.*, p.11.
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53. J.D.B. Miller, *op. cit.*, p. 1.
54. M. Aldons, ‘Responsible, representative and accountable government,’ *Australian Journal of Public Administration*, vol. 60, no. 1, 2001, p. 35.
55. H. Parkes, Official Report of the National Australasian Convention, Debates, Sydney, 2 March to 9 April, 1891, p. 23.
56. M. Aldons, *op. cit.* p. 35.
57. J. Chalmers and G. Davis, *Power: Relations Between the Parliament and the Executive*, Research Paper, no. 14, 2000–01 Department of the Parliamentary Library, Canberra, pp. 7–8.
58. G.S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Carlton, Victoria, 1989, p. 23. On responsible party government see also M. Aldons, *op. cit.*, p. 36.
59. E. Thompson, *Australian Parliamentary Democracy After a Century: What Gains, What Losses?*, Research Paper, no. 23, 1999–2000, Department of the Parliamentary Library, Canberra, p. 21.
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- and former parliamentarians. See also B.L. Hocking, *op. cit.*, p. 283; J.D.B. Miller, *op. cit.* p. 3.
61. This table was compiled by the Parliamentary Library, Canberra. See also B.L. Hocking, *op. cit.* p. 283; J.D.B. Miller, *ibid.*, p. 3.
 62. A. Gyngell and M. Wesley, *op. cit.*, pp. 173–4; B.L. Hocking, *op. cit.*, p. 288; M. Indyk, *op. cit.*, p. 1.
 63. A. Gyngell and M. Wesley, *ibid.*, pp. 173–4; B.L. Hocking, *ibid.*, pp. 288–291; M. Indyk, *ibid.*, p. 39.
 64. B.L. Hocking, *ibid.*, p. 290.
 65. For example see R. Peake, ‘Government ignores, then gags debate on terrorist threat’, *The Canberra Times*, 20 March 2003, p. 3; J. Uhr, *Deliberative Democracy in Australia*, Cambridge University Press, Cambridge, 1998, p. 134; K. Martin, ‘Parliament, information and intelligence’. In J. Nethercote (ed.), *Parliament and Bureaucracy*, Hale and Iremonger, Sydney, 1982, pp. 232–233.
 66. A. Gyngell and M. Wesley, *op. cit.*, pp. 191–3.
 67. B.L. Hocking, *op. cit.*, p. 284.
 68. J.D.B. Miller, *op. cit.*, p. 3.
 69. C. Clarke, ‘Parliament, defence and foreign policy’. In J. Nethercote (ed.), *op. cit.*, pp. 293–301; J. Uhr, ‘*Terra infirma?* Parliament’s uncertain role in the “war on terror”’, *UNSW Law Journal*, vol. 27, no. 2, 2004, pp. 339–353.
 70. B.L. Hocking, *op. cit.*, p. 303.
 71. A. Gyngell and M. Wesley, *op. cit.*, p. 188.
 72. J. Uhr, 2004, *op. cit.*, p. 341.
 73. *ibid.*, p. 349.

Chapter Two

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2. *ibid.*, p. viii.
3. S. Bartos, ‘Accountability in the public sector,’ *Canberra Bulletin of Public Administration*, no. 111, 2004, p. 27.
4. H. Evans, ‘Accountability versus government control: the effect of proportional representation’. Department of the Senate, Canberra, *Papers on Parliament*, no. 34, 1999, p. 4.
5. M. Weber, *From Max Weber: Essays in Sociology*, H.H. Gerth and C.W. Mills (eds), Oxford University Press, New York, 1975, pp. 233–4.

6. Committees are composed of members from the various parties or independents, and chairs are distributed approximately in proportion to their numerical strength in each house. For a history of the committee system see H. Evans, 2004, *op. cit.*, pp. 346–8; and M. Aldons, ‘The growth of parliamentary committees of the House and Representatives and Joint Committees’, *Legislative Studies*, vol. 6, no. 1, 1991, pp. 6–8.
7. H. Evans, ‘The parliamentary power of inquiry: any limitations?’, *Australasian Parliamentary Review*, vol. 17, no. 2, 2002, p. 139.
8. H. Evans (ed.), *op. cit.*, p. 57.
9. G. Lindell, ‘Parliamentary inquiries and government witnesses’, *Melbourne University Law Review*, vol. 20, no. 2, 1995, p. 393.
10. Neither limitation has been adjudicated. H. Evans (ed.), *op. cit.*, p. 377. See also E. Campbell, *Parliamentary Privileges*, Research Paper 1, 2000–01, Parliamentary Library, Canberra.
11. Department of Prime Minister and Cabinet, *Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, 1989. <http://www.pmc.gov.au/guidelines/docs/official_witnesses.pdf> Viewed 1/2/05.
12. A number of commentators have pointed to the distinction between accountability and responsibility. Australian political writer Jack Waterford explains it neatly in this way: ‘Ministerial accountability is the obligation of a minister to give Parliament a truthful account of matters that fall within his or her executive responsibilities... Ministerial responsibility [refers to] the extent to which ministers must accept the blame for mistakes which occur in that administration.’ The accountability obligation is to Parliament while responsibility obligation is to the Prime Minister. J. Waterford, ‘The minister and his private office,’ Department of the Senate, Canberra, *Papers on Parliament*, no. 28, 1996, p. 84.
13. Senate, *Standing Orders and Other Orders of the Senate*, Privilege Resolution 1(16). <http://www.aph.gov.au/Senate/pubs/standing_orders/standingorders.pdf> Viewed 1/2/05.
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29. R. Gregory and M. Painter, op. cit., p. 66.
30. J. Nethercote, 'Exposed: the system at work', *The Public Sector Informant*, March 2002, p. 14.
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33. Department of the Senate, 2002, op. cit, Chair's Foreword, p. xii. <http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/report/a05.pdf> Viewed 9/2/05.
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37. P. Weller, *Don't Tell the Prime Minister*, Scribe, Melbourne, 2002, p. 70.
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59. This point was made by a number of interviewees, but they requested it be made without attribution.
60. K. C. Wheare, op. cit., p. 142.
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2. J. Richelson and D. Ball, *The Ties That Bind*, (2nd ed.), Unwin Hyman, Sydney, 1990, pp. 141–2.
3. Information from an interviewee who did not wish to be named.
4. Information from various interviewees who did not wish to be identified.
5. According to the Government's national security website: 'Critical infrastructure is defined as those physical facilities, supply chains, information technologies and

communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic well-being of the nation, or affect Australia's ability to conduct national defence and ensure national security. It includes telecommunications, transport and distribution, energy and utilities, and banking and finance.' <http://www.nationalsecurity.gov.au/agd/www/nationalsecurityhome.nsf/Page/Business_Information> Viewed 25/2/05. For example, in April 2003 the Government established the Trusted Information Sharing Network to enable 'the owners and operators of critical infrastructure [to] work together to share information on security issues which affect critical infrastructure.' See the website: <http://www.tisn.gov.au/agd/www/TISNhome.nsf/Page/Business-Govt_partnership> Viewed 25/2/05.

6. Joint Committee on ASIO, ASIS and DSD, op. cit., p. vii.
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- 17 T. Allard and A. Clennell, 'Howard and Reith departments knew poll campaign slur on asylum seekers was false,' *Sydney Morning Herald*, 14 February 2002.
- 18 J. Howard, *Address to the National Press Club*, 14 March 2003. <<http://www.pm.gov.au/news/speeches/speech74.html>> Viewed 30/3/05.
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Conclusions

1. For an account of Australia's new security co-ordination arrangements see A. Metcalfe, 'Advancing the coordination of national security in Australia,' address to the 2005 National Security Conference, 21 February 2005. <http://www.dpmc.gov.au/speeches/metcalfe/coordination_national_security_2005-02-21.cfm> Viewed 5/4/05.
2. Permanent committees that deal with these matters are: (Senate) Foreign Affairs, Defence and Trade Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Joint Standing Committee on ASIO, ASIS and DSD. Committees can also be established to deal with specific issues, but particularly sensitive matters will in most cases go to the permanent committees. Membership of these committees depends on each party's representation in parliament. See the committee website: <<http://www.aph.gov.au/committee/index.htm>>.

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