

**SENATE ESTIMATES HEARINGS
AND THE GOVERNMENT MAJORITY IN THE SENATE**

Address

National Press Club

11 April 2006

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Senate estimates hearings were initiated in 1970. They were intended to be a more effective means for senators to put questions to ministers and public servants about government activities than the earlier method of asking questions in the committee of the whole stage on the appropriation bills and having Senate ministers repeat answers which were supplied to them by officers in the advisors' box. The hearings, originally conducted by dedicated committees called estimates committees, and since 1994 by the standing legislation committees, were initiated and agreed to by the Senate in the context of a complex numbers situation in the chamber. Briefly, the then government could not command the votes of its senators, and the government did not have a party majority in any event. The change would not have come about if the government had had control of the Senate, in the sense of being able to command a majority, as can the current government.

This is a reminder that we are in a completely new situation. It can accurately be said that no previous government controlled the Senate in that sense. Even the Fraser government, with a majority of six, did not control the chamber, because there were at any time up to twelve government senators willing to vote against their government, particularly on accountability issues.

From the start the estimates hearings were an opportunity to question ministers and officers about any activity of government departments and agencies. They were a general inquisition into the operations of government. It is worthwhile emphasising this because successive governments, after they have been in office for some time, have made the claim that when they were in opposition estimates hearings were confined to the estimates, questions about how much money would be spent on particular purposes, that since they gained office the hearings have been debauched from this pure purpose, and that the committees should be brought back to their original function. This is not true; the hearings have always ranged over any and all government activities.

In 1999 there appeared to be a concerted effort by ministers to restore the estimates hearings to their claimed original purpose by declining to answer questions which were not about how much money was to be spent on particular functions. This led to a dispute which found its way into the Senate, to the Procedure Committee and back to the Senate again. The Senate

adopted the report of the Procedure Committee, to the effect that all questions going to the operations and financial positions of government departments and agencies are relevant questions for estimates hearings. As the Procedure Committee made clear, this only reasserted what had always been the practice. In more recent times, when ministers and chairs of committees have indicated impatience with lines of questioning, they have been reminded of the 1999 resolution. In some cases they have been invited to move a motion in the Senate for the repeal of the 1999 resolution if they consider that the practice should be changed. So far this invitation has not been taken up. It would lead to an interesting debate.

The 1999 incident also demonstrates an important aspect of the change brought about by the current situation. If a Senate committee encounters resistance to its inquiries, it can only report the matter to the Senate and it is then for the Senate to provide a remedy. In the past, where ministers have resisted inquiries in committees, the majority of the Senate has undertaken various steps to pursue the inquiries, including directing committees to meet again, directing particular witnesses to appear, instructing committees to conduct wider inquiries, ordering ministers to produce particular information and extending the length of question time in the chamber. These measures have the effect of raising the level of any dispute, and have generally been successful. In effect, if a government wished to be uncooperative it had to get into a major fight in the chamber with the potential to disrupt the legislative program. This ability of the Senate to impose a remedy has effectively been removed by the current numbers situation.

Of course, sometimes government has legitimate reasons for withholding some information. Legitimate reasons, on known public interest grounds, properly raised and articulated are almost certain of acceptance.

The value of estimates hearings in improving accountability and probity of government has long been widely recognised. The hearings allow apparent problems in government operations to be explored and exposed, and give rise to a large amount of information which would not otherwise be disclosed. They have come to be recognised as a major parliamentary institution of accountability.

It is often said that estimates hearings are largely devoted to party politics, with non-government senators attempting to put blame on ministers or particular officers and to win political points. This should not be a matter for reproach, and nor does it invalidate the hearings as an accountability process. Free states work through party politics. The ultimate safeguard against the misuse of power by a government is the ability of its opponents and rivals to find out about, and draw attention to, its mistakes and misdeeds. Accountability is not a refined process which operates on an elevated plane, above sordid politics.

Accountability operates down in the swamp of politics, amongst the crocodiles and mosquitoes. The political wetlands sustain our cultural life and biodiversity; without them the desert of despotism assumes the landscape.

This is not to say that questioning in estimates hearings is always appropriately directed and well conducted. That would be too much to expect of a political process. More difficulties are caused, however, by the way in which questions are answered than by poor questioning.

Public servants must, as part of their essential skills, learn to operate in this environment. Some operate in it very well, while others have difficulty. Entering that public, political environment is an opportunity for them to demonstrate their professionalism and to show how effectively they carry out their functions. In particular, they should be able to show that they have performed the role appropriate to public servants, of advising ministers and carrying out both ministerial and departmental decisions with legality and propriety. Difficulties arise when public servants are seen to be doing whatever ministers want and then helping to conceal illegalities or improprieties.

The effect of the government control of the Senate was well demonstrated by the treatment in the February estimates hearings of the AWB affair. The hearings began with a declaration by the government that it had instructed all officers not to answer any questions about the matter. The only reason given was that it would be undesirable to have Senate committees looking at the affair while the Cole commission of inquiry was conducting its examination. It was explicitly stated that this was not a public interest immunity claim, that is, a claim that answering questions would be harmful to the public interest in some specific way. It was simply a refusal to answer. This was contrary to past Senate resolutions, which declared that ministerial claims to be excused from answering questions in Senate inquiries should be based on particular public interest grounds, and the claims would be considered and determined by the Senate. Had the government's declaration been made before 1 July 2005 it is fairly certain that some action in the Senate would have followed. The government was able to make its declaration secure in the knowledge that the majority of the Senate would not take any remedial action.

The government could also be secure in the knowledge that the majority of the Senate would not initiate a separate Senate inquiry into the matter. Senate committees, with some exceptions not relevant here, can inquire only into matters referred to them by a resolution by the Senate. Several motions in the Senate for inquiries by committees have been rejected by the government's majority. It is clear that no inquiries into matters which might cause political difficulty for government will be allowed. Because there will be no special Senate

inquiries, the estimates hearings are the only avenue for pursuing such matters, and the estimates hearings can be frustrated simply by this kind of refusal to answer questions.

It might be thought that this episode did not disclose an accountability gap, because the Cole commission would be pursuing its inquiry. The most significant point about the Cole commission, however, is that it came about because of pressure from powerful bodies overseas, ironically starting with members of another legislature, the US Congress, and flowing through the United Nations and its inquiries. Without that overseas pressure, a great deal of information about the matter would have never been disclosed, if the whole affair had become known at all. The accountability gap will be of greater concern when such an external element is not present, the government is not forced to conduct its own inquiry, and the last remaining parliamentary avenue of inquiries, the estimates hearings, are frustrated.

The AWB matter might be a model for further refusals to provide particular information in the estimates hearings, with no possibility of any remedy. During the February estimates hearings, there was some discussion about whether the government's direction was unprecedented. It was unprecedented in the sense that an inquiry by a government-appointed commission had not previously been the basis for a general direction to officers not to provide information. There had been previous occasions of particular refusals to answer questions on various grounds, and of reluctance to answer questions because of other inquiries, but no general direction on that ground. It was a significant extension of past claims.

During the estimates hearings many questions are taken on notice by ministers or officers or placed on notice by senators. The committees are required by the Senate's procedures to set deadlines for answering questions on notice. To encourage ministers and departments not to ignore the deadlines, the Senate has a procedure known as the thirty-day rule. If answers are thirty days or more overdue, any senator can ask for an explanation in the chamber and initiate a debate. This potentially imposes a penalty of loss of legislating time. The procedure provides no remedy against flat refusals to answer questions. The Senate now cannot impose any more effective remedy. The procedure is therefore not a significant disincentive for refusals to answer.

It has been suggested that more questions are now taken on notice and that fewer answers are provided, and more slowly provided, because ministers know that no more effective remedy can be taken in the chamber. It is not yet clear whether this is the case; statistics are being collected and regularly circulated, which may reveal in the future whether there is a growing lack of cooperation in this area.

The inability of the Senate to pursue remedies for ministerial refusals to provide information clearly poses a danger to accountability of government. It also gives rise to a danger for public servants. Apart from potentially depriving them of the opportunity to demonstrate their professionalism and capacity in handling different lines of questioning in estimates hearings, the current situation removes a safeguard for public servants. Over many years reference has been made to the “estimates test”: if a person responsible for some government activity would not feel comfortable in defending that activity in the estimates hearings, then there is probably something wrong with the activity. Officers can use the test to check for themselves the operations in which they are engaged, but may also use it to deflect improper or inappropriate demands made upon them by the political wings of government, ministers and their ministerial staff. The political wing could be told that, while officers would provide appropriate assistance, they would also be obliged to explain their role at the next round of estimates hearings, and that ministers would have to take responsibility for explaining any politically-based decisions and actions of dubious propriety. The “estimates test” is now seriously weakened, because government may feel that it does not need to worry about the Senate, and public servants may be told not to worry about the Senate either, and to get on and carry out their instructions.

This situation is not in the long-term, best interests of government itself, apart from public accountability. It means that minor illegalities and improprieties are more likely to multiply and end in a major wreck. In the past, some ministers have recognised the value of estimates hearings and other accountability mechanisms as a means whereby they may learn more about the multifarious activities of government and ensure that problems and mistakes came to light before they develop into something much worse. It is to be hoped that ministers will not forget that lesson in the current weakened state of the parliamentary forum.

Harry Evans