TEN YEARS OF SCRUTINY

a seminar
to mark the tenth anniversary
of the
Senate Standing Committee
for the
Scrutiny of Bills

PARLIAMENT HOUSE
CANBERRA

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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PARLIAMENT HOUSE,
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Monday, 25 November 1991

The seminar commenced at 10.30 a.m.

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

INTRODUCTION

The Senate Standing Committee was first established, by resolution of the Senate, on 19 November 1981.

On 25 November 1991, the Committee conducted a one-day seminar to mark the tenth anniversary of its establishment.

The seminar addressed three main aspects of the Committee's work; operation of the Committee in its first ten years; the Committee's terms of reference; and the future of the Committee.

The Seminar was addressed by a range of distinguished speakers. Similarly, it was attended by an impressive cross-section of persons interested in the work of the Committee.

This is an edited transcript of the proceedings of the seminar.

OPENING

The President (Senator the Hon. Kerry Sibraa) - Honourable senators, distinguished guests, ladies and gentlemen, I am very pleased to welcome you to this seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, the first such Committee to be established in the Commonwealth. I am delighted that so many colleagues from other parliaments within the Commonwealth of Australia have been able to join us today for the seminar which, I hope, will help to convince you of the value of a scrutiny of bills committee. In addition, I extend a particularly warm welcome to Lord Thurlow, a member of the House of Lords Select Committee which has been established to examine committee work of that House, including proposals for new committees. Lord Thurlow has come from the United Kingdom, accompanied by the Clerk to the Committee, Mr William Sleath, to see at first-hand how the Senate's Scrutiny of Bills Committee operates.

I am pleased to note that the Lords Committee's interest has been stimulated by contributions made by Australian delegates to the British Commonwealth Conference on Delegated Legislation, hosted by the British Joint Committee on Statutory Instruments, held just two years ago. The worth of such contacts is reinforced by your presence, Lord Thurlow. I have recently been involved with one of your colleagues, Lord Tordoff, on a very important task - I suppose you could call it the Commonwealth scrutiny of elections committee - when we were together in Zambia, overseeing the election campaign. I know that he is a member of your Committee and he made an outstanding contribution to our task there.

As you will all be aware, the Senate Standing Committee for the Scrutiny of Bills was established on 19 November 1981. It is fair to say that, as with all bodies of this nature, its establishment was not without controversy. Indeed, it had to prove itself for an experimental period before its permanent appointment was assured. I shall leave the description of those early days to some of the people who were there and who will speak to you in the course of today's proceedings.

I must, however, take this opportunity to record the debt of gratitude which the Scrutiny of Bills Committee owes to its first chairman, the late Senator Alan Missen. His role in the establishment of the Committee was pivotal. He was not, however, alone in his endeavours, and I acknowledge on behalf of the Senate - and indeed the Parliament and the people - the debt owed to a number of people, both known and unknown, whose work has ensured that the Scrutiny of Bills Committee is the vibrant force that we celebrate here today.

This tenth anniversary provides a great opportunity both to reflect on the Committee's first 10 years and to contemplate what might happen in the next 10 years. The fact that so many of you here today are from other parliaments and have travelled great distances so that you may evaluate the scrutiny of bills process, offers hope that very soon the Committee will no longer be the only one of its kind.

It is now my great pleasure to introduce to you Professor Dennis Pearce, who will give the opening address. Professor Pearce is currently the Dean of the Faculty of Law at the Australian National University and is an acknowledged expert in the field of scrutiny of primary and delegated legislation. Immediately before resuming his professorial role, Professor Pearce was for several years the Commonwealth Ombudsman. However, he appears today principally in his capacity as the first legal adviser to the Scrutiny of Bills Committee. Those who know the workload involved have long acknowledged that without his commitment, insight and speedy advice, the experimental Committee might never have survived those early times.

OPENING ADDRESS

Professor Pearce - Thank you, Mr President. Ladies and gentlemen and very distinguished visitors to this gathering. Who would have thought that 10 years ago we would be assembled with such a distinguished crowd and in such numbers? I would like to give a bit of background to the establishment of this Committee. I came to Canberra in 1963 as a parliamentary drafter, in the now non-sexist language. Then, we had no doubts that we were parliamentary draftsmen. It was an interesting experience, because it became very clear to me that the parliamentary drafters made the country's laws, that the input from the Parliament was not all that great and what we said tended to be the form the legislation took. There was very little consideration of a multitude of issues that ought to have gone to the broad question of the format of legislation. I became interested in the Parliament because it was that which I was serving and feeding material to. The two Houses were very different; the House of Representatives tended to remind me of Tennyson's poem, *The Brook*. Those of you who can hark back to those chanting days of your schoolhood will recall it used to go, 'I come from haunts of coot and hern, I make a sudden sally, and sparkle out among the fern, to bicker down a valley'. If you read it, and I have only just re-read it, there is a lot of bickering, babbling, bubbling, chattering and sallying. That was a pretty fair description of the House of Representatives in 1963 and some of you may well think it is not a bad description of the House of Representatives in 1991. There does seem to be a fair concentration on babbling, and bubbling, and chattering but one questions how much there is on legislating.

On the other hand, the Senate was quite different. The alliteratives were utterly different from all those lively Bs. They were more like Ss - somnolent, soporific and slow - because nobody did a lot in the Senate in 1963. The place was very much full of senators, males, of course, whose names started with 'A' which was a reflection on the electoral system. If a person called 'Aaron Aardvark' put himself forward, he would have been immediately at the top of everybody's ticket. That sort of pattern went on much throughout the 1960s and it made the life of parliamentary drafters pretty easy. It made the life of members of the Executive extraordinarily straightforward. There was little looking at what should be in legislation, little looking at whether legislation really

did impinge on people's rights and liberties. However, I stress, that that was in Bills. I will come back to the reason for that in a moment.

In the 1970s, the Senate went through a process that was little short of a revolution. The advent of people such as Senator Murphy and Senator Rae, and the support that was given by the Clerks of the time, particularly Jim Odgers, lifted that somnolent sleepy body out of that torpor into the role of the House where legislation became a matter that was begun to be looked at. The Legislative and General Purpose Committees were established in the 1970s. The name was interesting because here was a first labelling of the notion of legislation that might begin to give some indication that the Parliament was actually interested in that topic. However, if one looks at the references to those committees through the 1970s, I doubt whether you will find that a Bill was referred, the concentration was all on the general side. That is the side that was concerned with supervision of the Executive. So, again, the looking at the content of legislation was given second place.

Running parallel with all that, and in existence long before this movement in the 1970s, was our old friend, the Regulations and Ordinances Committee. The remarkable step that the Senate took back in the 1930s was to pioneer a committee that looked at the way in which delegated legislation was structured; looked at the matters that delegated legislation dealt with; and produced changes in that delegated legislation when it was thought that the public were being improperly dealt with. That Committee, prior to the 1970s, had established for itself a formidable reputation as the body that did concern itself with legislation. It has slowly been imitated worldwide as an indication of the sort of activity that a parliament should be engaged in. But it took a while before there was a realisation in other parliaments that that particular type of committee formed a valuable part of parliament's role.

The curiosity that was there in the 1970s was that you had this very active committee that was picking up all sorts of problems with delegated legislation but in Bills, provisions were being enacted that would never have survived the scrutiny of the Regulations and Ordinances Committee.

At that point, and I suppose it must have been a process of generally thinking about the topic, onto the scene came Senator Alan Missen, who the President has

already mentioned today. Senator Missen was, at that point, the Chairman of (as it was then) the Constitutional and Legal Affairs Committee.

In 1978, two reports were tabled by that Committee. One was concerned with the delegation of parliamentary authority and the other was concerned with the establishment of a scrutiny of bills committee. It is interesting to note that the reference to the Constitutional and Legal Affairs Committee of the inquiry into the questions of scrutiny of bills had been moved by Senator Chaney.

The Committee reported in 1978. It recommended that a committee to do much the same in relation to Bills as the Regulations and Ordinances Committee was doing with delegated legislation, should be established. But it took a somewhat grand view in that it proposed a joint committee and it also made certain proposals about the speed with which legislation could be enacted. It was an endeavour to try to actually restore the Parliament to its role as the legislative body. And to achieve that, of course, it was seen moderately desirable that the Parliament be given time to look at legislation and not just have it pushed past.

Anyway, those two suggestions, that the committee should be a joint committee and that there should be some limitation, some minimum time that the Parliament had to look at legislation, was not well received by the Government or, indeed, by other areas within the Parliament.

So the Committee reported in November 1979, after Senator Missen had obviously done a certain amount of groundwork to try to raise support for the committee, and moved that it be established. The resistance, as had been alluded to by the President, was quite extraordinary. The Government had, pursuant to the ordinary arrangements that existed, the standard arrangements, responded to the Committee's proposal and it opposed the establishment of this Committee. But the resistance to this suggestion was so great that you even find the Opposition refusing to allow Senator Missen to table the Government's response to the Legal and Constitutional Affairs Committee's proposals. And this was done not once but twice.

It really was quite remarkable that the Senate seemed to be worried by the thought that it might be able to engage in informed legislating. There was a problem

in relation to the joint committee proposal and there was a problem in relation to the timing proposal. But they seemed to be used as much as anything to resist this notion that a parliamentary committee should actually begin to identify problems relating to legislation that were recognised as being inappropriate in delegated legislation.

Two more years went by and Senator Missen again moved to establish the Committee. He had had various forays along the way. He was supported, very strongly, in November 1981, by Senator Tate. The Government was still opposed to this proposal - this radical and wicked proposal. A compromise was suggested by Senator Hamer that the Committee should have a six-month probationary period, in effect, and that the work should be done by the Constitutional and Legal Affairs Committee. With that compromise, there was an acceptance of the Committee, and it finally did get under way.

I was appointed as legal adviser at that time. Anne Lynch was loaned by Senator Lewis from the Regulations and Ordinances Committee to be the Secretary of the new Scrutiny of Bills Committee. They were really very exciting times. We all felt that we were breaking into entirely new ground. We were doing something that very badly needed to be done - at least we thought it did - which involved the establishment of a committee which had this fairly reluctant start to its life.

Concerns were expressed that this Committee was about to take over the role of the Senate, or about to take over the role of the Government. People said it was going to become the place from which all legislation would emerge in terms of its actual content. While it was a committee that knew it had a real task to perform, it equally knew that it had a very sensitive task and that it was important that it establish its credentials.

Those credentials followed along two pathways. One was that it did not hold up legislation and the other was that it pursued that delicate line between looking at the question of invasion of civil rights and not interfering with the Government's political policy.

Looking back, I found that I put in my first report on 29 January 1982 and that the first Alert Digest and the first Report came out on 23 February 1982. Of course,

this notion of the Alert Digest was a significant and important step in the establishment of the credentials of the Committee because it did give all elements of the Parliament, all members of the Parliament and not just the Senate, the opportunity to be able to see what it was that the Committee had in mind and to identify what the problems were that the Committee could foresee.

The need for that to be produced expeditiously became all important and, until I left the Committee in 1983, whenever the Parliament was sitting one simply had to write off the period from Friday night through to Monday lunchtime as being the time that you spent looking at Bills. It was not the best thing for marital bliss - but there it was! It was something that I thought was tremendously important. It was an essential part of the management of the Committee that it be able to turn around the comments very rapidly.

Just finishing the story of the Committee: the Committee apparently passed its first test because it was established as a separate committee in May 1982. Even then, there was still some reluctance to enshrine this Committee because it did not make the Standing Orders of the Senate until March 1987. That must have been an extraordinary period for the place to worry as to whether it had done the right thing and whether it had created a body that was going to take over its role.

Can I just mention the final matters that I should refer to in terms of the personnel. As I said, I left the Committee in July 1983 and my colleague from the Law School, Professor Jim Davis, took over from me then. He has shown the most remarkable stamina by being still the adviser to the Committee. It is one of those cases where election years are sheer bliss for somebody like Jim. The ANU connection was continued during a year when Jim was away, when Douglas Whalan, who looks after the Regulations and Ordinances Committee so manifestly competently, took over and ran both committees for a period of 12 months.

The interesting thing that I found when I first started, and perhaps it is almost the justification for the Committee, was revealed when I went back and looked at the first report. In it there were comments about concerns with the contents of a number of Bills following the grounds which the Committee had adopted as grounds for reporting on legislation - which had been heavily influenced by the Regulations and

Ordinances Committee's experience. There are reports there, as you might expect, on the Criminal Investigation Bill, on the Sex Discrimination Bill, but you also find detailed commentary on what could be seen as invasions of civil liberties in the Patents Bill, the Archives Bill, and the one that I think probably gave the Committee the most thrill, the Dried Sultana Production Underwriting Bill. If you can find something wrong with the Dried Sultana Production Underwriting Bill then you really do have need for a Scrutiny of Bills Committee. It is that sort of problem, tucked away in the unexpected areas in the Bills that would get no consideration by the Parliament because they are just seen as part and parcel of the general management of an area, that points to the absolute need for some body like this Committee to be around.

If the Parliament is to be a true legislative body, it needs information. It is just not possible for members to be able to look at all legislation; it is not possible for them to be the fonts of all wisdom and to be able to find when things have gone astray in various Bills. The Committee does feed that need which is, in my view, an essential need. Regulations and Ordinances, as I have mentioned, has been slowly imitated and probably still is being imitated by other parliaments around the world. There was certainly more than a 10-year gap before the imitators began to appear on the scene and I do rather wonder whether the same tale might exist in relation to Scrutiny. It frightened the Senate when it was first proposed. It probably frightens a lot of other parliaments, particularly the government-controlled parliaments, that this sort of body should appear on the scene.

It would have been a bold person who would have said 10 years ago that we would have been meeting like this to talk about the 10 years' worth of the Scrutiny of Bills Committee. Certainly those of us who were there at the founding would have been terribly disappointed if 10 years down the track it was not still present but, as I say, there was certainly no guarantee that that would have occurred. There was a good deal of concern at its outset. I think it is very useful for this gathering to take place today because I think it is appropriate to expose, 10 years later, those questions about whether the Committee has survived because of the work it does or because in effect of the work it does not do. Is it a Committee that has done its job and that people have maintained because of that recognition? Or is it a Committee that is not really upsetting anybody terribly much so there is no need to get rid of it? I would hope that the answer to that question is the former; that people have recognised the worth of the

Committee. But that is the sort of topic that this gathering has to deal with.

It is important too that the seminar examine the work from the point of view of drawing the attention of the public to the existence of this Committee. It is one of the problems that I see with both Regulations and Ordinances and Scrutiny of Bills, that there is very little public input into the consideration of the matters with which they deal. Most of it is internally self-generated; generated from the advisers. It would be worth while, I would have thought, for it to be better known that the public can bring concerns to the attention of these Committees. Any gathering such as this which can spread the word that these Committees exist is of immense value.

Let me conclude by saying that I hope the end of the stanzas of *The Brook* are appropriate. It, as some of you will recall, finishes up by saying:

> For men may come and men may go,
> But I go on forever.

I hope that the same can be said of the Scrutiny of Bills Committee. Thank you.

THE OPERATION OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS: 1981-1991

Miss Lynch - On behalf of you all, I thank Professor Pearce for the very profound introduction and also the President of the Senate for his perceptiveness and contemporaneous comments.

As Professor Pearce mentioned to you, the reason for my being the introducer of the next session is that I was inaugural secretary to the Committee. As with him, I was very enthusiastic and I am delighted 10 years later that the hopes that we felt particularly, say, at 3 o'clock in the morning when a report was hastily being prepared for tabling the next day, have now been realised. Like him, I think that the profound questions that he has put forward for discussion at the seminar will well be considered in the course of the day.

I now have pleasure in introducing to you the present Chairman of the Scrutiny of Bills Committee, Senator Barney Cooney. Senator Cooney is now the longest serving Chair of the Committee. It is also of interest to note that he has followed in the steps of the earliest Chairman, Senator Alan Missen, in that he is also Chair of the Legal and Constitutional Affairs Committee.

I am also delighted to welcome as the first commentator on the Committee, Mr Fred Chaney, formerly Senator Fred Chaney, whose instigation and conclusion of the whole process of the permanent establishment of the Committee as a Minister ensured at the time that the Committee was permanently established.

But now may I first introduce Senator Barney Cooney. His paper, I understand, will be an update of a very extensive paper produced by a former Chairman of the Committee, Senator Michael Tate. So not merely will it be useful in its own right, it will be useful in the continuation of the history that has now been unfolding. Thank you.

Senator Cooney - Thank you, Anne. It is sure to be a good paper because, as many of the people here know, perhaps from their own departments and what have you, it has not necessarily been written by the person that gave it. I am going to embarrass, of course, our present Secretary, Stephen Argument, by saying he has worked nobly to get this paper together and he has given it to me this morning. May I say a lot of his running has been taken already by Professor Pearce. The other thing I have to do, as Chairman, is to welcome everybody here today and as I look around there are some very eminent people. In fact, it is almost frightening to see who is here. I might sit down and not give it to avoid the comments. But may I welcome you all. And in that context and obeying union rules can I give particular attention to the outstanding statespeople who have come from other States. I did not say politicians, I said statespeople.

I have a list here. There is Adrian Cruickshank from New South Wales. From the Northern Territory there is Rick Setter. From Queensland there is Len Stephan and Jon Sullivan. From South Australia there is John Burdett. From Tasmania there is the Honourable Hugh Hiscutt. And we have to give special mention to Victoria because of sheer prejudice on my part! So welcome Ken Jasper, Hayden Shell and Victor Perton. And from Western Australia there is Tom Helm and Bob Bloffwitch.

And may I welcome also Lord Thurlow. It is great to see you here. I think you have travelled further than anybody else and the cricket has not even started. So it shows the nobility of it all!

While I am on that I might as well get it all over and done with now. There are a few other people we ought to thank. Dennis Pearce, of course, was our first legal adviser, and he was followed by Mr Jim Davis. He was Mr Jim Davis when he took it on but he is now Professor Jim Davis. It is great to see you here. You will be talking later on and you have given mighty service to the Committee.

While you were away furthering your knowledge, Professor Doug Whalan took over. And besides Stephen Argument, our present Secretary, I would like to acknowledge our earlier secretaries - Ben Calcraft, Andrew Snedden, Giles Short, Robert Walsh, Derek Abbott, John Uhr and Anne Lynch herself, who was the original Secretary of the Committee.

So I think that it is proper on an occasion like this that all those people are acknowledged. May I also acknowledge the splendid efforts put in by my fellow senators who you will be hearing from later on. In my view it might sound a dry committee but I think it is quite an outstanding committee. It is a very, very pleasant Committee to be on. And even though we have to get there at half past eight on a Wednesday morning and get away fairly early, I have always found it a mighty pleasure. So can I thank my fellow senators who have been on the Committee with me.

This the tenth anniversary. As I say, a lot of this has already been spoken about by Dennis Pearce but I think nevertheless it would be worth just adding a few things. It was on 9 June 1978, on the motion of the then Senator Fred Chaney, who is now Mr Fred Chaney, Member for Pearce, that the following matter was referred to the then Standing Committee on Constitutional and Legal Affairs. It was to inquire into the desirability and practicability of referring all legislation introduced into the Parliament to a committee of the Senate for the purpose of examining the legislation and reporting to the Senate as to whether there were provisions in the Bills, whether by express word or otherwise which (a) place the onus of proof on a defendant in a criminal prosecution; (b) confer a power of entry onto land or premises other than by warrant issued according to the law; (c) confer a power of search of the subject, land or premises other than by warrant issue according to the law; (d) confer a power to seize goods other than by warrant issued according to law. They are the very fundamental principles that we live by in this society and which, hopefully, we will continue to live by.

The next one is in a different category - (e) purport to legislate retrospectively; and after that to (f) delegate authority to amend any Act of the Parliament of the Commonwealth, or to create exemptions from the operations of any such Act, by means of subordinate legislation. That is where a department may have power under an Act to change the effect of the Act itself by passing a regulation.

The next one is to (g) authorise administrative decisions affecting the rights and liberties of the subject without prescribing objective criteria to govern such decisions or without providing a right of appeal to a court or competent tribunal. Next is to (h) affect the liberty of the subject by controls upon freedom of movement, freedom of association, freedom of expression, freedom of religion or freedom of peaceful

assembly. They are all the sorts of concepts that we are used to and which, hopefully, we put into practice.

The last one is (i) otherwise to trespass unduly on personal rights and liberties, or make the rights and liberties of citizens dependent upon administrative rather judicial decisions. After a short inquiry, the Constitution and Legal Affairs Committee tabled its *Report on the Scrutiny of Bills* on 23 November 1978.[1] Then a history followed which you have been told about by Dennis Pearce.

However, the actual tests that were the first ones adopted were that the Committee was to see whether or not, by express words or otherwise, legislation trespassed unduly on personal rights and liberties; made rights, liberties and obligations unduly dependent on insufficiently defined administrative powers or non-reviewable administrative decisions; or inappropriately delegated legislative power or insufficiently subjected its exercise to parliamentary scrutiny.

As a consequence of the Constitutional and Legal Affairs Committee's report, a Standing Committee on the Scrutiny of Bills was first established by a resolution of the Senate on 19 November 1981.[2] Professor Dennis Pearce has already given you a very good idea of the struggle involved in getting the Committee from the point of being a recommendation to the Senate to being a reality.

I believe that my former Senate colleague Fred Chaney - now Member for Pearce might I say, and I do not know whether the connection that he had with the original Dennis Pearce has led him to success in the House of Representatives - but in any event he will give you some further insights into that struggle. Both Professor Pearce and Mr Chaney were here at the time and they are in the best position to tell you about the blood, sweat and tears involved in getting the committee established.

I think people can be overpraised at times, but I notice in the next section of the speech there is a mention of Alan Missen. Great tribute has already been paid to him by Dennis Pearce. I do not want to talk about what Dennis Pearce talked about there,

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1 Parliamentary Paper No. 329 of 1978.

2 *Journals of the Senate*, No. 76, 19 November 1981, pp 675-77.

but I think Alan Missen was one of those great parliamentarians who, although he had the ability perhaps to take a ministry, saw his task and his career as being that of a parliamentarian. That meant looking at, examining and making sure that legislation served the community and that the great concepts we have inherited from a number traditions were not betrayed. I think he suffered because of that. He is an outstanding example to us and it is proper that we do remember him today.

I notice that we will also pay tribute to the hard work of Senator Michael Tate, and that has already been mentioned before. As a result of ministerial commitments he could not be with us today. He has asked me to pass on his regrets to you. I know that he is very disappointed that he could not be here. Might I say that I saw him earlier at the swimming pool this morning and he looked quite relaxed! I do not want to give him up or anything, but he is obviously in the House.

A main purpose of this address is to update a paper on the operations of the Committee which Senator Tate presented in 1985.[3] That paper, which we have come to know as the operations paper - I am sure you all know about the operations paper, because Stephen says you do - has always been the first port of call for people who want to know about the operation of the Committee. Though it will continue to be an essential reference document on the work of the Committee, there are things which must be added, and this occasion provides a good opportunity to make those additions.

For the first six years of its operation, the Scrutiny of Bills Committee was the creature of a Senate resolution - Dennis Pearce has touched on this - and later a Senate sessional order. The relevant resolution or sessional order both established the Committee and set out its terms of reference and methods of operation. A consequence of this method of establishment was that the Committee had to be re-established at the commencement of each new parliament. However, on 17 March 1987, and anything that happens on 17 March must be a great occasion, the Committee became a permanent feature of the Senate committee system with the adoption of a new Senate standing order 36AAA.[4] Our AAA rating has since been taken away and

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3 *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, Parliamentary Paper No. 317 of 1985.

4 *Journals of the Senate*, No. 169, 17 March 1986, pp 1676-8.

we are now simply standing order 24, which does not look quite so grand. Standing order 24 provides:

> At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of Bills introduced into the Senate and in respect of Acts of Parliament, whether such Bills or Acts, by express words or otherwise:
>
> (i) trespass unduly on personal rights and liberties;
> (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
> (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
> (iv) inappropriately delegate legislative powers; or
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Pursuant to the Standing Order, the Committee has six members, three nominated by the Leader of the Government in the Senate and three nominated by the Leader of the Opposition in the Senate or by other parties or independent senators. The Committee is required to elect a Government senator as Chairman and, as such, he or she has a casting vote when the Committee is equally divided. We just qualify on the grounds of proper division of the sexes; Senator Crowley has been chair for a while. However, as I will outline in due course, the relative numbers of the political groupings represented on the Committee have proved to be of little or no significance to its operation. Co-operation across the political groupings on the Committee is and always has been a feature of it.

Under standing order 24, the Committee has the power to appoint a legal adviser and that has always been crucial to its work. You heard Dennis Pearce on this - without the legal adviser, the Committee would be quite ineffective, and without the Secretary too it would be quite ineffective, I feel. I take this opportunity to record the appreciation of the Committee for the hours of hard work, largely undertaken over weekends, put in by these three eminent legal minds, Professor Pearce, Professor Davis and Professor Whalan. I also record our gratitude to the Law Faculty of the Australian National University, from whence they have all been poached.

I will quickly tell you about how the Committee works. When a Bill is introduced in either House of Parliament, copies are provided to the Committee. On the Friday afternoon of every parliamentary sitting week, copies of all the Bills introduced that week are bundled up by the Committee secretariat and sent out to the legal adviser for examination and report. Over the weekend, the legal adviser examines each Bill against the five principles which I have already read out. On the Monday morning, the legal adviser provides a written report to the Committee in respect of each of the Bills, advising whether or not they offend against the Committee's principles and, if so, in what way. On the basis of the legal adviser's report, the Committee Alert Digest is drafted for consideration by the Committee at its regular meeting on the Wednesday morning of each sitting week. That document, which is generally tabled late on the Wednesday afternoon, deals with all the Bills introduced in the preceding week. In it the Committee sets out its comments in respect of each Bill. Adverse comments are set out by reference to the relevant principle.

Once the Alert Digest is tabled in the Senate, any comments on a Bill are formally drawn to the attention of the Minister responsible for it by the Secretary to the Committee writing a letter to the office of the relevant Minister. The Minister is invited to make a response to the Committee's comments. Given the necessary time constraints, which the legislative process generates, these comments are requested by the following Tuesday, in order that the Committee can consider them on the following day at its regular Wednesday meeting.

I will just make a few points about that. You can see that it is a fairly rapid process and it goes through quite quickly. Dennis Pearce said before that it is a pity that there is not a greater input from outside the Committee and I agree with that. It would be good if that could be done. Indeed, there are some people here today who have from time to time written to us.

For example, I notice that Robert Gardini is here. He has attempted, from time to time, to have an outside input into the Committee. I think the Committee has to look at ways in which it will be able to accommodate that. People from outside get the Bill after the Committee receives it and quite often the whole process has been gone through before anyone from outside has a chance to comment on it. I think that is something for the Committee to look at and to see what can be done about it. If it has

made its recommendations, and the Bill has gone through and been made into an Act in the time that it sometimes takes, it is a bit difficult to expect people from outside to have an input. I think that is the way the Committee ought to go and in that I agree with Professor Pearce.

When the Committee receives a response from a Minister, that response is reproduced in a subsequent Report. In its Reports, which are also tabled on a weekly basis during sitting periods, the Committee restates its concerns about a Bill. It refers to the relevant ministerial response and makes appropriate comments where there is a difference of opinion between that of the Committee and that of the Minister.

It is important to note that, in reporting to the Senate, the Committee expresses no concluded view on any possible offence of provisions. Given the nature of the Committee's brief, these are matters which are ultimately for the Senate to decide. So the function is to raise issues which the Senate can reject or accept.

The Committee's non-involvement in the final decision as to whether or not a provision in fact transgresses against the principles it is required to consider is important for another reason. Since its inception, the Committee has operated on the basis that it keeps party politics at bay. In that, I think it has fulfilled very well the fears that members of the Senate had when this issue was first raised, and which Professor Pearce told you about, where people were very concerned that it might not continue on this basis. Votes on the matters before the Committee rarely, if ever, occur. By confining itself to matters of scrutiny against specific tests, upholding civil rights, and by avoiding the expression of a concluded view, it is easier for the Committee to maintain this consensual approach.

I would now like to turn to the effectiveness of the Committee. There are some statistics which you may want to ask about. I have never been a great believer in statistics - they remind me too much of economists. It may be that the business of legislation is too complex to allow for indicators of the Committee's performance. For instance, it is a fact that no matter how offensive the Committee might find a provision, the decision as to whether or not that provision passes into law is a matter for the Parliament. This is the way that it should be. Often what is involved is the balance to be struck between the public interest in preserving individual rights against

the public interest in meeting community needs. That is really what the Committee is doing the whole time. It has to ask: does this intrude on individual rights too much, if it does, and you want to do something about it, would the remedy suggested impact too much on the public interest in meeting community needs of what Parliament is about? The Parliament is the institution best placed to balance these interests. It is the Committee's role to highlight these issues, so that Senators are aware of them when making these sorts of decisions about legislation.

Over the past 10 years, the Committee has observed a passing parade of problems (and potential problems) in the legislation which has come before it. Those of you who avidly read our Alert Digests and Reports will be familiar with such terms as 'legislation by press release', 'Henry VIII clauses' and 'reversal of the onus of proof', as well as the kinds of provisions that manifest these problems. You really cannot get onto the Committee until you have learnt those sorts of phrases!

The Deputy Chairman of the Committee, Senator Amanda Vanstone, will deal with these sorts of issues in more detail in the second session. It is over to you to do the hard bit, Amanda! I do not know whether it is proper to say that she has been a great Deputy Chairman. Amanda says I should say that; I did not want to give her any more credit than the rest of the members of the Committee but I acknowledge that role of hers.

Clearly, the Office of Parliamentary Counsel and, to a lesser extent, the instructing departments do pay attention to what the Committee has to say. We hope that the First Parliamentary Counsel, Mr Ian Turnbull, will speak more about that later. However, I would like to mention an aspect of Commonwealth legislation which has caused concern in recent years, that is, the inaccessibility of legislation. In Victoria they seem to do it better because they keep amending things down there, or they did in my day when I was practising there. I do not know whether it is still the same but it was good because you could get to the legislation.

First, there is the question of physical accessibility. In recent years, the Committee has observed an alarming trend to what has been called 'quasi legislation'. Briefly, this is a tendency to legislate less by Acts of the Parliament and by regulations and more by ministerial and departmental guidelines, directions and determinations.

This trend causes all sorts of problems. However, in terms of accessibility, it can mean that the laws by which people are expected to abide and to run their lives can be contained in instruments which they are neither aware of nor have access to.

The point is that, if you are going to have to obey a law, you ought to at least know where it is and what it is. It is always nice to know what you are being fined or imprisoned or punished for.

This is not an acceptable situation and leads to my second accessibility point. The Committee has indicated in the course of this year - and I suggest that there is judicial authority for the proposition - that if people in the society are to be expected to operate within the laws of that society, then they have a right to know what those laws are or, at least, a right to be able to work them out.

The Committee is increasingly inclined to point out that, in the case of some of the laws which are on the statute books and which amend laws already on those statute books, the law is very hard to work out. This is particularly so, given the complexity of some of the drafting and the seemingly low priority accorded to reprinting legislation.[5]

That is very well put, Stephen. I want to also say, in regard to running this cost of justice inquiry at the moment, that, if Parliament and the Executive - and the judiciary in their own way - add to the complexity of the law and to the volume of law and to what we might do and what we might not do and that becomes inaccessible either because it cannot be understood or because it cannot be found, then the cost of justice is to go up. Therefore, I think the point about accessibility is one that ought to be emphasised.

In making this comment, I acknowledge the fine work of the officers of the Parliamentary Counsel and also the initiatives of the Social Security Department and others in the area of plain or clear English drafting. I hope the Committee will continue to identify what it perceives to be problem areas in terms of drafting and will continue to point out the need for the law to be more accessible.

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5 See the Committee's *Alert Digest No. 4* and the *Fourth Report of 1991,* in relation to the Australian Capital Territory (Electoral) Amendment Bill 1991, and *Alert Digest No. 5* and the *Eighth Report of 1991,* in relation to the Student Assistance Amendment Bill 1991.

The next 10 years are very much into the home stretch now. As the Committee contemplates its first 10 years, the next 10 promise new challenges. Recent changes to the way that the Senate and its committees deal with legislation is one such challenge. I understand that my colleague, Senator Robert Hill, will address these issues when he speaks to you this afternoon. I would like to say, however, from my completely unbiased perspective, that the Scrutiny of Bills Committee retains a vital scrutiny role under the new regime. However, I suggest that it is important that the Committee be prepared to adapt in order to play as effective a role in any new system as it can.

With the new system in the Senate that we have now, where you refer certain Bills to the legislative and general purpose standing committees, there is a chance for people outside the Parliament to have a direct input to the legislation that comes before Parliament. I think that has been a very good thing and it is the sort of thing I was talking about before. There is, however, more opportunity for people outside in the private sector and elsewhere to have an input through the standing committees considering a Bill that is sent out specifically from the Senate than there is in the system of Scrutiny of Bills, where the process has to take, by necessity, a very short and truncated time.

The other major area of challenge arises as a result of the ground swell of interest from other jurisdictions in the establishment of similar committees. This is underlined by the presence of so many interstate parliamentarians here today. I believe that my committee colleague, Senator Rosemary Crowley, will discuss the interest from other jurisdictions later in the seminar. The outside bodies, the private sector, and people from the various departments should have more access to this Committee. I keep coming back to that theme. It is a bit hard to work out how it should happen, and perhaps that will arise through some discussion, but I think this Committee has been a successful one.

The issue of liberties, the issue of what rights we have and should not have, and the protection of those is not an issue that raises a great deal of enthusiasm, unless a specific example arises through something that happens in the community. But when you have this delicate balance between individual rights and the needs of the community, and considering those, neither one is absolute, just as the pursuit of truth is not absolute.

I am not sure whether it has got a great deal of relevance, but there is a great quote from Vice-Chancellor, Sir Knight Bruce in a civil case called *Pearse v. Pearse.* The Vice-Chancellor said:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of those objects, which however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them...
> Truth, like all other good things, may be loved unwisely - may be pursued too ... keenly - may cost too much. And surely the meanness and mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusion reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.[6]

It might be worth while to say in conclusion that what this Committee does is to try to achieve that great balance. I suppose if you are running a department it seems proper that you take certain procedures to get to a very good purpose. But if that purpose costs too much in terms of individual rights, then that purpose is just costing too much.

Miss Lynch - Thank you very much. Both you, Mr Chairman, and the President of the Senate mentioned that the people who are, I suppose, eligible to speak on the establishment of the Committee and its early and sometimes painful days, were those who were there at the time. I was there, and I would therefore like to introduce the next speaker by saying that if it were not for Mr Fred Chaney we would not have a committee. He proposed it, he fought for it; he was an active member of the Constitutional and Legal Affairs Committee, which first recommended it. He then became a Minister. I know just a little of the contribution he made to ensure the proper working of the Committee and its validity as an institution. However, I know relatively little about it; suffice it to say that I am prepared to say that if it were not for the Hon. Fred Chaney we would not celebrating even one year of the Scrutiny of Bills Committee, much less the 10.

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[6] (1846) 63 ER 950, at p 957.

Therefore, it gives me great pleasure to introduce him very appropriately as the first speaker after the present Chairman of the Committee. I do hope he will give us even more detail of the hardships he had to face as the link between the Parliament and the Executive, consisting of both the Ministry and the bureaucracy. May I welcome on your behalf Mr Fred Chaney.

Mr Chaney - Thank you, Anne, ladies and gentlemen. We do not really have a family history in the Chaney family but I am trying to get one going. My father's oral history does not seem to be written down in a very biblical way, but I hope it will be said of me in the family history that I begat Freddy and Gervase and Patrick and that I begat this Committee. Tribute can then be paid to Dr Smith in New Guinea, who delivered Freddy, and Dr Smith in Perth, who delivered Gervase and Patrick. I think tribute can continue to be paid to Senator Missen, who delivered the Committee. It would otherwise been stillborn after the point of conception, because its establishment required some vigorous and independent action by senators against the wishes of the then Executive Government of which I had become part.

I would like to say a little bit about why the Committee came about. In current political debate there is a lot of talk about generational change; I have heard Dr Hewson using that expression quite often over the last week. I must say that, by 1978, I was convinced that, in parliamentary terms, we were undergoing something that seemed to me like a generational change. We were moving from a group of senators who could read, to a group of senators who perhaps could but did not. This seemed to me to have serious implications for the operation of the democratic process.

I was very impressed by a number of my elders and betters when I arrived in the place. They came from across the political spectrum. On the Labor side, I would pick out, as personifying what I am talking about, Senator Jim Cavanagh, a member of the Whitlam Government but a man I remember essentially as a parliamentarian. On our side, I would personify it by two names - those of the late Sir Reginald Wright and Alan Missen. Alan was a newcomer like me, but he very quickly achieved the patina of an ancient senator and proceeded to behave in an obnoxious and unreasonable way, just like Senator Wright. This meant that he was a very effective parliamentarian.

The truth is that you had a group of men who looked carefully at legislation and who were quite prepared to get up and be very difficult about what they saw as breaches of the principles that should be contained in legislation. I must say that I enjoyed, as a spectator, watching them harass various Ministers who had brought legislation - which often they had not read - into the Senate. I then enjoyed it rather less when I was a Minister being harassed by them.

It seemed that, with the changing pressures of politics, less and less time was being devoted by the new senators to the laborious and exhausting task of careful scrutiny of legislation, and that we were becoming more and more politically based in our activities. Senator Peter Durack and various other people are exceptions to that but I do think that there was occurring and there has occurred a generational change.

It seemed to me that this was potentially a bad thing for the Australian community, something that would result in even worse legislation than we have. I think that a lot of the legislation that we have is pretty dreadful, in a technical sense - a bonanza for lawyers but certainly not a bonanza for the citizen. It seemed to me that, unless we could ensure that the parliamentary scrutiny process was improved, we would not be doing our job.

I would agree with the people who have already said that the Committee would not operate without professional help. Essentially, what was required was for somebody to do the sort of reading which, perhaps in a more leisurely age, was done by the Jim Cavanaghs and the Reg Wrights, and which enabled them to bring to the attention of their colleagues, in a very powerful way, inadequacies in legislation.

I think that those who are concerned about the parliamentary institution can learn something from the history of this Committee. One thing is that a relatively obscure backbencher can have an influence on the way the institution operates. When I put forward this proposition, originally in a speech in February 1978 and then in a formal motion later in the same year, I had been in the Senate for less than four years and it was possible to get one's colleagues to focus on a proposal for change. We used the existing committee system (which again had been forced upon the Government of the relevant day by senators) to examine this proposition. Indeed, I had a wonderful and unusual chance to see both sides of the operation.

Shortly after the Senate committee commenced its consideration of the resolution that has been referred to this morning, I was appointed to the Ministry. This, some people say, is on the basis that, if you are enough trouble, that is one way to shut you up. I then sat in the Fraser Cabinet room as a non-Cabinet Minister and listened to the discussion of the proposition that we should have this Committee as was recommended by the Constitutional and Legal Affairs Committee. I then was in the embarrassing position of having to come into the Senate to defend a decision which I totally disagreed with: to oppose the establishment of the committee that I had advocated.

I must say that it gave me great pleasure to find that senators really were not terribly impressed by the Executive Government's decision. They, in fact, took it into their own hands to establish this Committee, originally through putting its functions into the Constitutional and Legal Affairs Committee. I think the first thing to remember about it is that this was done not at the behest of or with the approval of the Executive Government, but against the objection of the Executive Government. Of course, the Executive Government's concern was that the legislative process would be slowed down, and effective and efficient government would be impeded.

I must say that the contribution of speedy passage of legislation to effective and efficient government seems to me to be rather doubtful. If you examine current parliamentary records of the number of second bites we are taking at legislation, the number of times we are having to re-amend amendments, I think you get some sense that perhaps the process is still in fairly dramatic need of improvement.

So the first point that I would want to make, to an audience which I think is not much made up of politicians or of members of parliament, is that it was Parliament itself which took this initiative; that it had to overcome Executive resistance, even though the Regulations and Ordinances Committee provided a very close and long operating precedent; and that it needs to be noticed that there is no shortage of power to make changes if members of Parliament really want them.

Politicians who complain about the lack of power of Parliament should be ignored, because they are simply complaining about themselves. There is no shortage of power in Parliament. We proved that in 1975, to the considerable hostility of at least

half of my colleagues in the Senate, when we got rid of the Whitlam Government. The fact is that there is enormous power vested in the Parliament, and to the extent that power is not used, that is a matter for decision by members of parliament. I would like to address that question very briefly a little later.

The second major thing that I want to make some comment on this morning is my personal view that, in the system of government in Australia, we need to extend the role of the people's representatives rather than the reverse. We have hundreds of thousands of public servants and we have a relative handful of politicians - most people say too many, of course. But if you think about it, you realise that the elected element of government is surprisingly small. I come from Western Australia, a long way from Canberra. I have in some respects - not in all respects - traditional Western Australian attitudes of distrust against central government. I must say that my early years here in Parliament confirmed that mistrust.

I think I can best summarise that by referring to the lesson I got from an officer of the Senate who was servicing the Constitutional and Legal Affairs Committee in my time as a member. In a very instructive conversation with me, he contrasted his life as a public servant in Canberra with his life as a public servant on Norfolk Island. He said, 'It was terrible on Norfolk Island, you actually had to walk out of your door in the morning and face the people who were affected by what you had done'. He said that, I might say, in a most understanding way, but I think it is true.

I think it is unfortunate, but there is a contempt for Australia which runs through our bureaucracy. It is a very unfortunate thing that there is a genuine contempt for the efforts of the ordinary men and women of Australia among those who are paid handsome salaries by them, given extraordinary security of tenure, and generous retirement benefits.

The role of the elected people in this House, who are, of course, among the most despised class in Australia, is to give the people some say. It is my firm personal belief that by expanding the role of Parliament, provided we do it properly, we can increase the rights of the people of Australia to have a say in their government.

We have good politicians and bad politicians here, of course. One of the outstanding new recruits, I think, from our side of politics, is Peter Costello. He made a wonderful maiden speech and then he said something like this, 'In the struggle between the Executive and the Parliament I stand for the Parliament'. I said to him, 'That is a great line, Peter. It will be interesting to see when we are in government and you are a powerful Minister what it means'. I think the truth is that there needs to be not just an assertion of authority by parliamentarians but, if we are to get a better value from our parliaments, also a change of attitude on the part of governments which can pick up from the bureaucracy that contempt for the will of the people which in the long run can be unhealthy.

My own experience led me, as a Minister, to continue to support things such as the Scrutiny of Bills Committee and, in part, my continued support for the Parliament was based on my personal experience of dealing with the backbench members of my party. I have previously paid public tribute to Phil Ruddock, still a member of this Parliament and a shadow Minister now. He was the chairman of my backbench committee when I was the Minister for Aboriginal Affairs, a task which I found joyful but arduous. I had a fine group of bureaucrats in the Department and we worked very hard to ensure that legislation we brought into the Parliament was as well prepared as possible. It went through all of the sieves: through the Department, often through the course of long public consultation as well, the Cabinet, the party room, the legislation committee of Cabinet. Then, it having gone through all the sieves provided by the experts, I would take it to my backbench committee. There was not much point in taking it to the Parliament, because the Parliament's consideration of the Bill was usually fairly meaningless.

But when the Bill was actually exposed to a group of elected members of Parliament led, in this case, by Phil Ruddock, it was extraordinary how effective they were in finding the flaws and in improving what we put forward. I never took a Bill to that committee which left the committee in the same form. The committee was always able to make suggestions to me that improved the Bill. For the life of me, I cannot see why we have a system in which governments believe that the protection of the often appallingly convoluted drafting of particular Bills is a matter of honour and a matter of government survival.

I simply put the view to this group that the Scrutiny of Bills Committee is, in a sense, just the tip of a potentially very useful iceberg. The Scrutiny of Bills Committee in its 10 years has shown its capacity to contribute quite usefully to taking objectionable features from some Bills.

The capacity of the parliamentary process to improve Bills, to improve legislation generally, is still incompletely understood by government. I totally support the efforts the Senate is currently making to subject legislation to more detailed committee consideration.

I must say that I think that a good deal of the credit for that change should go to the recent Chairman of Committees, ex-Senator David Hamer, who worked for the whole of the period that I was Leader of the Opposition in the Senate to convince his Senate colleagues that we should go down this track. He did so with my very strong support, but he did it on the basis that it was something that should come not from the Executive but from the Senate itself.

And it has come from the Senate itself. I think it is the next stage in making Parliament a more rational place, a place where senators do one of the many jobs that they are elected to do better than they have been able to do in the past. I think it is a step towards giving the people of Australia a slightly greater say in their futures.

The only cautionary note that I would like to throw in is the reality of some of the parliamentary scrutiny which is imposed or which is provided for. Almost every piece of legislation seems to provide some parliamentary role. Reports are to be tabled in Parliament. Parliament has the power of disallowance. Parliament has this role or that role. I think we need to watch the extent to which we provide for functions for Parliament which in the end cannot be performed by parliamentarians but which are simply handed to a new bureaucracy which belongs to the Parliament itself.

The Scrutiny of Bills Committee is an interesting example of how you avoid simply producing another bureaucratic mechanism because essentially the professional advisers do much of the detailed work which enables sensible, useable information to be put before senators so that they can make a personal judgment and give genuine personal endorsement to what has been put forward.

But my own view as to the extent to which we can improve the performance of Parliament is one which is tempered by the reality that once you get to the point that you are putting functions on senators or members of the House of Representatives which in fact is physically impossible for them to fulfil because of the volume of material, the volume of work and the multiplicity of tasks that you are performing, then you are holding out the promise of simply a new form of 'the new despotism'.[7] You are simply offering another set of faceless, nameless bureaucrats, a decision making power over the people of Australia where there is no accountability.

So I offer that caution as an enthusiastic exponent of the parliamentary process. I hope that Senator Amanda Vanstone and the other members of parliament who are participating today have the same opportunity as I have had to see this debate from two sides of the fence and I hope that when they do that they will maintain their same enthusiasm for the involvement of Parliament.

I think it is a very, very important institution, one that we have underused and one which I think has been contributed to much more by the Senate than by the House of Representatives of which I am now a member. Thank you.

Miss Lynch - After the typically thoughtful and thought provoking speech from the person who has put his money where his mouth is over time, I now have pleasure in introducing a person who has been cast almost as the enemy in the context of the discussions we have had so far. Nonetheless, on behalf of you all I would like to welcome Mr Michael Sassella, who is Principal Adviser in the Legal Services Group of the Department of Social Security.

Much has been mentioned today about the input that is desirable from the public to their elected representatives. I think that committees like the Scrutiny of Bills and the Regulations and Ordinances, even if they cannot have the greatest input from the public, nonetheless perform a very important function in, as I have often wanted to call it, burrowing into the bureaucracy. As a representative of the bureaucracy into which the two Committees burrow, welcome, Mr Sassella.

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7 Lord Hewart of Bury, *The New Despotism* (1929, Ernest Benn Limited, London).

Mr Sassella - Early in 1988 I began working as branch head for the legislation program of the Social Security portfolio. I had not previously done legislation work and was unprepared for the first Scrutiny of Bills Alert Digest which arrived and had some not very welcome comments to make about one of our then current Bills. Was a 'Henry VIII' clause something to do with the Church of England, the Pope and annulments of marriages? It did not take me long to find out. What I also found out was that both the Minister and the Departmental executive took an active interest in the activities and the views of the Scrutiny of Bills Committee. With this came a task of accountability in advising the Minister on the terms of a reply to the Committee chairman, explaining the portfolio view of the matters of controversy.

I, and others in the portfolio concerned with legislation, have since that time awaited the Scrutiny of Bills Alert Digest on any social security legislation with interest. We usually know what will concern the Committee and we are seldom disappointed by the Committee's success in detecting and highlighting these matters.

This morning, though, I want to say something of the Committee's impact on the portfolio and its impact on legislation officers within the portfolio, say a few words on some issues raised by Senator Cooney and present some modest ideas about some minor suggested changes to the Committee's mode of operation.

Firstly, the portfolio. The Social Security portfolio is quite used to external scrutiny. This comes from such bodies as the Social Security Appeals Tribunal, the Administrative Appeals Tribunal and the Ombudsman. These are usually in respect of decisions made in the cases of individual people. The portfolio, therefore, is practised in self-examination and is relatively mature in accepting and acting on criticism. The Scrutiny of Bills Committee has, however, a different and potentially more powerful function in providing a possible preventive mechanism rather than, as in the cases of the above bodies, curing mistakes which have already occurred. To put it another way, if the Scrutiny of Bills Committee can directly or indirectly prevent the passage of a legislative provision which will cause problems in administration or equity terms in the future, it is desirable that it achieve such a result.

The inconvenience for the portfolio, of course, arises when the Committee forms and expresses its view. It usually happens when the Bill is public property but not yet

through Parliament. The Bill may, as has increasingly become the case in social legislation, be controversial. Added to the often highly political or coloured criticism or comment on the Bill, there is then also the civil libertarian critique from the Senate Scrutiny of Bills Committee. The portfolio has then to consider and respond, hopefully promptly, to the Committee. At worst, this is an inconvenience. It is, however, a justifiable and valuable inconvenience in requiring an accountability from the portfolio which may not be there otherwise.

A few words now about the legislation officers. This may be a bit self-indulgent, but the legislation officer plays quite a crucial role in the production of a piece of legislation. The legislation officer in a Commonwealth department is in a complex position. He or she is both a lawyer or a paralegal and policy officer, both a functionary and a protector of standards or principles, both an officer of the portfolio and, indirectly, a de facto officer of the Parliament. The legislation officer acts on instructions from a variety of sources: the Government via the Cabinet decision or other authority for a policy initiative; the departmental policy officers, many at very senior levels; policy officers from other departments, usually central agencies; and, in a sense, the drafters at the Office of Parliamentary Counsel. They, in turn, are in a very similar position to that of legislation officers.

It is often difficult, if indeed not impossible, to marry the demands made by all of the players. It is then something of a luxury to find time to consider the ethical dimension of the work. In addition, certainly in the Social Security portfolio, there has been a trend to legislate on more topics. This reflects a number of phenomena. Firstly, it stems in part from a need to ensure that decision makers are acting according to the rules of law. In social security, this means a trend to including in the Social Security Act matters which would have been handled administratively in the past. Secondly, it reflects a trend away from distribution of social security on a discretionary basis in favour of the provision of inflexible rules in the legislation. This is partly to cope with appeal bodies but also provides recipients of social security with more in the way of a right to what they receive. Thirdly, the trend to clear English legislative drafting carries with it a tendency to full coverage in legislation rather than leaving things unsaid. Fourthly, increasingly, legislation is introduced to reverse decisions of the tribunals which cause administrative difficulties or expose the Commonwealth to the risk of heavy expenditure.

Some of these phenomena have a greater value content than others. The legislation emerging in response to some of these phenomena and pressures will be less attractive to most legislation officers than other legislation. Strictly, of course, the public servant is a professional who should probably do as his or her masters bid, provided it is lawful. The terms of reference of the Scrutiny of Bills Committee can have the effect of empowering a legislation officer by providing a set of standards against which to measure the content of legislative proposals. By alerting portfolio clients to the potential problems of legislative proposals which may infringe the Committee's terms of reference it is sometimes possible to encourage clients to reconsider a proposal.

In general terms, I think it is true to say that many professional public servants appreciate the accountability standard provided by the terms of reference. To hark back to the Second World War, in a rather more ghastly sort of context I suppose, a defence of superior orders was held not available in the Nuremberg war crimes trials. There was held to be an ethical dimension. The same must apply at the end of the day to the legislation officer, and the Scrutiny of Bills Committee helps him or her to find it and to do something about it.

I have a few comments on Senator Cooney's observations. A number of his comments intrigued me when I read his paper last week. The first was something quite new to me. It was the description of the job of the Committee's legal adviser in having to assess and prepare a written report over a weekend on a week's complement of Bills. The capacity of the Committee to sift through a Bill and locate matters of concern has always impressed me. Most of us know that the often disjointed and user-unfriendly nature of amending legislation militates against quick and easy comprehension.

Professor Davis's task is more difficult than I had known, and he deserves great credit for the speed and quality of his output. I will make a suggestion later that, if taken up, might assist the legal adviser in this work. Meanwhile, it may be worth commenting on the encouragement the departments are now receiving from the Department of Prime Minister and Cabinet to produce a new and more helpful type of explanatory memorandum. As a result, Social Security, like other portfolios, is experimenting with the thematic presentation of legislative initiatives in its explanatory

memoranda. This entails the break from the tradition of sequential clause commentary in favour of the sequenced exposition of each legislative initiative included in a Bill. In the course of that exposition all clauses related to one initiative are discussed together, although often they appear in a disjointed way through a Bill for technical reasons. This also facilitates discussion in the explanatory memorandum of the context of the changes wrought by the Bill. The explanatory memorandum may become a more ready aid to identification and location of matters within the Committee's terms of reference.

Senator Cooney's comments on the Committee's effectiveness were interesting. For some of the reasons I gave above about the use of the Committee to the portfolios, I see it as effective from where I stand. As to its impact on Parliament and the Senate, I expect that it is also effective but these things are often an expression of faith. Busy senators who attempt to master a number of often complex Bills each sitting week must appreciate the pithy, pointed assessments on very fundamental issues provided by the Committee.

At the same time, I have been surprised by the infrequent reference to the Committee's assessments of social security legislation in Senate debate on our Bills. I believe that senators could make more use of Committee reports on our legislation. At the same time it is clear that the broad policy issues reflected in social security legislation excite senators in their speeches on those Bills and that that content captures attention at the expense of some of the civil liberty issues. Nevertheless, even in social security debates, occasional use is made of Committee assessments and this could be more pronounced in relation to the legislation of other portfolios. Of course, it could be, in our case, that senators find the Social Security Minister's responses to expressed Committee concerns totally satisfactory! I doubt that, though.

Senator Cooney comments also on the passing parade of issues and on how certain types of provisions come and go. This is another area where the Committee's role can be of great value in providing an overview of systemic trends in legislation. The Committee might take this activity further by issuing papers, or holding seminars or workshops not unlike today's, to discuss its global observations and to foster consideration of the reasons for trends and the value of persevering in the perceived direction.

Senator Cooney's comments on the accessibility of legislation were pertinent and mesh with a project under way in the Administrative Review Council. In the Social Security portfolio, statutory instruments are being used to replace the even more inaccessible policy manuals in areas where the issues are important but primarily administrative or managerial. These documents are frequently scrutinised by the Senate Standing Committee on Regulations and Ordinances. They should, therefore, have an air of respectability but the lack of coherent mode of access is a major problem which the forthcoming ARC report may help resolve.

The Senator Tate's 'Operations Paper' includes substantial material on the desirability of the Committee having a power to open up Committee meetings to experts and the public. As a means of raising the profile of the Committee and enriching its deliberations I would expect that there is much more to be said in favour of such a development than against it. Social Security at least would be happy to contribute to such a process as required.

It may also be worth considering requiring the portfolio to provide a statement in relation to a Bill dealing with matters in the Bill which may be seen to contravene one of the Committee's terms of reference. It would be a sort of environmental impact statement but related to the terms of reference. This could have several advantages. It would assist the Committee's legal adviser. It would also raise the portfolio's consciousness of the importance of the terms of reference, and it would bring forward the ministerial comments and justification of the controversial clause at an earlier stage for consideration by the Committee. Portfolios are now required to produce statements relating initiatives to such programs as the access and equity program and the Government's social justice statement. It would therefore be nothing totally new.

I just want to pick up on one comment made by Mr Chaney. His comment on the contribution of speed to the poor quality of legislation was spot on. The first item each session that we put on our list of items for the coming session are the errors that were perpetrated in the most recent batch of legislation. In the UK parliament, that parliament sits longer and passes fewer pieces of legislation each year and there is a more pervasive committee system in the lower house. Is it any wonder that (in Australia) legislation is often not right in the first place?

Just by way of conclusion, I am sure the portfolio sees the Scrutiny of Bills Committee as working well on a number of levels and I wish it well for the next 10 years. Thank you.

Miss Lynch - May I thank you very much for your most positive comments. I often think that legislation officers have a fairly bad time in the bureaucracy, particularly when they are dealing with risk managers who say, 'Yes, we know we should not do it but let us have a go and see what happens'. Unfortunately, the risk managers are often right, except that we are salvaging their errors years later.

We have about a 10-minute period for questions if you would be interested in taking up any of the points raised by our speakers this morning. Would you mind identifying yourselves both by your name and where you come from to assist *Hansard* because, as you may or may not be aware, though I imagine you are aware, we are having a full record of today's proceedings which will be sent to you in due course. I wonder if I might ask for questions from the floor of any of the speakers, or of matters generally.

Mr Stephan - I am from Queensland. The last speaker stated that scrutiny of bills would enable fewer mistakes to be made in legislation. I just wonder how long would be required to go through some of the bills to ensure that there would be not too many mistakes in the legislation, bearing in mind that some of the bills are quite lengthy and some of them are quite involved. Could we expect that in a week, could we expect it in a month? What time would you require?

Mr Sassella - It may be my fault, because I was not clear enough in the talk. I did not see the Scrutiny of Bills Committee doing that job on its own. Basically, the point I was trying to make is that in some other parliaments there is a much longer preparatory process before the passage of a Bill. The Scrutiny of Bills Committee could certainly play a role in that, within the terms of reference that it operates under. But committees not unlike the Senate committees that are currently looking at a lot of bills at the Senate stage I think are far more useful when it comes to the overall scheme of the bill. That Senate process in the Commonwealth at the moment sometimes holds up the progress of a bill for about a month, and I think that generally, from our perspective, the bills that have been held up by that process have been the better for it.

Miss Lynch - Perhaps Mr Chaney, with his views about speed of legislation leading to inaccuracy, might like to add to that.

Mr Chaney - Very briefly, I was very pleased that Michael Sassella agreed on that point. There is sometimes a view among politicians that bureaucrats conspire to hold legislation back so that it hits the Parliament with a very tight deadline. I have to say, Michael, that there is deep suspicion at times! My view is that, if we have the choice between a muddle or a conspiracy, we should go for the muddle every time.

If you look at the legislative program in the House of Representatives over recent weeks you will find major amendments to corporate law, taxation law and so on going through in a matter of minutes. To suggest that there has been an adequate opportunity to scrutinise that legislation is absurd.

I mentioned Peter Costello. He had two major items of legislation relating to quite complex issues, relating to property trusts and corporate law, over the last two-week period. I think that the time between the receipt of the legislation of the House of Representatives and consideration by shadow Cabinet and party room was three or four days. It then gets half an hour, 40 minutes, perhaps an hour and half in the House of Representatives. Unless at some point in the parliamentary process it is slowed down, there is no opportunity for external comment. There is no opportunity for sober assessment.

Anne gave me an estimate of the very high proportion of bills we now deal with which are simply tidying up the results of the rush of that process. That is very significant and that is why I think the attitude of the Executive Government is critical to further advance in the parliamentary process. You really have got to get to a situation where there is an acceptance from the Executive Government itself that it is in the interests of good government to slow that process down, as well as to expand it in other ways.

Mr Grant - My question goes to what Senator Cooney is talking about in the operations of the Committee and the machinations in the decisions of the Committee. To what extent, if at all, does party politics play a part in the decisions of Committee,

as to whether or not they breach those criteria set out in the Standing Orders regarding any offending clauses in a bill?

Senator Cooney - You can overpraise yourself on this and say that it does not. But I really do not think it has been a major problem at all. What do you think, Amanda?

Senator Vanstone - I think you are right. The closest I think we have come to blows - and it was nowhere near a case of coming to blows - was the legislation dealing with the limitations on political advertising. When we sat down and calmly reflected on that bill, we were able to isolate those portions which in a bipartisan way we could justifiably bring to the Senate's attention, and to see for ourselves where our political disagreements were and put them aside to be raised in the chamber or elsewhere, through the media. It does sometimes happen that it is a bit difficult to see the line between a political difference of opinion and one that is purely technical, but usually it only requires a bit of thought to isolate the technical aspect and put your political views aside to be brought to the fore in another forum.

Senator Cooney - I agree with that. By the very nature of the system you have got to be political in the chamber. I think the five criteria that are put there are very well-drawn tests. Most people believe, even if they do not practise the belief, in freedoms and non-arbitrary arrest and all that sort of thing. As Amanda says, you can go through the legislation, no matter how powerfully or strongly you might feel - and you should feel strongly - about its political purpose. People on the Committee, may I say, are very good members of their respective parties and do well in the chamber. But they have the ability - I am glad Amanda agrees with me on this - to set that aside in the interests of identifying those criteria we all believe in and applying them.

Mr Chaney - With Anne Lynch's permission, I am glad to make a supplementary comment. To some extent, you are looking at the easiest end of the spectrum with this Committee. As Barney Cooney has just said, you are dealing with principles which most people from right across the political spectrum would agree - freedom from arbitrary arrest and so on. The really impressive thing about the potential of Parliament is demonstrated by looking at very contentious issues which have been dealt with through the committee process. Let me give you three examples.

The $2 billion national compensation scheme put forward by the Whitlam Government, a very important part of its program, was put forward at a time of extraordinary political stress, 1974-75. The Constitutional and Legal Affairs Committee examined that. The Government members are worthy of mention, because two of them would be well known to you - Senator Button and Senator Grimes. The other was the then Senator Everett, a very, very capable QC, later judge, from Tasmania. That was a very important policy issue for the then Government. The Committee unanimously reported that the legislation should be withdrawn and redrafted. So, on a very contentious issue, at a very politically charged time, it was possible to get a view which was quite different from the Government view, on a bipartisan basis.

Another very contentious issue was the legislation for the trial of war criminals. I think Barney would agree and Senator Vanstone would agree that great passions were involved in that, with very powerful emotional issues in the Australian community, whether among the Ukrainian community or the Jewish community - very powerful arguments and passions running in the community. I think that the Senate committee consideration of that legislation was able to bring forward some ameliorating changes to that legislation, which did something to take some of the really difficult issues off the agenda.

Finally, let us take what I think was the most difficult exercise of parliamentary authority in my time in Parliament, the Murphy question - the *Age* tapes. One can only look with great admiration at the efforts made by the people on the committees that looked at that matter to deal with it in a responsible way. I think of the political courage of somebody like Senator Tate and how good it is that he went on to get ministerial office. He took a very difficult decision as a committee member, for which I think many people who are cynical about the political process would have destroyed his hopes of advancement within the Labor Government and so on.

I think that, when we examine the record of the committee process, it is extraordinarily consistent. I cannot think of a single bill that has been sent to a committee and that has not been changed by the majority view, usually the unanimous view, of the committee. This is still a very large and fertile field to be tilled.

Mr Cruickshank - I did want to ask a question about the examination, but I have a comment along the lines that you have just been speaking about, as Chairman of the Regulation Review Committee in the New South Wales Parliament. Yes, one does try to keep the political aspects of one's parties et cetera out of it, but sometimes the opposition comes from unexpected quarters. Particularly when you are on the Government side, you do find that, being a bipartisan committee from both upper house and lower house and both parties included, a lot of aspiring young politicians have their place in a queue and they are very loath to do anything that might upset that place in the queue. We have had the situation where we have agreement on all sides politically, except for some of our own who will not, to put it in their words, 'line up a Minister over an issue like this'. It is very unfortunate, but I think it tends to disappear as they mature and stay in parliament a little bit longer, if they stay there long enough. So I just wanted to say that we do have troubles like that at all levels. Politicians are born regulators and combined with one's political allegiance it does require some considerable maturation within the parliament.

I believe that one of the proposals is a requirement for a regulatory impact statement on rules and for them to be made available to the parliament and public. Does the Senate Committee believe that these procedures could usefully be adopted in making a bill? There is a lot more to that but I think I will just leave it at that.

Senator Cooney - I would like to be able to claim that, but I think that has got to be claimed by my colleagues from Victoria. You have got one down there, have not you? Would you like to comment on that, Ken?

Mr Jasper - We could not make a real contribution on that right now because of the time.

Senator Cooney - Well, I think it is a good idea and perhaps the Victorians can tell us about it after lunch.

Miss Lynch - I must confess I am suitably reproved, I just do not dare to call for more questions. However, I hope that people do not remain silent during lunch and these sorts of matters can be discussed informally. I would like to thank you all for your attendance at and contribution to the first session. I hope you will continue to

participate and enjoy the whole of the remainder of the seminar. May I, on your behalf, thank the three speakers we have had this morning, and the President of the Senate and Professor Pearce.

Luncheon adjournment

THE FIVE PRINCIPLES: THE COMMITTEE'S TERMS OF REFERENCE

Professor Whalan - I am adviser to the Senate Standing Committee on Regulations and Ordinances, but for today I am the chairman of this session, which is to discuss the five principles of the Committee's terms of reference. My instructions say that I am to point out that the purpose of the session is to try to give illumination on those terms of reference. Senator Amanda Vanstone, the Deputy Chairman of the Committee, will speak first, followed by First Parliamentary Counsel, Mr Ian Turnbull, QC. The panel session will follow, made up of all members of the Committee, plus the legal adviser, my colleague Professor Jim Davis.

I introduce, with great pleasure, Senator Amanda Vanstone, who has been a member of the Scrutiny of Bills Committee since May 1990 and she is Deputy Chairman of that Committee. Also, she was, in the middle 1980s, a member of the Regulations and Ordinances Committee, as I well remember, and she was an extraordinarily valuable member of that Committee, as I know she also is of the Scrutiny of Bills Committee.

Senator Vanstone - Thank you, Professor, for that kind introduction. It is always kind of legal advisers to speak nicely of members of the Committee in case they become legal adviser to the new Committee that you are on again. I am very much indebted to you, Professor Whalan, for your kind remarks.

Before addressing the Committee's terms of reference, it may be of some benefit to put the Committee's work in a broader perspective, as seen through my eyes. It would be of no surprise to many of you here to hear me say that politicians the world over are regarded with deep suspicion and cynicism. 'Hear, hear!' I hear someone say. I am glad you agree with me; this fact is not lost on me. I thought I would make a list of the sorts of things that politicians are regarded as being. I went only to five things, because I realised I would be there forever and a day if I kept going. But I came up with: shallow, insincere, corrupt, pork-barrelling and prepared to do almost anything to advance their

own position. I do not think that is an unrealistic list of the types of adjectives that most Australians would use to describe their politicians. Perhaps that is the case the world over.

Australian parliaments seem to be regarded with very deep suspicion and cynicism, as their parliamentarians are. They seem to be enjoying a lower and lower standing in the eyes of the community as time goes by. I think there is an explanation for that. In one sentence, it is that parliaments have not been using the power, that Fred Chaney referred to this morning, that parliaments have. It has all been a bit difficult. One gentleman here from New South Wales spoke earlier about young, aspiring politicians been weak-kneed cheapskates who would not stand out against their executive. Where has he gone? He has left. Somebody just said that the young MPs threw him out! I think that, by and large, there was a measure of truth in what he said. That is why you see more and more contentious matters being palmed off, flick-passed, onto Royal Commissions, generating what some have referred to as judicial imperialism gone berserk, because there is nothing more frightening than a former judge given the power of a Royal Commission. It is a far more frightening power that is given to these people individually than any executive power that we give to a group of people. Why do we palm these things off onto Royal Commissions? Because Parliament is not prepared to handle them, or does not think it can. Why will it not handle them and why does it think it cannot? Because it probably knows, in some sort of collective understanding, that there are not too many in there who will ask the difficult questions of their own executive and that will be in this Opposition-Government racket.

As a senator, I visit quite a few schools and I find that school children, in particular, after they have asked you what you are paid - which is the first thing they always want to know because their mother and father have told them at the breakfast table that politicians are lazy blobs who lie on banana lounges, sucking milkshakes and who are given enormous amounts of taxpayers' money to do nothing - are very, very cynical about being told that the role of Parliament is to keep a check on the Executive. They look at you with a bemused look, as if to say, 'She comes from another world'.

I think that is true of the electorate in general. They regard that notion, by and large, as an antiquated concept that they were taught at school which has absolutely no relevance to the lives they lead, to the Parliament they read about in the paper, or they hear about on radio and which, through the work of some of us, including myself, they now mercifully are able to watch on television. Parliament is seen almost exclusively as being a contest between the Executive and the shadow Executive and nothing more than that. Parliament is seen by many as an ornate and, as you will have seen today, a very expensive rubber stamp to that which the Executive wants.

The role of a parliamentarian has almost - I have written it twice; I was not inebriated when I wrote it; I wrote 'almost' twice, and underlined the second one to give emphasis to the fact that I do not think it is dead, but it has almost - been forgotten and replaced by the role of a politician. For many, forming a government is the be-all and end-all of Parliament. They see Parliament as government rather than seeing government as a part of Parliament.

The fact that Senator Chaney this morning pointed out to you - sorry, former Senator; I am used to calling him your eminence because he was once my leader, so to come down to Senator is pretty good, but Mr is even better - how important it was or how different it was from the norm that this Committee started against the Executive's wishes. Why should we be surprised at that? Why should the Executive have the running all the time? But it is so surprising. It was surprising 10 years ago and it still is surprising now when Parliament gets a win over the Executive.

I want to conclude my remarks about the diminishing role of parliamentarians by endorsing some remarks that Senator Chaney made about the power being there. That is true. The role of parliamentarians has not declined just because the Executive has been a big, nasty, evil body like an all-encompassing cancer that has crept through Parliament. It is that because parliamentarians have allowed it to become that. They have the power to stop that and they have not done so. In that context, all of the Senate committees, I believe, work in a very bipartisan fashion.

It is a matter of regret that that is not acknowledged or understood by the community. It is a matter of regret that the bipartisan nature of so much parliamentary work is not news because it is not conflict. It is an absolutely discouraging factor to new parliamentarians if you say to them, 'There is some very good parliamentary committee work, but you will never get a run on it. You will never get any coverage for it, ever'. Perhaps the most ambitious to be part of the Executive say, 'Right. I will keep away from that', and that is a matter of regret, I think.

Anyway, let us get onto the five references. Perhaps I should give you a couple of things to think about in terms of the democratic system and Parliament working against the Executive. Our guest from the House of Lords may be able to confirm whether this story is true of not. I am told that there was a young member of the House of Commons who worked his backside off to get into the Commons. An older member took him in and showed him the seats and said, 'We have more members than we have actual physical seats, so you can basically sit anywhere but in the front row. That is for the front bench; for the big boys'. He said, 'Just this once', and he went down and sat in the front seat. The old bloke behind him said, 'I do not know what you are doing that for'. The young man said, 'Well, I have worked so hard for this; I want to see what it is like to look across the chamber and look my enemy in the eye' - there is this common perception that your enemy is the opposing major party. The old guy laughed and said, 'Listen mate, back there's your enemy, behind you'. It is well to understand that because it is very easy from being in the other party to say, 'Come on, let's have a go at the Executive', because your party is not the Executive. I do not want to be seen to be having a bash at the Labor Party, but I strongly disapprove of their collective decision making process whereby once the collective decision is made you are locked-in. However, when some of my colleagues yell across the chamber and they pick on the most idealistic ones, like Senator Cooney, our Chairman, a great ideologue, and say, 'Come on Barney, you know this stinks; come over and support us', I look at these people and wonder whether, in a very short space of time, when we are in government, they are going to vote against their executive, because that is really where the true notion of a parliamentarian comes into play.

It is not hard to speak out against the executive of another party. That is not hard. A witless idiot could do it. Some would say that fits the bill for most parliamentarians! But it is much harder to speak out against your own. Perhaps, going into these five principles will convince you that the definition of a democracy offered by someone is not right, that is, that it is an naive attempt at gaining wisdom by pooling well-intentioned ignorance.

I know that many people see parliamentarians - or politicians as they might be wont to call them - and say, 'Ignorant fool. Fancy that person having a hand in running the country'. You can be encouraged by the fact that we have marvellous assistance from the Clerk, Deputy Clerk, Clerks-Assistant and from the secretariats of Committees and from our very eminent legal advisers, with whom we never disagree, to get to this task.

The task is sometimes regarded as a very mysterious one. The operation of the Scrutiny of Bills Committee in its terms of reference, what they mean and what comes within them, can be a mystery. I should say in the very beginning that it is sometimes a mystery to members of the Committee, as it would be to any of you who follow our Alert Digests and reports. I do not mean by that that the Committee is witless and does not understand what its terms of reference are. Not at all. But what I mean to highlight is the difficultly in knowing how to categorise some of the legislative snakes - or nasties - that become before us. It is all very well to know your terms of reference. It is another matter altogether to match the legislation up to those terms of reference and that can sometimes be something of a mysterious process.

The Committee has an invidious task of working out whether or not a particular provision should be drawn to the attention of the Senate. The reason it can be an invidious task is that provisions can infringe against the terms of reference and yet, for example, be beneficial to individuals. In such situations, the Committee tends to take the view that the technical infringement should be brought to the attention of the Senate, so that the Senate is at least aware of that infringement. After all, it should be remembered that it is the Senate which makes the ultimate decisions on these matters. It is essentially for this reason that the Committee expresses no concluded view on whether or not provisions infringe against its terms of reference, whether those infringements be technical

or substantive. What the Committee does is draw these infringements to the Senate's attention so the Senate can do with them what it will.

It might be useful to go through each of the terms of reference by using some examples. Under terms of reference 1(a)(i), provisions which 'trespass unduly on personal rights and liberties', the Committee is required to draw attention to legislative provisions which it believes may do that. In some senses, this is a real catch-all as a very wide variety of problems come to light under this term of reference. It is one of the most frequently used and, within that, one of the most popular infringements is retrospectivity. There would hardly be an Alert Digest that goes out without the Committee drawing attention to the fact that a bill or provision in the bill is expressed to come into force at some date prior to the bill being passed by both Houses of Parliament and being assented to by the Governor-General. In recent times, the Committee has also encountered the alternative device of provisions which, though they do not commence until Royal Assent, are expressed to apply to transactions or events which occurred prior to that assent. Some of the draftsmen, and I understand the Parliamentary Draftsman is going to respond later, have been quite ingenious in this respect.

Retrospectivity is, in principle, 'a bad thing'. Parliamentarians think simply, good things and bad things. Retrospectivity is a bad thing because people, including corporations, are entitled to go about their daily lives and business on the basis of the law as it exists from day to day. Retrospective legislation prevents this, because it has the effect of making something that was lawful when it was done, retrospectively unlawful; and, just to be tautological, I will add, 'at some later stage'. For obvious reasons, the Committee maintains an in-principle objection to this practice, as it operates to make life very uncertain for people who may be affected by this legislation. However, there are numerous instances where the Committee is, in the final analysis, less concerned about the practice.

The most obvious case is one where the change in question actually benefits persons other than the Commonwealth. For example, the Committee recently considered some amendments to the Social Security Act 1991 which proposed to allow for certain special payments in relation to child bereavements.

The bill in question proposed to extend the application of those payments back to 17 August this year, which you may or may not realise was the date of the Strathfield massacre. The effect of the retrospective operation was to make parents who lost children on or after that day eligible for the new benefit. The Committee in that case therefore simply noted the retrospectivity without making any further comment.[8]

I think that is a good example to choose because you do often see people picking up the banner of retrospectivity and running around as if it is always a bad thing. In principle it is, because the paths that we are allowed to tread change after we have trod them. But when the principle is put into practice, there are occasions when retrospectivity can be a good thing.

Similarly, the Committee makes no further comment - that is a particularly political turn of phrase, is it not - in relation to so-called technical amendments which retrospectively correct drafting errors or which clarify the operation of certain provisions.[9]

It is worth digressing momentarily from my prepared text - very largely prepared, as was the Chairman's, by our Secretary, who is here somewhere. He is not happy with being accredited with the work that he has done in this area but I do not see why we should let his unhappiness stop us from crediting him with the work that he has done, and he has done a good job. I digress from the prepared text to point out that when a bill is introduced and the explanatory memorandum says that it is to correct a drafting error, I think the first question should be: 'Is this clause the subject of litigation anywhere, has any action been raised in relation to this matter?'. That might not always be mentioned in the explanatory memorandum. There are a number of cases where the Executive has introduced legislation into Parliament to circumvent someone's opportunity to proceed at law on a matter and to change the thing and disguise it as a drafting error. What they mean by a drafting error is, 'We now realise that

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8 See the Committee's *Alert Digest No. 17* of 1991 (Social Security Legislation Amendment Bill (No. 3) 1991).

9 See, for example, *Alert Digest No. 19* of 1991 and the Committee's comments on the Health and Community Services Legislation Amendment Bill 1991.

someone can do something we did not want them to be able to do, so we are going to correct it'.

There is also clarifying the operation of certain provisions. I remember in another Committee being sent almost witless by a discussion of what was 'old oil' and 'new oil' in relation to Tasmania. There was a particular piece of legislation that clarified some oil as old oil and that would be entitled to certain benefits, and some as new oil which would be entitled to others. The story was that everyone understood what the true picture was, according to the Executive, but someone was now seeking to take the literal meaning and, heavens above, snatch a benefit on the basis of the literal meaning, and that was not fair because we all knew that, despite the fact that we had said it the wrong way, we really meant to say it the right way and now we should retrospectively change it to not let these people have a benefit. It all centred around whether the oil from a particular field of exploration was old oil or new oil. So one should be suspicious of clarifying the operation of something - that usually means cutting someone out of the picture as well.

Of course, retrospectivity, is not always straightforward. A difficult question arose in the case of some proposed amendments to the Customs legislation which the Committee considered late last year. The amendments concerned proposed to retrospectively validate certain seizures which had been made on behalf of the Minister responsible for Customs, pursuant to a particular provision of the *Customs Act 1901.* Two aspects of the provision in question caused the Committee particular concern. First, the amendments were expressed to operate back to 13 December 1956 - this is a whole hog retrospectivity arrangement, there is no mincing about here, no press release we are relying on, we are straight back to 1956 when I was four. Second, the amendments were explicitly designed to overcome a decision of the Federal Court, which had found that a particular exercise of the Minister's power under the relevant provision to be invalid.

It is one thing to change the law in the light of an unfavourable decision on that law, - that is, the Parliament decides that is not really what it meant, it did not want the judiciary to interpret it that way so forever and a day thereafter, change it. However, it is a different thing altogether to change that

law in such a way as to undo what a court has decided in relation to the law as it stood at that time. The situation, of course, was not quite that simple. The power that the Minister was exercising was the power to seize dangerous goods which people were attempting to import into Australia. According to the Minister's Second Reading speech, we could see that 'dangerous' goods included bombs, land-mines, flick knives and unsafe toys.

The items that were the subject of the Federal Court decision in question were 200, 7.62mm Chinese machine guns. None of us wanted to be responsible for 200 of these machine guns coming into the country. Armed - for want of a better word - with these facts, the Committee sought some more information from the Minister before expressing any further opinions. The Committee sought details of the kinds of items which had been, as a result of the court decision, unlawfully seized. The Minister, in a very detailed response, told the Committee about a somewhat mind-boggling list of confiscated goods, ranging from flamethrowers to grenades to stink bombs - not that harmful in themselves, I suppose - to erasers in the shape of dummies. This was an all-encompassing law.

The Committee also asked the Minister about the effects of the decision on the person involved in the Federal Court case and, in particular, what would happen to the guns. The Minister advised the Committee that though the Federal Court found the seizure to be invalid under one provision of the Customs legislation, the Customs officials had nevertheless validly seized the guns under a different provision, which they had relied on in the alternative. There was, mercifully, never any suggestion of the guns being returned. The Committee also noted the Minister's advice that the Federal Court ordered each party to bear their own costs. This was clearly a difficult case.

When the time came to report on the Bill, the Committee had to weigh up the options. In the final analysis the Committee said:

> ...that as a matter of principle, it was concerned that the decision of a court can be, in effect, overruled by the subsequent passage of a piece of legislation. Such a course of action would tend to detract from the role of courts in the legal system (of which Parliament is, of course, also a part) and the certainty of their decisions.

Bearing in mind this time we were lucky because the guns had been validly seized under another provision, but that may not have been the case.

The Committee went on to say that in making this statement it had noted that the circumstances of this case and the particular dangers to the community which the Minister said the amendment was intended to contain. The Committee concluded that ultimately the principles involved had to be balanced against the realities of the situation and this balancing exercise is, in the final analysis, best left to the Senate.[10] The legislation was passed without amendment.

A refinement of the exercise of legislating retrospectively or perhaps I will cut out the word 'refinement' as that implies that it is an improvement and I do not think it is. A change or secret subterfuge on the part of the Executive in legislating retrospectively, is the practice of legislation by press release, particularly important to the business community and taxation matters. For the uninitiated, this is a practice by which the Government announces by way of press release or ministerial statement that it intends to introduce legislation or to amend existing legislation in order to give effect to the Government policy or initiative contained in the press release or statement. When the relevant legislation is introduced, it is then expressed to commence or operate from the date of the announcement. I am sure you understand that the press release is not anywhere near as detailed as the legislation you finally see.

Legislating in this way is a very bad thing. Perhaps we will have a refinement on good and bad - we can have very good and very bad. Legislating in this way is a very bad thing for two basic reasons: first, it involves the same sort of uncertainty that any form of retrospective legislation entails; second, the practice is predicated on the assumption that Parliament will not only actually pass the relevant legislation, but will also pass it in a form which gives effect to the policy or initiative that has been announced. Such an assumption can only detract from the Parliament's ability, capacity and inclination to amend legislation.

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10 See the Committee's *Alert Digest No. 11* of 1990 and the *First Report of 1991*, dealing with the Customs and Excise Legislation Amendment Bill 1990.

In practical terms, the assumption is also unwise, given the political make-up of the Senate.[11] I think what that is referring to is the presence of the Australian Democrats, because what their presence means is that you simply cannot guarantee the outcome of a particular piece of legislation. I do not mean that to refer simply to their preference to announcing at the last minute what they will do, having had various preferences expressed in the months leading up to the legislation actually being voted on. I simply mean that you cannot tell whether they will go at any stage with the Government or with the Opposition. Fortunately, the practice of 'legislation by press release' appears to have been in decline in recent years and now happens relatively infrequently.

You cannot be given an exhaustive run-down of what is covered by this particular term of reference, but other concerns which commonly arise under this reference are abrogations of the privilege against self-incrimination[12] and reversals of the onus of proof.[13] Once again, provisions which affect these abrogations and reversals appear to be either in decline, or else the relevant provisions tend to be drafted in such a way that the Committee's concerns are allayed.

Perhaps it is worth giving one other example of a problem which the Committee has recently dealt with under this term of reference. You will all be aware of the Political Broadcasts and Political Disclosures Bill which the Government introduced earlier this year. You will also be aware that the Bill seeks to limit the broadcasting of political advertisements. To say that this is a particularly political bill is to state the very obvious.

The Bill was considered by the Committee in the same way as any other bill and it is fair to say that the Committee's discussions on the Bill were livelier

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11 See, for example, the Committee's *Alert Digest No. 1* and *First Report of 1990*, dealing with the Sales Tax Laws Amendment Bill 1990 and the Sales Tax (Nos. 1-9) Amendment Bills 1990. See also, Argument, S. 'Legislation by press release a bad process', *The Canberra Times*, 7 August 1991, p9.

12 See, for example, *Alert Digest No. 18* of 1991, dealing with the Migration Amendment Bill (No. 2) 1991.

13 See, for example, *Alert Digest No. 16* of 1991, dealing with the Electoral and Referendum Amendment Bill 1991.

- as was indicated I hope in question time earlier today - than those in relation to another Bill we have considered, the Pig Slaughter Levy Amendment Bill. Those discussions were, nevertheless, bipartisan and apolitical. As I said this morning, what we did was to concentrate on the extent to which the Bill might infringe on our terms of reference and to draw those aspects to the Senate's attention.

At the end of the day, the Committee was bound to observe that the limitations which the Bill proposed to impose would amount to an interference with the freedom of expression and might, therefore, be considered to trespass on personal rights and liberties as contemplated by this term of reference. The Committee noted that freedom of expression was not absolute, referring to the effect of defamation laws and laws relating to censorship as examples of instances in which some restriction on the freedom of expression was considered by society to be necessary. With this in mind, the Committee stated that the key question to be determined was whether or not the limitations to be imposed by the Bill trespassed unduly on personal rights; a matter for the Senate.

After lengthy consideration and after referring to article 19 of the International Convention on Civil and Political Rights, the Committee suggested that what was and was not a necessary restriction was really a question of public policy, that is, better left to the Senate - as are all these decisions, in the end. The Committee concluded that, as such, it was a question which was appropriately a matter for decision of Parliament and not the Committee.[14] In the end, the Senate set up a select committee to look at that Bill and that committee has not yet reported.[15]

I will perhaps come back later to the question of drafting and the invaluable support that the Office of Parliamentary Counsel provides to the Committee. However, it is important to note at this point, as the Chairman indicated, that the Committee has in recent times also felt compelled to draw attention to unduly complex or difficult legislation that was difficult to

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14 See *Alert Digest No. 8* of 1991.

15 The Senate Select Committee on Political Broadcasts and Political Disclosures was set up on 14 August 1991. It reported on 28 November 1991.

understand under this term of reference. The Committee has taken the view that people have a right to be able to work out what the law is and that unnecessarily complex legislation interferes with that right.[16] That might sound like something we would all expect to know and understand, but the type of legislation that we receive, with more regularity than we should, indicates that not everyone else agrees with that view. So much for that particular term of reference.

Under the second term of reference, the Committee is required to draw attention to provisions which make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. What this means is probably best illustrated by the Committee's continuing campaign against delegations of power to 'a person'. This is a pearler, we often have these. I have an example to highlight for you how stupid this is. The Committee often encounters bills which, for example, set up a new statutory authority to do certain things. A good example of that is the Australia Maritime Safety Authority, AMSA, set up pursuant to a piece of legislation in 1990. The functions of the Authority include the combating of pollution of the marine environment, the provision of a search and rescue service, and the provision of services to the maritime industry on a commercial basis. The Authority is, under its Act, given the power to carry out those functions. In particular, it can enter into contracts, acquire, hold and dispose of real and personal property, join in the formation of companies, enter into partnerships, let on hire the plant, machinery or goods of the Authority, and it is also able to invest such money as is not immediately required for the purposes of the Authority. So it has a quite broad range of powers.

Clause 58 of the AMSA Bill proposed to allow the Authority to delegate any or all of its powers under the legislation to 'a person'. Given the wide-ranging powers which the Authority was to be given under the Bill, the Committee suggested that this power to delegate was too wide. As it has done in the past, the Committee further suggested that the power to delegate should be limited. This can be done in one of two ways. You can limit either the persons to whom the power can be delegated, which is often the case, or you

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16 See, for example, *Alert Digest No. 4* and the *Fourth Report of 1991*, dealing with the Australian Capital Territory (Electoral) Amendment Bill 1991.

can limit the powers that can be delegated. Or, I suppose, there can be a combination of both. There was some limitation put on that power to delegate in that Bill.[17] It is clearly ridiculous to have an authority given such a wide range of powers and to give that authority the power to delegate those powers to a person - those powers could be delegated to any person, to any Tom, Dick or Harry. So that is another reference which frequently comes to the Committee's attention.

The third term of reference requires the Committee to draw attention to provisions which make rights, liberties or obligations unduly dependent upon non-reviewable decisions. The classic example of an infringement against this term of reference is a provision which exempts decisions under a particular legislative provision from review by a court or a tribunal. Of course, in the case of a purported exemption from review by a court, the provision would have to survive the courts' natural disinclination to interpret such privative or ouster clauses in the way that the draftspersons, or rather their instructing departments, intended. However, in the case of administrative review, they are likely to be more successful.

The Committee most recently drew attention to this type of provision in the rewritten Social Security Act, in which section 1253 excludes certain specified decisions from review by the Social Security Appeals Tribunal. Despite the Committee's objections, the provision in question was enacted, though it should be conceded that the provision was largely a rewrite of the (then) existing 1947 Act.[18] The rewritten Social Security Act is the plain English version, which started off at 200 pages and, after community consultation, I think went to 600 or something like that. But that is not a bad thing; if it is plain and clear and everyone can understand it, length should not be a barrier.

The fourth term of reference requires the Committee to draw attention to provisions which inappropriately delegate legislative powers. It is under this

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17 Though the provision in the Australian Maritime Safety Authority Bill 1990 was actually drawn attention to under term of reference 1(a)(iv), the problem is, arguably, equally one under term of reference 1(a)(ii) - see, for example, *Alert Digest No. 16* of 1991 and comments on the Hearing Services Bill 1991.

18 See *Alert Digest No. 13* of 1991.

term of reference that the dreaded 'Henry VIII' provisions are encountered. For the benefit of the uninitiated, a 'Henry VIII' provision is basically one which allows the amendment of a piece of primary legislation - that is, an Act - by a piece of subordinate legislation. That is a regulation or other instrument made under that Act. As to the connection with Henry VIII, while it might relate, as Professor Pearce said this morning, to the Church of England or it might relate to the Pope or it might relate to a whole lot of things, I am told that if someone is encouraged to ask a question of Professor Whalan he can tell us one of his infamous stories about these matters and explain quite concisely why we call such clauses 'Henry VIII' clauses!

Recently, the Committee has been drawing attention to these provisions and to a particular version of them - a version which if not 'Henry VIII' clauses, is a pretty good imitation thereof.

A typical example occurred recently in the Hearing Services Bill 1991. In that Bill, subclause 4(1), defines 'hearing products'. They are defined as:

> (a) hearing aids; and
> (b) alternate listening devices; and
> (c) listening systems; and
> (d) tests, procedures, documents and computer software associated with the provision of hearing services; and -

just to catch the lot of them -

> (e) such other products as the Minister determines to be hearing products within the meaning of this Act ...

We think that is probably a 'Henry VIII' clause.

The Committee suggested that that was exactly what it was, because it would allow the Minister to alter the definition of a hearing product contained in the primary legislation by simply issuing a determination.[19] I understand the argument that he was not altering the definition, because the definition says that

19 See *Alert Digest No. 16* of 1991.

anything he says is a hearing product is a hearing product. But it does alter the definition in so far as members of the public who buy the legislation can be expected to understand what a hearing product is.

I have been tipped off that the First Parliamentary Counsel, who is going to have a bite of the cherry after this, has a different view. So I will just alert you to the fact that already I feel under attack from behind. Or perhaps the Committee should, on my behalf, feel under attack!

The last term of reference is the one where the Committee is required to draw attention to provisions which insufficiently subject the exercise of legislative power to parliamentary scrutiny. In some respects this is a subset of the earlier one. It is perhaps for that reason that the Committee Secretary has not been easily able to lay his hands on examples of infringements of this principle.

As a general example, however, one can say that a provision which we might draw attention to under this principle would be one which allowed a Minister to issue guidelines or directions to, say, the Secretary to his or her department, which are then to govern the exercise of any Secretary's discretions under legislation which will itself be administered by the Minister. If those directions or guidelines were legislative in effect and they were exempt from any form of legislative scrutiny such as by tabling or disallowance by Parliament, there would probably be an infringement of that reference[20].

The fourth and fifth references throw up questions of quasi-legislation and the proliferation of quasi-legislative instruments in the Commonwealth legislative framework. Though it is not appropriate to deal with such a difficult and complex problem in the context of this seminar, I would say that the Committee is ever vigilant about the use and the spread of quasi-legislation in the Commonwealth arena, and will continue to draw attention to instances which, in the Committee's view, involve the inappropriate delegation of legislative power of the Parliament.

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20 See, for example, the *Seventeenth Report of 1988* and the *Second Report of 1989*, dealing with the Social Security Legislation Amendment Bill 1988.

That was a tour - not as quick as it should have been - of the Committee's terms of reference. I would like to offer some general comments about the Committee's interpretation of them.

As the first point, I would simply repeat what the Chairman has already said about the Committee's scrutiny of legislation being very much a technical scrutiny. I do not say that to diminish it but to highlight the fact that the politics is taken out of it. As a result, in applying the terms of reference to a Bill or to the provisions of a Bill, the Committee studiously avoids any policy or political issues which the provisions may involve. This should be borne in mind when you look at what the Committee has said - or perhaps more importantly what it has not said - about any particular provision.

The second general point is to stress that, in commenting on a Bill, the Committee is not in any sense bound by what it may have said before - which is a good thing. While the Committee naturally endeavours to maintain consistency in its comments, it is never an answer for a ministerial response to point out that the Committee did not object to such a similar provision in another Bill which was passed earlier. Such a response from a Minister is just discarded.

The final general comment that I would like to make is by way of a thank you to the First Parliamentary Counsel and his Office. It has become increasingly clear to the Committee that certain unwelcome legislative practices have been assigned to the legislative equivalent of Siberia, as much as a result of the good work of the Office of Parliamentary Counsel as it is a result of the Committee's persistence in commenting unfavourably on them. I do not have time to explore this matter in any detail here but I note, for example, the role which the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 has played in controlling the use of open-ended proclamation clauses in bills[21]. I also acknowledge the general good work done by the draftsmen and draftswomen - parliamentary drafters, I suppose - in Mr Turnbull's Office, in their advice to instructing departments that certain provisions should be avoided for fear of attracting the attention of the Committee.

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21 See Senate, *Hansard*, 12 April 1989, pp 1464-8.

Just before passing on to the First Parliamentary Counsel, Mr Ian Turnbull, QC, may I say that I hope having listened to an outline of those terms of reference has been useful. They are certainly not news-making - Channel 9 is not bursting to come through the door and report that there is a committee watching out for your civil liberties, but that is one aspect of parliamentary work that goes on here, week after week. It occurs every Wednesday, as Senator Cooney says, at 8.30 a.m. - quite regularly - simply because there is a commitment by a large number of people to use whatever forums we can to increase the role of parliament as opposed to increasing the role of the executive. I think that is 'a good thing'. Would you welcome the First Parliamentary Counsel, Mr Ian Turnbull, QC.

Professor Whalan - Thanks very much, Senator Vanstone. All I want to add in introducing Mr Turnbull, QC, is that he has held that office for five years, since 1986. Senator, you have already said thank you for his help to the Committee, and indeed that was exemplified just last week. There was a joint seminar held between members of his Office of Parliamentary Counsel and the Office of Legislative Drafting and the secretariats of the two scrutiny committees. I, at least, gained a very great deal from that and I hope that we will hear now from Mr Turnbull of some more of the fruits of that cooperation.

Mr Turnbull - Thank you very much, Mr Chairman, for those kind remarks. I would also like to start by thanking Senator Cooney, in his absence, for inviting me to act as a commentator in this session. It is a great honour to take part in the celebration of the tenth birthday of the Scrutiny of Bills Committee. I am also very grateful for Senator Vanstone's kind remarks about my Office. Before going any further, perhaps I could help her by saying that we too were stuck on the non-sexist word for people who work in my Office. We are indebted to the Canadians for inventing the word 'drafter'. It is a lot easier to say than 'draftsperson' or 'draftswoman' or 'draftsman'!

I would like to start by commenting that most of us have probably wished at some time or another that we did not have a conscience. I know I certainly have on many occasions. When, in 1981, the Scrutiny of Bills Committee was established, although I then was far from being the head of the Office but was one of the drafters, I was in the position of someone who had suddenly, in fairly

mature age, been handed a conscience. It caused me some irritation at first because it forced me to re-examine a lot of preconceptions that I had had for many years on how legislation should be drafted.

Having said that, I should say that I believe that conscience makes us better people; and even if Senator Vanstone's description of politicians is accurate, I think it must make better politicians. I have no hesitation whatever in saying that I firmly believe that the Scrutiny of Bills Committee has helped the Parliament make much better law.

Before going any further, I should briefly explain the role of parliamentary counsel, just in case some of you do not know exactly what we do. We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

However, we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee's principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and the Parliamentary Counsel work together for the same ends, but we do have different points of view.

I look it at this way, that the Committee looks at things from the top down. It is looking always at its principles or the terms of reference. I will refer to those as principles through my comments. On the other hand, Parliamentary Counsel look at it from the bottom up. We are making the law, we are making the provisions, and so we look rather at precedents. So we are looking at the

same thing but we are looking at it from different angles. I will come back to that later.

Senator Vanstone, very modestly I think, has not said what I am about to say, and that is that the Scrutiny of Bills Committee has obviously had a tremendous success story in improving the law. Attached to their coat-tails, if I may say this, I think that we can claim a small part in that success story in our co-operation with the Committee. Some examples are, for example, the burden of proof on the defendant, the reverse onus. I suppose I am not all that atypical in that I had been drafting for many years before the Committee was established. I was quite used to the standard provisions you would see in statutes from England, New Zealand, the United States, the Australian States. You would have a persuasive burden placed on the defendant in a criminal offence provision. Usually it would be in one of these two forms - either something was presumed unless the contrary was proved, or it was a defence to the charge if the defendant proved something.

I was used to just drafting this without thinking about it but when the Committee started to investigate the question of reverse onus, I then learnt for the first time - I may add that I had been a prosecutor for five years before I became a draftsman - the difference between the persuasive onus and the evidential onus. I had never heard this distinction before because when you are a prosecutor all you are worrying about is proving things beyond a balance of probability, you are not so worried about the exact standard applying to the defendant. And, as a drafter, as I say, we were not used to making these distinctions.

But now we are very conscious of this and whenever there is a reverse onus provision, we will at least advise departments and say, 'Look, do not forget there is a question of persuasive onus or evidential onus and the Scrutiny of Bills Committee prefers the evidential onus which is much easier for the defendant to satisfy'.

Exemptions from self-incrimination are also becoming standard provisions now. I am not aware that departments argue about the advice we give them on these.

In the case of crimes of making false statements, the standard form now - at the request of the Committee - is to write in or spell out the fact that the defendant must know the statement to be false.

Concerning delegations, even though an example was given by Senator Vanstone, we advise regularly that they should be limited. Usually that is done not so much by limiting the powers but by limiting the persons to whom the powers are delegated. In many cases the departments go along with that. Usually it is just that they had not thought about it and usually it is quite easy to find a class or classes of persons to whom the delegation can be limited.

Concerning the review of administrative decisions, this is becoming more and more common. As for 'legislation by press release', Senator Vanstone said that this is becoming much less of a problem. Here I think that Parliamentary Counsel cannot take the credit. The credit for this should be taken by the departments which are aware of the fact that the Committee will object and are, consequently, requesting us to do this far less often.

Parliamentary scrutiny of delegated legislation is becoming very common. In fact, we in our Office invented the idea of disallowable instruments. One of my officers invented this. He wanted to call them scrutable instruments! I had a double problem with that because firstly I do not think there is such a word and secondly it suggested that all other instruments were inscrutable. But, of course, we did not invent the principle. It is simply the shorthand way of calling them this and, therefore, applying the provisions of section 46A of the Acts Interpretation Act.

If this co-operation is going on so well, why is there still need for comment by the Committee? I will have to say straight away that some may slip through without advice being given in my Office. I do not have any statistics on this since you cannot have statistics of negatives. Although we do try very hard to remember to advise these things, it must certainly be possible that we do not always remember.

By far the most common reason for things getting into the legislation even though they infringe the principles is because departments have asked for

them. And as you well know from seeing the reports of the Committee, the Committee invites Ministers' responses and then comments on those responses and the Senate decides what to do.

But even in these cases I think there is value because it makes a department focus on the question. So even if these provisions do get into the law and they perhaps do infringe the principles, at least the departments have thought about it and are aware of the fact that they have got to run the gauntlet of this criticism.

I think that it is safe to say that the provisions that get into Bills and come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in the Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very powerful weapon in our armoury.

I would like to comment on what I regard as a special case, and that is the question of complex drafting, because here we are solely responsible, although even here I will try to pass the buck slightly. Unlike the other ones where it is largely a question of policy being determined by the department, here it is a question of how we do our job. I would like to start by making it very clear - I have said this a few times but I would like to say it again - that it is the policy of our Office that we are fully committed to the ideal and the aim of making our legislation as clear and as simple as possible.

The Scrutiny of Bills Committee recognises this commitment and, indeed, Professor Davis made some kind remarks to the effect that in recent years, statutes have become a lot easier to read. I am most grateful to him for those remarks. I even asked him whether I could quote them in the annual report. We need that kind of thing because we get so many critics outside who do not like complicated Bills, and I quite understand why they do not like them.

You may say, 'If you are so committed to this, then why are there so many complex Bills?'. And I must concede that there are too many complex

Bills. The first big reason is time - or lack of time. The famous philosopher and mathematician Pascal once wrote to one of his friends:

> I have made this letter longer than usual, only because I have not had the time to make it shorter.

He may have been joking, but there was a lot of truth in that. I firmly believe that even when you know the technique of simple writing it does take longer to write something more simply or to at least find the most simple way of expressing something.

As an example, I could mention that the Social Security rewrite took 18 months to do and, Senator Vanstone, it was 1,000 pages in the end. I should say in passing, people might well say, 'If it is supposed to be so simple and easy, why is it so long?'. We came to the view that there was a special reason in this Act for repeating various provisions for the benefit of people who approach the Act with a view to looking at one particular benefit each time.

But even leaving aside the question of drafting simple legislation, I know for a fact that it takes me twice as long to read my officers' drafts since we have adopted this policy. It is not because they are badly drafted, but it is simply because it takes a long time to think of various possible ways of making a thing simpler, even if you end up saying, 'Leave it the way it is'.

A second big reason for legislation being too complex is that the policy is too complicated. I drafted the first version of the D'Hondt system for the ACT electoral law. I do not often get the chance to draft legislation and I thought, 'This is my chance to show what a really nice simple piece of legislation can look like.'! It was also one of the early cases where we could actually print an example in a Bill and at the back of that Act there is in fact a little table showing how to calculate in the D'Hondt system. I was very pleased with that particular provision. Anyway, as you well know, there were political compromises, and we went from D'Hondt to super-D'Hondt and then we went to ultra-D'Hondt and then we went to mega-D'Hondt. We all know what it is like now - it is an absolute monstrosity. I would defy anybody to write that simply.

A third thing that works against simple laws is that most Bills are amendments of Acts that were written in the traditional Commonwealth style. We are to some degree stuck with their structure and their language. Even though we organised an amendment of the Acts Interpretation Act to cover the case of provisions which are expressed in different language, we still find that we are largely limited in our innovations when we are dealing with amendments.

So far I have been carrying on the tradition of cooperation between the Scrutiny of Bills Committee and Parliamentary Counsel by saying how good we are and how good the law is that we are making. However, just to prove to you that I am a free individual, I will say that I do think that there is scope for improvement. I think that both the Parliamentary Counsel and the Scrutiny of Bills Committee could perhaps improve in a certain degree. In our Office, taking what I called a bottom-up viewpoint of concentrating on precedents is natural because we are obviously trying to be aware of cases where the Scrutiny of Bills Committee has not liked something in the past. Clearly, we should know about that and advise people against it. But the problem with that is that we do not look so much at the principles and therefore we will not anticipate new forms of breaches of the principles. There, I think, is an area where we could improve our performance.

Turning to the Scrutiny of Bills Committee, if I may respectfully say this in a spirit of cooperation, I think there are two cases where there might be some improvement. I think there are signs, in two areas anyway, that the Committee is also adopting the same bottom-up viewpoint, concentrating on the precedents and losing sight of the principles. As I am surrounded by persons affected by my comment, I think I had better be careful in explaining what I mean. I will give two examples.

One is retrospective legislation. This is quite rightly treated as falling under principle 1(a)(i), that is to say, legislation that trespasses unduly on personal rights and liberties. Senator Vanstone quite rightly said that retrospective legislation is not always a bad thing. On this question of drafting errors and legal errors being fixed up, I can give an example which is even older than the one that was mentioned by Senator Vanstone. I was asked to draft something which was to restate or correct the powers of the Registrar of the

Australian Capital Territory Supreme Court. Apparently, the Registrar of the Australian Capital Territory Supreme Court had been doing certain things - I forget what they were now - ever since the Court was established and it turned out that, in strict law, all these instruments and acts were invalid. So I was asked to correct this thing. We said, 'What do we do about retrospectivity?'. They said, 'Make it retrospective', and I said, 'How far back?', and they said, 'Right back to when the Court was established'. In fact, it went back 50 years. But I think that that would be a case where no-one would argue that it was a good thing to do.

On Senator Vanstone's statement about laws being brought into operation on Royal Assent but applying to transactions taking place before Royal Assent, with great respect, I do not think this is increasing. I would be most surprised to see such a provision because I do not believe that an Act can operate before it commences. Possibly the example that was at the back of that statement was a recent bill amending the Sales Tax Act where the amendment came into operation on Royal Assent and it was giving a benefit to use of certain goods. There was a provision that said that this did not apply to goods that had been purchased before Royal Assent simply because, if people had warehouses full of goods that had been bought long before the law came into operation, they might argue that they should have the benefit. It is arguable whether from a policy point of view that was a good idea, but this was not done as an ingenious trick by drafters to dress something up as not retrospective which really was retrospective. I assure all here present, including Senator Vanstone, that that was not the intention.

To illustrate my point that I think that the Committee is losing sight of its principles in fixing on precedents, the first example is the special payments for child bereavements under the Social Security Act. This was made retrospective and the Committee noted the retrospectivity in the Alert Digest, but because it was beneficial it made no further comment. What I would ask is: why mention that at all? Those payments could not possibly be described as trespassing unduly on personal rights and liberties. It was retrospective - but that does not necessarily mean that it trespasses unduly on personal rights and liberties. I think that, if the Committee had looked at the principle and not at the mere fact that this was retrospective, it would not have needed to make any comment at all.

In this way I advocate that it should follow the excellent approach that it adopted in the case of the machine-guns thing, where it was looking at the reason why a law was made retrospective. That is the point: it should be weighed up against the principle and not condemned merely because it is retrospective.

The other case is the 'Henry VIII' clauses. In recent years the Committee's reports have been full of statements that provisions are 'Henry VIII' clauses. You have heard a definition given to you by Senator Vanstone of how the Committee interprets the meaning of the phrase "'Henry VIII' clause" and, as she promised, I disagree with that. We have no time for history here and anyway I am not qualified, but I will give you three definitions from textbooks.

First of all, the *Macquarie Dictionary of Modern Law* says that a 'Henry VIII' clause is 'a clause in an enabling Act providing that the delegated legislation under it overrides earlier Acts or the enabling Act itself; so named because of its autocratic flavour'. *Craies On Statute Law* says that a 'Henry VIII' clause is 'a clause delegating power to amend Acts'.[22] And Professor Pearce, in his book on delegated legislation, has said that it is 'the inclusion in an Act of power to amend either that Act or other Acts by regulation'.[23]

Here is an example of this kind of provision in the UK - I will read to you the words: 'An order under this section may make provision for amending, repealing or revoking, with or without savings, any provision of an Act passed before or in the same session as this Act'. That is really powerful stuff.

The Scrutiny of Bills Committee defines a 'Henry VIII' clause as any clause that enables regulations to alter the effect of an Act, even if they do not amend it, and you heard the example given of the Hearing Services Bill. This was a case where you had a definition of a hearing product. You have got paragraphs (a), (b,), (c) and (d) - all different kinds of products listed in the Act

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22 Seventh edition (1971, Sweet and Maxwell, London), p 293.

23 Pearce, DC, *Delegated Legislation in Australia and New Zealand*, (1977, Butterworths Pty. Ltd., Sydney), p 7.

- and then paragraph (e): 'such other products as the Minister determines to be hearing products within the meaning of this Act'. What this is doing is not amending the Act, or any other Act. It is not autocratic; it merely extends a definition.

Senator Tate, in a paper delivered in Adelaide in 1985, reporting on the deliberations of the Scrutiny of Bills Committee in the previous five years, said that the Scrutiny of Bills Committee approved this use of regulations. He said that it was acceptable for regulations to extend a definition. What the Committee did not like was leaving the full scope of the definition to the regulations.[24]

A final comment on this example is that it is beneficial. If regulations are made under this definition, more products will get benefits under the Act.

The Scrutiny of Bills Committee simply labelled this a 'Henry VIII' clause. It did not comment on the fact that it is beneficial; it did not comment on the fact that it was adopting a different view from the 1985 approach; and there was no discussion whether this was an inappropriate delegation of legislative powers.

There are a vast number of ways in which regulations can alter the effect of an Act, ranging from changing a date or an amount of money to really substantial law-making, and I cannot believe, personally, that they are all bad. If they are all called 'Henry VIII' clauses, it is assumed *ipso facto* that they are bad and we do not get the very valuable benefit of the views of the Scrutiny of Bills Committee on the real principle - what is an appropriate delegation of legislative power.

I am in real trouble now, because I have criticised the Committee, but I would like to add that what I said was in the spirit of co-operation and not criticism. By focusing more on the principles, I think the comments made by the Committee will have an even greater impact than they already have. Thank you very much.

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24 *The Operations of the Senate Standing Committee for the Scrutiny of Bills 1981-1985*, Parliamentary Paper No. 317 of 1985, pp 49-54.

Professor Whalan - I am grateful to Mr Turnbull for reminding me about the ACT Supreme Court. Wearing my other hat, as adviser to the other scrutiny committee that exists around the place, namely, the Australian Capital Territory Scrutiny of Bills and Subordinate Legislation Committee, when I did my weekend homework on 12 Bills and only 10 pieces of delegated legislation - but one contained 400 pages - I noted that there was a retrospective provision going back, unfortunately, to 24 December 1956. But it was beneficial. As Mr Turnbull would appreciate, it was beneficial as it approved all powers of attorney that had been made in the interim. I had forgotten that one of 13 December 1956, because I was being Jim Davis at the time when that came up.

In case somebody asks, I had better get off my Henry VIII thing. He was born 500 years ago this year, you would recall, in 1491. When I was a schoolboy I used to be able to give all the regnal years; I could no longer pass that exam. Henry VIII gets the blame for these things, but he was not the first. The first one we have been able to find is in 1385. It was the Staple, setting up the wool monopoly, as it was. Henry VIII's legislation was pretty bad. You will find the Statute of Proclamations, which gets the great publicity, but it was not the worst. The worst really was the Statute of Sewers, which was a stinker because it delegated legislative powers, judicial powers, powers of amendment, powers of entry - powers of everything. That just about qualifies under any definition, I reckon, Mr Turnbull.

I suspect that what Stephen Argument had in mind when he put that bit in was my true experience when I was privileged to be at the delegated legislation conference at Westminster in 1989. The magnificent hospitality meant that we spent most of the time at working hard or at magnificent entertainment, but I zoomed off on the Underground to see a friend and I was intrigued by an advertisement up in the Underground. There was old Henry VIII advertising the Underground, saying, 'A return ticket to the Tower of London, please'. A graffiti artist had added, 'and a single for the wife'. I suspect that is what Stephen had in mind - my terrible story. It is a totally genuine story, as those who have been in London in the last few years will know.

I am going to introduce the panel. You will notice that I am carefully not giving any sort of political or State affiliations, because we are talking about a

bipartisan committee. We have Senator Ian MacDonald, Senator Rosemary Crowley, Senator Barney Cooney, my colleague Professor Jim Davis - who I am proud to say was once upon a time my student, a long, long time ago - and Senator Nick Sherry. I now invite questions.

Mr Gardini - Firstly, I would like to congratulate the Committee on its tenth birthday. I think the Committee does a great deal of very valuable work. I also think that the business community regards it more as an independent check and is certainly bipartisan.

I have two comments to make. The first goes to perhaps reversing the onus of proof. In the sense of efficiency, why should the Committee bear the onus of proof of bringing a Minister to task about some clause or provision in a Bill which may contravene one of its terms of reference? I have listened to the process this morning, and I have heard of the short period of time and of the limited resources that the Committee has, albeit very well assisted by Professor Davis. The difficulty is that if the Parliament has deemed these principles so important, why should a Minister, in introducing a bill into Parliament, not make the affirmative statement that to the best of his knowledge no provision of the legislation infringes any of the provisions of the terms of reference of the Committee? That would seem to me to certainly assist the work of Professor Davis over the weekend. This is part of a self-assessment coming from the private sector that we are subject to. I think that this might be a reasonable burden to place on departments. I am not suggesting for one moment that Professor Davis should not sit down and check every clause of each Bill. We have to have a certain degree of cynicism.

As we all know, major pieces of legislation are often subject to public consultation and there is a month or two allowed for public discussion. I have recently had some discussions with Senator Tate about reversing the onus of proof in product liability draft legislation. He is quite well aware of the business view about that. If it was not the case that he changed his mind two weeks ago, I am sure that we would be coming back to the Committee. However, if he decided not to change his mind, why should he not say to the Parliament that this is the Government's view and we want to reverse the onus of proof for these reasons? It should be pointed out to the Committee that a certain section of the

community disagrees with the view. It may well be that that disagreement relates to the terms of reference of the Committee. It would seem to me to be a great deal more efficient to do it that way.

The second comment I would like to make really flows from the first. I have sat patiently here this morning listening to how this process works between members of Parliament and the bureaucracy. But as a member who represents a large and important section of the community, it is very difficult to have access to the Committee. There is nothing to stop me from writing to the Committee and, as Senator Cooney said, I have done that on several occasions. However, once again it would seem much more efficient, where there is common knowledge that there are some areas of disagreement, to bring those matters before the Parliament. Also, to ensure that various groups are given the opportunity to discuss matters and perhaps even appear briefly before the Committee. However, I hesitate in saying that because I do not want to be seen to be building up some great mechanism which gets out of control. With reductions, there could be efficiency gains in bringing about those processes.

I believe that as we look towards the later part of the 1990s, and beyond that the Committee could well take on other functions. The member from the New South Wales Parliament mentioned that their committee also looks at requirements in relation to financial impact statements and whether or not government agencies have in fact complied with those. At the moment, whilst we do have those processes at the federal level, they are largely internal and the business community is unaware of what response it could provide. So in making that comment about the efficiency argument and perhaps elements of self-assessment I also raised the question, perhaps more appropriately for the next segment, of the future of this Committee and how it would see its role not in a policy sense but in making sure that agencies conform to stated government policy.

Professor Whalan - Who would like to take that on board from the Committee?

Senator Cooney - I will stay back here because I am an elder statesman!

Senator Macdonald - Concerning an answer to the question of why should not the Minister do that, I have not got an answer for that. I think it is probably a good idea. The difficulty is that the Minister is a politician and so would you trust him if he were left to be the one to point out those things to you.

I think one of the advantages of the Scrutiny of Bills Committee is that it is entirely independent of the Ministry and the bureaucracy and obviously looks at things in a different light and probably a little bit more carefully.

Senator Sherry - Just on the first issue you raised, the reality is most Ministers would argue at the moment that they do not transgress the terms of reference of the Committee and therefore why would they need to say that in Parliament. Often we argue amongst ourselves about whether there is a transgression of the criteria. So I would assume that the Ministers by their past performances believe they are fitting into and meeting the criteria. I think the way in which we do it at the present time is certainly the easiest.

The additional problem is, of course, if you require Ministers to make statements about the criteria of the Scrutiny of Bills Committee you could logically require them to make a series of statements about a whole range of other matters which I am not sure that, given pressures of time and resources, we could do that.

Mr Gardini - Could I just respond to that just to say that Ministers now have to make a statement about the financial impact of legislation. That is a requirement. Sometimes the Committee misses points where it is conceivable that some impact on my clients may infringe one of the terms of reference. In fact, we have just written to the Committee about that matter. The Committee said that this did not appear to trespass on the terms of reference. I cannot expect Professor Davis to know how my clients would be affected by every piece of commercial legislation.

Dr Kinley - I have a few comments to direct towards Mr Turnbull. You talked at length about the role that you play anticipating what the Scrutiny of Bills Committee may say with respect to certain departmental drafting

instructions. You relay back to them your opinion and hopefully they would take notice of that. Do you do that merely on the anticipation or do you actually have formal or informal liaison with the Committee or perhaps the legal adviser? Irrespective of that, it does seem to indicate therefore that the departmental counsel does not have itself informal or formal links with the legal adviser or the Committee itself.

It would seem to stand for reason that if they are in doubt, certainly if you have indicated to them often enough that there are possible transgressions, that the way round it would be to form some sort of informal link and go off the record to the legal adviser to try to anticipate what may happen.

Mr Turnbull - First of all, we have no link, formal or informal, with the Committee. Secondly, I do not think that departmental legal advisers have any such links either. I think an awful lot of benefit is gained by simply giving the advice that these things are in our view such that the Committee will disapprove of them. We churn out an awful lot of legislation and if we had to liaise with the Committee each time then I think that would take up a lot of time unnecessarily. I think that the only cases where there are difficulties are where we advise that something does infringe the Committee's principles and the Department then says it still wants it. In a case such as that, I do not think there would be much point in liaising with the Committee because the Committee would simply agree with what we had said.

Professor Whalan - It was not a set-up that it was another one of my colleagues who asked that question!

Senator Crowley - I would like to say that it seems very dubious to allow consideration of what you are proposing, if the Committee is supposed to be independent and at arm's length from all of those people who are rushing words onto the page that are called draft legislation. The idea of the departmental legal person ringing up the Scrutiny of Bills legal person and saying off the record, 'Have I got it right this way?', seems to me to cut right across what real independence means. I think they should find out after they have sinned if that is how it is judged, but I would not like colluding before you went there. I think that is a very dangerous precedent.

In fact, what I would like to say is that the thing that appals me is how long it has taken the draftspersons - time to bite back, Mr Turnbull - to take note of the kinds of recommendations the Scrutiny of Bills Committee regularly puts up. In fact, we have met with Parliamentary Counsel to talk about how that process happens and why indeed it has taken some considerable time.

So, it is possible for that process to happen, and to happen more speedily, but I think I would defend, at considerable volume, the need for the Scrutiny of Bills Committee and its legal counsel to stay very independent: not only to be independent, not only to be seen to be independent, but fiercely to be independent.

Professor Whalan - It is my privilege to say thank you, particularly to Senator Amanda Vanstone and to Mr Ian Turnbull, QC, and to the other members of the panel.

FUTURE DIRECTIONS: SCRUTINY OF BILLS IN THE 90s AND BEYOND

Mr Harry Evans - It is very appropriate that we should end a seminar like this by looking into the future. You will have gathered from Dennis Pearce's remarks this morning that when the Scrutiny of Bills Committee was established, there was very much the idea that it would evolve. The Senate had already experienced the way in which an institution like that can evolve in the case of the Regulations and Ordinances Committee and there was certainly a view that the Scrutiny of Bills Committee would be a body which would develop as it went along. As Dennis Pearce also said, the first steps were somewhat tentative and it was hoped that the tentative steps would lead to more confident steps later on.

In order to deal with this problem of the future, we have a very well qualified person in Dr John Uhr, who has uniquely combined academic work with work as a parliamentary officer. As an academic he has been very much engaged in the future, pointing to future directions and, as a parliamentary officer, he actually served as a secretary to the Scrutiny of Bills Committee, so he has seen the work first-hand.

To comment on Dr John Uhr's paper, I will be calling on Senator Rosemary Crowley, who is one of those senators who was thrown in at the deep end when the Committee was established and was a distinguished member of the Committee in its initial work.

We shall also be hearing from another senator who was thrown in at the deep end, Senator Robert Hill, who is a lawyer with a great interest in scrutiny of legislation and who now holds the exalted position of Leader of the Opposition in the Senate. First, Dr John Uhr.

Dr John Uhr - I followed Anne Lynch as Secretary to the Committee. Anne was the first Secretary; I was the first one appointed once the Committee was set up and running and I inherited her office and her shoes, those high heeled shoes which I wobbled around in. I probably left the Committee messier

as a result of that and probably left my own shoes behind. I cannot remember who it was that tried to wear my shoes but, whoever it was, I would like them back at some stage.

I should also point out that I have a cut finger which is the result of actually trying to staple this paper together this morning. I think it also indicates that there are some cutting elements within some of the remarks in the paper and they redound to me as well. So some of the comments that I might be making about the Committee's ability to find its way towards the future really do reflect upon myself as well, since I tried to set the ship up those several years ago now.

The Scrutiny of Bills Committee, I think, is very much a paradox. On the one hand, it is capable of attracting, as it has done recently, the delicately worded criticism of its original legal adviser, Professor Dennis Pearce, who was too polite, too prudent, too careful, to repeat those criticisms this morning. But about a year ago, on the twentieth anniversary of the Senate committee system, Professor Pearce devoted perhaps a page in a more lengthy address to a fairly surprising criticism of the Committee's inability to live up to be what he understood to be its potential.

In Professor Pearce's view, the Committee has never really lived up to that and it suffers under the shadow of its better-regarded sibling, the Regulations and Ordinances Committee. The other committee to which I was Secretary was that Committee and, again, I followed in Anne's footsteps.

The Scrutiny Committee is also capable of attracting effusive praise as well as this sort of muted criticism. For example, Professor Gordon Reid and Dr Martyn Forrest in their official bicentenary history of the Parliament,[25] draw attention to the Scrutiny of Bills Committee as perhaps the most promising landmark in the 1980s development in the Commonwealth Parliament. That official parliamentary history, written by eminent and immensely talented parliamentary and executive leaders - Martyn Forrest a commissioner for consumer affairs now in Western Australia - floats the Committee as a kind of

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25 Reid, GS and Forrest, M, *Australia's Commonwealth Parliament, 1901-1988*, (1989, Brown Prior Anderson Pty Ltd, Burwood).

model of true committee activity, the conscience, as it were, of a model legislature, but without much bother with evidence or data establishing that the Committee does actually achieve everything that it sets out to achieve.

The paradox is that the Reid and Forrest official history turns the Scrutiny of Bills story into Australia's forgotten claim to have nurtured at least one invention or device comparable to international best practice. Yet the compelling nature of their story has, at least in their own telling of it, very little evidence to back it up.

It is as if the establishment of the process has become an end in itself, regardless of the merits of the work performed. Reid was certainly no parliamentary novice and he knew that the very existence of the Committee would be enough to cause legislative advocates and, of course, their drafting colleagues, to conform through a kind of fear of the anticipated reaction that Mr Turnbull so eloquently mentioned before, in the event that the draft had got anything wrong. The model of persuasive conformity was, and still is, the Regulations and Ordinances Committee, although I am going to contend that there are important differences between the two committees.

On the other hand, we have that other 'home-town' view of Professor Pearce which is based on the closest possible access to the evidence through his office as a foundation adviser. His account, of course, cuts in another direction. Reid and Forrest provide a kind of authorised official history which goes out of its way to praise the tenacity of the Committee's founders, particularly Senators Missen and Chaney, who moved heaven and earth, and then indeed their own Liberal Government, to get the Committee up and running as though the establishment of the Committee was the heart of the whole story.

I suggest there is something about this Committee which attracts fans and probably also creates enemies with less than customary fair regard to the facts of the case. That something has gone a little bit unnoticed today and perhaps at this point in the proceedings, at the beginning of the last panel, it is the appropriate place to try to broaden our perspective. That something is the Committee's claim to be the Parliament's only specialist legislative committee, which summons up the learned anxiety amongst commentators over the capacity

and the responsibility of the Commonwealth Parliament for legislation. Since the birth of the Scrutiny Committee there has arisen, of course, a whole new scrutiny of bills process, one effect of which is to require of this Committee that it carefully define its core business and stick to that specialised business.

Now our institutions of government are coming under increasing community suspicion for their inward-looking tendencies. Our public services are doing all within their power - and, of course, they have considerable power - to force public institutions and public officials to think through their value-added activities, to be more attentive to their use of public moneys and their corresponding public accountabilities, and to subject themselves to regular performance evaluations. Parliament has been the recipient of much of the information associated with this so-called new accountability, but it has been much slower to throw its hat into the ring and present itself in the guise of a modern managerial institution.

There may be good reasons for Parliament's deliberate if somewhat slow acceptance of performance measures and evaluation. The Senate Finance and Public Administration Committee has done as much as could be expected from any parliamentary body in keeping the administration honest in its use of managerial forms and formalities. But I hold that the debate surrounding the performance of the Scrutiny of Bills Committee, debates about its current performance and its future, are of much greater significance than we might realise today.

The Scrutiny of Bills Committee is a fascinating test case for Parliament. If, on a matter of its basic legislative workload, Parliament cannot come up with feasible outcome and performance measures by which to evaluate the effectiveness of its operations, then Government and the community will have reason to doubt the worth of many other parliamentary operations. More is at stake than just Scrutiny's own fate. Let me itemise a number of factors which will adversely affect the Committee's redefinition and rededication process, of which this conference is an important part.

Let me first of all mention a number of external factors. There are two that I want to mention conditioning the future of the Committee's operations.

One is the specific pattern of ministerial responses to the Committee's reports and comments, and the second is the more general pattern of administrative responsibilities to Parliament.

On the first matter, the history of the ministerial responses, of course, is an important one to acknowledge. The Hawke Labor Government entered office in 1983, with a welcome commitment to various parliamentary reforms, including one that Ministers would respond to committee reports - not just to Scrutiny, of course, but to all committee reports - within three months. I was running around to the Table Office while you were having lunch trying to establish what the facts really are about this and I have been given much more paper than I realised.

Not only does the President now table a report itemising those committee reports that have not yet been responded to by the Government, but the Government now responds to that, indicating why it has not responded - so you get heaps of indications. I think that is an element of accountability: explaining why you have not responded. There are many responses overdue, in fact by many months if I can judge by what I believe to be the latest report, but of course there are many responses that are way overdue, in some cases by years.

Obviously, this suggests something of the environment in which Scrutiny is trying to operate in trying to get a response within a week or 10 days. And, of course, related to this is the notorious practice associated with the former Treasurer of simply not bothering to respond to the Committee, a practice which is now happily on the wane as is reported in the most recent Senate Annual Report.[26]

The other external factor is the wider ethos of administrative accountability. I mention this because a recent report on accountability by the Management Advisory Board[27] might be taken to illustrate the next phase of public management reform which has as its rhetorical standard the return of

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26 Department of the Senate, *Annual Report 1990-91*, p66.

27 Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector: An Exposure Draft*, (1991, AGPS, Canberra).

ministerial responsibility - very much a good thing, if it ever happens - but with the sub-text of the renunciation of administrative accountability to Parliament, which I think is happening now, as is evidenced by the very appearance of the MAB report on accountability.

The MAB report is a kind of blueprint for the latest reform directions in public management. It suggests a new environment of public administration in which Parliament and its committees, together with Professor Pearce's former agency, the Ombudsman, will be downgraded to the status of 'adjuncts' to true accountability, which of course is an internal managerial line of command up to the Minister who alone has the say on forms of interaction with Parliament. RIPAA, which used to be called RAIPA, which used to be called something else, RIPA, now the Royal Institute of Public Administration of Australia, has already held one important seminar on the MAB report and another is being held in Sydney later this week. It is an exposure report and could well be altered before its final publication. But as it now stands, it serves to remind officials that the traditional Treasury line is in some sense the preferred line; one that, if widely adopted, would turn the Committee's dialogue with government into a kind of pathetic shouting match. My query is: where is all the value added dimension to this? What is the community meant to think about the public interest qualities of an administration which unilaterally downgrades Parliament to an institution of 'adjunct' status?

Let me now turn to the internal factors. Lest you think that I am in the pocket of the Parliament, let me mention some of these other factors within Parliament that I think are going to adversely affect the Committee's freedom to engage the future. Parliamentary committees have a reputation for acting as black holes into which considerable energy and extraordinary amounts of information are surrendered, never again to be heard of, and perhaps never again to be used. As was amply demonstrated in the 1989 Senate seminar on the future of the Estimates committees, parliamentary committees face a range of credibility problems. Firstly, that they exercise power without responsibility, demanding endless amounts of time and officers' co-operation, as though they had an unrivalled right to commend public resources as they see fit. Secondly, that they bite off more than they can chew, becoming enmeshed in vast and complicated matters of policy and administration for which they have few

resources adequate to the task of analysis and review. Finally, that they fail to provide feedback, devouring endless amounts of information without much consideration for reinvesting in the administrative loop and only rarely providing constructive feedback and models of preferred practice with clear quality standards or even rewarding best practices.

Once again, the Senate Finance and Public Administration Committee was amongst the first to break ranks and admit, in its 1989 report on annual reports, that Parliament needed to provide a more positive feedback; and then to monitor and evaluate its own activities more critically in sympathy with the latest interest in performance evaluation, in that Committee's 1991 report on the Estimates processes. Until quite recently, parliamentary performance information was substandard. If one accepted as that standard of best industry practice the requirement of MAB's old sibling, the Federal Financial Management Improvement Program, FMIP, think, for example, of that other legislative activity undertaken by the Senate through the Estimates committees. Again, Reid and Forrest are typical in that they tend to support the process more for its noble aims than for its actual impacts.

As dramatically illustrated in the Senate's 1989 seminar - which is available as a Paper on Parliament[28] - opinions differ greatly on how best to evaluate the operations of committees whose primary aim is to enhance Senate consideration of Bills, in the Estimates case the Appropriation Bills, when they do eventually come up for a full debate within the chamber. The weakest form of evaluation is that occasionally offered by friends of the Senate to the effect that 'excellence is as the Senate does' and there is not much that it cannot do under the authority of the Constitution.

Let me try to describe my own view of the Committee's primary goal: if you want to rely upon the formal goal statements to be found in official Senate publications, you would find two contrasting views or justifications of the Scrutiny Committee. The first is process-oriented and is rather like that for the Estimates committees; it is the 'open eyes' argument, which holds that the

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28 Department of the Senate, *Senate Estimates Scrutiny of Government Finance and Expenditure. What's it for, does it work and at what cost?* (Papers on Parliament No. 6) (1990, Department of the Senate, Canberra).

Scrutiny of Bills Committee exists to promote and enhance debate in the Senate by providing additional information on a defined range of legislative practices so that the full Senate can properly deliberate and pass the proposed legislation with open eyes - a new form of 'the eyes have it'. The Committee's task is understood to be one of replenishment rather than repair, replenishment in the sense of adding to the total information bank available to the Senate during formal consideration; repair, of course, being something else designed actually to fix things up.

The second justification is more contents specific, although still dominated by a process or a procedural outlook. It is a repair mode in that it seeks to effect a preferred outcome, actually to fix things up. In contrast to the replenishment mode of 'let us promote and enhance debate', under this second mode the Committee exists to protect and defend something verging on policy, and a major public policy at that. In fact, it is nothing less than social justice. Now it might well be that here is a case of the Senate taking the mickey out of the administration's current guidelines on portfolio program performance statements - we used to call them explanatory notes, which was much simpler - which require attention to the Government's social justice program of equity, access, participation and civic equality. But I think not.

The Senate's own program performance statement states, under the heading of social justice, that the Scrutiny of Bills Committee shares with the Regulations and Ordinances Committee 'the primary goal of the achievement of just outcomes and the maintenance of personal rights'. I am convinced that the higher reputation and the intrinsic worth of the Senate committee on delegated legislation stems from two factors which this Committee has, I think, unwisely rejected: both are facets of parliamentary control and illustrate that parliamentary control can still be a useful standard to aspire to when understood as *quality* control or *verification* of systems and standards, rather than personal control as in the 'gotcha' attitude which occasionally dominates the Estimates Committees.

One aspect of control as exemplified by Regulations and Ordinances is the more subtle formulation of that overused distinction, to which Professor Pearce drew attention, between policy and administration, which Regulations

and Ordinances sometimes uses as a shield to deflect attention from its own policy agenda. More on that in a minute. The other aspect of control is that Regulations and Ordinances has a commitment to a preferred outcome with the Committee being prepared, I think unlike Scrutiny, as a corporate body to go to the wire in effecting its repairs to legislation, even to the point of risking defeat on a lost disallowance motion, which, of course, I am not sure that it has ever done. These two features are closely related.

The delegated legislation committee takes its repair task seriously, precisely because it has a corporate view on the social justice of its preferred outcomes. It examines specific exercises of official power, as distinct from general empowerment provisions, and it knows that what it is prepared to tolerate is fair and reasonable; where to draw the line in defence of justice as it understand it. For reasons which have already come up today, the Scrutiny Committee operates on a much stricter distinction between policy, which is off limits, and legislative policy or administration. The Committee justifies itself as a non-policy committee.

Of course, it is always difficult to know how to separate policy from administration, and many would say that it is impossible. I think one sad consequence of the Committee's flight from policy is the adoption of the replenishment mode of operation as the main outcome orientation. I think this is understandable and on another occasion I would be prepared to defend the Committee, given three key features of its operations, all of which have come up today.

One, of course, was the original fear which held up the establishment of the Committee, to which Professor Pearce and Mr Chaney drew attention this morning - and it is a legitimately-based fear, I think - that legislation would be slowed down the closer it got to examining policy. The second was the fact that the focus of the Scrutiny operations is on empowerment provisions rather than instances of bureaucratic power and rule, which is the case with Regulations and Ordinances. Then finally, the aim of the Committee is to set standards for drafting legislative instruments: an activity of legislative policy, as distinct from public policy broadly understood. But an occasion such as today will not come again, and certainly it might not come to me after this presentation!

My worry, which I hope is groundless, is that the Committee has taken an something like an Executive line on 'hands-off policy' and has been unable to anchor its laudable interest in drafting standards in the most solid ground; it has not developed an agenda or policy of its own related to social justice in the manner of Regulations and Ordinances. One manifestation of this is seen in the Scrutiny reports with that kind of anchorless drift of observations on possibly defective provisions which attract the routine response from government that, of course, they are required for reasons of policy, to which the Committee succumbs with a mild protest and then incorporates the Government's response.

As the current Secretary has eloquently put it - and this is putting, I think, the best face on it - the Committee 'has observed a passing parade of problems'.[29] I think I am the third person to quote that today. The question is: what does the Committee have its eye on? Is it consistent? What standards does it use to review that passing parade? What is it doing to disrupt that parade?

The Senate Annual Report records an impressive list of bills which were amended to accord with Scrutiny comments. The equivalent Regulations and Ordinances list, of course, would unambiguously note that all amendments were as a result of dedicated pressure by the Committee acting as a corporate unit. Can the same be said of the Scrutiny of Bills Committee? Did the Committee as a whole pursue amendments even into the chamber during the committee stage? What of all the other bills, much more numerous, to which the Committee reported but which were not amended? How far down the track did the Committee go in seeking their preferred outcome?

The reason I ask these questions is that so many bills attract Scrutiny attention and comment that at least two doubts are beginning to emerge. First, what is the character of the inner professionalism of the Committee? Is it as serious about every mention of some possible defect, or does it take policy into account and waive some otherwise objectionable provisions? I think the answer to that is yes, judging from the comments earlier today of the Deputy Chairman, Senator Vanstone. Secondly, what about the character of the corresponding Public Service professionalism? Is the Service beholden to take every comment

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29 Argument, S, 'Ten years of Scrutiny', 26(9) *Australian Law News* (October 1991) 24, at p 26.

by the Committee as equally weighty? I think the answer to that is no, or at least the practice to that is no. The best explanation came this afternoon from Mr Turnbull, in his defence of core principle trumping precedent. Both doubts, I think, go to the heart of the Committee's own policy agenda, about which there is a fair degree of uncertainty.

There are a number of things which the Committee could do to clarify its quality control, in either capacity: policy repair or process enhancement. Some are relatively minor; others are quite substantial. The choice and balance, of course, depend upon the Committee. My modest little list here is premised upon my preference for the repair mode. My three little suggestions for a change in order to get us more quickly to a more reliable future are three Ps: paper, process and performance.

First of all, let us consider paper. I think the Committee ought to follow the Regulations and Ordinances lead and publish more periodic issues papers or status reports, to consolidate models of best legislative practice on which the Committee bases its comments. Messrs Sassella and Turnbull both drew attention to the need for this - a kind of consolidation of principle rather than a repeat of observations. The Committee could help the drafting community more through issuing these periodic papers by establishing firm guidelines on what is permissible, under what conditions.

The second 'P' is the process: to do as you have done and run more seminars along the lines of this one today - as indeed was promised in the Senate's program performance statement, which I am happy to see - and have them integrated into the Senate's promised development of an overall departmental evaluation strategy. That is to work from the bottom up and see to what extent this Committee can devise feasible categories of effectiveness for performance evaluation.

The third 'P' relates to performance. The Committee should think and act corporately, determining those issues on which the Committee can go out on a limb. This will not be easy, since it is going to force the issue of policy and force the issue of whether the Committee really acts as a defender of social justice, as claimed in the departmental documents.

My final comment is this: how much further can the Committee go without an explicit outcome orientation? I personally doubt that reporting possible defects along with ministerial responsibilities is really an outcome. It is a process activity which tells the community very little about how seriously the Committee is prepared to protect it against threats to social justice, through denials of rights of access and the like. I look forward to the responses of Senators Crowley and Hill. Thank you very much.

Senator Crowley - John, I will try to take note of what you said, but I might ask your tolerance of my doing it another day. I am not sure that my paper actually addresses any of the points of criticism you have raised. It might in part.

I would like to open by welcoming our overseas guests, Lord Thurlow and Mr Sleath. I wish you well in your deliberations on our deliberations. I understand that, following the conference in Westminster, the House of Lords is minded to look at establishing a scrutiny of bills committee in the British Houses of Parliament, and that you currently have a committee examining those committees and the prospect of a new one. I am not sure whether today will assist you but I will be interested to hear your feedback on that later.

I am one of those curious politicians who enjoy the work of the scrutiny of bills. I am interested to note, amongst other comments in general today, that a lot of my parliamentary colleagues seem not to, or at least seem not to find the time to look at the processes behind the legislation. That is very easy to understand, given the huge pressures on our time. Indeed, I am not sure who said this morning, but I agree, that our lives get busier and busier. Perhaps, if I had my way, without being a full Luddite I might shoot the photocopier. All it means is that we are under more stress to deal with more paper in a shorter time, and certainly it leaves us less time for reflection. It leaves us less time to look at the mechanisms behind legislation, or to ask what the relationship is between the Parliament and the executive, or whether there is such a thing as separation of powers and where the judiciary fits at all.

I heard my Chairman say this morning that the idea of Executive rights replacing judicial rights would be something he would be very concerned about.

I have certainly heard my colleague Senator Peter Walsh say what he thinks sometimes about what the judiciary does to our rights, too, and in particular how much we may have to pay for what the judiciary decides are our rights. So I can think of about 10 good seminars, and I have been through only half of the day here today. I would certainly like the time to follow some of those things up.

By way of doing so in a shorthand way, I joined the Scrutiny of Bills Committee. I was not there at the beginning, and I am delighted to hear today, on the tenth anniversary, how it did get established. I would particularly like to invite Fred Chaney back to ask him to please account for what went on in his head when he stood up as part of the Executive to argue against the Scrutiny of Bills Committee, when he had been the person who previously had been moving for its establishment.

I think that would be a very useful debate: one of the reasons parliamentarians are criticised and loathed by the community is that we seem to be two-faced. I do not believe we have had enough discussion about the different positions we may have to take - for example, comparing a private ethic with a public ethic or asking Fred Chaney to account for, I think, a very honourable piece of behaviour when he represented the Executive, which had a different view from what he held as an independent member of the back bench. I think all of those things are reasonable and splendid, and in some ways I am allowed to at least taste the edge of them by working through the Scrutiny of Bills Committee.

I have many notes here about how exciting it is in all the other States and Territories. Fortunately, they will be published for you. I will not hold up the time of this seminar in talking to them now, except to say in summary that most parliaments in Australia are either in the process of establishing or have already established a similar committee. I suppose that does say that all parliaments are concerned to have some brake or check to protect the civil rights of people against the design of legislation as it is coming through to very busy parliamentarians.

I want to highlight a few points that have interested me in my time on the Scrutiny of Bills Committee. I come from the medical profession; I have very

little understanding of the legal process. I think it is important to say that there is an advantage in having non-legal persons on scrutiny of bills committees. We ask such questions as, 'What is a "Henry VIII" clause?', and indeed ask it every week, as we forget every week what it is. We sometimes ask what 'heretoforth' means and what 'whereby' means.

In particular, an example such as this - I have never found one in my time in this Parliament - would have to be read to such a seminar. It is a wonderful example of the gobbledegook that gets put into our legislation. I think this is now becoming famous. It is the Nuts (Unground) (Other Than Ground Nuts) Order. My example reads:

> In the Nuts (Unground) (Other Than Ground Nuts) Order, the expression 'nuts' shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (unground) (other than ground nuts) by reason of their being nuts (unground).

I have read that many times and I still have got no idea of what it means, but it may have some reference to bolts - or kernels.

Another thing that worries me is that legislation I have actually passed or at least voted to pass in the Parliament. Unfortunately, I have thought of this only recently and have not got an example of it here. One of the nursing home pieces of legislation, which is probably called a health legislation something or other Act, contains, amongst other things, at section 95X(i)(b)(q)(c)(3) - I am a non-legal person, you understand - a mathematical formula that something like X equals (f) over (y) something or other, and then underneath (n) is the number of beds and (f) is the number of people in the population. If you are very clever you can work out what amount of government money shall come to a person when the person occupies the bed! I also have grave concern about legislation that includes formulae like that. I suppose it is probably better than leaving it entirely in the minds of the Executive about how much money is allocated to beds, but I certainly know that when I read it I flinched on my own behalf, and on behalf of the citizenry.

I just got another stunning example from one of those dreadful people, the parliamentary bureaucracy, in this case Anne Lynch, and I thank her very much for it. It is from a paper by Ian Turnbull, who was speaking to us earlier and he has given us another example of appalling drafting. The Motor Traffic Ordinance 1936 reads:

> On approaching a traffic light with a red arrow pointing at an angle between the vertical and the horizontal, the driver shall not proceed beyond the road marking applicable in relation to the light in the direction that makes, with the direction directly ahead, an angle that has approximately the same number of degrees as has the smaller of the angles that the direction in which the arrow is pointing makes with the vertical.

Here ends that paragraph. All I can say is that underneath that it says, 'This was described as barbarism by Sir Garfield Barwick' - and he may have been right on one thing.[30] That is a view, and you can shoot me about that later.

I believe that they are good examples of how our legislation is not accessible, not understandable, and in no way could I think most legal minds, let alone most ordinary folk - the citizens - understand what it was about. In the aforementioned delegated legislation conference of 1989 at Westminster, I was particularly taken by a comment by Mr David Magang MP, from Botswana, who was commenting on the amount and complexity of legislation. He said, 'You know, in my country not too long ago what you might do is just round up all the people and tell them'. He did not put it as though that was what happened, but he was making the comment about delegated legislation. I think he said in a very succinct way how remote the law and the law making process has become from the people it affects.

Recently a very well-known Australian had this to say:

> Since I grew up as a boy, from the time that I was 18 or 19 years of age to now, I would imagine that 10,000 new laws must have been passed through the Parliaments of Australia. I do

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30 See Turnbull, IML, 'Clear legislative drafting: New approaches in Australia',11(3) *Statute Law Review*, Winter 1990, 161, at p 162.

> not think it is a much better place. I would like to make a suggestion to you which would be far more useful: if you want to pass a new law, why not do it only when you have repealed an old one? This idea of passing legislation every time someone blinks is a nonsense; nobody knows about it, nobody understands, you have to be a lawyer to understand it and there are books up to the ceiling. Laws are put in place purely and simply to do the things we used to do. Every time you pass a law, you take somebody's privileges away from them.

That well-known Australian was the Chairman of Consolidated Press, Mr Kerry Packer, who made those comments in the course of his evidence to the House of Representatives Select Committee on the Print Media.[31]

I suppose the best way I can comment on that is by para-phrasing T.S. Eliot's *Murder in the Cathedral* - that Mr Kerry Packer may have indeed said the right thing but for the wrong reason. Those of you who were watching that debate would know that I would not really want to use Mr Packer to support my views, but he did touch on something that is of some relevance. That is, there is a huge amount of law, and largely it is not known to the ordinary citizens. How many of us know much about tax law, customs, industrial law, for example? How many of us know about the legislation except when it becomes brutally relevant to us, or when we know that we desperately need to know it?

I suspect most of us have a fair idea of road rules, but I also find it somewhat shocking that recipients of social security are probably better informed about the law related to them than many other citizens, largely because if they are not they do not get their money for living on. I might also say that I have met a few who are past masters at managing the social security legislation. The Royal Commission into the painters and dockers union suggested that a few people had mastered that law to their own advantage too. The trouble is that the people who are probably the least powerful in society have to be very informed about the law immediately affecting their lives, and in some ways I think that is a kind of reverse rightness in this whole complicated question. Fortunately though, they have a very good organisation, or series of organisations, from ACOSS to the State COSSs, to look out for that legislation,

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31 Transcript of Evidence, p 1184.

how it affects the people affected by it and the recipients of social security benefits and pensions, and to argue very strongly the case for those people.

I suppose that there have to be more and more 'spokesgroups', groups in between the people and the law, to work on their behalf and to be watchdogs on behalf of the community. That is a worry because sometimes watchdogs become another barrier to the information getting through to people.

There are a couple of other points I want to touch on. I am very concerned about bills that come before our Committee and the Parliament whose titles give no clue at all to their content. For example, the Health and Community Services Legislation Amendment Bill No. 2, or a miscellaneous amendment Bill.[32] The miscellaneous amendment Bills also worry me because they are very often omnibus Bills amending a number of pieces of legislation. Given the number of months, indeed years, before those amendments are put into the reprinted Principal Act, I would be fairly sure that lots of citizens are not aware of the changes under those amended pieces of legislation and how they affect them. I might also assure you that most politicians do not understand what is going down in many of those miscellaneous amendment bills, and it is a great challenge to try to keep across them. I would like to see the title of an amending bill at least give clue to what is contained within it.

I would also like to point out that we have had some successes in legislation. It would be of no surprise to many people here that I am interested in how the draftspeople now write our legislation in non-sexist language. It is, to my mind, fascinating. It has taken so long to make clear the rights of women in society and to have those rights clearly stated in legislation. I did ask one of the secretaries of the Scrutiny of Bills Committee at one stage to check for me whether Lord Brougham, when he devised the Acts Interpretation Act and wrote the line that 'he shall be taken to mean she' was doing this with a feminist perspective. There is no evidence that Lord Brougham was doing it from a feminist perspective; I suppose it could be said there is no evidence he was not. But certainly it seems that the British courts felt that if a woman was seen carrying a stick of dynamite she was understood to be covered by the Act when

32 See *Alert Digest No. 19* of 1991.

the prospect of blowing up the Houses of Parliament. But if she was carrying a pencil and heading towards a ballot box she was not seen to be covered under the intentions of the Act - not for a very long time.

I am delighted to know that we now write legislation in a non-sexist way so that women can properly claim their rights, that they are not disenfranchised. As late as 1959, Jessie Cooper, in my State of South Australia, had a case brought against her standing for Parliament, on the grounds that she was a woman and not a person under the Electoral Act. In case we laugh about that, I say there are fine precedents in earlier British law. We are pleased to know that women are now, for the purposes of the Electoral Act, 'persons'.

I want to conclude by picking up on a couple of points. If we have the responsibility of informing people about the law, to what extent should that be a responsibility of the Scrutiny of Bills Committee? If it were a responsibility of the Scrutiny of Bills Committee, how would it do it? I think that if the Scrutiny of Bills Committee did devote itself to doing that, we would have little time for anything else. Maybe what we ought to do is review a way in which we can monitor departments, making sure that they publicise the legislation that they are responsible for.

In sorting out these points, it is interesting, particularly in the light of John Uhr's comments, to appreciate that the Scrutiny of Bills Committee has a double agenda. One is that it should be there on behalf of the citizens, on the civil rights of people. It should therefore be looking at ways in which it can, in protecting those rights, make accessible the law to the community, make accessible the law to people, and demand that it be written in a way that we can understand. But at the same time I think it also should be free to criticise Parliament, as well as bureaucracies and the Executive. I do not think that the Scrutiny of Bills Committee should ever become a tame instrument of the Parliament itself. It may indeed have to sometimes critique the very Parliament that supports it.

I seem to have skipped the page about one piece of legislation that I cannot let pass. That is the concept that was given to us by the draftsperson at some stage of half a child. The Scrutiny of Bills Committee could not settle for

the concept of 'half a child'.[33] It was actually talking about parental liability for half a child. We thought the concept of half liability for a full child seemed to make better sense. We also suspected that Solomon would have supported that too!

If you had listened to us talking earlier you might have thought that all was light and love within the Scrutiny of Bills Committee. It is largely but it does not mean that we do not have lively debate. For example, the onus of proof is an issue that causes us quite some interest. Some of us come down on the side of the community outweighing individual rights in certain circumstances, whereas others take the opposite view.

For example, if a fisherman catches a lot of undersized fish thus threatening the supply of fish and fishing grounds for future years and future citizens, should the law protect the fisherman by insisting on his right to innocence until proved guilty, even in the face of the evidence of a ship's hull full of undersized fish, or should it protect the citizens by taking such evidence as presumption of guilt.[34] That can keep the Scrutiny of Bills Committee going for a good 15 minutes.

Another example concerns the issuing of search warrants and whether laws should be drafted so as to protect the rights of crooks - my word - and disadvantage the citizens. If the rights of the crooks are protected and they are allowed to get out of this country, skedaddling with all the money, you then disadvantage the citizens who lose their livelihood or large sums of money. Those are issues that do cause, as I say, heated agreement in the Committee.

Finally, I would just like to say that there is no way the Committee could properly and successfully function if it does not remain bipartisan. I disagree a bit with John in saying that the Committee is unable to distinguish between policy and process. It has done this very successfully and it does this by trying to define where it will draw the boundary, what sorts of things are up for grabs.

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33 See *Alert Digest No. 8* of 1989 and the *Twelfth, Thirteenth and Fifteenth Reports of 1989*, dealing with the Child Support Assessment Bill 1989.

34 See, for example, *Alert Digest No. 10* of 1991, dealing with the Fisheries Management Bill 1991.

Even in the 'half a child' Social Security legislation - it was actually with the Child Support Agency - while it was clearly policy that the spouse who does live with the child, the non-custodial parent, should have a half liability for the child, and while that goes clearly to the heart of the policy, we still felt that we could talk about that legislation even to the matter of how it was described without infringing our requirement on ourselves not to get into policy if we could.

I think if we lose that bipartisan approach, the Scrutiny of Bills Committee would rapidly cease to be the effective parliamentary asset it has been to this date. And while I accept that we should look at ways we can improve in the future, I think we can also say that this so far has been a very remarkable monument to Alan Missen, who I think deserves the title of the driving force and the inspiration behind its creation. Thank you.

Senator Hill - I appreciate the opportunity to say a few words at today's seminar which is looking at the history of the Scrutiny of Bills Committee, the ten years of Scrutiny. And, in particular, I appreciate the opportunity of commenting briefly on John's paper. I served under the first two secretaries, both Anne and John - and when I say served under, I think that is the way the Senate Committee system works. It was a privilege and a great learning experience for me.

In fact, the whole origin of this Committee was a learning experience for me because I had been in the Parliament only three or four months when the issue arose. I sat in the Senate one night and listened to my dear friend, Senator Alan Missen, as he was putting the case to the Senate for the adoption of his motion setting up this Committee. He quoted a comment made by Professor Gordon Reid at a Senate delegated legislation seminar. Professor Reid had said:

> I believe that the Senate should now defy the Executive Government's negative reaction to the two reports of its Constitutional and Legal Affairs Committee and establish its own committee of scrutiny over new delegated powers in legislation and matters of official discretions.

I sat there listening to that and afterwards Alan Missen said to me, 'Well Robert' - as I tended to share political values with Alan - 'this will test what you are made of'.

On the other hand, Sir John Carrick took me aside and talked to me about loyalty to the Executive and to my party. I listened to the rest of the debate and I, at the end of it, with six other Liberals, decided that the case had been made for the committee and so we crossed the floor. That resulted in the numbers to approve the Committee.

For any of you who have read that debate, Fred Chaney was somewhat teased by Alan, in that he reminded the Senate of the original contribution Fred had made to the issue and the need for such a committee and then, subsequently as John said today, poor Fred was in the position of representing the Executive. But Fred was somewhat shrewd in that when he came on to defend the Executive's position and oppose the committee, it was late at night and all he had time to say was that he was there to present the Executive's case, before the adjournment intervened. When the matter came back on for debate one week later, Senator Peter Durack delivered the rest of the speech. That was the origin of the Committee. You probably heard a lot more of that this morning. But I and my colleagues decided to support it against the wishes of the then Executive because it seemed to us, on the merits, that it was a service that was worthwhile and that the Parliament should take extra effort in identifying areas in which there are unnecessary intrusions upon civil liberties. I was also very conscious, even with but three months in the Parliament, that the Parliament and even the Senate can really only give a cursory examination to all legislation and there needs to be mechanisms to explore the detail and to look at ways in which matters of real concern are identified and therefore hopefully dealt with by the Parliament in a considered way. So, as I said, the case had been made out in my view and we supported it.

Fred Chaney's two arguments against the Committee, as delivered by Peter Durack, were, first, that it would cause undue delay in the legislative process (Our experience over the last 10 years has been that that certainly has not occurred.) and secondly that, as legislators apart from the Executive, we could rely upon the Executive having taken due care to ensure that such

breaches of civil liberties do not find their way into bills. Alan Missen made the case strongly against the second argument when he tabled pages of examples where such breaches had occurred.

The question is, where does the Committee now go after 10 years? I gather there has been some suggestion today that perhaps the Committee should have developed further, it being said that because of its history it took only tentative steps for some time. This view is being expressed in terms that the Committee should have looked to expand or further consolidate its role, or now be doing something differently. In many ways, I disagree. John talked about the core business of the Committee and I think that one of the lessons we have learnt from some other committees is that, as they extend their tentacles, they forget or lose touch with their core business and perhaps become less effective as a result of that. This Committee has never sought to be too ambitious. It has basically stuck to its original core business as was set down in that debate in 1981 and I think has done so reasonably effectively.

I am unable to really assess John's last area of concern, quality control, because, as we operate in this place, we are very dependent upon the current members of the Committee to ensure quality control. We only know what the Committee in fact tells us. We know little about its deliberation on a particular issue as to what sort of examination it gave it, what evidence it sought on it, what were the arguments that were put for or against the Committee's recommendation.

One issue I understand Amanda Vanstone raised today is the extent to which the Committee sought to weigh up the breach of civil liberties against the overriding purpose of the piece of legislation. Perhaps there is need for some sort of outside assessment of the quality of the work. I can only operate from what the Committee puts before me, which is the conclusions of its work. It brings to my attention these potential breaches and then leaves it to me as a parliamentarian to do something about them.

However, although the Committee may bring these matters to the attention of the Parliament, because of the busy lives that politicians lead, it seems to me that, all too often, the work of the Committee is not given

sufficient consideration by the Parliament or by the legislators in the subsequent legislative process. Everything always seems to be so much of a rush.

Somebody like Barney Cooney will get up in the Senate during the course of the debate and remind us that the Committee has raised these concerns, but by then the pressure is on for the next item of business. As I said, it sometimes concerns me that, the Committee having gone so far to bring the matters to our attention, we then let the Committee down by not giving sufficient attention to what it has put before us.

Therefore, I think it is necessary for us to explore whether we need further mechanisms to ensure that the parliamentarians take into account these concerns. There are two ways that occur to me that could be developed further and, certainly, should after 10 years be given some further consideration.

The first is that we could actually limit ourselves in the debate upon a Bill in that we oblige ourselves to take account of the Committee's recommendations before debating the content of the Bill. That could be done in terms that we provide that we cannot deal with a Bill until the Committee has had an opportunity to examine it and to report to the Senate or we could take it one step further and provide that we cannot deal with a Bill until the Committee has presented a report which in itself has been dealt with by the parliament.

In either instance, it would mean that we would be forced to focus greater attention on the Committee's recommendations than we probably do at present. I think that is worth giving some consideration to.

The argument against such a proposal, again from the Executive of course, would be that it would be time-consuming and thus detrimentally affect the Executive's progress of legislation. It seems to me that that argument is of unlikely validity, as the work of the Senate is an ongoing process. There are always other bills that can be dealt with for the time being and over a period of time everything gets dealt with anyway. It might mean that the Executive is forced to ensure that it gives the Committee proper resources to carry out its functions.

Alternatively, a more limited but just as effective way, of ensuring that the Parliament gives more attention to the Committee's recommendations would be to provide that, if the Committee produces an adverse recommendation against a bill, then that recommendation is automatically referred to the relevant portfolio standing committee for further consideration.

At the time of the introduction of this Committee back in 1981, our procedures for standing committee hearings were time-consuming. We needed resolutions from the Senate before a matter could be referred to the Committee and often they took many months in deliberation. More recently, we have adopted a much less time-consuming mechanism for standing committees to consider particular Bills. We now can process them within a week or two of reference. If, therefore, this Committee referred an issue relating to a particular piece of legislation to the relevant standing committee, say for example the primary industry committee, that Committee would therefore be forced to consider the argument put by Scrutiny Committee as against the policy considerations of the Bill.

It seems to me, with respect to my colleague Amanda Vanstone, that it might be more appropriate for the relevant standing committee, which has a wider understanding of the total perspective of the subject matter, to be weighing the policy considerations against the intrusion on civil liberty. It might mean that the Scrutiny of Bills Committee can better focus itself simply on the issue as to whether there is an intrusion. The Standing Committee, which is really just a microcosm of the Senate as a whole, would deal with the wider issue of balance on its merits. The legislative process would have been thereby improved in the knowledge the Senate had given greater consideration to the Scrutiny Committee Report than now occurs.

I simply raise those two options as possibilities for us to consider as we move into this next decade of the work of this Committee. I hope it continues its work because I think it is just as worthwhile as when we commenced the Committee in 1981. I simply suggest to you two ways in which perhaps its work could be given greater attention by the Senate in the future.

Mr Harry Evans - Before I call on Senator Cooney to sum up the day's proceedings, we might take five minutes for any questions to the members of our current panel. Are there any questions on the contributions you have heard?

Senator Cooney - I would like to hear something from the Victorian and New South Wales representatives on that matter that was raised this morning, regulatory impact statements and so on.

Mr Harry Evans - If we have a question or a comment, let us by all means hear it.

Mr Cruickshank - I am the Chairman of the Regulation and Review Committee in New South Wales. I spent four years in opposition and we called the Government all kinds of names and accused them of all the most vile crimes and whatever was possible; never let a few facts get in the road of a good story, et cetera. Having spent nearly four years in government, I realise that what we were saying is true. My impression here today from listening to some of these esoteric speeches is that we are losing sight of promoting the principles or maintaining the principles of democracy that we hope emanate from our parliaments. We do not have scrutiny of bills yet, we have merely regulations, but the principles are the same and the same people are trying to put it over you, namely, Ministers and their bureaucrats. Without getting into throwing accusations around too much, just remember that in New South Wales we were having a new law coming in on 30 June which said that all principal rules had to be subjected to a regulation review statement, a regulatory impact statement. On 29 June the last Gazette for the year was issued. It is the largest gazette that was ever produced in the State of New South Wales, purely to avoid all those regulations being subjected to review after 30 June.

So I would like to say that, while I am fascinated with the speeches today by Dr Uhr and others, I think they were marvellous speeches, I really wonder whether we are making any real criticism of what they are up to. I am not a disappointed Minister or anything like that; I felt I was lucky to be made Chairman of the Regulation Review Committee and I was very happy at that. I think they did it because they knew I used to sell wheat over the border and I used to sell eggs illegally and all that sort of stuff. They did not say that, but I

think that is why they thought I would perhaps be all right for the job. Subsequently, what I have discovered has been mainly how Ministers and their bureaucrats get around whatever it is they have to do.

We have got the ozone layer regulations coming in at the moment which ignore 10 years of work that has been going on in Europe and everywhere else. In my opinion, if we are going to have new ozone legislation brought in through Australia, if we as a government are going to bring in that legislation, we are bound to consult every group possible and it should be all laid out on the table as to what we are doing. We are trying to reinvent the wheel, it has been done elsewhere, we do not pay any attention to that, we do not do anything about the impact economically on the community. I think that we as the people that are scrutinising the bills or scrutinising the regulations have got to pay far greater attention not to their policy - that policy is theirs - but to the way in which they are doing it and what they are trying to do. Ministers come and go but the bureaucrats are there for the long haul. Most Ministers are overworked and they are very grateful to have the advice that comes from the bureaucrats, but unfortunately there is still a lot of empire-building going on. We do not use those unparliamentary words that they use here in Canberra, but there are a lot of highly suspect motives in what the various Ministers, who are highly motivated in their particular direction, are trying to put over the people of New South Wales, and I would suggest that your lot down here are no different.

Mr Harry Evans - Have you ever thought of standing for Federal Parliament?

Mr Jasper - I want to thank Senator Cooney on behalf of the delegation from Victoria for the organisation of this seminar to review the Scrutiny of Bills Committee. I must say that I thought Victoria was the only State that did not have very much money. I noted that we had a very nice lunch and everyone will know that we were charged $20 for it, so there must not be too much money in Canberra as well! I listened to comments from Senator Vanstone and one or two of the others who were very critical of the MPs and who commented on the impression people have of MPs in the community. As one of those people who is an MP, I want to say that it reminded me of my father and all the sorts of comments that he made. One that he made to me many years ago - and I want

you to think about this - was, 'The fishmonger never goes out crying stinking fish'. I am afraid that that has remained in my mind. So I want to say that I think that perhaps MPs are not as badly thought of in the community as perhaps one or two of us might think.

In response to Adrian Cruickshank and the sorts of comments that he was making, we felt that Victoria led the way in 1985 when we set up the regulatory impact statements for many of the regulations which are produced in Victoria. We do not have a scrutiny of bills committee, but our criticism then was that we were not able to fully scrutinise regulations that were being produced by the bureaucrats and we wanted to review those regulations which are made under the various Acts of Parliament. So we have come a long way in Victoria in looking at regulations and how we review them. We do not have a scrutiny of bills committee and that is something I think we need to look at in Victoria. It is interesting, going to the various regulation review committee conferences, that now we are finding that the Executive is trying to find out how it can bypass the system, so we have to be one jump ahead again.

I am very concerned about what is happening with all jurisdictions, probably in the Western world and certainly throughout Australia, that we are setting up these review systems and scrutiny of bills committees. But we are going to have to be one jump ahead as far as the bureaucracy and particularly the executive government is concerned, because now they are looking at codes of practice to try to bypass this system. I want to leave the view with you that we will need to be very vigilant, particularly as members of Parliament, in looking at what is going on in the future and to try to ensure that the executive is responsible to the Parliament itself and then the Parliament of course is responsible to the people. I will be working to see that we try to maintain that review process and that we do not get overcome by bureaucracies feeding through the executive government.

Mr Harry Evans - Thank you for that comment which I will take as a comment, not a question. We have now had views from the north and the views from the south. Senator Barney Cooney will sum up today's proceedings. That is very appropriate, because not only is Senator Cooney the Chairman of the Committee but I have noticed that in the Senate he also very often has the last word.

Senator Cooney - I think the seminar has been a quite successful gathering. A lot of people do a lot of work making arrangements, and I want to mention Jacquie Hawkins, Dianne Simpson, Nancy Myles and Sue Blunden. Thank you all very much for the organising you have done. I want to thank the participants for their attendance and for the contributions that have been made. If we conduct another seminar, the general thrust perhaps should be to have more discussion and more exchanges. However, there were plenty of things to say and, as it was an anniversary event, I suppose we all had to leave great words on the record to be read in *Hansard* 1,000 years from now! And I thank *Hansard*. As I say, a thousand years from now they will be got out and read.

There are lots and lots of things that did arise that we have got to think about. Could I just say one thing about the party system and the Executive, which has come in for a bit of stick today. I am perhaps the only politician here that got in as a result of being a member of the Australian Labor Party, in my case, therefore I have to congratulate all the other politicians here who got in on their own merit.

I simply say that to point out a factor that when we are looking at all this and looking at the Executive and looking at the party system that the voters of Australia have, whether we like it or not, opted for the party system. That is the first thing to talk about. Secondly, under the system that we have got, the Executive does need some sort of support from the party that it is drawn from, otherwise it is going to be a fairly hairy business of its trying to administer if it does not quite know what its backbench is going to do and what its Ministers are going to do.

I say that to indicate to you that - and, again, it has been pointed out I think fairly - it is a matter of balance that we are talking about here. That is what makes the exercise fairly difficult. I notice that Hugh Hiscutt is here from the Tasmanian Parliament. If he wanted to go off and do whatever he wanted to do it might be hard for the Executive that he hoped to support I suppose soon to function. Nevertheless, like the rest of us, he has to somehow say 'Look, when you intrude upon civil liberties it is a very heavy onus that you bear'.

To conclude: thanks for all the help, and let us talk about this matter further because it must be talked about. Perhaps the best thing about the Committee is that it has existed for 10 years, it has struck interest and it has, as I say, represented what we as parliamentarians do honestly, as do those who help us. The Public Service has come in for a bit of stick, I think a bit unfairly because the members of the Public Service I have come across are, by and large, intent on the same sort of thing of trying to strike that balance. It is not that any particular group is saying, 'Look, there should not be disregard of civil liberties. There should not be a disregard of peoples' rights'. What they are saying is that when you are looking at those, where is the fulcrum of the balance to be set; closer towards what is regarded as the needs of the community, or closer to individual rights? That is the issue.

Finally, I would like to thank some people that I have not mentioned for coming, and they are the people associated with such bodies as the Administrative Review Council and those from the universities. I will not name them, but they are very much about the same task, and that is the other thing we have got to look at more and more in the future - the co-ordination between those bodies that are doing all that good work.

In fact, we are meeting with the ARC on Thursday week. There was a great battle there for a while about where we were going to meet, whether it would be up here, in which case we would have to pay for the supper, or down there where they would have to pay. We lost, which just goes to show that we do crumble to pressure - and that is probably where John Uhr is right!

Mr Harry Evans - I have an announcement to make with which we will conclude the proceedings. A rash promise was made earlier that the papers would be available at the conclusion of the proceedings. In fact, that has proved to be somewhat rash. I am told that the papers will be made available in the very, very near future to all attendees of the Seminar.

Thank you very much for coming.

Seminar adjourned at 5.06 p.m.

Appendix I

MEMBERSHIP OF THE COMMITTEE 1981-1991

The following Senators have served as Chairmen of the Committee:

Missen, A.J.	25.11.81	-	4. 2.83
Tate, M.C.	4. 5.83	-	25. 2.87
Crowley, R.	25. 2.87	-	5. 6.87
Cooney, B.	7.10.87	-	present

The following Senators have served as members of the Committee:

Baume, M.	22. 8.85	-	5. 6.87
Beahan, M.	24. 9.87	-	8. 5.90
Bolkus, N.	8.12.82	-	21. 2.85
Bourne, V.	1. 7.90	-	10.10.91
Brownhill, D.	24. 9.87	-	31. 5.89
Cooney, B.	26. 2.85	-	
Crichton-Browne, N.A.	19.11.81	-	4. 2.83
Crowley, R.	22. 4.83	-	
Durack, the Hon. P.D.	22. 4.83	-	21. 2.85
Evans, G.J.	19.11.81	-	8.12.82
Faulkner, J.	11. 5.90	-	24. 8.90
Haines, J.	8. 9.82	-	5. 6.87
Hill, R.	19.11.81	-	4. 2.83
Macdonald, I.	24. 8.90	-	
McGauran, J.	31. 5.89	-	30. 6.90
McKiernan, J.F.	25. 2.87	-	5. 6.87
Missen, A.J.	19.11.81	-	30. 3.86
Newman, J.	17. 4.86	-	5. 6.87
Patterson, K.	24. 9.87	-	8. 5.90
Powell, J.	24. 9.87	-	1. 7.90,
	10.10.91	-	
Ryan, S.M.	19.11.81	-	8. 9.82
Scott, the Hon. D.B.	26. 2.85	-	30. 6.85
Sherry, N.	24. 8.90	-	
Tate, M.C.	19.11.81	-	25. 2.87
Vanstone, A.	11. 5.90	-	

Appendix II

LEGAL ADVISERS 1981-1991

Professor Dennis Pearce	December 1981 - July 1983
Mr Jim Davis	August 1983 - January 1990
Emeritus Professor Douglas Whalan	February 1990 - January 1991
Professor Jim Davis	February 1991 - present

SECRETARIES TO THE COMMITTEE 1981-1991

Anne Lynch	November 1981 - August 1982
John Uhr	September 1982 - August 1983
Derek Abbott	August 1983 - January 1985
Robert Walsh (acting secretary)	February 1985 - March 1985
Giles Short	April 1985 - July 1987
Andrew Snedden	August 1987 - October 1988
Stephen Argument (acting secretary)	November 1988 - December 1988
Ben Calcraft	January 1989 - March 1990
Stephen Argument	May 1990 - present